[2015] FWCFB 8200

The attached document replaces the document previously issued with the above code on 30 November 2015.

The appearances for the Independent Education Union of Australia and for the Commonwealth have been corrected to *I Taylor* and *L Andelman* for the Independent Education Union of Australia and *K Eastman* and *E Raper* for the Commonwealth.

Miriam Henry
Associate to Justice Ross

Dated: 3 March 2016

DECISION

Fair Work Act 2009
s.302—Application for an equal remuneration order

Equal Remuneration Decision 2015

(C2013/5139 and C2013/6333)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
SENIOR DEPUTY PRESIDENT HARRISON MELBOURNE, 30 NOVEMBER 2015

Equal remuneration – Children's services and Early childhood education industry.

CONTENTS

ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACA	Australian Childcare Alliance, Australian Childcare Centres Association, Industrial Organisation Of Employers and The Creche and Kindergarten Association Ltd
ACCI	Australian Chamber of Commerce and Industry
ACCI and others	Australian Chamber of Commerce & Industry, Australian Business Industrial, New South Wales Business Chamber, Tasmanian Chamber of Commerce and Industry, and State and Territory Local Government Associations
ACTU	Australian Council of Trade Unions
AEU	Australian Education Union
AFEI	Australian Federation of Employers and Industry
AFPC	Australian Fair Pay Commission
Ai Group	Australian Industry Group
AMWU	"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
APCS	Australian Pay and Classification Scale
AWE	Survey of Average Weekly Earnings
AWOTE	Average Weekly Ordinary Time Earnings
CCIWA	Chamber of Commerce and Industry of Western Australia
Commission	Fair Work Commission[1]
EEH	Survey of Employee Earnings and Hours
Equal Remuneration Case	Applications by United Voice and AEU, and IEUA for equal remuneration orders in the children's services and early childhood education industries
FW Act	*Fair Work Act 2009* (Cth)
IEUA	Independent Education Union of Australia
ILO	International Labour Organization
IR Act	*Industrial Relations Act 1988* (Cth)
Layton et al. report	Layton, R., Smith, M. & Stewart, A. (2013), A Report for the Pay Equity Unit of the Fair Work Commission, *Equal Remuneration under the Fair Work Act 2009*
NES	National Employment Standards
NSW IR Act	*Industrial Relations Act 1996* (NSW)
NSW IRC	New South Wales Industrial Relations Commission
Panel	Annual Wage Review Decision, Expert Panel
QIRC	Queensland Industrial Relations Commission

Qld IR Act	*Industrial Relations Act 1999* (Qld)
RANF	Royal Australian Nursing Federation
Research Report 5/2011	Romeyn, J., Archer, S-K. & Leung, E. (2011), *Review of equal remuneration principles*, Research Report 5/2011, Fair Work Australia, Melbourne
SA FW Act	*Fair Work Act 1994* (SA)
SACS Case	Application for an equal remuneration order for the social, community and disability services sector C2010/3131
SACS Case No 1	SACS No 1 Decision, 16 May 2011, (2011) 208 IR 345
SACS Case No 2	SACS No 2 Decision, 1 February 2012, (2012) 208 IR 446
WA IR Act	*Industrial Relations Act 1979* (WA)
WAIRC	Western Australian Industrial Relations Commission
WR Act	*Workplace Relations Act 1996* (Cth)

1. Introduction and background

1.1 General

[1] United Voice and the Australian Education Union (Victorian Branch) (United Voice and AEU) have made an application for an equal remuneration order pursuant to s.302(3)(b) of the *Fair Work Act 2009* (Cth) (the FW Act) in the children's services and early childhood education industry. An additional application was subsequently made by the Independent Education Union of Australia (IEUA). These applications are being heard concurrently and are collectively referred to as the Equal Remuneration Case.

[2] The United Voice and AEU application was filed on 15 July 2013 and amended applications were subsequently filed on 23 September 2013, 27 November 2013 and 3 September 2015.[2] The IEUA application was filed on 8 October 2013 and amended on 28 November 2013.

[3] In broad terms the United Voice and AEU amended application seeks an equal remuneration order for '… employees who perform work in a long day care centre or preschool(s)' covered by the *Children's Services Award 2010*; the *Educational Services (Teachers) Award 2010*; or the *Educational Services (Schools) General Staff Award 2010*. The amended application excludes employees 'employed by a local government authority'.[3]

[4] The IEUA's amended application seeks an equal remuneration order for 'early childhood teachers (including early childhood teachers appointed as directors) who perform work in a long day care centre or preschool covered by the *Educational Services (Teachers) Awards 2010*'[4], other than those employed by a state or territory government.[5]

[5] On 19 March 2013, the former Government announced the establishment of a Pay Equity Unit within the Fair Work Commission (the Commission). The primary function of the Pay Equity Unit was to provide the Commission with specialist pay equity research and information to inform matters related to pay equity under the FW Act. In June 2013 the immediate research priorities of the Pay Equity Unit were set.[6] Parties to this case were informed of this research, along with the rest of the research program, in a paper tabled on 19 September 2013, '*Proposal for facilitated consultation on data for C2013/5139*'. The initial research program included, among other things, the procurement and publication of an independent research report into equal remuneration under the FW Act. This work was undertaken by the Hon. Dr Robyn Layton AO QC, Dr Meg Smith and Professor Andrew Stewart. Building on previous Commission research published in *Research Report 5/2011—Review of equal remuneration principles*[7], the report explained key constructs, identified material parties could bring to equal remuneration proceedings, and directed parties to resources which could be relevant to an equal remuneration case.

[6] A draft of the Layton et al. report was published for comment on the Commission website on 23 October 2013 and the final version, titled *Equal Remuneration under the Fair Work Act 2009*, was published on the website on 6 December 2013.

[7] In addition, pursuant to a direction of the Full Bench issued on 8 October 2013, the Pay Equity Unit undertook a facilitated consultation process with parties to the proceedings.

Roundtable research meetings with interested parties were convened on 5 February 2014 and on 28 March 2014 the Pay Equity Unit released a report titled 'Data report - preschool and long day care sector'.

[8] Early in the course of proceedings it became apparent from the submissions of the parties that there would be some utility in providing greater clarity around the relevant legal and conceptual framework issues and in addressing those issues first.[8] Accordingly, the Commission has conducted the proceedings in this matter on the basis that it would first consider the legal and conceptual issues relevant to the applications, and then consider the evidentiary case of the parties. The purpose of clarifying the legal issues first was to ensure that parties did not run their evidentiary case on a particular premise, particularly in relation to the comparator issue, only to discover later that we had come to a different view on that premise.[9]

[9] At a mention on 24 September 2013, the Commission explained the above approach and directed the parties to file submissions identifying the legal and conceptual issues that should be determined in the first phase, and noted the difference of opinion between the parties on the comparator issue.[10]

[10] On 8 October 2013, the Commission published draft directions and timetables, including a draft list of issues to be addressed by the parties on the legislative and conceptual framework.

[11] A further mention was held on 19 November 2013 to finalise the timing and the issues to be dealt with on the legislative and conceptual framework.[11]

[12] The Full Bench issued a revised list of 'Issues to be Addressed' on 27 November 2013 along with draft directions proposing times for parties to file written submissions and submissions in reply addressing the issues. Final directions including the list of 24 'Issues to be Addressed', (see Annexure [1]) and times for making submissions on the legislative and conceptual framework, were issued on 20 December 2013.

[13] During 2013 and 2014, a number of submissions were received and hearings were held regarding directions and programming for the Equal Remuneration Case. A timetable outlining key events in this process is provided at Annexure [2].

[14] A list of the materials received in relation to the legislative and conceptual framework is set out at Annexure [3].

[15] On 16 April 2014, the Commission published a Summary of Submissions in Relation to Identified Issues, which was a draft working document providing a summary of parties' written submissions and submissions in reply in response to the issues to be addressed on the legislative and conceptual framework.

[16] Oral submissions on the legislative and conceptual framework were heard on 22 and 23 April 2014. A number of parties took questions on notice during these proceedings which were addressed in written submissions received in April and May 2014.

[17] A specialised mini website for the Equal Remuneration Case is accessible through the Fair Work Commission website and all material relating to the Equal Remuneration Case is available on the website.

[18] This decision addresses most of the legal and conceptual issues identified in the final directions of 20 December 2013. Annexure [1] is an annotated version of that list of issues containing answers to identified issues by reference to our decision. Not all of the issues are addressed.

[19] The legal and conceptual issues to be determined are dependent on the proper construction of Part 2–7 of the FW Act. Before turning to those provisions we propose to make some general observations about pay equity, relevant International Instruments and the scheme of the FW Act. We then propose to first summarise the general principles relating to statutory construction and the relevant legislative and arbitral history, before turning to Part 2–7.

1.2 Pay Equity, International Instruments and the *Fair Work Act 2009* (Cth)

Pay Equity

[20] The gender pay gap (sometimes referred to as the gender wage gap) refers to the difference between the wages earned by men and women. It is usually expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis.

[21] At a conceptual level no party disputes the proposition that employees should receive equal remuneration for work of equal or comparable value. The gender pay gap has narrowed over time, in part as a result of arbitral decisions dealing with equal pay. Yet over 40 years after the commencement of a federal equal pay principle the gender pay gap remains a persistent form of inequality that has been described as 'one of the most obvious examples of structural gender discrimination'.[12]

[22] It is generally acknowledged that the determinants of the gender pay gap are complex.[13] The most recent pay equity inquiry in Australia was that conducted by the House of Representatives Standing Committee on Employment and Workplace Relations in 2009 (the H.R. Gender Pay Equity Inquiry). It concluded that the factors contributing to the gender pay gap are complex and multi-faceted,[14] and summarised the evidence about the factors contributing to pay inequity in the following terms:

- social expectations and gendered assumptions about the role of women as workers, parents and carers resulting in majority of primary unpaid caring responsibilities undertaken by women;
- disproportionate participation in part-time and casual employment leading to few opportunities for skill development and advancement resulting in a concentration of women in lower level classifications;
- invisibility of women's skills and status leading to an undervaluation of women's work and the failure to re-assess changing nature of work and skill; unrecognised skills described as creative, nurturing, caring and so forth;

- labour market tenure and engagement, and more precarious attachment to the workforce;
- industry and occupational composition and segregation factors attributable to geography and desirability of work;
- sex discrimination and sexual harassment;
- concentrated in award-reliant employment with less opportunity to collectively bargain for higher wages, working in small workplaces and with low union participation;
- treatment by industrial tribunals and regulation; and the misguided belief that if men and women are subject to the same laws, rules and conditions, then equality will result;
- women's apparent higher job satisfaction with work at a given wage level means employers less likely to feel under pressure to improve wages for employees. Trade off between monetary rewards and non-monetary rewards;
- working in service rather than product related markets;
- poor recognition of qualifications, including vastly different remuneration scales for occupations requiring similar qualifications and the way that 'work' and how we value work is understood and interpreted within the industrial system; and
- women receive lower levels of discretionary payment such as overaward payments, bonuses, commissions and service increments and profit sharing, partly because in the industries where women are employed, overaward payments are not usually available.

[23] Research Report 5/2011[15] expressed a similar view and observed that the factors influencing the gender pay gap include:

- differences in the types of jobs, such as industry, occupation, location, method of setting pay and the levels of discretionary payments (bonuses, commissions, allowances, etc.);
- structures and workplace practices which restrict the employment prospects of workers with family responsibilities, leading to higher part-time and casual employment and less training; and
- the undervaluation of the work and skills of females.

[24] The gender pay gap may be expressed and measured in a number of different ways.

[25] The two main sources of gender earnings from the Australian Bureau of Statistics (ABS) are the Survey of Average Weekly Earnings (AWE) and the Survey of Employee Earnings and Hours (EEH). The AWE produces estimates for Average Weekly Ordinary Time Earnings (AWOTE) and is the most frequently released data on gender earnings, however, the AWOTE does not consider compositional factors. The EEH can provide an estimate for hourly earnings, thereby considering hours worked, however, up to the 2014 survey, hourly earnings could only be estimated for non-managerial employees. In addition to

the above factors, earnings data from the EEH also reflects compositional factors such as the junior, apprentice, trainee and disability rates of pay and overtime payments.

[26] In the 2013–14 Annual Wage Review decision the Expert Panel (Panel) considered the appropriate measure of the gender pay gap.[16] In that decision, the Panel noted there are a number of ways to calculate the gender pay gap, each with its strengths and weaknesses. The Panel concluded that AWOTE was its preferred measure,[17] but in its 2014–15 Annual Wage Review Decision the Panel added that it would consider estimates from the 2014 EEH which collected hourly earnings for managerial employees when they are made available.[18] These data are now available. The EEH is used by the ABS in providing a summary of earnings indicators as part of a catalogue on gender indicators.[19]

[27] The following table provides estimates of the gender pay gap using data from both AWOTE and EEH.

Table 1: Estimates of the gender pay gap

Measure	Male earnings	Female earnings	GPG
AWOTE *(May 2015)*	$1593.60	$1308.80	17.9%
EEH adult hourly ordinary time cash earnings (hourly) *(May 2014)*	$41.09	$34.16	16.9%
EEH non-managerial adult hourly ordinary time cash earnings *(May 2014)*	$37.66	$32.95	12.5%

Note: AWOTE is expressed in trend terms.

Source: ABS, *Average Weekly Earnings, Australia, May 2015*, Catalogue No. 6302.0; ABS, *Microdata: Employee Earnings and Hours, Australia, May 2014*, Catalogue No. 6306.0.55.001.

[28] The Workplace Gender Equality Agency also calculates a measure of the gender pay gap from reports required to be provided by non-public sector employers with 100 or more employees, covering over 40 per cent of employees in Australia. The gender pay gap was found to be 19.1 per cent based on full-time base salary and 24 per cent based on full-time total remuneration.[20]

[29] Historically, hourly earnings data for private sector, non-managerial, adult full time employees show a sharp improvement in gender pay equity ratios between 1967 and 1980 (and hence a decline in the gender pay gap), in part attributable to the 1969 and 1972 equal pay decisions (discussed at [50]–[66]). Since 1980 the improvement has been less marked and also subject to fluctuation.[21]

International Instruments

[30] Australia has ratified the principal conventions dealing with equal remuneration: the International Labour Organization (ILO) *Equal Remuneration Convention*[22] and the United Nations *Convention on the Elimination of All Forms of Discrimination against Women.*[23]

[31] The ILO has also adopted the Equal Remuneration Recommendation.[24] Though not subject to ratification and non-binding, the recommendation provides guidance on the implementation of the *Equal Remuneration Convention*.

[32] The *Discrimination (Employment and Occupation) Convention*, ratified by Australia in 1973, and the associated recommendation, provides that Member states should seek to adopt policies which have regard to principles including that of remuneration for work of equal value.[25]

[33] As with most parts of the FW Act, Part 2–7 is enacted in reliance on the corporations power, not the external affairs power, and no longer has as its object to give effect, or further effect, to the Conventions and Recommendations. Section 3 of the FW Act simply provides that an object of the FW Act is to 'take into account Australia's international obligations'. We later discuss the relevance of the Conventions and Recommendations, if any, to the interpretation of Part 2–7.

The Fair Work Act 2009 (Cth)

[34] The objects of the FW Act make no specific mention of pay equity. The principle of 'equal remuneration for work of equal or comparable value' appears in three parts of the FW Act: the modern awards objective (s.134(1)(e)); the minimum wages objective (s.284(1)(d)); and the equal remuneration provisions found in Part 2–7. The dictionary in s.12 of the FW Act defines 'equal remuneration for work of equal or comparable value' in terms of the meaning given to that expression in Part 2–7 of the FW Act (in s.302(2)).

[35] The modern awards objective is directed at ensuring that modern awards, together with the National Employment Standards (NES), provide a 'fair and relevant minimum safety net of terms and conditions' *taking into account* the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). One of the s.134 considerations is:

> '(e) the principle of equal remuneration for work of equal or comparable value'

[36] The modern awards objective is very broadly expressed.[26] In *National Retail Association v Fair Work Commission* the Full Court of the Federal Court made the following observation about the modern awards objective:

> 'It is apparent from the terms of s.134(1) that the factors listed in (a)-(h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s.134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor ("relative living standards and the needs of the low paid")?'[27]

[37] In the 2014–15 Annual Wage Review decision the Panel applied the above observation to the minimum wages objective in s.284.[28]

[38] The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision

making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award. The Commission's task is to balance the various s.134 considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions.

[39] The principle of equal remuneration for work of equal or comparable value also forms part of the minimum wages objective (s.284(1)(d)). In giving effect to both the modern awards objective and the minimum wages objective the Expert Panel constituted to hear and determine the Annual Wage Review must take into account the principle of equal remuneration for work of equal or comparable value.

[40] The interaction between the modern awards objective, the minimum wages objective and the provisions of Part 2–7 are addressed later in our decision.

2. Statutory construction – the general principles

[41] The starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy.[29] Regard may also be had to the legislative history in order to work out what a current legislative provision was intended to achieve.[30]

[42] Part 2–7 of the FW Act must be read in context by reference to the language of the FW Act as a whole.[31] The relevant legislative context may operate to limit a word or expression of wide possible connotation.[32] The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be displaced by the context and legislative purpose, as the majority observed in *Project Blue Sky*:

> '… the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'[33]

[43] The provisions of an act must be read together such that they fit with one another. This may require a provision to be read more narrowly than it would if it stood on its own.[34]

[44] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[35] (*Alcan*) the High Court described the task of legislative interpretation in the following terms:

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.'

[45] Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object (noting that s.40A of the FW Act provides that the *Acts Interpretation Act 1901,* as in force at 25 June 2009, applies to the FW Act). The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the FW Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the FW Act in the light of its purpose, not to rewrite it.[36]

[46] In considering the purpose or policy of the FW Act we note at the outset that s.578(a) provides that in performing its functions and exercising its powers the Commission must take into account the objects of the FW Act and the objects of the part of the FW Act under which the Commission is performing the particular function or exercising the particular power.

[47] The objects of the FW Act are set out in Section 3.

> '3 Object of this Act
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
>
> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
>
> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
>
> (g) acknowledging the special circumstances of small and medium-sized businesses.'

[48] Of course it must be borne in mind that the purpose or policy of the FW Act is to be gleaned from a consideration of all of the relevant provisions of the FW Act.[37]

[49] As we have mentioned, regard may be had to the legislative history in order to work out what a current legislative provision was intended to achieve. We now turn to the legislative history relevant to Part 2–7 of the FW Act.

3. The Historical context

[50] For most of its legislative history pay equity was not an express objective of the federal system of industrial regulation and the awards that set minimum pay rates typically discriminated between male and female employees. It was not until the 1969 and 1972 *Equal Pay Cases*[38] that the Commonwealth Conciliation and Arbitration Commission (as the federal tribunal was then known)[39] moved to end the practice of having different rates within awards for male and female workers. The 1969 decision accepted the principle of equal pay for equal work, although confined it to work performed by women that was of a similar or like nature to that done by men, and excluded work that was 'essentially or usually performed by females'. The 1972 decision embraced the broader principle of 'equal pay for work of equal value', as embodied in the ILO's *Equal Remuneration Convention* of 1951. The 1974 *National Wage Case*[40] subsequently accepted that the minimum wage for award-covered workers should be the same for men and women.

3.1 The 1969 Equal Pay Case

[51] In the 1967 *National Wage Case*[41], the Commission abandoned the practice of awarding separate increases to the basic wage and margins in separate proceedings and introduced the concept of a 'total wage'. The Commission also decided to award the same general wage increase to both men and women, but observed that 'there will for the present be a different total wage for males and females and a number of total wages for many classifications'.[42] While conscious of these apparent anomalies the Commission considered that it was not practicable to attempt to deal with such matters at that time but it did make the following observation:

> 'The community is faced with economic industrial and social challenges arising from the history of female wage fixation. Our adoption of the concept of a total wage has allowed us to take an important step forward in regard to female wages. We have on this occasion deliberately awarded the same increase to adult females and adult males. The recent *Clothing Trades decision*(1) affirmed the concept of equal margins for adult males and females doing equal work. The extensions of that concept to the total wage would involve economic and industrial sequels and calls for thorough investigation and debate in which a policy of gradual implementation could be considered. To a lesser extent the same may be said about the abolition of locality differentials. We invite the unions, the employers and the Commonwealth to give careful study to the questions with the knowledge that the Commission is available to assist by conciliation or arbitration in the resolution of the problems.'[43]

[52] The introduction of the total wage in the 1967 case and the Commission's remarks in that decision led to the 1969 *Equal Pay Case.*[44] The 1969 *Equal Pay Case* arose from a series of claims to vary certain awards and determinations so as to eliminate the difference in current rates represented by the difference between the former male and female basic wages.

[53] The Commission found that the concept of equal pay was difficult to define and apply with precision, observing that:

> 'While we accept the concept of 'equal pay for equal work' implying as it does the elimination of discrimination based on sex alone, we realise that the concept is difficult of precise definition and even more difficult to apply with precision. We do not propose to deal in detail with all these possible different meanings of the phrase, nor do we propose to consider how it could be applied in communities other than ours.'[45]

[54] The Commission went on to note that, although the international conventions referred to by the parties represented international thinking on the matter, the conventions had not been ratified by Australia and their meaning in an Australian context was by no means clear. It acknowledged that these conventions should carry significant weight in a general way, but stated that they must be considered within the Australian context of wage fixation. The Commission indicated that it was influenced by the position of the States, which had been implementing the principle of equal pay progressively since 1958 through equal pay legislation and the fact that the majority of women were covered by State awards.

[55] The Commission rejected the union's application to increase all female wages in line with male wage rates, stating that before rates could be increased the equality of the work must first be determined and that no increase should be awarded without an examination of the work done. The Commission also found that gradual implementation would address economic concerns. It established principles to be applied in deciding future applications, as follows:[46]

(1) the male and female employees concerned, who must be adults, should be working under the same determination or award;

(2) it should be established that certain work covered by the determination or award is performed by both males and females;

(3) the work performed by both the males and the females under such determination or award should be the same or a like nature and of equal value, but mere similarity in name of male and female classifications may not be enough to establish that males and females do work of a like nature;

(4) for the purpose of determining whether the female employees are performing work of the same or a like nature and of equal value as the male employees the Arbitrator or the Commissioner, as the case may be, should in addition to any other relevant matter, take into consideration whether the female employees are performing the same work or work of a like nature as male employees and doing the same range and volume of work as male employees under the same conditions;

(5) consideration should be restricted to work performed under the determination or award concerned;

(6) in cases where males and females are doing work of the same or a like nature and of equal value, there may be no appropriate classifications for that work. In such a case, appropriate classifications should be established for the work which is performed by both males and females and rates of pay established for that work. The classifications should not be of a generic nature covering a wide variety of work;

(7) in considering whether males and females are performing work of the same or like nature and of equal value, consideration should not be restricted to the situation in one establishment but should extend to the general situation under the determination or award concerned, unless the award or determination applies to one establishment;

(8) the expression of 'equal value' should not be construed as meaning 'of equal value to the employer' but as of equal value or at least of equal value from the point of view of wage or salary assessment;

(9) notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed.

[56] The Commission also provided that where an Arbitrator or Commissioner was satisfied that equal pay should be awarded, implementation of such a decision should be phased in over a four year period.

3.2 The 1972 Equal Pay Case

[57] In 1972 a Full Bench of the Commission was asked to consider whether the male minimum wage should apply to females and to formulate new principles in relation to equal pay for equal work.[47] The broad issue to be determined was whether in the then social and industrial climate it was fair and reasonable that the 1969 principles should remain unaltered. This involved the Commission making an assessment of what, if anything, had happened in the area of equal pay since 1969 which would make it just and proper to alter those principles.[48]

[58] One impetus for the 1972 proceedings was the limited impact of the 1969 equal pay principles. The 1969 principles allowed parties to apply to vary award rates only on the basis of comparisons made within an award, and only where it could be shown that women were performing the same work as men, and did not extend to awards where work was performed predominantly by women. According to the parties in the 1972 proceedings, only 18 per cent of women covered by federal awards had received wage increases and pay parity with male workers as a result of the 1969 decision.[49] Researchers have also confirmed that while the 1969 case contributed to an improvement in the relative pay of women, its impact was limited.[50]

[59] The Commission dismissed the unions' claims to apply the male minimum wage to females on the basis that the male minimum wage included a family component. However the Commission noted the limited application of the 1969 decision, amendments since 1969 to legislation in State jurisdictions, as well as legislative developments in the United Kingdom and New Zealand which marked changed approaches towards equal pay for females. It also noted the then Commonwealth Government's support for the concept of equal pay for work of equal value and concluded that the 1969 concept of equal pay for equal work required expansion in light of changing social circumstances:

> 'In our view the concept of 'equal pay for equal work' is too narrow in today's world and we think time has come to enlarge the concept to 'equal pay for work of equal value'. This means that award rates for all work should be considered without regard to the sex of the employee.'[51]

[60] The Commission also rejected as 'unwieldy' the proposition that it should examine in detail the various claims before it and as a result of that examination lay down principles which would have general application. It concluded that a general principle applied by individual Members of the Commission was likely to obtain better results. In addressing the likely cost of the implementation of equal pay for work of equal value, the Commission acknowledged that there would be a substantial increase in total wages bills, but suggested that the community was prepared to accept these costs and that they could be reduced by phasing in over a period of two and a half years.[52]

[61] The Commission did not rescind the 1969 principles applicable to 'equal pay for equal work', which it said would continue to apply in appropriate cases. The stated reason for retaining the 1969 principles was 'because an injustice might be created in cases based on equal pay for equal work where females could become entitled immediately to male rates under those principles'.[53] However, it developed a new principle of equal pay for work of equal value which was based on work value comparisons being performed to determine the value of the work 'without regard to the sex of the employees concerned'. For the purpose of assessing the value of the work, comparisons could be made between male and female classifications within an award. However, where such comparisons were unavailable or inconclusive, for example where the work was performed exclusively by females, the principle allowed comparisons to be made between female classifications within the award or in different awards. It also acknowledged that in some cases comparisons with male classifications in other awards might be necessary.

[62] The new principle stated as follows:[54]

> (1) The principle of 'equal pay for work of equal value' will be applied to all awards of the Commission. By 'equal pay for work of equal value' we mean the fixation of award rates by a consideration of the work performed irrespective of the sex of the worker. The principle will apply to both adults and juniors. Because the male minimum wage takes into account family consideration it will not apply to females.
>
> (2) Adoption of the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned. Differentiations between male rates in awards of the Commission have traditionally been founded on work value investigations of various occupational groups or classifications. The gap between the level of male and female rates in awards generally is greater than the gap, if any, in the comparative value of work performed by the two sexes because rates for female classifications in the same award have generally been fixed without a comparative evaluation of the work performed by males and females.
>
> (3) The new principle may be applied by agreement or arbitration. The eventual outcome should be a single rate for an occupational group of classification which rate is payable to the employee performing the work whether the employee be male or female. Existing geographical differences between rates will not be affected by this decision.
>
> (4) Implementation of the new principle by arbitration will call for the exercise of the broad judgement which has characterised work value enquiries. Different criteria will continue to apply from case to case and may vary from one class of work to another. However, work value inquiries which are concerned with comparisons of work and fixation of award rates irrespective of the sex of employees may encounter unfamiliar issues. In so far as those issues have been raised we will comment on them. Other issues which may arise

will be resolved in the context of the particular work value inquiry with which the arbitration is concerned.

(5) We now deal with issues which have arisen from the material and argument placed before us and which call for comment or decision.

(a) The automatic application of any formula which seeks to by-pass a consideration of the work performed is, in our view, inappropriate to the implementation of the principle we have adopted. However, pre-existing award relativities may be a relevant factor in appropriate cases.

(b) Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and /or comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary.

(c) The value of the work refers to worth in terms of award wage or salary fixation, not worth to the employer.

(d) Although a similarity in name may indicate a similarity of work, it may be found on closer examination that the same name has been given to different work. In particular this situation may arise with respect to junior employees. Whether in such circumstances it is appropriate to establish new classifications or categories will be a matter for the arbitrator.

(e) In consonance with normal work value practice it will be for the arbitrator to determine whether differences in the work performed are sufficiently significant to warrant a differentiation in rate and if so what differentiation is appropriate. It will also be for the arbitrator to determine whether restrictions on the performance of work by females under a particular award warrant any differentiation in rate based on the relative value of the work. We should, however, indicate that claims for differentiation based on labour turnover or absenteeism should be rejected.

(f) The new principle will have no application to the minimum wage for adult males which is determined on factors unrelated to the nature of the work performed.

(6) Both the social and economic consequences of our decision will be considerable and implementation will take some time. It is our intention that rates in all awards of this Commission and all determinations under the Public Service Arbitration Act should have been fixed in accordance with this decision by 30 June 1975. Under normal circumstances, implementation should take place by three equal instalments so that one third of any increase is payable no later than 31 December 1973, half of the remainder by 30 September 1974 and the balance by 30 June 1975. This programme is intended as a norm and we recognise that special circumstances may exist which require special treatment.

(7) Nothing we have said is intended to rescind the 1969 principles applicable to equal pay for equal work which will continue to apply in appropriate cases. We have taken this step because an injustice might be created in cases based on equal pay for equal work where females could become entitled immediately to male rates under those principles.

[63] In the *National Wage Case 1974*,[55] the Commission followed the 1972 decision and decided to establish one minimum wage for adults, replacing the separate minimum adult

male and female rates. The Commission specified a female minimum wage in the 1974 case, though only for the purpose of it being phased out.

[64] The 1972 principle provided the opportunity for the Commission to make comparisons between different work classifications within and across awards. From 1969 to 1977, average minimum wages for female employees rose from 72 to 92 per cent of the average minimum award wages for male employees.[56] The gender pay equity ratio increased from 64 per cent in 1967 to 80.1 per cent in 1980—an increase of 16.1 percentage points over a 13 year period.[57] Analysts have suggested that changes of this magnitude could not be explained by market factors related to supply and demand or human capital improvements, and must be attributed in large part to the institutional developments.[58]

[65] However, a number of commentators have argued that the 1972 principle failed to achieve its full potential, pointing to the plateau in gender pay equity ratios following the anticipated surge in women's wages in the wake of the 1972 decision.[59] Contributing factors identified in these analyses include:

- limited attempts to address work value issues;[60]
- barriers to properly establishing the value of feminised occupations, continuing a long history of assumptions of women's work being semi-skilled or unskilled and the difficulty that industrial tribunals have had in properly valuing the 'skills, exhibited, acquired and used by women in traditional occupations';[61] and
- the significant number of cases where the 1972 principle was applied through award variations by consent without substantive work value inquiries.[62]

[66] Central to these critiques were said to be the difficulties endemic in any approach based on 'work value' which did not address the segregated nature of the labour market and excluded consideration of problems concerning the reward of skill and career progression in feminised industries and jobs, and the effects of maternity and parenting on labour market participation.

[67] No further explicit direction on this issue was given until 1986, when the Commission ruled that the 1972 principle could not be applied by reference to the concept of work of 'comparable worth'.[63] At this point the Commission referred the parties again to the explicit direction to work value in the 1972 equal pay for work of equal value principle. The Commission noted that the 1972 principle remained in operation and directed the parties to the anomalies and inequities principle (as described in [70]), which was subsequently used to secure significant pay increases in some female-dominated industries.[64]

3.3 The 1986 and 1987 Nurses Pay Equity Cases

[68] In 1986 the Commission handed down two decisions concerning equal pay claims for nurses whose conditions of employment were regulated by federal awards.[65]

[69] In the first decision, which became known as the *Nurses Comparable Worth Case*[66], a Full Bench ruled on two threshold matters, prior to the commencement of a detailed case for a review of nurses' rates:

(i) whether the 1972 equal pay decision was still available to be implemented; and

(ii) whether the applications were affected by the Wage Fixing Principles then in operation.

[70] In short, the Full Bench concluded that the 1972 equal pay principle was available to be implemented in awards in which it had not been applied and that all such applications should be processed through the Anomalies Conference procedure set out in principle 6 of the Wage Fixing Principles[67], which sought to address anomalies or inequities in wage fixation.

[71] The Commission rejected the proposition advanced by the Australian Council of Trade Unions (ACTU) that the 1972 principle of equal pay for work of equal value should be equated with the principle of comparable worth. In rejecting the argument that the concept of comparable worth should be used to implement the 1972 equal pay principle the Commission indicated its unease with the concept and concern that its acceptance could undermine centralised wage fixation:

> 'The other issue relates to the use of the term comparable worth. The applicants, the ACTU and the Commonwealth Government, whilst recognising the need to consider the concept of comparable worth in the context of the Australian industrial environment, attempted to equate the 1972 principle of equal pay for work of equal value with the doctrine of comparable worth. The Council of Action for Equal Pay went even further and suggested that the Commission should adopt the doctrine of comparable worth which would allow for the rates of pay for all women in predominantly female occupations to be reassessed on a case by case basis. …
>
> It is clear that comparable worth and related concepts, on the limited material before us, have been applied differently in a number of countries. At its widest, comparable worth is capable of being applied to any classification regarded as having been improperly valued, without limitation on the kind of classification to which it is applied, with no requirement that the work performed is related or similar. It is capable of being applied to work which is essentially or usually performed by males as well as to work which is essentially or usually performed by females. Such an approach would strike at the heart of long accepted methods of wage fixation in this country and be particularly destructive of the present Wage Fixing Principles. …
>
> Moreover as explained to us by the Commonwealth, in the United States at least, the doctrine of comparable worth refers to the value of the work in terms of its worth to the employer. …
>
> This is quite contrary to what the Full Bench of this Commission envisaged in the 1972 equal pay principle. The principle requires equal pay for work of equal value to be implemented by work value inquiries carried out in the normal manner in which such inquiries are conducted in our wage fixing environment. …
>
> In our view the use of the term "comparable worth" in the Australian context would lead to confusion, and in particular, we believe that it would be inappropriate and confusing to equate the doctrine with the 1972 principle of equal pay for work of equal value. For all of these reasons we specifically reject the notion.' (emphasis added)[68]

[72] In accordance with the decision in the *Nurses Comparable Worth Case* the relevant unions brought a claim before the Anomalies Conference on 19 March 1986 for a review of the salaries of nurses covered by federal awards and determinations. The then President

concluded that an arguable case existed for the finding of an anomaly and an inequity and referred the claims to a Full Bench for determination.

[73] In *Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972 and other Awards*[69] a Full Bench determined the nurses' claims. At that time nurses covered by federal awards comprised a small proportion of the total number of nurses in Australia. The vast majority of nurses were subject to the terms of awards made by State industrial authorities and within the public hospital sector State awards applied to over 90 per cent of nurses. The claim before the Commission was for a single salaries and career structure for all nurses covered by federal awards and determinations. The Royal Australian Nursing Federation (RANF) contended that the existing wage scales for nurses did not reflect their professional standards and did not provide adequate career opportunities in the area of clinical nursing. It was submitted that the education, training and duties of nurses were such that they should receive rates equivalent to those of other professional employees within the health care industry. The RANF submitted that the rates of pay of registered nurses had been fixed having regard to the fact that the vast majority of nurses are female; that this sex bias had served to depress the level of wages; and that this bias had never been corrected. It was also claimed that the case provided the Commission with an opportunity to prescribe a national scale which could bring stability into the fixation of nurses' wages throughout Australia.

[74] The Full Bench concluded that having regard to all the circumstances surrounding the claims, there was a problem of a special and isolated nature which constituted an anomaly within the meaning of principle 6 of the Wage Fixing Principles. The grounds on which the Bench was so satisfied included: the non-application of the 1972 principle to registered nurses covered by federal awards; fundamental problems in the existing career structure; and a shortage of nurses while there was a pool of qualified nurses outside the industry. The Full Bench also concluded that in relation to certain claims, inequities existed within the meaning of the relevant principle. In respect of work value the Commission was satisfied that there had been changes in the nature of the work, skill and responsibility of nurses which constituted a significant net addition to work requirements within the terms of the work value principle.[70] However the Commission rejected the proposed movement to 'professional rates':

> 'We have already found that an anomaly exists with respect to the rates of pay for the Commonwealth nurses who are subject to the awards and determinations which are before us. We fully recognise the fact that Commonwealth nurses rates are depressed, and that their training and skill are relevant factors in determining the appropriate level of rates to be awarded. However we have not been convinced by the RANF or the ACTU in these proceedings of the need to move to professional rates, whatever that term may mean. Nor have we been given any information or material which would justify a fixation of rates beyond the levels of the rates for nurses which have been assessed by recent decisions of State tribunals.'[71]

[75] The Commission went on to grant a range of increases in respect of the awards before it on the basis of the identified anomaly, inequities and work value changes.

[76] After the *Nurses Comparable Worth Case* pay equity claims were processed through the anomalies and inequities principle and from August 1989 the Commission used the structural efficiency principle as an adjunct to the anomalies and inequities principle to deal with pay equity claims. The anomalies and inequities principle was dropped in the 1991

National Wage Case decision[72] and the potential for using the structural efficiency principle was curtailed with the adoption of the enterprise bargaining principle.[73]

3.4 The 1993 and 1996 federal legislation

[77] In 1993 the *Industrial Relations Reform Act 1993* amended the *Industrial Relations Act 1988* (IR Act) by introducing Division 2 of Part VIA, titled 'Equal Remuneration for Work of Equal Value'. This was the first piece of federal legislation expressly dealing with equal remuneration in Australia and relied on the external affairs power. Under the new provisions, which commenced operation on 30 March 1994, the Commission could make such orders it considered appropriate to ensure that, for employees covered by the order, there will be 'equal remuneration for work of equal value' (s.170BC(3)(a)). The expression 'equal remuneration for work of equal value' was explicitly defined, by reference to the Equal Remuneration Convention, to mean rates of remuneration established without discrimination based on sex. The provisions in Division 2 of Part VIA of the IR Act are set out in full as follows:

> **Division 2 -Equal remuneration for work of equal value**
>
> **SECTION 170BA OBJECT**
>
> **170BA** The object of this Division is to give effect, or further effect, to:
>
> (a) the Anti-Discrimination Conventions; and
>
> (b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No. 90; and
>
> (c) the Discrimination (Employment and Occupation) Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation No. 111.
>
> **SECTION 170BB EQUAL REMUNERATION FOR WORK OF EQUAL VALUE**
>
> **170BB(1) [Equal remuneration for men and women]** A reference in this Division to equal remuneration for work of equal value is a reference to equal remuneration for men and women workers for work of equal value.
>
> **170BB(2) [Meaning]** An expression has in subsection (1) the same meaning as in the Equal Remuneration Convention.
>
> Note: Article 1 of the Convention provides that the term 'equal remuneration for men and women workers for work of equal value' refers to rates of remuneration established without discrimination based on sex.
>
> **SECTION 170BC ORDERS REQUIRING EQUAL REMUNERATION**
>
> **170BC(1) [Commission to make appropriate orders]** Subject to this Division, the Commission may make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value.
>
> **170BC(2) [Increase in rates of remuneration]** Without limiting subsection (1), an order under this Division may provide for such increases in rates (including minimum rates) of remuneration (within the meaning of the Equal Remuneration Convention) as the Commission considers appropriate to ensure that, for employees covered by the order, there will be equal remuneration for work of equal value.
>
> **170BC(3) [Conditions to be satisfied before order made]** However, the Commission may make an order under this Division only if:

(a) the Commission is satisfied that, for the employees to be covered by the order, there is not equal remuneration for work of equal value; and

(b) the order can reasonably be regarded as appropriate and adapted to giving effect to:

(i) one or more of the Anti-Discrimination Conventions; or

(ii) the provisions of the Recommendation referred to in paragraph 170BA(b) or (c).

SECTION 170BD ORDERS ONLY ON APPLICATION

170BD The Commission must only make such an order if it has received an application for the making of an order under this Division from:

(a) an employee, or a trade union whose rules entitle it to represent the industrial interests of employees, to be covered by the order; or

(b) the Sex Discrimination Commissioner.

SECTION 170BE NO ORDER IF ADEQUATE ALTERNATIVE REMEDY EXISTS

170BE The Commission must refrain from considering the application, or from determining it, if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an adequate alternative remedy that:

(a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and

(b) will ensure, for the employees concerned, equal remuneration for work of equal value.

SECTION 170BF IMMEDIATE OR PROGRESSIVE INTRODUCTION OF EQUAL REMUNERATION

170BF The order may implement equal remuneration for work of equal value when the order takes effect. However, if it is not deemed feasible to implement it immediately, the order may implement it in stages (as provided in the order).

SECTION 170BG EMPLOYER NOT TO REDUCE REMUNERATION

170BG(1) [Employer not to reduce remuneration] An employer must not reduce an employee's remuneration (within the meaning of the Equal Remuneration Convention) for the reason, or for reasons including the reason, that an application or order has been made under this Division.

170BG(2) [Reduction of no effect] If subsection (1) is contravened, the purported reduction is of no effect.

SECTION 170BH DIVISION NOT TO LIMIT OTHER RIGHTS

170BH This Division is not intended to limit any right that a person or trade union may otherwise have to secure equal remuneration for work of equal value.

SECTION 170BI ADDITIONAL EFFECT OF DIVISION

170BI(l) [Effect equal to secs 170BA and 170BC(3)(b) repeal] Because of this section, this Division has the effect it would have if section 170BA were repealed and paragraph 170BC(3)(b) were omitted. That effect is additional to, and does not prejudice, the effect that this Division has otherwise than because of this section.

170BI(2) [Application to be determined by arbitration] The Commission must determine by arbitration an application made under this Division as it has effect because of this section.

> **170BI(3) [Conditions warranting making of order]** The Commission may make an order under this Division (as it so has effect) only if:
> (a) it considers that the order is necessary to prevent an industrial dispute about equal remuneration for work of equal value; and
>
> (b) it has given to each organisation or other person who, in its opinion, would be likely to be a party to the dispute an opportunity to be heard in relation to the making of the order.
>
> **170BI(4) [Persons on whom order binding]** An order so made must be expressed to bind only such of the following as the order specifies:
>
> (a) the organisations and other persons to whom the Commission has given, as required by subsection (3), an opportunity to be heard;
>
> (b) the respective members of those organisations.

[78] The stated object of the new Division was to give effect to the 'Anti-Discrimination Conventions' (a term defined to include the *Equal Remuneration Convention*), and the ILO's Equal Remuneration Recommendation (No. 90) and Discrimination (Employment and Occupation) Recommendation (No. 111). As well as relying on the external affairs power the Division was given an additional operation by s.170BI, allowing it to apply in circumstances where there was a potential industrial dispute over the issue of equal remuneration.[74]

[79] Orders could only be made under section 170BC if the Commission was satisfied that:

(i) the employees to be covered by the order did not have equal remuneration for work of equal value (s.170BC(3)(a));

(ii) making such an order would give effect to one or more of the Anti-Discrimination Conventions or ILO Recommendations No. 90 or No. 111 (s.170BC(3)(b));

(iii) the application had been made by an employee or trade union entitled to represent the interests of the employees to be covered by the order, or by the Sex Discrimination Commissioner (s.170BD); and

(iv) no adequate alternative remedy was available under a law of the Commonwealth or a State or Territory law (ss.170BE(a) and (b)).

[80] In 1996 the IR Act was amended and renamed the *Workplace Relations Act 1996* (WR Act) by the *Workplace Relations and Other Legislation Amendment Act 1996.* The equal remuneration provisions in the IR Act were retained, with only minor changes. This included the insertion of a new provision, s.170BHA, which precluded the making of an application for an order for equal remuneration for work of equal value if proceedings for an alternative remedy to secure equal remuneration had begun under another provision of the WR Act, or a law of the Commonwealth, State or Territory.

[81] The 1993 legislative provisions attempted to widen the concept of 'equal pay' embedded in the 1972 principle to include 'equal remuneration', which enabled consideration of overaward earnings.[75] Additionally there were clear linkages to the relevant International Instruments.

[82] However, as a number of commentators have remarked, a notable feature of the 1993 equal remuneration provisions was the relatively small number of applications made under

them, the uncertainties and limitations associated with their interpretation and application and, as a result, their failure to make a significant contribution to achieving gender pay equity.[76] The legal hurdles associated with the provisions meant that, in practice, it favoured prosecution at the level of the individual worker or workplace, rather than providing the broader, award-based solutions of the 1969 and 1972 cases[77]. In particular the use of the term 'without discrimination' in the *Equal Remuneration Convention* was interpreted by the Commission to require the applicants to demonstrate that disparities in earnings had a discriminatory cause. As Smith has observed, a lack of clarity around the meaning of the term 'discrimination' and difficulty in applying the test of discrimination added to the difficulties associated with the provisions.[78]

[83] Following their commencement in March 1994, there were only 18 applications in total under the new equal remuneration provisions, four of which arose from claims for equal remuneration at HPM Industries and David Syme & Co. Only one claim was arbitrated and no equal remuneration orders were made by the Commission.[79] The key cases are outlined below.

The first HPM case

[84] In the first *HPM* case[80] the Australian Manufacturing Workers' Union (AMWU) applied for an equal remuneration order for process and packer workers at HPM Industries' Darlinghurst site in Sydney. The employees concerned were employed under the *Metal Industry Award 1984*. The general hands and storepersons were all men and all of the packers and all but four of the 302 process workers were women. Their remuneration was not equal. The primary ground advanced by the union in support of the claim was that the female process workers and female packers did not receive equal remuneration for work of equal value when compared to 'male General Hands and male Storepersons employed at the same premises'[81]. The work of the females, it was argued, was at least of equal value to the men as measured by the competency standards adopted by HPM.

[85] In assessing what was required of applicants, Commissioner Simmonds noted that the legislation required the Commission to be satisfied, as a 'first step' to making an order, that the relevant rates of remuneration were established 'without discrimination based on sex'—the test set out in Article 1 of the *Equal Remuneration Convention*.[82] The Commissioner considered the definition of discrimination that should be applied for this purpose and decided to adopt the definition of discrimination adopted by a Full Bench of the Commission in the *Third Safety Net Adjustment and Section 150A Review* decision (the October 1995 decision),[83] rather than the definition contained in the *Sex Discrimination Act 1984* (Cth), on the basis that it would be undesirable for the Commission to follow two different definitions of discrimination; one for its award making functions and another for the purpose of equal remuneration orders.

[86] To determine whether there had been different treatment of men and women in the same circumstances—and, therefore, direct discrimination—the Commissioner considered whether the work in question was of equal value. On this point, the Commissioner decided that in the absence of agreement, the competency standards relied on by the AMWU 'are not an adequate tool for assessment for the purposes of this matter'.[84] While the Commissioner found that the competency standards provided 'an objective and gender neutral mechanism

for measuring the relative competencies', they did not provide a means for assessing other attributes, such as 'elements of responsibility that are not skill-related, the nature of the work and the conditions under which the work is performed'.[85]

[87] The Commissioner expressed the view that in the absence of agreement 'the appropriate method of examining 'equal value' is to apply the criteria of work value, as described in the relevant wage fixing principle'[86]. The Commissioner came to this view having regard to the words of the *Equal Remuneration Convention* at Articles 2 and 3 and subsequent reports of the Committee of Experts. The Commissioner determined that the appropriate authority remained the 1972 *Equal Pay Case*. The principle adopted in that case explicitly required the Commission to use work value inquiries to determine applications that sought equal pay orders. Commissioner Simmonds defined work value in terms of the wage fixing principles in place at the time of the case, namely 'the nature of the work, skill and responsibility required or the conditions under which the work is performed'. The Commissioner noted that it was not appropriate for a single Member to establish a new method of work value evaluation applying award competencies in place of the Commission's established work value principles.[87]

[88] The Commissioner dismissed the union's application on the basis that he was not satisfied on the evidence and arguments presented that the different remuneration paid to process workers and packers by comparison to that paid to general hands and storepersons arose in circumstances that were sufficiently similar as to amount to discrimination based on sex. The Commissioner summarised his conclusions in the following terms:

> 1. That the Commission as presently constituted must follow the definition of discrimination established in the *Third Safety Net Adjustment and Section 150A Review* decision of the Full Bench [Print M5600].
>
> 2. To establish that equal remuneration for work of equal value is justified it is necessary to establish that the rates of remuneration 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 thus the equivalence of the work needs to be established.
>
> 3. In the absence of agreement about establishing the equivalence of the work, the competency standards process as provided in clause 6E of the Award is not appropriate. Where there is no agreement the appropriate method is to apply the criteria of work value.
>
> 4. There was no agreement in this matter to the use of the competency standards as a method of determining the equivalence of the work.
>
> 5. There is insufficient evidence to satisfy the Commission that HPM has indirectly discriminated, in a relevant way, so as to justify the making of an order under Part 2 of Division VIA of the *Act*.
>
> 6. There is no basis for an order of the kind proposed by the Women's Organisations to mandate a program of equal opportunity and supervise its implementation.[88]

The second HPM case

[89] In 1998, the AMWU lodged a second application for an equal remuneration order for female process workers and packers at HPM's Sydney site and sought a retrospective application of any order made dating back to 1985. The matter was settled by the parties in late 1998 by making an enterprise agreement, after more than three years of proceedings

before the Commission. Prior to that settlement Justice Munro made a number of observations about the statutory provisions, particularly concerning the meaning of 'work of equal value'.

[90] While noting that the Commission's established work value principles and practice should be a primary source of guidance, Justice Munro suggested that a number of evaluation techniques could be applied:

> '14. For the applicant to succeed in this matter, one point on which it will need to satisfy the Commission is that there is not equal remuneration for work of equal value for the class of employees subject to any order that might be made. It may be prudent to assume that the Commission will only be satisfied as to that circumstance if it exists at a time material to, and covered by any order to be made …
>
> 15. It follows that evidence about past inequity in the remuneration of work of equal value may be of some probative value in establishing a current inequality. But such evidence is not compelling and it is unlikely to be sufficient to establish the condition precedent in paragraph 170BC(3)(a). On the other hand, evidence about the record of the employment, the positions advertised, the pattern of duties habitually undertaken and practice as to fixing remuneration may be relevant. It could be considered to be so if it were logically probative of facts from which at least inferences might be drawn about the nature and limits of the work and of actual duties, or about remuneration practices, managerial reasons, or the credit of the respondent company's witnesses. For that reason it is in my view proper for the applicant to seek production of the detailed records available about such matters over a reasonable time period …
> …
>
> 17. Views may differ about what considerations would constitute the elements upon which a particular member of the Commission may be satisfied that, for a particular employee or set of employees, there is not equal remuneration for work of equal value. A subjective judgment is a necessary component of the paragraph 170BC(3)(a) condition precedent to an order. However there must at least be a clear and relatively complete depiction and hopefully finding about both the "work" of the employee(s) to be subject to the order, and the "comparator" work of equal value. Upon the relevant two sets of work content being established, the valuation and relative equivalence of them will need to be established. That forensic task involves a requirement to persuade the Commission of both the validity of an evaluation principle to be used and of the equivalence of value of the work resulting from the application of it.
>
> 18. From the submissions put to me, and from the documentation submitted by the applicant union to HPM for agreement, it is apparent that the parties are at issue about the factors or considerations that should be the foundation of any "work value" evaluation. It seems likely that there will be no agreed method of evaluation of the relevant "work". If that is the case, the applicant will be at liberty to rely upon a method of its own choosing. The adequacy and effectiveness of that, or any competency method if there be one employed by the respondent, will be among the matters that will need to be considered by the relevant Commission member in the determination of the merits of the application. In my view, so far as that determination turns upon the paragraph 170BC(3)(a) condition precedent, it will be open to the Commission member concerned to adopt any method of evaluation that he or she may hold to be adequate and effective in persuading the member to be satisfied about the fact that the relevant work is of equivalent value. As Simmonds C stated in his decision on 4 March 1998, the Commission's principles and practice related to work value comparison and changes are a primary source of guidance about what factors and considerations are of accepted relevance to such evaluation. However, experience of work value cases suggests that work value equivalence is a relative measure, sometimes dependent up [sic] an exercise of judgment. A

history of such cases would disclose that a number of evaluation techniques have been applied for various purposes and with various outcomes from time to time.'[89]

The first Age case

[91] In *Automotive, Food, Metals Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd*[90] the AMWU made an application for an equal remuneration order for female clerical employees at *The Age* newspaper. The union argued that female telesales advisers and copy control clerks paid at level one should be paid the same rates as male employees in production jobs classified at level four and machine room operators classified at level three.

[92] The application was for an order under s.170BC of the WR Act, which set out the primary operation of Division 2 of Part VIA. The application also stated that the applicant sought the exercise of the Commission's powers under s.170BI to prevent an industrial dispute about equal remuneration for work of equal value. As mentioned earlier, s.170BI extended the operation of the Division to empower the Commission to make an equal remuneration order if, among other things, it considered that the order was necessary to prevent an industrial dispute about equal remuneration for work of equal value. The respondent company made four jurisdictional objections to the claim, one of which was that an application for an order under Division 2 of Part VIA cannot rely on the additional operation of the Division created by s.170BI while simultaneously relying on the primary operation of the Division (the 'alternative remedy point').

[93] Section 170BHA dealt with applications for alternative remedies. The section provided that 'an application must not be made under this Division for an order to secure equal remuneration for work of equal value' if proceedings for an alternative remedy to secure equal remuneration for work of equal value have begun 'under another provision' of the FW Act.

[94] On the issue of alternative remedy, Vice President Ross (as he then was) upheld the company's jurisdictional objection:

'The determination of the point raised by the Company requires a consideration of the proper construction of s170BHA, in particular:

- what is meant by the expression "An application … under this Division for an order to secure equal remuneration for work of equal value for an employee" in s.170BHA(1); and
- is an application under s.170BI an application for an alternative remedy "under another provision of this Act" within the meaning of s.170BHA(1)(c).

In relation to the first matter I am satisfied that the expression in the opening words of s.170BHA(1) is a reference to an application under s.170BD for an order under s.170BC. In other words the expression refers to an application for an order pursuant to the primary operation of Div 2 of Pt VIA.

Turning to the second issue I have concluded that s.170BI application is an application for an alternative remedy under "another provision" of the Act, within the meaning of s.170BHA(1)(c). In reaching this conclusion I have found the following matters particularly persuasive:

- the distinct differences between the nature of the jurisdiction conferred under s.170BI and that conferred by the other provisions of Div 2 of Pt VIA; (In this regard I have not taken into account the potential effect of s89A(3). This is an important issue which having regard to the other factors I have relied on it is unnecessary for me to determine and I have decided not to do so.)
- s.170BI proceeds on the basis that s.170BA was repealed and s.170BC(3)(b) was omitted. These provisions are fundamental to the Commission's jurisdiction under the primary operation of Div 2 of Pt VIA.

In my view s.170BI is ''another provision'' of the Act in the context of s.170BHA(1)(c).

…

In my view the Company is correct in contending that the Commission cannot determine applications under Div 2 of Pt VIA simultaneously in the primary and secondary operation of the Division.'[91]

The second Age case

[95] In April 1999, the AMWU made a second application for an equal remuneration order for clerical employees at *The Age* newspaper. The union's second application was not limited to female employees but sought an order applicable to all clerical workers employed by the company.[92] The company again raised a number of jurisdictional matters as threshold issues, including in relation to the Commission's jurisdiction to issue a summons for the production of documents. Commissioner Whelan considered the matters required to make out the successful elements for an equal remuneration order and agreed with Justice Munro's comments in the second *HPM case* that 'considerable uncertainty exists about the elements necessary to make out a proper case'.[93] She also observed that in determining whether there is equal remuneration for work of equal value:

'The words of the [Equal Remuneration] Convention do not suggest that the only comparisons acceptable are those which compare the work being performed by males with that being performed by females. Indeed, it is clear that the issue is not who performs the work but the basis upon which the rates have been established.'[94]

[96] Commissioner Whelan referred to the decisions of Justice Munro and Commissioner Simmonds in the *HPM* cases, noting that both had considered that the use of the Commission's principles and practice related to work value change and evaluation were a primary source of guidance about what factors and considerations were relevant in evaluating whether work is of an equivalent value.

[97] The Commissioner determined that it would be wrong to pre-empt the parameters of ss.170BC(a) and 170BC(b) due to the absence of advice of the evidence that the applicant sought to present and rejected the submission that the application was without foundation. The Commissioner considered that the request for documents as contained in a summons issued by the Commission was not oppressive and that evidence relevant to the application was likely to be held by the company.

[98] David Syme appealed the Commissioner's decision. After the appellant failed to obtain a stay of the decision pending an appeal,[95] proceedings resumed before Commissioner

Whelan, who issued further directions in June and August 1999. The matter was ultimately settled by consent.[96]

The Gunn and Taylor case

[99] The decision in *Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor*[97] concerned a graphic design company which employed four plate makers, one of whom was female. All the plate makers were qualified tradespersons and all had different rates of pay. The female employee had a similar length of service to the longest serving male employee, but received the lowest rate of pay. The AMWU made an application for equal remuneration for female plate makers in the company arguing that the employee in question should be paid the same rate as the highest paid male employee in the plate making department.

[100] The company objected to the application on the basis that a suitable alternative remedy existed under the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 1995* (Vic), as the matter could be dealt with as a sex discrimination matter relating to an individual employee, rather than as an application for equal remuneration. The company also argued that the award and the company's enterprise flexibility agreement did not discriminate against men and women in classifications of pay and, therefore, there was no discriminatory treatment, although it was admitted that the employees were being paid in excess of the award and the agreement. They added that to pay the female plate maker at the highest rate of pay would be to discriminate against male plate makers who received lower rates.

[101] As we have noted, s.170BE of the WR Act provided:

> '170BE No order if adequate alternative remedy exists
>
> The Commission must refrain from considering the application, or from determining it, if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an adequate alternative remedy that:
>
> (a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and
>
> (b) will ensure, for the employees concerned, equal remuneration for work of equal value.'

[102] Commissioner Whelan found that overaward pay set by an industrial instrument was within the definition of 'remuneration' for the purposes of the WR Act and noted that the existence of the industrial instruments did not provide a bar, or an answer, to the application. The Commissioner rejected the company's submission regarding an alternative remedy, as she was not satisfied that either the *Sex Discrimination Act 1984* (Cth) nor the *Equal Opportunity Act 1995* (Vic) would provide a remedy which would ensure equal remuneration for work of equal value for a class or group of employees.

[103] The Commissioner's conclusions in relation to this were as follows:

> '[30] In my view, the <u>remedy</u> available under section 170BD is:
>
> (a) of application to all employees engaged in the work found to be of equal value;

(b) designed to establish a regime where work of equal value attracts equal remuneration;
(c) intended to ensure that rates of remuneration are established in a way free from discrimination based on sex.

[31] The remedies available under the *Sex Discrimination Act* or *Equal Opportunity Act* are:

(a) applicable only to the individual or established class of persons who bring the application;
(b) designed to compensate a person or persons who have established unlawful discrimination within the meaning of those Acts;
(c) aimed at ensuring that the complainant(s) is/are not subject to ongoing unlawful discrimination.

[32] It appears to me that the union in this matter may be seeking to achieve both objectives. I am not sure that that is possible in such an application.

[33] To the extent that the union seeks an order of general application I am not satisfied that the *Sex Discrimination Act* or the *Equal Opportunity Act* meet the requirements of section 170BE in that they are not able to ensure equal remuneration for work of equal value for female employees employed, or who may be employed, as graphic reproducers in the plate making department of the company's business.'

[104] The company appealed the decision to a Full Bench of the Commission.[98] The Full Bench upheld Commissioner Whelan's decision, noting that even though the order may affect only one employee, the remedy sought was of broader application:

'We think it is appropriate that we note … that we agree with Commissioner Whelan's conclusion that neither the *Sex Discrimination Act 1984* (Commonwealth) nor the *Equal Opportunity Act 1995* (Victoria) provides a remedy which would ensure equal remuneration for work of equal value and which would be of general application. We add this qualification. In the submissions made to us there was no exploration of the possibility of a class action under the Commonwealth Acts. Nor was there any debate concerning the power to make prospective orders under those laws in the circumstances of this case. Despite this, it is clear that the provisions of Division 2 of the WR Act are designed to provide a remedy of general application. We are unconvinced that even if a remedy of general application were available elsewhere it would be an adequate alternative for the purposes of section170BE of the WR Act.'[99]

3.5 The 2005 federal legislation

[105] The *Workplace Relations Amendment (Work Choices) Act 2005* introduced amendments to the WR Act which came into effect in March 2006 and significantly altered the industrial relations framework. Importantly, the amendments sought to widen the federal jurisdiction by relying on the corporations power of the Constitution, in addition to a number of other constitutional powers. The effect of these changes was that employers of a certain type, notably 'constitutional corporations' (that is, trading, financial or foreign corporations), could no longer be covered by State awards or industrial laws.

[106] The amendments created the Australian Fair Pay Commission (AFPC) as the federal body responsible for the setting and adjusting of minimum wages, removed rates of pay from awards and created Australian Pay and Classification Scales (APCSs) which contained wages

and certain other provisions. The AFPC became the body responsible for adjusting the rates in APCSs, as well as creating and adjusting Federal Minimum Wages for award-free employees. In discharging these functions and in exercising any of its powers, the AFPC was required to apply the principle that men and women should receive equal remuneration for work of equal value.[100] The AFPC informed itself on wage-setting matters through commissioned research, stakeholder consultation and public submissions.

[107] The equal remuneration provisions were retained but with some amendments, as outlined below. The provisions were re-enacted at Division 3 of Part 12 of the WR Act and renumbered. It is noted that the 2005 amendments effected a renumbering of the entire WR Act.

[108] Section 620 of the WR Act reiterated that the purpose of the provisions was to give effect to the Anti-Discrimination Conventions and ILO Recommendations Nos 90 and 111 (as did the former s.170BA of the IR Act). Section 623(1) contained the same definition as the former s.170BB(1) of the IR Act, namely that a reference in the Division to equal remuneration for work of equal value is a reference to 'equal remuneration for men and women workers for work of equal value'. Section 623(2) continued to provide that the phrase 'equal remuneration for work of equal value' had the same meaning as in the *Equal Remuneration Convention* (as did s.170BB(2) of the IR Act).

[109] Section 622 governed the relationship between the Division, AFPC decisions and the Australian Fair Pay and Conditions Standard and prevented the Commission from dealing with an application if the proposed equal remuneration order would have the effect of setting aside or varying minimum rates set by the AFPC (s.622). Subsections 622(2), (4) and (5) expressly referred to the 'comparator group of employees', which was defined as 'employees whom the applicant contends are performing work of equal value to the work performed by the employees to whom the application relates (s.622(7)). This section was not re-enacted in Part 2–7 of the FW Act.

[110] There were also some other minor amendments, including: a new requirement for compulsory conciliation or mediation as part of equal remuneration proceedings, formalising the then current practice of the Commission [101] (s.626); and a new provision providing that an employer could not, or could not threaten to, dismiss, injure or prejudice an employee as a result of the employee making an application for an equal remuneration order (s.631).

[111] In addition, section 16(1)(c) excluded the operation of 'a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value'. This provision and the expansion of the federal system effectively limited the application of approaches to equal remuneration that had begun to develop at the State level.[102]

[112] During its operation, from 2006 to 2009, the AFPC did not make, adjust or vary any pay scales for reasons relating to equal remuneration, on the basis that it did not receive any submissions claiming that specific pay scales did not provide equal remuneration: see *Wage Setting Decision July 2008*;[103] *Wage Setting Decision July 2009*.[104] The Commission remained responsible for hearing equal remuneration matters outside the minimum wage setting. However, between 2005 and 2009 no equal remuneration applications were made.

[113] Before turning to the current provisions in Part 2–7 of the FW Act we propose to briefly summarise the pay equity provisions at State level. The relevant State pay equity principles are set out at Annexure 4.

3.6 Developments at State Level

New South Wales Industrial Relations Act 1996

[114] The *Industrial Relations Act 1996* (NSW) (NSW IR Act) contains a number of provisions which refer to pay equity and the principle of equal remuneration for work of equal or comparable value. The objects of the NSW IR Act include a requirement to 'prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value'[105]. Unlike the federal equal remuneration provisions (in Part 2–7 of the FW Act) the NSW Industrial Relations Commission's (NSW IRC) ordinary award and agreement making functions do not contain a discrete remedial provision directed at pay equity.[106]

[115] In 1997 Justice Glynn of the NSW IRC conducted an inquiry into pay equity. The inquiry considered a wide range of evidence, including case studies comparing female and male dominated industries and the history of equal remuneration cases at federal and state level. One conclusion of Glynn J's report was that establishing an equal remuneration principle within the NSW industrial relations system and using non-gender biased work value assessments, offered the best means of addressing gender pay inequity.[107]

[116] The NSW principle arose out of an application filed by the Labor Council of NSW (now Unions NSW) under s.51 of the NSW IR Act[108] for the making of a State decision to give effect to Glynn J's recommendations that a new equal remuneration principle be developed. The case was primarily concerned with establishing a principle under which claims could be made in relation to the undervaluation of work performed by women and not whether any award failed to provide equal remuneration for men and women doing work of equal or comparable value.[109] In making the principle, the NSW IRC relied on its general award making power under s.10 of the NSW IR Act, rather than under specific pay equity provisions.

[117] Following extensive hearings and discussions with representatives of employers, unions and government, a Full Bench of the NSW IRC rescinded the 'equal pay principle' set down in the State *Equal Pay Case 1973*[110] and introduced the 'Equal Remuneration and Other Conditions' principle.[111] This principle largely incorporated Glynn J's recommendations.

[118] The principle is primarily concerned with assessing work value and provides general indicia to assess any gender based undervaluation in this respect. To date the principle has been applied in two cases.[112] We deal with the principle and its statutory basis later in our decision at paragraphs [257]–[264]

Queensland Industrial Relations Act 1999

[119] Section 60 of the *Industrial Relations Act 1999* (Qld) (Qld IR Act) allows the Queensland Industrial Relations Commission (QIRC) to 'make any order it considers

appropriate to ensure employees covered by the order receive equal remuneration for work of equal or comparable value'. The objects of the Qld IR Act also deal with equal remuneration and provide:

> 'The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice — by ensuring equal remuneration for men and women employees for work of equal or comparable value'.

[120] In 2000 Commissioner Fisher was directed to conduct an inquiry into pay equity (the Qld Inquiry). One of the terms of reference was to develop a draft pay equity principle that might be adopted in Queensland, having regard to the NSW and Tasmanian pay equity principles and their relevance for a pay equity principle for Queensland.[113]

[121] The Qld Inquiry accepted that a complex range of factors contributed to pay inequity, such as the concentration of women in low-paid work and precarious employment. It also found that the profile of undervaluation indicators developed by the New South Wales Pay Equity Inquiry was relevant to Queensland.

[122] In arriving at a draft principle, the Qld Inquiry stated it was guided by principles developed in NSW and Tasmania but, more particularly, its own case study of dental assistants' work was regarded as of most assistance in formulating a pay equity principle. The Qld Inquiry found:

> 'The unpacking of the work of dental assistants provides useful assistance in identifying matters which need to be considered in developing a pay equity principle. It confirms the most appropriate approach of valuing work remains that of work value, however it highlights the need for each of the elements of work value to be identified objectively and in a manner free of assumptions based on gender. The case study also demonstrates the value in examining contextual matters such as the composition of the workforce, the extent of unionization and agreements and the level of casualisation. The relevance of award histories to establishing undervaluation is also highlighted.'[114]

[123] In 2002, following hearings before a Full Bench, the QIRC declared an equal remuneration principle as a statement of policy.[115] The Full Bench adopted the draft principle recommended by the Qld Inquiry with minor amendment. The principle has been subsequently applied in a number of cases.[116]

[124] The principle requires the QIRC to assess the value of work performed under any award, or in workplace agreements in female dominated industries, having regard to traditional work value factors such as the nature of work, skill and responsibility and the conditions under which the work is performed. The assessment of the work must be 'transparent, objective, non-discriminatory and free of assumptions based on gender'. The principle does not require a change in work value to be established. In assessing the value of work, the QIRC is to have regard to the history of any award, including whether there have been any work value assessments in the past and whether remuneration has been affected by the gender of the workers. The principle specifically identifies the features of an occupation or industry that might have contributed to undervaluation. We deal with the principle and its statutory basis later in our decision (at paragraphs [265]–[268]).

Tasmania, Western Australia and South Australia

Tasmania

[125] The Tasmanian Women in Paid Work Task Force[117] recommended the introduction of an equal remuneration principle which was subsequently introduced as part of the wage fixing principles in the 1999 State Wage Case.[118]

[126] The Tasmanian equal remuneration principle shares several points of similarity with the NSW and Queensland principles. For example, to assess whether past valuations of the work have been affected by gender bias, the Tasmanian principle focus attention on the history of the establishment of the rates in the award. Prior assessments of the value of the work undertaken by the Tasmanian Industrial Commission are not to be assumed to have been unaffected by gender bias. Work value principles are to be used in determining appropriate rates taking into account the nature of the work, skill, responsibility and qualifications required and the conditions under which the work is performed. It is not necessary to establish work value change. Any assessment of the value of the work must be made 'irrespective of the gender of the worker'. No cases have been brought under the Tasmanian principle.

Western Australia

[127] An object of the *Industrial Relations Act 1979* (WA) (WA IR Act) is to 'promote equal remuneration for men and women for work of equal value'. Further, the Western Australian Industrial Relations Commission (WAIRC) is required to take into consideration the need to provide equal remuneration for men and women for work of equal or comparable value in exercising its wage setting function.[119] Principles set by the WAIRC governing adjustments to rates of pay in state awards also make reference to the principle of equal remuneration for men and women for work of equal or comparable value.[120]

[128] The Western Australian wage fixing principles provide that equal remuneration claims can be brought, but do not provide guidance as to the nature of the assessments to be made or matters to be considered.

South Australia

[129] The *Fair Work Act 1994* (SA) (SA FW Act) contains a number of provisions which refer to pay equity and the principle of equal remuneration for work of equal or comparable value.[121] The SA FW Act requires remuneration fixed by a contract of employment, or an award or enterprise agreement, must be consistent with the *Equal Remuneration Convention*. Like Western Australia, the South Australian wage fixing principles provide that equal remuneration claims can be brought, but do not provide guidance as to the nature of the assessments to be made or matters to be considered.

3.7 The Fair Work Act 2009 – The SACS Case

[130] The FW Act established a new legislative framework for workplace relations, effectively replacing the WR Act in its entirety (other than Schedules 1 to 10 of the WR Act). The majority of the Act commenced operation on 1 July 2009, with the new safety net (comprising the NES and the modern awards) commencing on 1 January 2010. Pursuant to

the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth) and the *Fair Work (State Referrals and Other Measures) Act 2009* (Cth) the States of New South Wales, Queensland, South Australia, Tasmania and Victoria enacted legislation to refer certain workplace relations matters to the Commonwealth.[122] These referrals expanded the coverage of the FW Act.

[131] As we have mentioned, equal remuneration is given effect in three parts of the FW Act. The 'principle of equal remuneration for work of equal or comparable value' is included as a relevant consideration in the 'minimum wages objective' set out at section 284(1) and the 'modern awards' objective at section 134(1). Part 2–7 of the FW Act deals with equal remuneration orders and provides that the Commission may make any equal remuneration order it considers appropriate to ensure that, for the employees to whom the order will apply, 'there will be equal remuneration for work of equal or comparable value' (s.302(1)).

[132] We first turn to the decisions which have construed Part 2–7, before turning to the provisions of Part 2–7.

[133] The first case considered under Part 2–7 of the FW Act was an application for an equal remuneration order for the social, community and disability services sector (the SACS case).

[134] The application was lodged in March 2010 by the Australian Municipal, Administrative, Clerical and Services Union and four other unions[123]. It followed a case in Queensland, which resulted in increased award rates for non-government SACS workers in Queensland designed to 'compensate for historical undervaluation of work, recognise current work value and provide redress for the incapacity to bargain'.[124] The wage rates were fixed by the QIRC, in part, by reference to rates paid to employees performing similar work in state and local government in Queensland.

[135] The applicant unions in the SACS case drew substantially on the approach in the Queensland case, seeking an order applying the classification structure and wage rates in the Queensland SACS award[125] to the SACS industry nationally.

May 2011 decision

[136] On 16 May 2011, a Full Bench of the Commission handed down the first of two major decisions in the proceedings.[126]The Full Bench held that an order cannot be made unless the Commission is satisfied that there is not equal remuneration for work of equal or comparable value, but if it is so satisfied, it nevertheless retains a discretion to make an order or not.[127]

[137] The Full Bench noted that the inclusion of the concept of work of comparable value in Part 2–7 is a significant departure from previous federal legislation and held that it is not necessary to demonstrate that the rates in question have been established on a discriminatory basis, and nor is a male comparator required.[128] They concluded that:

> 'The question is whether and how gender-based undervaluation is to be established. The existence of a valid male comparator group which receives higher remuneration than a female dominated group performing work of equal or comparable value is one way of demonstrating the need for an equal remuneration order. We do not accept that as a matter of logic it is the only way. The presence of a male comparator group might make the applicants' task easier

> and the absence of such a group make the task relatively more difficult, but it does not follow that in the absence of a male comparator group the application must inevitably fail.'[129]

[138] The Full Bench observed that a case in which no predominantly male comparator group is relied upon can only succeed if the applicant establishes that the remuneration paid is subject to gender-based undervaluation.[130] In that regard, it was emphasised that the provisions are not directed at undervaluation itself (which they recognised can be the result of a range of factors, not only gender), but at undervaluation which is gender based and that the identification of the gender-based element is critical to the development of an equal remuneration remedy.[131]

[139] However, in identifying gender-based undervaluation, the Full Bench noted the limitations of the so called 'indicia approach' originally formulated by the NSW IRC in its Pay Equity Inquiry, stating that:

> 'Many if not most of the indicia may in themselves be gender neutral. While the indicia may be indicative of gender-based undervaluation of work in some circumstances, they may also be observed in workplaces, sectors or industries which are mainly male or in which neither gender predominates… The applicants' approach may therefore tend to conceal some of the real causes of undervaluation by imputing a gender bias where none exists.
>
> We do not think that the indicia approach was ever intended to be a prescriptive formula. That is apparent from the prefatory words in the relevant passage from the NSW Pay Equity Inquiry report. Even if all of the indicia are present it does not necessarily follow that gender-based undervaluation exists. Conversely, if none or only a minority of the indicia are present in a particular occupation or industry it does not necessarily follow that there is no gender-based undervaluation. The list of indicia is no more than a framework for considering whether there is undervaluation.'[132]

[140] The Full Bench went on to note that the case posed complexities due to the industry wide nature of the application and the diversity of the SACS industry. The Bench recognised that differences in rates of remuneration between any one enterprise and another are to be expected and that the reasons for those differences will be many and varied and the result of the peculiar circumstances of each enterprise.[133] They observed that the fact that there are differences in rates of remuneration between one workforce made up predominantly of women and another workforce made up predominantly of women may suggest that factors other than gender have contributed to the difference.[134] They stated that:

> 'In order to give effect to the equal remuneration provisions in these complex circumstances, we consider that the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation.'[135]

[141] The Full Bench was satisfied as to the existence of the requisite jurisdictional fact – that is, for the employees to whom the order will apply 'there is not equal remuneration for work of equal or comparable value' (s.302(5)), stating:

> 'We record our view, reached on the material before us, that for employees in the SACS industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with state and local government employment.'[136]

[142] The Full Bench directed the applicants to make further submissions on remedy, including how the amount of the gender related undervaluation of the work should be calculated and concrete estimates of the gender related undervaluation.[137]

[143] Finally, the Full Bench declined to issue a formal statement of principles, noting that to do so on the basis of one case would be premature and run the risk of limiting the Commission's discretion under Part 2–7.[138]

February 2012 decision

[144] On 1 February 2012, the Full Bench issued its decision on remedy.[139] The decision considered the submissions of the parties, who adopted a variety of approaches to try and quantify the amount of the gender related undervaluation. However, there was broad recognition of the difficulty of doing so.[140]

[145] Ultimately, a majority of the Full Bench awarded percentage increases to rates in the SACS modern award, in line with proposals in a joint submission on remedy filed by the applicant unions and the Commonwealth. The joint submission compared public sector rates with the minimum wages in the SACS modern award and attempted to identify how much of the differential in rates was attributable to gender considerations by utilising 'caring work' as a proxy for gender considerations. This was done by identifying the percentage of a job that was comprised of both direct and indirect caring work and then applying that 'caring work' percentage to the public sector pay differential.

[146] The majority expressed reservations about the two methods used in the joint submission to justify the percentages sought. They noted that it would not be appropriate to endorse any percentage or other relationship between the wages resulting from an equal remuneration order and wages in state and local government agreements or in an award. In particular, they observed that:

> 'There is no justification for establishing a nexus between an equal remuneration order and market rates in state and local government. Attempting to establish such a link would be fraught with difficulty. Which rate or rates should be chosen? At what level or levels should the nexus be established? When should adjustments be made?'[141]

[147] Further, they were critical of the reliance placed on caring work as a proxy for gender-based undervaluation, noting that the application of the suggested care percentages to the public sector pay differentials resulted in wage levels which were too close to current public sector pay levels.[142] Further, the majority raised doubts about the inclusion of indirect care work in the definition of caring work.[143]

[148] Despite these reservations, the majority concluded that 'in general terms the percentages proposed in the Joint Submission are appropriate'.[144] The majority went on to note widespread support for the proposals and that the Commonwealth had given a commitment to fund its share of the increased costs arising from the proposals.[145]

[149] Vice President Watson issued a dissenting decision, finding that the applicants had failed to establish key elements of the claim. In his view the case was:

> '… unprecedented by reference to international equal pay cases. It does not seek equal pay for men and women in a single business, or in an industry. Rather it seeks a large minimum overaward payment for all men and women in the entire SACS industry to a level approaching public sector wage levels.'[146]

[150] His Honour emphasised that the fact that it was unprecedented and highly unusual, and further was seen as a test of the equal remuneration provisions of the FW Act, warranted the adoption of a 'very careful and rigorous approach'.[147]

[151] Vice President Watson expressed concern that no comparison had been made with male employees of any relevant employer and that the comparison sought to be made was with public sector employees who perform similar work and who were also primarily female. The Vice President also noted, that no reliable analysis had been provided of the differences which exist between industries and different employers or the factors which might otherwise explain the reasons for the differences in rates of pay.[148] His Honour observed that:

> '… international perspective and considerations of logic require the claim in this matter to be based on the establishment of a reliable benchmark or comparator and the elimination of any factors not related to gender from any comparisons that can legitimately be made. If a benchmark is sought to be utilised, it must be reliable. It must constitute equal or comparable work in every respect. Generalised comparisons of work between industries are insufficient. Comparable roles must be fully assessed against work value criteria. Remuneration for comparable roles must not contain additional elements such as the inevitable differences in pay between employers and between different industries or superior bargaining outcomes that generally arise in different sectors of employment.'[149]

[152] His Honour acknowledged that while it was indisputable that SACS employees deserve more recognition and reward for the work they undertake,[150] the rates paid to SACS employees are not entirely the result of the fact that a significant proportion are female but 'are the result of market and funding arrangements which cannot be equated with gender undervaluation'.[151]

[153] Vice President Watson further observed that there did not appear to be any reason why the commitments or preparedness to fund an equal remuneration order could not occur for enterprise bargaining purposes, expressing the view that if the claim was granted 'it is inevitable that there will be very little or no enterprise bargaining in the entire SACS industry for very many years, probably decades'.[152] His Honour expressed concern that selectively extracting an entire industry from the enterprise bargaining legislative framework would be a change of 'mammoth proportions'.[153]

[154] The Layton et al. report conveniently summarise the *ratio* of the SACS cases:

- There is no requirement to demonstrate discrimination as a threshold to an equal remuneration claim.

- Undervaluation was adopted as a key part of the Full Bench's approach in assessing equal remuneration claims.

- There is a requirement to establish that the asserted undervaluation is linked or attributable to gender.

- There is no requirement for applications to reference an explicit male comparator group, although such references may be included.

- The 'indicia' of undervaluation developed through the New South Wales and Queensland jurisdictions provide a framework for considering whether there is undervaluation but do not constitute a prescriptive formula.

- The Full Bench recognised that impediments to bargaining can impede equal remuneration.

- Consistent with approaches utilised in the past, the Full Bench adopted a 'phased' approach to wage adjustments established through the equal remuneration order.

- Additionally, the Full Bench did not indicate that it would depart from its traditional reliance on work value as a means of assessing the value of work.[154]

[155] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

> 'Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law.'[155]

[156] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to Full Bench decisions of the Commission.[156] Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so, as a Full Bench of the Commission observed in *Cetin v Ripon Pty Ltd* [157]:

> 'Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.'[158]

[157] It is appropriate that the Commission take into account previous decisions relevant to the statutory provisions it is construing. The particular context in which a decision was made will also need to be considered. In that regard we agree with the submission of the NSW Government that there were several unusual features of the SACS case. The case proceeded on the basis of an agreement between the applicant and the Commonwealth; there was widespread support for the proposals advanced; the Commonwealth had given a commitment to fund its share of the increased costs arising from the proposals; and no other government had indicated that it was unable to fund its share. The conclusions reached in the SACS cases need to be considered in the context of those particular circumstances.

[158] While we are in accord with many of the views expressed in *SACS Case No 1* and with the majority in *SACS Case No 2* we have reached a different conclusion in relation to the following aspects of those decisions:

> 1. In order for the jurisdictional prerequisite for the making of an equal remuneration order in s.302(5) to be met, the Commission must be satisfied that an employee or group of employees of a particular gender to whom the order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. In other words, s.302(5) requires a comparator. We do not accept that s.302(5) can be satisfied on the basis of gender-based undervaluation without the need for a comparator.
>
> 2. The comparison of remuneration required to satisfy the jurisdictional fact in s.302(5) only involves determining whether the remuneration of the employees being compared is unequal. It does not require the identification and removal from the comparison of differences which are said to be caused by sex discrimination or which are not gender related.
>
> 3. Under s.302(5), once the Commission has concluded that the employees or groups of employees being compared are performing work of equal or comparable value, the Commission only has to be satisfied that 'there is not equal remuneration' in order to establish the requisite jurisdictional fact. There is no warrant in the text of the section for the imposition of a further requirement to dissect any difference in remuneration, to determine the causes of the various elements of the difference, and to dismiss the application if the difference cannot be concluded to be gender-related.

[159] We are satisfied that there are cogent reasons for departing from the SACS decisions in these respects and we detail those reasons later in our decision. We now turn to construe the provisions of Part 2–7.

4. Part 2–7

4.1 Overview

[160] Part 2–7 is in Chapter 2 of the FW Act, which deals with terms and conditions of employment. The provisions in Part 2–7 are as follows:

> **Division 2—Equal remuneration orders**
>
> **302 FWC may make an order requiring equal remuneration**
>
> ***Power to make an equal remuneration order***
>
> (1) The FWC may make any order (an equal remuneration order) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

Meaning of equal remuneration for work of equal or comparable value

(2) ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.

Who may apply for an equal remuneration order

(3) The FWC may make the equal remuneration order only on application by any of the following:

(a) an employee to whom the order will apply;
(b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
(c) the Sex Discrimination Commissioner.

FWC must take into account orders and determinations made in annual wage reviews

(4) In deciding whether to make an equal remuneration order, the FWC must take into account:

(a) orders and determinations made by the FWC in annual wage reviews; and
(b) the reasons for those orders and determinations.

Note: The FWC must be constituted by an Expert Panel in annual wage reviews (see section 617).

Restriction on power to make an equal remuneration order

(5) However, the FWC may make the equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.

303 Equal remuneration order may increase, but must not reduce, rates of remuneration

(1) Without limiting subsection 302(1), an equal remuneration order may provide for such increases in rates of remuneration as the FWC considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

(2) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration.

304 Equal remuneration order may implement equal remuneration in stages

An equal remuneration order may implement equal remuneration for work of equal or comparable value in stages (as provided in the order) if the FWC considers that it is not feasible to implement equal remuneration for work of equal or comparable value when the order comes into operation.

305 Contravening an equal remuneration order

An employer must not contravene a term of an equal remuneration order.

Note: This section is a civil remedy provision (see Part 4–1).

> **306 Inconsistency with modern awards, enterprise agreements and orders of the FWC**
>
> A term of a modern award, an enterprise agreement or an FWC order has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of an equal remuneration order that applies to the employee.

[161] We propose to provide a brief overview of Part 2–7 before turning to consider the key provisions and issues in more detail.

[162] Part 2–7 deals with equal remuneration orders. The central provision is section 302(1) which provides that the Commission may make any equal remuneration order it considers appropriate 'to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value'. Section 302(2) defines the expression 'equal remuneration for work of equal or comparable value' to mean 'equal remuneration for men and women workers for work of equal or comparable value'.

[163] An equal remuneration order may be made on application by an employee to whom the order will apply, an employee organisation entitled to represent the industrial interests of such an employee, or the Sex Discrimination Commissioner (s.302(3)).

[164] The Commission can only make an equal remuneration order if it is satisfied that, for the employees to whom the order will apply, there is *not* equal remuneration for work of equal or comparable value (s.302(5)). In deciding whether to make such an order, the Commission must take into account any orders and determinations made by the Expert Panel in the Annual Wage Reviews required by Part 2–6 of the FW Act, as well as the reasons given by the Expert Panel for such decisions (s.302(4)).

[165] An equal remuneration order may increase rates of remuneration, but must not decrease them (s.303). While an equal remuneration order must not reduce rates of remuneration, any increases provided by such an order may be phased in, where the Commission considers that it is 'not feasible' to provide for equal remuneration with immediate effect (s.304).

[166] Section 305 provides that an employer must not contravene a term of an equal remuneration order. A note to this provision indicates that it is a 'civil remedy provision', which means that it is enforceable under the provisions of Part 4–1 of the FW Act.

[167] Section 306 makes it clear that an order will override any term of a modern award, enterprise agreement or Commission order that is 'less beneficial' to an affected employee.[159]

[168] Part 6–1 of the FW Act deals with 'multiple actions' and Division 2 prevents certain applications where other remedies are available. Sections 721 and 724 are relevant for present purposes. Section 721(1) provides that the Commission must not deal with an application for an equal remuneration order under Part 2–7 if it is satisfied that there is available to the relevant employees 'an adequate alternative remedy' that will ensure equal remuneration for work of equal or comparable value, for those employees. Section 724(1) prohibits the Commission from dealing with an application for an equal remuneration order under Part 2–7 if proceedings for an 'alternative remedy' to ensure equal remuneration, or against unequal

remuneration, have been commenced. We give detailed consideration to these provisions in section 4.3 of this decision.

[169] Before turning to consider some of these provisions in more detail we note that there are two particular features of the provisions of Part 2–7 which bear generally upon their proper construction.

[170] First, the location of the equal remuneration provisions in a discrete part of the FW Act is an important contextual consideration which has implications for the application of other provisions of the FW Act to the making of equal remuneration orders. In particular, both the 'modern awards objective' (s.134) and the 'minimum wages objective' (s.284), have no application to the making of equal remuneration orders.

[171] The 'modern awards objective' applies to the performance or exercise of the Commission's 'modern award powers', which are defined to mean the Commission's functions or powers under Part 2–3 and, so far as they relate to modern award minimum wages, the Commission's functions or powers under Part 2–6. As the power to make equal remuneration orders is set out in Part 2–7, it follows that the modern awards objective has no application to the exercise of these powers.

[172] Further, it is plain from the provisions of Part 2–7 that they are not concerned with rates of pay in modern awards at all. There is no power conferred by Part 2–7 to make or vary modern awards. Rather the power conferred is to make a separate species of order, the equal remuneration order. Section 305 imposes a separate obligation not to contravene such an order, with the section being a civil penalty provision enforceable under Part 4–1 of the FW Act. Section 306 provides that a term of an equal remuneration order prevails over a term of a modern award or an enterprise agreement which is less beneficial to the employee. Section 302(4) requires the Commission, in deciding whether to make an equal remuneration order, only to 'take into account' orders and determinations made in Annual Wage Reviews and the reasons for those orders and determinations, demonstrating that the process of making equal remuneration orders is separate and not subject to the Annual Wage Review process. These provisions taken together tend to confirm that equal remuneration orders are intended to serve a purpose distinct from that of modern awards.

[173] Similarly, the 'minimum wages objective' has no application to the exercise of the Commission's functions or powers under Part 2–7. Section 284(2) provides that the 'minimum wages objective' applies to the performance or exercise of the Commission's functions and powers under Part 2–3 (in so far as they relate to setting, varying or revoking modern award minimum wages) and under Part 2–6.

[174] However, the general provisions relating to the performance of the Commission's functions do apply to equal remuneration proceedings under Part 2–7. Sections 577 and 578 are particularly relevant in this regard. Section 577 states:

> **577 Performance of functions etc. by the FWC**
>
> The FWC must perform its functions and exercise its powers in a manner that:
>
> (a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

[175] Section 578 states:

578 Matters the FWC must take into account in performing functions etc.

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

(a) the objects of this Act, and any objects of the part of this Act; and

(b) equity, good conscience and the merits of the matter; and

(c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

[176] Further, in dealing with an application for an equal remuneration order the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to such applications in such manner as it considers appropriate (s.590(1)). Subsection 590(2) sets out some of the ways in which the Commission can inform itself, including by requiring a person to attend before the Commission; inviting oral or written submissions; requiring a person to provide copies of documents or records; undertaking or commissioning research; by holding a hearing; or by conducting a conference. The Commission is not bound by the rules of evidence and procedure in determining an application for an equal remuneration order (s.591).

[177] The second general observation in respect of Part 2–7 is that these are remedial or beneficial provisions. No party submitted otherwise.[160]

[178] A remedial or beneficial provision is one that gives some benefit to a person and thereby remedies some injustice.[161] It is appropriate to characterise the provisions of Part 2–7 as remedial or beneficial. Part 2–7 is directed at achieving equal remuneration 'for men and women workers for work of equal or comparable value'.[162] The general purpose of the provisions is to remedy gender wage inequality and promote equal pay.

[179] The characterisation of these provisions as remedial or beneficial has implications for the approach to be taken to their interpretation. As the majority (per Gibbs CJ, Mason, Wilson and Dawson JJ) observed in *Waugh v Kippen*:

> '… the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended he should have.'[163]

[180] Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow,[164] provided that the interpretation adopted is 'restrained within the confines of the actual language employed that is fairly open on the words used'.[165] As their Honours Brennan CJ and McHugh J put it in *IW v City of Perth*:

> '… beneficial and remedial legislation, like the [Equal Opportunity] Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.'[166]

[181] If the words to be construed admit only one outcome then that is the meaning to be attributed to the words. However if more than one interpretation is available or there is uncertainty as to the meaning of the words, such that the construction of the legislation presents a choice, then a beneficial interpretation may be adopted.

4.2 Detailed Consideration

[182] We now turn to consider some of these provisions in more detail.

[183] At the outset we would observe that while the provisions of Part 2–7 appear simple on their face, that apparent simplicity masks a considerable degree of complexity. While it may be accepted, based on the context and legislative history, that the general legislative purpose of these provisions is to remedy gender wage inequality and promote pay equity, the task of construing the particular provisions in Part 2–7 is far from straightforward. That task is not assisted by the absence of any express statement of objectives in Part 2–7, or in s.3 of the FW Act.[167] Further, the extrinsic materials are of limited assistance. These deficiencies were noted by the H.R. Pay Equity Inquiry and legislative change was recommended[168], but these recommendations have not been implemented.

[184] The historical context is of some assistance, but it must be borne in mind that the provisions of Part 2–7 differ from the comparable provisions in the WR Act in certain key respects:

(i) it is not a stated object of Part 2–7 to give effect to certain International Instruments (as was provided in s.620 of the WR Act); and

(ii) there is no requirement in Part 2–7 that an order be regarded as reasonably appropriate and adapted to give effect to one or more of the specified International Instruments (as previously required by s.624(3)(b) of the WR Act).

[185] There is nothing in the text of Part 2–7 or in the extrinsic materials which suggests a continuing intention for the International Instruments to be called upon as an aid to the

construction of the provisions of Part 2–7, or in the framing of any remedy. Indeed the deliberate decision of the legislature to 'uncouple' the provisions of Part 2–7 from the international instruments evinces a contrary intention.

[186] That said, some observations can be made about the operation of these provisions. The provisions of Part 2–7 incorporate a broader conception of equal remuneration than under the equivalent provisions in both the WR Act and the IR Act. As we have mentioned, (see [77], [82] and [108]) the previous legislative provisions effectively defined equal remuneration to mean equal rates of remuneration for work of equal value, established without discrimination based on sex. The provisions of Part 2–7 are different in two key areas.

[187] First, the expression 'equal remuneration for men and women workers for work of equal value' is no longer defined by reference to the *Equal Remuneration Convention* to mean rates of remuneration established without discrimination based on sex. The use of the term 'without discrimination' was interpreted as requiring applicants to demonstrate that disparities in earnings had a discriminatory cause. Part 2–7 of the FW Act contains no such requirement and, as determined in *SACS Case No. 1*[169], it is no longer necessary to establish that rates have been established on a discriminatory basis.

[188] The second key respect in which Part 2–7 differs from its legislative antecedents is that the expression at the heart of the provisions – equal remuneration for work of equal or comparable value – now extends to the concept of 'comparable value'.

[189] In the *SACS Case No 1*[170], the Full Bench observed that the inclusion of the concept of comparable value was 'a significant departure' from the previous legislative regime and accordingly noted that 'decisions under the [WR] Act are not directly applicable, being made under provisions limited to equal remuneration for work of equal value'.

[190] The intention that Part 2–7 should have a broader operation than its legislative antecedents is confirmed by the *Explanatory Memorandum* to the Fair Work Bill 2008.

> 'The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.
>
> The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.'[171]

Equal remuneration for work of equal or comparable value

[191] The central provision in Part 2–7 is s.302(1), which states:

> (1) The [Fair Work Commission] may make any order (an ***equal remuneration order***) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

[192] The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'.

[193] The appropriate approach to the construction of the provisions in Part 2–7 is to read words of the definition into the substantive provisions (i.e. ss.302(1) and (5), 303(1) and 304) and then construe those provisions, in context and bearing in mind the statutory purpose. As McHugh J said in *Allianz Australia Insurance Limited v GSF Australia Pty Ltd:*[172]

> 'Except in rare cases, definitions are not intended to enact substantive rules of law. Their function is to aid the construction of those substantive enactments that contain the defined term or terms. Moreover, the meaning of the definition depends on the context and object of the substantive enactment. As I pointed out in *Kelly v The Queen*:[173]
>
> > "[T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. … [O]nce … the definition applies, … the only proper … course is to read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment. …[T]he true purpose of an interpretation or definition clause [is that it] shortens, but is part of, the text of the substantive enactment to which it applies."
>
> In this case, therefore, the definition of "injury" is to be read into and applied in respect of s.69(1) of the Act. When that is done, the sub-section, with that term defined, must be construed in the context in which it appears and in light of the objects of that Part and the Act as a whole.'[174]

[194] A number of observations may be made about s.302(1).

The discretion

[195] The first is that as the use of the word 'may' implies the power to make an equal remuneration order is discretionary,[175] but the discretion is only enlivened if the Commission is satisfied that, for the employees to whom the order will apply, 'there is not equal remuneration for work of equal or comparable value' (s.302(5)).

[196] Once the requisite jurisdictional fact has been established, the Commission may make an equal remuneration order. It is plain from the use of the word 'may' that the legislature did not intend that the Commission's satisfaction as to the requisite jurisdictional fact would of itself necessitate the making of an equal remuneration order. If it had been intended that an order would automatically follow the finding of jurisdictional fact then that is what the legislature would have said – as is the case elsewhere in the FW Act (e.g. s.418). Instead, the

legislature chose to confer a broad discretion on the Commission to decide on a case by case basis whether or not to make any order that it considers appropriate (to ensure equal remuneration).

[197] The second observation we wish to make about s.302(1) concerns the factors relevant to the exercise of this discretion.

[198] In deciding whether or not to make an equal remuneration order s.302(4) provides that the Commission:

> '… must take into account:
>
> (a) orders and determinations made by the FWC in annual wage reviews; and
>
> (b) the reasons for those orders and determinations.'

[199] To date, the issue of equal remuneration has not been a particularly prominent feature of the Annual Wage Review decisions handed down by the Commission's Expert Panel, or indeed in submissions to the Panel by major parties[176]. The Panel has placed only limited emphasis on the significance of minimum wage adjustments as a tool for promoting gender pay equity. For example, in *Annual Wage Review 2014–15* the Panel observed that:

> 'Women are disproportionately represented among both the low paid and the award reliant[177] and hence an increase in minimum wages is likely to promote pay equity, though we accept that moderate increases in minimum award wages would be likely to have only a small effect on the gender pay gap. The other mechanisms available under the Act, such as bargaining and equal remuneration provisions, provide a more direct means of addressing this issue.
>
> The principle of equal remuneration is a factor in favour of an increase in the NMW and the minimum wages in modern awards and as such has been considered together with the various other statutory considerations the Panel is required to take into account.'[178]

[200] Beyond the matters in s.302(4), the FW Act does not specify any criteria for the exercise of the discretion conferred in s.302(1). But that does not mean that the discretion is at large. It is to be exercised judicially having regard to the subject matter, scope and purpose of the FW Act and Part 2–7.[179]

[201] Section 578 is applicable in this context and requires the Commission to take into account, relevantly for present purposes, : the objects of the FW Act; equity, good conscience and the merits of the matter; and the need to respect and value the diversity of the workforce by 'helping to prevent and eliminate discrimination on the basis of … sex …'.

[202] The objects of the FW Act are set out in s.3 (see paragraph [47] above). Of course it must be borne in mind that the purpose or policy of an Act is to be gleaned from a consideration of all of the relevant provisions of the Act.[180]

[203] The relevance of particular considerations to the exercise of the discretion in s.302(1) will depend on the circumstances of each case. By way of illustration, in *SACS Case No. 1* the Commission had regard to a range of discretionary considerations:

> 'The applicants also submitted that apart from the statutory mandate to provide for equal remuneration for work of equal or comparable value, there are independent discretionary grounds to make an order in this case. Workers and their families are suffering the effects of low pay. Staff turnover is affected which in turn affects service delivery. The low wage rates are also a discouragement to female participation in the SACS industry as employees leave to take better paid jobs in state and local government. It was submitted that we should act to remedy the situation.
>
> As we have indicated, the power to make an order under s 302 is a discretionary one. Considerations of the kind advanced by the applicants are important. Of course there are also other relevant considerations. A range of other matters were raised and we mention just some of them. The potential negative effects of an order on employment and services if the cost is not fully funded by government, the impact on the award rates, the fact that an order may discourage enterprise bargaining and deprive employers of the productivity benefits associated with such bargaining and the effect of our decision in other areas of employment. Some of the matters raised by the applicants support the desirability of making an order if the necessary grounds are established, and must be considered along with all other relevant matters.'[181]

[204] It seems to us that the considerations which may be relevant to the exercise of the discretion include:

(i) the circumstances of the employees to whom the order will apply;

(ii) eliminating gender based discrimination;

(iii) the capacity to pay of the employers to whom the order will apply;

(iv) the effect of any order on the delivery of services to the community;

(v) the effect of any order on a range of economic considerations, including any impact on employment, productivity and growth;

(vi) the effect of any order on the promotion of social inclusion by its impact on female participation in the workforce; and

(vii) the effect of any order on enterprise bargaining.

[205] These considerations are not listed in order of significance and nor is the list intended to be exhaustive.

[206] In relation to consideration (vi) above, we note that the object of the FW Act is, relevantly, 'to provide a balanced framework for cooperative and productive workplace relations that promotes … social inclusion for all Australians'.

[207] As to consideration (vii), a number of employer parties emphasised the importance of the impact of any order on enterprise bargaining in the exercise of the discretion in s.302(1). The objects of Part 2–4 of the FW Act include the facilitation of good faith bargaining and the making of enterprise agreements (s.171(b)).

[208] While the impact on enterprise bargaining may well be a relevant consideration in most cases it is not appropriate to make any generalised observations about the significance of this issue – it will depend on the context. For example, the history of a particular enterprise, industry or sector may be characterised by an absence of enterprise bargaining. The absence of bargaining may be explicable for a range of reasons, including the predominance of small enterprises in the industry or sector[182], low levels of unionisation, high employee turnover or that the enterprise, industry, or sector being heavily reliant on government funding which constrains its capacity to pay. In such circumstances declining to make an equal remuneration order on the basis that it will inhibit the promotion of enterprise bargaining is unlikely to be warranted. The very factors which have impeded enterprise bargaining in the past will, presumably, still provide a barrier to bargaining in the enterprise, industry or sector concerned in the future, whether or not an order is made. Hence the making of an equal remuneration order may have no practical impact on enterprise bargaining.

[209] The important point is that to the extent that a party relies on a particular discretionary consideration it should provide a proper evidentiary basis for its submission. It is not enough to simply assert that an order will have a chilling effect on enterprise bargaining[183] or that it will promote female participation in employment, without advancing a proper basis for such a submission.

[210] To the considerations we have identified at paragraph [204] above we would add that having regard to the history of these provisions and the broader context of the FW Act, it seems to us that Part 2–7 is not intended to operate as an automatic mechanism for creating comparative wage justice. Ai Group advances a similar proposition in its further submissions in reply.[184] As we have mentioned, the general purpose of these provisions is to remedy gender wage inequality and promote pay equity. This legislative purpose is relevant to the exercise of the discretion. Before we deal with how it may be taken into account it is necessary to refer to what we say about the 'discounting issue'. We deal with this issue in detail later in the decision (at [295]–[309]).

[211] For present purposes it is sufficient to note that we conclude that there is no textual basis in the provisions of Part 2–7 for the proposition that in making an equal remuneration order, there must or should be some discounting of any portion of the difference in remuneration which may be characterised as not 'gender-related'. The basis of this conclusion is (as discussed later at [223]–[230]) that if an order is to be made it must 'ensure' equal remuneration. An order that, because of 'discounting', only partially addresses the unequal remuneration is not one that ensures equal remuneration and hence there is no power under Part 2–7 to make such an order. It is important to appreciate that these conclusions are directed at the orders which may be made – they are not directed at the considerations which may be relevant to the exercise of the discretion as to whether or not to make an order.

[212] It seems to us, based on the general legislative purpose referred to earlier, that in the exercise of its discretion under s.302(1) it would be open for the Commission to take into account the reasons for any difference in remuneration between different gendered employees performing work of equal or comparable value. Of course it would be impermissible to establish a binding rule which prohibited the making of an equal remuneration order if the identified difference in remuneration cannot be established to be related wholly or substantially to gender, since this would place an inappropriate fetter on the exercise of the

statutory discretion.[185] Even establishing general principles which might guide, but not direct, the exercise of the discretion is problematic, given the well-established difficulty in identifying precise gender-related causes for the gender pay gap in Australia. The nature of this difficulty is illustrated by one aspect of the NSW Government's submissions. It gave as an example of factors not related to gender which might explain pay differentials as 'differences in pay that result from variations in the bargaining power of workers in different sectors of the economy, or between different employers'.[186] However, the historic existence of lesser bargaining power in areas of employment which are characteristically female-dominated has been identified as a potential element in the gender pay gap.[187] Therefore in a particular case a degree of analysis not capable of being captured in a general guideline is likely to be necessary in order that the discretion is proper exercised.

[213] For completeness we note that a number of parties, in particular the Australian Industry Group (Ai Group)[188] and Australian Chamber of Commerce & Industry, Australian Business Industrial, New South Wales Business Chamber, Tasmanian Chamber of Commerce and Industry, and State and Territory Local Government Associations (jointly ACCI and others), represented by Australian Business Lawyers[189], submitted that the making of an equal remuneration order should not undermine the role of modern awards or disturb existing wage relativities within and between modern awards. It was contended that the impact of an order on existing relativities in modern awards was a relevant discretionary consideration in the context of s.302(1). Ai Group also submitted that the Commission should generally decline to make an equal remuneration order that would undermine the role of modern awards by regulating terms and conditions across an entire industry or occupation.[190]

[214] While we would not reject the possibility that the making of an equal remuneration order may have an impact of the type contemplated by Ai Group and ACCI and others it is difficult to conceive how such an issue would arise, absent a specific factual context. Further, as we conclude later, the power to make an equal remuneration order does not extend to making of an order varying a modern award.

[215] Equal remuneration orders operate quite separately from the regime regulating modern awards. As noted earlier, in deciding whether to make an equal remuneration order the Commission is not constrained by either the modern awards objective in s.134 or the minimum wages objective in s.284, since neither of those provisions applies in its terms to an exercise of power under Part 2–7. This was confirmed in *SACS Case No 1* at [229], although the Full Bench added:

> 'Nevertheless considerations related to the safety net, including the terms of modern awards, are apt to be taken into account pursuant to the object in s.3(f) of the Act. We are required, therefore, by s.578(a) to take into account, among other things, the need to ensure there is a safety net of fair, relevant and enforceable minimum terms and conditions.'

[216] For our part we do not conceive of an equal remuneration order as being *part* of the 'safety net' of minimum terms and conditions under the FW Act. The safety net, as s.3(b) makes clear, is provided by the NES, modern awards and national minimum wage orders.

[217] It is apparent that there are a range of considerations which may be relevant to the exercise of the discretion to make an equal remuneration order. We agree with the

Commonwealth[191] that the nature and assessment of such factors will depend on the circumstances of the case.

The scope and type of orders under s.302(1)

[218] The third observation about s.302(1) concerns the scope and type of order that may be made under s.302.

[219] On its face the power in s.302(1) is expressed in broad terms, the Commission 'may make any order … it considers appropriate'. While the scope of such an order cannot extend beyond those in respect of whom an application has been made, the Commission has a broad discretion as to the form of such an order, which may include increases in wages or allowances, variations to bonus schemes, the establishment of new classifications or the variations of job descriptors.

[220] There are however three important limitations on the power in s.302(1).

[221] The first is that an equal remuneration order must not provide for a reduction in an employee's rate of remuneration (s.303(2)) as the *Explanatory Memorandum* for the Fair Work Bill 2008 confirms:

> 'Clause 303 ensures that FWA may increase, but not reduce, employees' rates of remuneration by an equal remuneration order. This means, for example, that FWA could not reduce the higher rates of remuneration of a male (or predominantly male) comparator group to bring the rates into line with the lower rates of remuneration of female employees subject to the application.' [192] (emphasis added)

[222] We refer to this aspect of the *Explanatory Memorandum* later in our consideration of whether a male comparator group is required.

[223] The second limitation comes from the terms of s.302(1) itself:

> 'The FWC may make any order … it considers appropriate to ensure that, for the employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value'.

[224] Section 303(1) is also relevant, it states:

> **303 Equal remuneration order may increase, but must not reduce, rates of remuneration**
>
> (1) Without limiting subsection 302(1), an equal remuneration order may provide for such increases in rates of remuneration as the FWC considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

[225] As Ai Group submitted, the word 'ensure' in the context of s.302(1) 'requires that the order must make certain or guarantee that the equality of remuneration is achieved'.[193] The IEUA makes a similar point in its submission of 24 February 2014[194].

[226] Hence, once the Commission is satisfied that there is not equal remuneration for work of equal or comparable value (the jurisdictional fact in s.302(5)) and it decides to exercise its discretion and make an order, then the order must address the unequal remuneration. While the Commission may phase in the effect of its order (s.304) the mandatory direction in s.302(1) means that the order must be such as to *ensure* that there *will be* equal remuneration for work of equal or comparable value upon the full implementation of the order.

[227] A simple example serves to illustrate this point. In a particular case it is contended that a female employee in an enterprise is performing work of equal or comparable value to a male employee in that enterprise, but is not receiving equal remuneration. The female employee is paid $100 per week less than the comparable male employee. The Commission makes a finding that there is not equal remuneration for work of equal or comparable value.

[228] In the example given the Commission's discretion to make an equal remuneration order is enlivened. It may choose to make an order or not. But if the Commission chooses to make an order it must *ensure* that there will be equal remuneration for work of equal or comparable value. In the context of the example any order made would have to increase the female employee's remuneration by $100 per week. It would not be open to the Commission to order an increase of only, say, $50 per week on the grounds of the employer's capacity to pay. However the Commission may refuse to exercise its discretion on that basis and it may provide that any increases provided be phased in, where it considers that it is 'not feasible' to provide for equal remuneration with immediate effect (s.304).

[229] The all or nothing nature of the remedy available under Part 2–7 may give rise to injustice. For example, the adverse employment consequences of making an order may be so substantial that the Commission declines to issue a remedy. As a consequence the relevant employees would receive no relief, despite the fact that they have established that they are not in receipt of equal remuneration for work of equal or comparable value. The converse may also apply. An employer may have a limited capacity to pay and the making of an order may have some deleterious employment effects. The Commission may balance these matters against other relevant considerations and decide to make an order. Any order then made must fully address the unequal remuneration. Hence if a wage increase is ordered to rectify the unequal remuneration the quantum of the increase cannot be moderated to take account of the economic consequences of fully addressing the unequal remuneration. To repeat, it is an all or nothing remedy (subject only to the capacity to phase-in increases: s.304).

[230] Such injustice could be mitigated by an amendment to s.302(1), to replace the requirement to 'ensure' that there will be equal remuneration for work of equal or comparable value, with a requirement that the Commission 'address' any unequal remuneration, 'to the extent it considers appropriate in the circumstances'.

[231] The third limitation concerns the power to vary a modern award.

[232] Ai Group and ACCI and others[195] contend that while the power to make an equal remuneration order is expressed in broad terms (i.e. 'make any order it considers appropriate') this should not be interpreted as extending to the making of an order varying a modern award. As Ai Group put it:

> 'Put simply, Ai Group contends that an ERO and modern awards are intended by the FW Act to constitute different forms of industrial regulation which are aimed at achieving different and discrete purposes'.[196]

[233] We agree. As we observed earlier (at [42]), the relevant legislative context may operate to limit an expression of wide possible connotation. In the context of the FW Act Part 2–3 (and Part 2–6 to the extent it deals with modern award minimum wages) constitutes a code for the making and variation of modern awards. It is clear from the legislative context that the making of equal remuneration orders under Part 2–7 is intended to be quite separate from modern awards, which form part of the safety net of minimum terms and conditions under the FW Act.

[234] As a general proposition where a particular procedure is designated to achieve something other procedures are impliedly excluded, reflected in the maxim *expressum facit cessare tacitum.*

[235] In *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia*[197] Gavan Duffy CJ and Dixon J said:

> 'When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.'

[236] Similarly, in *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* Dixon J said:

> '[A]n enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.' [198]

[237] In that case the Court held that a section of an Act that indicated the manner in which an arbitrator was to deal with a particular issue precluded the arbitrator dealing with that matter in accordance with more general procedures provided for in that Act.

[238] Before leaving our consideration of the scope of the orders that may be made under s.302 we wish to comment on one of the issues identified for consideration in this stage of the proceeding. Issue 17 poses the following question: If the Commission was to make an equal remuneration order should it only apply to the class of female employees for whom the inequity is found?

[239] This issue needs to be viewed in the context of what we say later about the comparator issue. For present purposes it is sufficient to note that we reach the conclusion that in order for the jurisdictional prerequisite in s.302(5) to be met, the Commission must be satisfied that an employee or group of employees of a particular gender to whom an order would apply do not enjoy equal remuneration to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. That is, it is essentially a comparative exercise. The remuneration and the value of the work of a female employee or group of employees is required to be compared to that of a male employee or group of employees.

[240] The essence of Issue 17 is whether an order can be made in favour of a group of applicant employees which consists of both female and male employees. Not all parties to the proceeding chose to address this issue. United Voice, AEU and IEUA submitted that an order should extend to any person performing the work which is the subject of the finding of jurisdictional fact. Hence the order should extend to all of the applicant employees in respect of whom a finding has been made that there is not equal remuneration for work of equal or comparable value, irrespective of their gender.

[241] ACCI and others take a different view. They submit that:

> 'Making an equal remuneration order which results in increases to both genders while relying on a finding concerning one gender when compared to the opposite may be inconsistent with Part 2–7.'[199]

[242] In our view orders can be made in favour of a mixed gender applicant group of employees, but only if the orders are made in a particular sequence. An example serves to illustrate this point.

[243] Assume that a group of 20 process workers in an enterprise apply for an equal remuneration order, 15 of the applicant employees are female and five are male. The applicants contend that they do not enjoy equal remuneration to that of the storepersons employed in the same enterprise who, it is argued, perform work of equal or comparable value. The storepersons are all male employees. The relevant comparison is between the female process workers and the male storepersons. If on the basis of that comparison the Commission is satisfied that there is not equal remuneration for work of equal or comparable value it may make an order in favour of the 15 female process workers. If the male and female process workers perform work of equal or comparable value then the making of an order in favour of the 15 female process workers will mean that the remaining five male process workers will not be in receipt of equal remuneration for work of equal or comparable value (because they will receive less remuneration that their female counterparts). If such a finding of jurisdictional fact were made the Commission could then make an order in favour of the five male process workers.

[244] The final observation we wish to make about s.302(1) is that, as we have mentioned, the Commission may only make an equal remuneration order if it is 'satisfied' that there is not equal remuneration for work of equal or comparable value (s.302(5)). An issue arises as to who has to satisfy the Commission as to the existence of the requisite jurisdictional fact. In this context it is relevant to note that the Commission may only make an equal remuneration order on application (by an employee to whom the order will apply, an employee organisation representing such an employee(s), or the Sex Discrimination Commissioner: s.302(3)).

[245] In *Coal and Allied Operations Pty Ltd v AFMEPKIU*[200] a Full Bench of the Commission considered the relevance of the notion of onus of proof to Commission proceedings and in particular where an exercise of discretion was dependent upon the Commission's satisfaction as to certain jurisdictional facts. The Full Bench said:

> '… There is a respectable basis for the view that, where there is a statutory requirement for the Commission to be "satisfied" about exercising a discretion, the notion of onus of proof

> imports legal doctrines that should have no part in the Commission's procedural or decisional process. This is especially so where a discretion, as in the case of s.127, is exercisable on the Commission's own motion. In short, the Commission is either satisfied that it should exercise the discretion, or it is not. It matter little how the Commission arrives at that state of mind. Perhaps no party can be said to bear an onus in a quasi-judicial proceeding that is freed of legal technicality and is directed to the determination of a statutory discretion. Even if that view be accepted, there are ingredients of the principles associated with the notion of onus of proof that have a useful role in any adversarial proceeding. In that context, a notion of onus stems from the fact that an applicant is the party who usually has the carriage of the application and who bears the risk of failure. The applicant thus may be said to bear an onus of satisfying the Commission that an order should be made. Where a matter commences on the Commission's own motion, no party bears any direct onus but the Commission must be satisfied that a proper basis for exercise of power in the matter is established.[201]
>
> In this instance, the onus on the applicant clearly extends to a need to satisfy the Commission as to the jurisdictional prerequisites to the discretion in s.127(1) being exercised.'

[246] While the above observations were made in a different statutory context they are apposite in the context of Part 2–7. Hence the applicant for an equal remuneration order bears the burden of persuading the Commission as to the existence of the requisite jurisdictional fact.

5. Key issues in contention

[247] As mentioned earlier, in consultation with the parties the Commission identified a list of issues to be addressed in the course of these proceedings. The issues identified go to the legal and conceptual framework within which the applications before us are to be considered.

[248] We do not propose to address each issue seriatim but instead we will focus on the substantive issue in the proceeding, namely, the determination of the jurisdictional pre-requisite for the exercise of the Commission's power in s.302(1).

[249] The Commission may only make an equal remuneration order if it is satisfied that, for the employees to whom the order will apply, there is not 'equal remuneration for men and women workers for work of equal or comparable value' (s.302(5)). The application of this test raises two main issues:

(i) The meaning of the expression 'equal remuneration for men and women workers for work of equal or comparable value' and whether Part 2–7 requires the applicant to identify a male comparator.

(ii) If it is established that there is not equal remuneration for work of equal or comparable value, should the extent of the difference in remuneration be 'discounted' to eliminate any factors not related to gender?

[250] We propose to deal with these issues before turning to the basis on which the Commission may determine that there is an adequate alternative remedy (within the meaning of s.721), or an alternative remedy (within the meaning of s.724), to the making of an equal remuneration order.

[251] We conclude by addressing the issue of whether we should develop guiding principles for the application of Part 2–7 and, if so, the content of those principles.

5.1 Is a male comparator required?

[252] The *SACS Case No 1* is the necessary starting point for consideration of the comparator question. In that decision the Full Bench determined that it was not necessary for there to be a comparison between male and female employees in order to establish the grounds for the making of an equal remuneration order. Those parties before us which contended that such a comparison was required, necessarily submitted that the *SACS Case No 1* was wrongly decided in this respect. As earlier stated, cogent reasons are necessary for a departure from a previous Full Bench decision. It is therefore necessary to consider whether there are cogent reasons for a different view to be taken on the comparator question to that expressed in the *SACS Case No 1*.

[253] The reasoning and conclusion of the Full Bench in the *SACS Case No 1* was as follows:

> '[231] A number of employer bodies and some governments submitted that it is implicit in the terms of Part 2–7, and in the terms of s.302(2) in particular, that in order to establish the necessary grounds for an equal remuneration order the applicants must identify a relevant male comparator group for the purpose of establishing undervaluation. On that approach a comparison is required between work performed by women in a female dominated industry or occupation and work performed by men in a male dominated industry or occupation. On the other hand, the applicants contended that it is only necessary that the work of a predominantly female workforce is undervalued. They submitted that this is the inevitable result of the change in the statutory concept from equal remuneration for work of equal value to equal remuneration for work of equal or comparable value and by the absence of any specific legislative requirements for a male comparator group. Other reasons based on decisions in state industrial systems were also advanced.
>
> [232] In our view this issue should not be seen simply as one of statutory construction. The question is whether and how gender-based undervaluation is to be established. The existence of a valid male comparator group which receives higher remuneration than a female dominated group performing work of equal or comparable value is one way of demonstrating the need for an equal remuneration order. We do not accept that as a matter of logic it is the only way. The presence of a male comparator group might make the applicants' task easier and the absence of such a group make the task relatively more difficult, but it does not follow that in the absence of a male comparator group the application must inevitably fail. This issue has some significance in this case because the applicants have in fact not sought to directly establish the existence of a relevant male comparator group.'

[254] The concept of 'gender-based undervaluation' referred to in the above passage as being the foundation for an equal remuneration order was heavily relied upon by the applicant unions to support their submission that no male comparator was required. For example the IEUA submitted that remuneration of female employees in a particular industry or occupation is not equal to the remuneration paid to those doing work of equal or comparable value 'whenever the remuneration is considered, by comparison, objectively below the true work value of that work'[202], and that it will be sufficient to justify the making of an equal

remuneration order 'to identify that there are characteristics of that industry or occupation that arise from the fact that it is female-dominated that have given rise to the undervaluation …'. [203]

[255] The analysis of the comparator question in the Layton et al. report (understandably in light of the SACS No 1 Decision) approached the question from a similar perspective:

> 'The absence of a mandatory requirement for comparators, including the absence of a requirement for gender-based comparators, is linked to the concept of undervaluation, given that this concept does not revert routinely to a male standard. Validating the undervaluation of women's work by reference to a comparable male group can be inherently flawed, because it relies on an assumption that 'male' rates of pay were objectively set by reference to work value. On this reasoning, comparisons within and between occupations and industries should not be required in order to establish undervaluation of work. As noted in the *SACS* case, male 'comparators' might be used for illustrative purposes but are not an evidentiary precondition … Applicants may choose to use a range of comparisons, including other areas of feminised work.'[204]

[256] It can be seen from the passage in the *SACS Case No 1* quoted above that the Full Bench did not treat the question of whether a male comparator was required as primarily one of statutory construction, and proceeded on the premise that the provision of a remedy for 'gender-based undervaluation' was the underlying purpose of Part 2–7. However because, as we have earlier stated, s.302(5) establishes as a jurisdictional prerequisite for the making of an equal remuneration order that that the Commission be satisfied that, for the employees to whom the order will apply 'there is not equal remuneration for work of equal or comparable value', it appears to us that the proper construction of that expression in the context of the FW Act as a whole is critical to the question of whether a male comparator is required or whether the demonstration of 'gender-based undervaluation' by the use of indicia is sufficient. Before we turn directly to the statutory construction of that provision, it is necessary to explain how the concept of gender undervaluation developed and identify the various statutory contexts in which it developed.

[257] As the Layton et al. report explains, this approach originated in the New South Wales industrial relations jurisdiction, and was subsequently followed in the Queensland jurisdiction before being adopted in the SACS No 1 Decision. In the New South Wales jurisdiction, equal remuneration cases have been decided under the 'Equal Remuneration Principle' established by the NSW IRC as part of its wage fixing principles in *Re Equal Remuneration Principle.*[205] As that decision made clear, the statutory power to be exercised under the Equal Remuneration Principle was that in s.10 of the NSW IR Act. Section 10 provides:

> **10 Commission may make awards**
>
> The Commission may make an award in accordance with this Act setting fair and reasonable conditions of employment for employees.

[258] The Equal Remuneration Principle itself was made pursuant to s.50(4) and s.51 of the NSW Act. Sections 50 and 51 provided as follows:

50 Adoption of National decisions

(1) As soon as practicable after the making of a National decision, a Full Bench of the Commission must give consideration to the decision and, unless satisfied that it is not consistent with the objects of this Act or that there are other good reasons for not doing so, must adopt the principles or provisions of the National decision for the purposes of awards and other matters under this Act.

(2) A Full Bench of the Commission is to give consideration to the National decision either on application or on its own initiative.

(3) The principles or provisions of a National decision may be adopted:

(a) wholly or partly and with or without modification, and

(b) generally for all awards or other matters under this Act or only for particular awards or other matters under this Act.

(4) The principles or provisions of a National decision so adopted may be varied by a Full Bench of the Commission, whether or not another National decision is made.

51 Making of State decisions

(1) A Full Bench of the Commission may, if satisfied that it is consistent with the objects of this Act and that there are good reasons for doing so, make a State decision setting principles or provisions for the purposes of awards and other matters under this Act.

(2) A Full Bench of the Commission may make a State decision only on the application of a State peak council or on its own initiative.

(3) A State decision may apply generally to all awards or other matters under this Act or only to particular awards or other matters under this Act.

(4) The principles or provisions of a State decision may be varied by a Full Bench of the Commission.

[259] The Full Bench of the NSW IRC said in its decision:

‘127 It follows that rates of pay fixed by current awards reflect not only work value assessments conducted by the Commission of the particular work to which the award applies but other agreed factors as well. Some awards undoubtedly reflect agreements about matters of the kind which the Labor Council and the Minister accepted would be an inappropriate or irrelevant basis for comparison of the value of the work of disparate groups of workers. Such matters included agreed productivity improvements, attraction rates and retention rates. This approach is understandable given that such factors do not reflect the intrinsic value of particular work, even as assessed by the parties rather than by the Commission, in accordance with the Work Value principle. Presently, some awards of this Commission, for good reason unconnected with the value of the work to which the awards apply or the gender of the

> workers performing the work, provide for different rates of pay and other conditions for `work of equal or comparable value'. Equally, however, we accept that some current awards may improperly undervalue the work performed by women.
>
> 128 These observations are relevant to a consideration of the concern to which this case was really directed, namely, alleged undervaluation of work performed by women. As we have already noted, the case advanced was in large measure one which flowed from a view that despite the existence of the Equal Pay principle and the Wage Fixing Principles generally since the 1970s, and in part from the legislative emphasis upon the desirability of industrial parties reaching agreements about matters, the result has been that the rates of pay and other conditions fixed by some awards which apply to female dominated workforces undervalue that work. The possibility of other gender based discrimination was also advanced.
>
> 129 There was no real contest at the end of the day that such undervaluation should be addressed and corrected. Professor Lewis, for instance, gave evidence that in his view such undervaluation should be remedied and that there should be government intervention to remove discrimination against female employees. He warned against the difficulties of detection and proper analysis of such undervaluation, particularly when it was sought to be demonstrated by comparisons drawn between disparate occupations. He accepted, however, that remedying properly identified cases of undervaluation was likely, in the long term, to have positive rather than negative economic effects.
>
> 130 Having heard the evidence and submissions advanced by the parties, we are satisfied that if such a case was demonstrated on the evidence brought it would properly follow that the award in question did not fix `fair and reasonable conditions of employment' for the work to which it applied and that, in accordance with s10 of the Act, the Commission should act to rectify the problem so demonstrated. We have therefore concluded that the new principle which we establish will permit gender undervaluation applications to be advanced and considered separate from the Special Case principle.'

[260] When determining the content of the Equal Remuneration Principle it proposed to be established, the Full Bench made it clear that a proper assessment of work value was at the core of the operation of the principle. The Full Bench said:

> '145 The parties also were agreed that some of the safeguards built into the Work Value principle should appropriately be part of any principle which we adopt for equal remuneration. This latter approach was reflected in the principle which they advanced. We take a similar view. Claims of gender undervaluation are concerned with the proper valuation of the work in question. 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 principle itself in para 6(c), namely in the context of other work to which the award applies and to the work of any related classifications in other awards. The principle which we formulate also contains such safeguards and is approached on the basis submitted by the Employers' Federation. It does not direct particular outcomes but facilitates the hearing of cases advanced. Because it is concerned with the proper valuation of work it has been drafted with the Work Value principle as its model.'

[261] In determining to anchor the gender undervaluation approach upon the power in s.10 of the NSW IR Act to make awards setting fair and reasonable conditions of employment, the Full Bench distinguished the work done by ss.21 and 23 of the NSW IR Act, which required awards to provide for equal remuneration and other conditions for men and women doing work of equal or comparable value. Section 23 in particular provided: 'Whenever the

Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.' In relation to s.23, the Full Bench said:

> '104 In our view, the section requires that in determining what remuneration and other conditions of employment are to be fixed by an award consideration is to be given by the Commission to the remuneration and other conditions of employment proposed in the award for men and women performing other work of `equal or comparable value' so as to ensure that such remuneration and other conditions are indeed equal. In other words, the Commission must ensure that the remuneration and other conditions of employment which the award prescribes are the same for men and women under the award who are performing the same work or different work but which has equal or comparable value.'

[262] In short, the obligation in s.23 to ensure equal remuneration in awards was regarded as conceptually different from the objective in s.10 to set fair and reasonable conditions of employment by ensuring that work was not undervalued by reason of gender.

[263] It was against that background that the Full Bench determined that 'the principle we propose permits appropriate comparisons to be drawn but does not require them'.[206] The principle itself relevantly provided:

> **'15 Equal Remuneration and Other Conditions**
>
> (a) Claims may be made in accordance with the requirements of this principle for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis.
>
> (b) The assessment of the work, skill and responsibility required under this principle is to be approached on a gender neutral basis and in the absence of assumptions based on gender.
>
> (c) Where the undervaluation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.
>
> (d) The application of any formula, which is inconsistent with a proper consideration of the value of the work performed, is inappropriate to the implementation of this principle.
> …'

[264] There are two critical observations that must be made about the statutory powers being exercised by the NSW IRC in *Re Equal Remuneration Principle.* The first is that the power conferred on the NSW IRC to establish wage-fixing principles by way of adopting National decisions under s.50 and making State decisions under s.51 involved the exercise of a broad discretion, and likewise the power in s.10, the exercise of which was to be guided by the wage-fixing principles so established, was broadly discretionary in nature. The second is that ss.10, 50 and 51 are all concerned with the making of awards setting minimum wages and conditions[207], and do not involve the regulation of actual wages and salaries of employees. It follows that the NSW IRC had a broad scope to determine the content of the Equal Remuneration Principle which it established and, because it was concerned with award rates of pay, necessarily focused on the well-established and fundamental work value concepts

which guided the setting of such rates. The two decisions subsequently made by the NSW IRC pursuant to the Equal Remuneration Principle, namely *Re Crown Librarians, Library Officers and Archivists Award*[208] and *Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award*[209] were essentially cases in which it was determined that the award rates of pay for the relevant female-dominated occupations did not properly reflect the value of the work.

[265] The QIRC made its own Equal Remuneration Principle in 2002.[210] The new principle was made by consent, so that the QIRC's decision was not accompanied by reasons. The principle itself described the scope of its application as follows:

> 'This principle applies when the Commission:
>
> (a) makes, amends or reviews awards;
>
> (b) makes orders under Ch 2, Pt 5 of the *Industrial Relations Act 1999*;
>
> (c) arbitrates industrial disputes about equal remuneration; or
>
> (d) values or assesses the work of employees in 'female' industries, occupations or callings.'

[266] The principle relevantly stated (emphasis added):

> '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:
>
> (a) whether there has been some characterisation or labelling of the work as 'female';
>
> (b) whether there has been some underrating or undervaluation of the skills of female employees;
>
> (c) whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;

(d) 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

(e) whether sufficient or 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 overaward payments.

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

[267] Unlike the NSW IRC's principle, the QIRC's principle was stated to have application beyond award-making. Chapter 2 Part 5 of the Qld IR Act, the making of orders under which the principle was stated to be applicable, confers upon the QIRC the discretion to make orders to ensure employees received equal remuneration for work of equal or comparable value (such expression being defined in s.59 to mean 'remuneration for men and women employees for work of equal or comparable value'). Sections 60 and 62 of the Qld IR Act provide:

60 Orders requiring equal remuneration

(1) The commission may make any order it considers appropriate to ensure employees covered by the order receive equal remuneration for work of equal or comparable value.

(2) An order may provide for an increase in remuneration rates, including minimum rates.

…

62 When commission must and may only make order

The commission must, and may only, make an order if it is satisfied the employees to be covered by the order do not receive equal remuneration for work of equal or comparable value.

[268] Sections 60 and 62 are plainly not confined to the achievement of equal remuneration in the exercise of award-making powers. However, notwithstanding the principle is stated to be applicable to the exercise of these broader powers, its text discloses that it is in fact only concerned with the making of awards and the review of award rates. Its focus upon the correct valuation of work and gender undervaluation and the lack of a requirement for a male comparator (in which, conceptually, it closely reflects the NSW principle) is comprehensible in this context. The principle having been made by consent, no consideration was given to the proper construction and application of the broader provisions in Ch.2 Pt.5 of the Qld IR Act. The principle itself appears only to have been applied in the award context.[211]

[269] It is clear therefore that the NSW and Queensland equal remuneration principles were essentially concerned with the setting of minimum award rates of pay and conditions based on a proper and gender-neutral assessment of work value. It was in that context that a male comparator was considered not to be necessary. Whether that approach is translatable to the equal remuneration provisions in Part 2–7 of the FW Act requires us first to carefully consider how those provisions are to be construed in the context of the FW Act as a whole. If the statutory framework of equal remuneration under the FW Act is inconsistent with the approach taken by the NSW and Queensland Commissions, it is not open to us as matter of policy or discretion to adopt that approach. We therefore, with respect, disagree with *SACS Case No 1* that this issue is not primarily one of statutory construction.

[270] We have already made the general observation that we do not comprehend equal remuneration orders as being part of the safety net of minimum wages and conditions under the FW Act. Having regard to the development of the 'gender undervaluation' concept in the NSW and Queensland jurisdictions as an adjunct to the setting of minimum award wages, the relationship between the setting of minimum wages in the FW Act and equal remuneration orders requires closer examination.

[271] The scheme of regulation of minimum wages in the FW Act is founded upon the mechanisms of the national minimum wage order and modern awards. In relation to the exercise by the Commission of its functions and powers under Part 2–6 to conduct annual reviews of the national minimum wage order and modern award minimum wages, and the exercise of functions powers under Part 2–3 to set, vary or revoke modern award minimum wages, s.284(2) provides that the minimum wages objective set out in s.284(1) applies. Section 284(1) provides:

What is the minimum wages objective?

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
>
> (b) promoting social inclusion through increased workforce participation; and
>
> (c) relative living standards and the needs of the low paid; and
>
> (d) the principle of equal remuneration for work of equal or comparable value; and
>
> (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

[272] The fundamental feature of the minimum wages objective is the requirement to establish and maintain 'a safety net of fair minimum wages'. We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for 'fair minimum wages' is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question. There are two textual indicators which strongly support this conclusion. Firstly, s.284(1) itself, in paragraph (d), requires the principle of 'equal remuneration for work of equal or comparable value' to be taken into account in setting fair minimum wages. This suggests that the setting of equal *minimum wages* for work of equal or comparable value in modern awards was intended to occur so far as it could be achieved in balance with the other matters required to be taken into account under s.284(1). Secondly, s.135 provides that one of the only three circumstances in which modern award minimum wages may be varied under Part 2–3 (that is, outside an Annual Wage Review) is if the Commission is satisfied 'that the variation is justified by work value reasons'. Sections 156(3) provides that such an adjustment for work value reasons may occur as part of the four yearly reviews of modern awards, and s.157(2) provides that it may occur outside the four yearly reviews and the annual wage adjustments if it is necessary to achieve the modern awards objective. The expression 'work value reasons' is defined in s.156(4) as follows:

> (4) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;
> (b) the level of skill or responsibility involved in doing the work;
> (c) the conditions under which the work is done.

[273] The provisions identified above, taken together, confirm the centrality of work value in establishing minimum wages in modern awards.

[274] The modern awards regime in the FW Act therefore involves the establishment of minimum wages which take into account work value. If it is considered that the minimum rate for any classification in a modern award does not properly take into account the value of the work performed by employees in that classification - that is, that the work is 'undervalued' by the modern award - then an application may be made to the Commission in the circumstances prescribed by ss.156(3) or 157(2) by an employer, employee or organisation covered by the relevant modern award, or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award, to vary that modern award to rectify the perceived undervaluation.

[275] In that overall context, the meaning of the expression 'equal remuneration for men and women workers for work of equal or comparable value' in s.302(2) (which defines the expression 'equal remuneration for work of equal or comparable value' in s.302(5)) requires close analysis. As earlier observed, in contrast to s.623 of the preceding WR Act (as it was immediately before the commencement of the FW Act), s.302 does not refer to the *Equal Remuneration Convention* for definitional purposes. Although the definitional expression in s.302(2) must be interpreted as a whole (and not simply as the aggregate of its component words), the meaning of three elements require particular examination: (1) 'equal remuneration', (2) 'men and women workers', and (3) 'work of equal or comparable value'.

[276] All parties appearing before us accepted that 'remuneration' should be interpreted according to its ordinary meaning, so that it is not confined to wages or salary and includes all other monetary and non-monetary compensation paid as consideration for service under an employment contract. This approach is consistent with that taken to the interpretation of 'remuneration' under the WR Act by the Federal Court Full Court in *Oliveri v Australian Industrial Relations Commission*[212] and a Full Bench of the Commission in *Rofin Australia Pty Ltd v Newton*[213]. In the absence of any special definition of 'remuneration' in the FW Act, we accept that it should be interpreted in accordance with its ordinary meaning.

[277] The remuneration of any given worker or group of workers may be the product of any one or more of a number of pay-setting mechanisms - modern awards, enterprise agreements, transitional instruments, overaward payments, non-statutory collective arrangements, individual employment contracts and/or employer policies. There is nothing in Part 2–7 which suggests that it is concerned only with remuneration produced by modern awards or the national minimum wage order, and no party submitted otherwise. Part 2–7 is therefore concerned with equality in the actual remuneration for the employees who will be covered by any equal remuneration order that is made. That is, Part 2–7 operates upon actual labour market outcomes for the employees under consideration, not the minimum rates of pay and conditions provided for such groups through modern awards and the national minimum wage order. Because there is no basis to proceed on the assumption that such labour market outcomes are established wholly or even substantially by reference to any notion of absolute or 'true' work value, it is apparent therefore that Part 2–7 is not, as the unions submitted, concerned with making orders to ensure that a group of workers receives remuneration in accordance with what is independently considered to be the proper valuation of their work.

[278] 'Equal', according to its ordinary meaning, posits one thing being the same or alike in quantity, degree or value as another thing. Therefore when s.300 and s.302(1) refer to ensuring equal remuneration for employees, this must necessarily involve making the

remuneration for one employee or group of employees equal to that of another employee or group of employees in circumstances where the Commission is satisfied under s.302(5) that they do not currently have equality of remuneration. In order to determine that the remuneration of relevant employees or groups of employees is unequal and needs to be equalised, it is necessary for a comparison between the employees or groups of employees to be made. The nature of this comparison - that is, who is to be compared with whom for the purposes of s.302 - is described by the words 'for men and women workers for work of equal or comparable value'.

[279] The words 'for men and women workers' (as used in ss.300 and 302(2)) are clearly fundamental, since (apart from the reference to the Sex Discrimination Commissioner in s.302(3)(c) as one of the persons who may apply for an equal remuneration order) they are the only express indicator in Part 2–7 that the Part is concerned with *gender* inequity in remuneration, and not inequity based on other criteria such as, for example, race or disability. No party before us contended that Part 2–7 had any non gender-related purpose. The words must therefore do the work of ensuring that the comparative task under Part 2–7 is based on gender. They can only do that work if the 'and' in the expression is given a dispersive effect, so that the words are read as meaning 'for male workers on the one hand and female workers on the other hand'. An alternate reading whereby 'men and women workers' is read as referring to a single undifferentiated group within which equal remuneration for work of equal or comparable value must be ensured would mean that the gender foundation of Part 2–7 is removed. This approach cannot be accepted as correct for that reason.

[280] There was no issue, and we accept, that the expression 'work of equal or comparable value' refers to equality or comparability in 'work value'. The established industrial conception of that term, as developed in decisions of this Commission's predecessor tribunals as well as by the various State industrial tribunals is the primary source of guidance in this regard.[214] Such decisions point to the nature of the work, skill and responsibility required and the conditions under which the work is performed as being the principal criteria of work value. We consider that those criteria are relevant in determining whether the work being compared is of equal or comparable value. However, as noted in the principle set down in the 1972 Equal Remuneration Pay Case, work value enquiries have been characterised by the exercise of broad judgment. Further, as Justice Munro observed in the second HPM case (discussed at [89]–[90] above),:

> 'experience of work value cases suggests that work value equivalence is a relative measure, sometimes dependent upon an exercise of judgment. A history of such cases would disclose that a number of evaluation techniques have been applied for various purposes and with various outcomes from time to time'.[215]

[281] Depending upon the specific characteristics of the work under consideration, it may be appropriate to apply different or additional criteria in order to assess equality or comparability in value. Work in which discretionary bonuses make up a significant proportion of total remuneration, for example, would undoubtedly raise special considerations. Job evaluation techniques developed in the private sector may also assist in comparing the value of the work of different individuals or groups.

[282] 'Equal' in respect of work value should, as with 'remuneration', be given its ordinary meaning - that is, the same as or alike. The meaning to be assigned to 'comparable' is somewhat more difficult. As earlier discussed, 'comparable' is an innovation in the FW Act and was clearly intended to expand the application of Part 2–7.

[283] The 'work of equal or comparable value' formulation first appeared in Australian industrial relations legislation in the context of gender pay equity in the NSW IR Act. The purpose of the inclusion of 'comparable' in the NSW IR Act was considered in the *Pay Equity Inquiry – Report to the Minister* of Glynn J in 1998 as follows:

> 'In my view the inclusion of the words 'comparable value' serves two purposes in the legislation. The first purpose is to make plain that the legislation is directed to the comparison of value and not the identification of equivalent job content. Thus the word 'comparable' indicates that the Commission is required to make assessments of comparisons of 'value'. Secondly, the word 'comparable' makes it clear that the assessment may include a comparison of dissimilar work as well as similar work. Thus, the reference to 'comparable' is not to indicate that a likeness of value was required but that by a comparison of the value of work there may be found sufficient basis to establish inequality of remuneration.'[216]

[284] Although not referenced in the *Pay Equity Inquiry - Report to the Minister*, the use of the word 'comparable' as the criterion of the circumstances in which dissimilar work can be compared for work value purposes probably originated in the 1928 *Metalliferous Miners Case*, in which the NSW IRC said: 'It must always be remembered that the rate of pay awarded in one industry is not to be accepted as a guide to the rate to be awarded in another unless the tribunal is satisfied that the work done in each is fairly comparable'.[217]

[285] The passage from the *Explanatory Memorandum* for the Fair Work Bill 2008 earlier quoted (at [221]) indicates that the inclusion of 'comparable' in s.302 was for the similar purpose of allowing comparisons to be made between different but comparable work. Paragraph 1191 of the *Explanatory Memorandum* (referring to what became s.302) also speaks of comparisons being carried out between different but comparable work, it states:

> 'The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.'[218] (emphasis added)

[286] The references in the extrinsic materials do not support the adoption of a gender based undervaluation approach, rather they point to the adoption of comparator based methodology.

[287] The ordinary meaning of 'comparable' is 'capable of being compared' or 'worthy of comparison'. We consider that, having regard to the extrinsic matters referred to above, the inclusion of 'comparable' serves the purpose of applying the provisions of Part 2–7 not just to the same or similar work that is equal in value, but also to dissimilar work which is nonetheless capable of comparison.

[288] The means by which equal or comparable value may be established will depend on the groups of male and female workers being compared. In some cases it may be quite straightforward. If, as submitted by United Voice and AEU, the comparison is between groups of modern award-dependent employees, then established award relativities originating in the restructuring of awards as part of the Structural Efficiency process may be sufficient, at least on a *prima facie* basis, to establish equal or comparable value. Each case will have to turn on its own facts.

[289] The consideration of whether there is unequal remuneration between the male and female workers being compared may not always simply involve determining whether one comparator group receives a higher rate of pay than the other. If, for example, the comparison is between female permanent employees and male casual employees, a conclusion that they receive unequal remuneration simply because the loaded casual rate of the male employees is higher than that of the permanent female employees would be unsound. All the remuneration benefits of permanent employment, including leave entitlements, redundancy entitlements and the like would need to be taken into account in the comparison. Other complexities may arise where the remuneration package includes bonus schemes, incentive payments or share schemes.

[290] In summary, in order for the jurisdictional prerequisite for the making of an equal remuneration order in s.302(5) to be met, the Commission must be satisfied that an employee or group of employees of a particular gender to whom an equal remuneration order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. This is essentially a comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees. We do not accept that s.302(5) could be satisfied without such a comparison being made. Section 302(5) could not be satisfied on the basis that an employee or group of employees of a particular gender are considered not to be remunerated in accordance with what might be considered to be the intrinsic or true value of their work. In this respect, we accept the submission made by the Victorian Government (and broadly supported by the Commonwealth and NSW Government and the various employer groups) concerning the first step in the process of analysis required by s.302, and we do not accept the submissions of the various unions to the contrary. We emphasise that in adopting this approach, we are not, as United Voice and AEU put it in their submissions, 'confin[ing] the evidentiary means by which the jurisdictional fact may be demonstrated'[219], but determining what the jurisdictional prerequisite or fact actually is on the basis of the text of the statute. In reaching this conclusion, we respectfully depart from the decision in the *SACS Case No 1*, in which the issue was not treated as one primarily of statutory construction. We consider that there are cogent reasons for doing so.

[291] It is not necessary for the purpose of this decision to attempt to prescribe or establish guidelines in respect of how an appropriate comparator might be identified. It will ultimately be up to an applicant for an equal remuneration order to bring a case based on an appropriate comparator which permits the Commission to be satisfied that the jurisdictional prerequisite in s.302(5) is met. It is likely that the task of determining whether s.302(5) is satisfied will be easier with comparators that are small in terms of the number of employees in each, are capable of precise definition, and in which employees perform the same or similar work under

the same or similar conditions, than with comparators that are large, diverse, and involve significantly different work under a range of different conditions. But in principle there is nothing preventing the comparator groups consisting of large numbers of persons and/or persons whose remuneration is dependent on particular modern awards.

[292] Our conclusion that Part 2–7 requires a comparator group of the opposite gender does not exclude the capacity to advance a gender-based undervaluation case under the FW Act. We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2). Those provisions allow the variation of such minimum rates for 'work value reasons', which expression is defined broadly enough in s.156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s.156(3) or s.157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.

[293] In relation to an approach based on comparators, Smith and Stewart observed[220]:

> 'In our view this type of reasoning invokes a number of the debates and limitations that have characterised previous phases of federal equal pay regulation. Narrow and binary forms of job comparison may not be capable of assessing the complex means through which undervaluation may be embedded in the classification, organisation and remuneration of women's work. These approaches fail to recognise that the value of male work has set industrial standards and benchmarks, and that binary means of assessment against those standards, such as the discrimination test, have proven to be incapable of assessing the dynamics of gender pay inequity. It is also an approach that fails to recognise frailties in gender pay equity regulation. Gender pay inequity is the result of cumulative and additive processes that have shaped wage setting and women's position in paid work. A mandated 'comparator' approach is unlikely to uncover the sources of the inequity and cannot address thoroughly the issue of undervaluation of the work performed by women.'[221]

[294] The conclusion we have reached concerning the requirement for a comparator of the opposite gender in Part 2–7 does not seek to deny the force of the above observation. Our conclusion is based on a conventional analysis of the proper interpretation of the provisions of Part 2–7 and above all recognises that the work of Part 2–7 is distinct from that of the setting of modern award rates under Part 2–3. For the reasons we have outlined, the considerations referred to by Smith and Stewart properly arise for consideration in the context of the making and variation of modern awards under Part 2–3.

5.2 Discounting

[295] A number of parties submitted that in determining whether the remuneration of the individuals or groups being compared is unequal for the purpose of determining whether the jurisdictional prerequisite in s.302(5) has been met, the Commission must exclude from consideration any element of any difference in remuneration which is non-gender related – that is, that has not arisen because of gender. Additionally or alternatively it was submitted that if the Commission is satisfied for the purpose of s.302(5) that there is not equal remuneration for work of equal or comparable value, then in exercising the discretion to make an equal remuneration order to remedy the inequality of remuneration, the Commission should not take into account differences in remuneration which are not demonstrated to be gender-related.

[296] In other words, it was submitted, the gap in remuneration between the two individuals or groups being compared should be bridged only to the extent of that part of the difference which was gender-related. Other components of the difference which were explicable on a non-gender related basis, such as historical differences in bargaining power or differences in the environment in which work was performed, should not be taken into account or 'discounted'.

[297] Reliance on the *SACS Case No 1* to resolve the 'discounting' issue is problematic because, as earlier discussed, the Full Bench determined that the jurisdictional prerequisite in s.302(5) could be satisfied by demonstration of 'gender-based undervaluation' without the need for a male comparator - an approach from which we have decided to depart. The Full Bench's reasoning therefore proceeded on the premise that consideration of an application for an equal remuneration order might not involve any comparison between the remuneration of different employees or groups of employees at all. In any event, the Full Bench rejected the proposition that it was necessary to demonstrate gender discrimination for a remuneration gap or shortfall. The Full Bench said:

> '[233] The applicants also submitted that where a remedy is sought under Part 2–7 it is unnecessary to demonstrate that the rates in question were established on a discriminatory basis. It is not necessary to make a general finding on that submission, but the submission may involve a misapprehension about what the provisions require. The essence of a successful application is that the prevailing rates are discriminatory. Whether that discrimination is the result of a conscious act or course of conduct by a particular individual or individuals may be relevant in some cases—for example some cases involving a single employer. But we are dealing with a broad range of rates operating in a diverse industry spread throughout Australia. The idea that the great diversity of rates actually paid has been fixed in a consciously or unconsciously discriminatory way would be difficult to demonstrate and perhaps somewhat artificial. In the particular circumstances of this case, it seems unlikely that discrimination in that sense could play a significant role in deciding whether, for the employees concerned, there is not equal remuneration for work of equal or comparable value. On the other hand, where it can be shown that rates have been fixed on a discriminatory basis, that will be a clear indication of gender-based undervaluation. A case in which no predominantly male comparator group is relied upon can only succeed if the applicant establishes that the remuneration paid is subject to gender-based undervaluation.'

[298] The Full Bench drew support for its conclusion that it was not necessary to demonstrate that any pay gap was caused by gender discrimination from the following passage in the *Explanatory Memorandum* for the FW Act:

> '1192. The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.[222]

[299] However the Full Bench subsequently indicated in the *SACS Case No 1* that the remedy to be ordered in respect of a pay gap depended upon identification of that part which was gender-based, while at the same time pointing to the difficulty of this task. The Full Bench said:

> '[281] But regardless of the reasons, the fact remains that there is a large gap in many cases between the rates paid in the SACS industry and those paid in state and local government. To the extent that the gap is gender-based we should take action to correct it if we can. This requires an examination of the causes or probable causes of the differences in rates. In that inquiry it is apparent that many factors are related and it is not possible to separate various factors entirely from each other. To illustrate this point, it may be possible to say that wages are low because the employees have low bargaining power. But that statement prompts the further question of why bargaining power is low. Gender factors, particularly the "feminised" nature of work in the industry and the fact that it is carried out mainly by females, are a contributor to low bargaining power. The same may be said of the dominant influence which funding arrangements have in restraining wages growth in the industry. The same gender factors may play some part in influencing, and limiting, the workforce's response to restraints imposed through funding models.
>
> [282] …We agree that it would be wrong to conclude that the gap between pay in the sector with which we are concerned and pay in state and local government employment is attributable entirely to gender, but we are in no doubt that gender has an important influence. In order to give effect to the equal remuneration provisions in these complex circumstances, we consider that the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation. We have reached some conclusions about how that might be done, but it would not be appropriate to finally decide the application without giving parties an opportunity to make further submissions in light of this decision.'

[300] The Full Bench then invited further submissions giving 'concrete estimates' of the extent to which the undervaluation it had identified was gender-related.[223]

[301] In the *SACS Case No 2*, in which the actual remedy was determined, there was a re-emphasis by the Full Bench majority on the centrality of 'the extent to which gender has inhibited wages growth' in the relevant industry. However the Full Bench ultimately did not actually analyse the extent to which the pay gap it identified was attributable to gender, and took the approach of increasing the wage rates in the relevant modern award in line with the joint submissions of the applicants and the Commonwealth.[224] Vice President Watson in his dissenting judgment rejected this remedy, and said 'The claim in this matter can only succeed to the extent that it is demonstrated that differences in pay are because of gender or to address gender-based undervaluation'.[225]

[302] The Layton et al. report, after analysing the SACS decisions and the NSW and Queensland decisions under their respective principles, discussed the policy considerations attaching to the discounting issue as follows, noting that the learned authors proceeded on the premise that an equal remuneration claim could succeed on the basis of a demonstration of 'gender undervaluation' without the need for a male comparator:

> 'As discussed in Chapter 5, the available research on gender pay equity identifies the complexity of separating gender from a range of other reinforcing and interconnected considerations that shape women's earnings. Different dimensions of undervaluation can contribute to pay inequity in an additive and cumulative way.
>
> In New South Wales and Queensland, tribunals have taken the view that the assessment of equal remuneration claims involves balancing a number of considerations, and that it is not always possible to identify the extent of gender-based undervaluation in a forensic manner. This disinclination by State tribunals to mandate a proportionate identification of gender-based undervaluation is linked to what those tribunals have assessed as a key task, namely assessing the current value of the work in question and ensuring that the minimum rates of pay for it have been properly set.
>
> Two further and related issues are raised by an insistence on a proportionate assessment of the contribution of gender to undervaluation. The first is whether this insistence introduces a de facto requirement for applicants to rely on comparators. The second is whether this insistence imports the weaknesses in the discrimination-based test that was effectively mandated under the previous federal legislation. Contemporary developments in equal remuneration regulation have indicated that an insistence on comparators may not aid the objective of equal remuneration. Similarly, one of the disamenities of the discrimination-based test was that it invoked a narrow and binary form of job comparison.
>
> Approaches to equal remuneration that affirm equality where women can demonstrate a 'sameness' to men, but are ambivalent or overly restrictive as to how 'difference' from men should be assessed, measured and valued, carry a number of weaknesses. Such approaches can be overly formulaic and historically have failed to contest the undervaluation of feminised work, or to assess the direct and tacit means by which undervaluation may be embedded in the classification, organisation and remuneration of work (Smith 2011, e191). Additionally, these approaches fail to recognise that the value of male work has set key industrial standards and benchmarks, and that binary means of assessment against those standards, such as the discrimination test, have proven to be incapable of assessing the dynamics of gender pay inequity.'

[303] However, as with the comparator issue, we consider that the resolution of the 'discounting' issue requires close attention to the text of Part 2–7. Any other approach simply leads to free-form policy making rather than the proper application of the terms of the statute. As the High Court observed in *Alcan,*: 'The language which has actually been employed in the text of legislation is the surest guide to legislative intention'.[226]

[304] Consistent with our earlier discussion in relation to the issue of comparators, we consider that the jurisdictional prerequisite for the making of an equal remuneration order in s.302(5) is to be given its clear and ordinary meaning. If it is determined that the female employee(s) the subject of an application perform work which is of equal or comparable value to that of the male comparator employee(s), but do not receive remuneration (in the sense earlier discussed, that is equal to that of the comparator employee(s)), the jurisdictional

prerequisite is satisfied. Upon being satisfied under s.302(5), the Commission is empowered to consider making an equal remuneration order under s.302(1).

[305] As we have earlier discussed, the use of the word 'may' in s.302(1) indicates that the making of an equal remuneration order is discretionary. In exercising the discretion, the Commission must take into account the matters identified in s.302(4). However, as earlier stated, if an order is made, it must be one which *ensures* equal remuneration as between the female and male employees being compared. Consequently the function of *equalising* remuneration in the prescribed circumstances is a somewhat narrow one; it does not involve a general discretion for the *setting* of a level of remuneration that the Commission may consider to be appropriate in the circumstances. Once it is established that a first group of employees of one gender are performing work of equal or comparable value to that of a second group of employees of the opposite gender but are receiving less remuneration for it, any equal remuneration order which the Commission decides to make must *equalise* the remuneration of the two groups. Because s.303(2) prohibits achieving this by reducing the remuneration of the second group to that of the first group or at all, equalisation can only be achieved by raising the remuneration of the first group to that of the second group. Section 303(3) allows such an increase to be implemented in stages if the Commission considers that it is not feasible to apply the entire increase from the date the equal remuneration order comes into effect. But the Commission is simply not empowered to make an equal remuneration order which increases remuneration of the first group to a level below that of the second group, since such an order would not discharge the statutory purpose of ensuring equal remuneration.

[306] The employer and government submissions to which reference has earlier been made proposed that an analysis of whether any difference in remuneration was gender-related was required at one or both of two stages - at the first stage of determining under s.302(5) whether there was not equal remuneration for work of equal or comparable value, and/or at the later stage of determining the form of equal remuneration order that might be issued if the requisite state of satisfaction was reached under s.302(5). However, we consider that there is no textual basis for either of the posited requirements in Part 2–7.

[307] Under s.302(5), once the Commission has concluded that the employees or groups of employees being compared are performing work of equal or comparable value, the Commission only has to be satisfied that 'there is not equal remuneration' in order to establish the requisite jurisdictional fact. We have earlier discussed what that expression means. There is no warrant in the text of the section for the imposition of a further requirement to dissect any difference in remuneration, to determine the causes of the various elements of the difference, and to dismiss the application if the difference cannot be concluded to be 'gender-related'. To do so is tantamount to searching for a sex-discrimination basis for the difference in remuneration. To the extent that the Full Bench in *SACS Case No 1* reaches a different conclusion, we respectfully disagree with that aspect of their decision. As explained above, and as confirmed by the following passage in the *Explanatory Memorandum*, there is no sex discrimination requirement in Part 2–7:

> 'The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.'[227]

[308] In this respect, the FW Act is to be contrasted to United Kingdom and United States equal pay legislation, which expressly exclude from their operation pay differences for work of equal value which are based on factors other than sex.[228]

[309] There is likewise no textual basis for the proposition that in making an equal remuneration order, there must or should be some discounting of any portion of the difference in remuneration which may be characterised as not 'gender-related'. As earlier discussed, if an order is made, it must ensure equal remuneration. An order that, because of 'discounting', only bridges part of the gap in remuneration between the employees of the opposite gender being compared is not one that ensures equal remuneration. There is simply no power under Part 2–7 to make such an order.

[310] Of course, the factors that constrain the type of orders which the Commission is empowered to make are different to the considerations the Commission may take into account in exercising its discretion about whether or not to make an order. As we have discussed earlier (at [210]–[212]) in the exercise of the discretion it would be open for the Commission to take into account the reasons for any difference in remuneration between different gendered employees performing work of equal or comparable value.

[311] It must be emphasised that some of the examples of non gender-related causes of pay differentials raised by the parties at the hearing are likely to be matters which would cause the Commission to conclude at the outset that the work being compared is not of equal or comparable value. For example where a female and a male employee perform the same role, but one receives higher pay because the work is performed at a remote location; it might be concluded that the value of the work is not equal or comparable because the conditions under which the work is performed are significantly different. This serves to confirm that the selection of an appropriate male comparator with which equality or comparability in work value can clearly be demonstrated will be critical to the success of an equal remuneration claim.

[312] We now turn to consider the issue of alternative remedies.

5.3 Alternative remedies

[313] As we have mentioned, Part 6–1 of the FW Act deals with 'multiple actions' and Division 2 prevents certain applications where other remedies are available. Sections 721 and 724 are relevant for present purposes. Section 721 states:

> **'721 Equal remuneration applications**
>
> (1) The FWC must not deal with an application for an equal remuneration order if the FWC is satisfied that there is available to the employees to whom the order will apply, an adequate alternative remedy that:
>
> (a) exists under a law of the Commonwealth (other than Part 2–7) or a law of a State or Territory; and
>
> (b) will ensure equal remuneration for work of equal or comparable value for those employees.

(2) A remedy that:

(a) exists under a law of the Commonwealth, a State or a Territory relating to discrimination in relation to employment; and

(b) consists solely of compensation for past actions;

is not an adequate alternative remedy for the purposes of this section.'

[314] Section 721(1) provides that the Commission must not deal with an application for an equal remuneration order under Part 2–7 if it is satisfied that there is available to the relevant employees 'an adequate alternative remedy' that will ensure equal remuneration for work of equal or comparable value, for those employees. Section 721(2) provides that a remedy under a law relating to discrimination in relation to employment that consists solely of compensation for past actions is *not* an adequate alternative remedy for the purposes of s.721(1).

[315] Section 724(1) also prohibits the Commission from dealing with an application for an equal remuneration order under Part 2–7 if proceedings for an 'alternative remedy' to ensure equal remuneration, or against unequal remuneration, have been commenced. Section 724 states:

'724 Equal remuneration applications

(1) The FWC must not deal with an application for an equal remuneration order in relation to an employee if proceedings for an alternative remedy:

(a) to ensure equal remuneration for work of equal or comparable value for the employee; or

(b) against unequal remuneration for work of equal or comparable value for the employee;

have commenced under a law of the Commonwealth (other than Part 2–7) or a law of a State or Territory.

(2) Subsection (1) does not prevent the FWC from dealing with the application if the proceedings for the alternative remedy:

(a) have been discontinued by the party who commenced the proceedings; or

(b) have failed for want of jurisdiction.

(3) If an application has been made to the FWC for an equal remuneration order in relation to an employee, a person is not entitled to commence proceedings for an alternative remedy under a law of the Commonwealth (other than Part 2–7) or a law of a State or Territory:

(a) to ensure equal remuneration for work of equal or comparable value for the employee; or

(b) against unequal remuneration for work of equal or comparable value for the employee.

(4) Subsection (3) does not prevent a person from commencing proceedings for an alternative remedy if:

(a) the applicant has discontinued the application for the equal remuneration order; or

(b) the application has failed for want of jurisdiction.

(5) A remedy that:

(a) exists under a law of the Commonwealth, a State or a Territory relating to discrimination in relation to employment; and

(b) consists solely of compensation for past actions;

is not an alternative remedy for the purposes of this section.'

[316] Section 724(3) provides that any application under Part 2–7 will itself have the effect of barring the applicant from commencing proceedings for an alternative remedy under any other law.

[317] The jurisdictional bars in ss.724(1) and (3) do not apply where the application in question is discontinued by the applicant, or fails for lack of jurisdiction (see ss.724 (2) and (4)). Further, s.724(5) provides that an application for a remedy under a law relating to discrimination in relation to employment that consists solely of compensation for past actions is *not* an alternative remedy for the purposes of s.724.

[318] There are two important distinctions between ss.721 and 724. First, the jurisdictional bar in s.721(1) is predicated on the availability of an 'adequate alternative remedy', whereas s.724 speaks simply of an 'alternative remedy'. Hence under s.724 the test is not whether the other remedy is an '*adequate* alternative remedy', but merely whether it is an alternative. The use of different expressions in the same legislative context suggests that a different meaning was intended, as Irvine CJ observed in *Scott v Commercial Hotel Merbein Pty Ltd*:

> '[T]hough it is not to be conclusive, the employment of different language in the same Act may show that the Legislature had in view different objects.'[229]

[319] Given the proximity of ss.721 and 724 and the fact that they appear in the same part of the FW Act we have concluded from the difference in language that Parliament intended to apply a different and less onerous test under s.724. We return to this issue later.

[320] The second significant distinction between the two sections is that under s.721 it is sufficient that an adequate alternative remedy *'is available'* to the employees to whom the equal remuneration order will apply, unlike s.724 there is no requirement that proceedings in respect of the other remedy have actually commenced.

[321] We turn first to the proper construction of s.721.

[322] Past equal remuneration decisions are of little assistance in construing s.721. While *Gunn and Taylor*[230] considered a legislative antecedent of s.721 the case was decided on a narrow point and offers no real assistance in ascertaining the proper construction of s.721. A more useful source of guidance as to the interpretation of the text posited by s.721(1), and in particular the meaning of the expression 'adequate alternative remedy', is in the decisions which interpreted the use of that term in the original federal unfair dismissal provision introduced in 1993. While the wording and context of the relevant provision in the IR Act, s.170EB, differs in some respects from s.721 of the FW Act, there are significant similarities between the two provisions.

[323] The leading authority in relation to s.170EB of the IR Act is *Liddell v Lembke t/a Cheryls Unisex Salon; Gibson v Bosmac Pty Ltd* (*Liddell*).[231] In *Liddell* the Full Court of the Industrial Relations Court of Australia considered whether a NSW law provided the applicants with an adequate remedy in respect of the termination of their employment, alternative to that provided by the IR Act. The Full Court unanimously concluded that it did not. At that time s.170EB of the IR Act provided:

> '170EB. The Court must decline to consider or determine an application under section 170EA if satisfied that there is available to the employee by or on whose behalf the application was made an adequate alternative remedy, in respect of the termination, under existing machinery that satisfies the requirements of the Termination of Employment Convention.'

[324] *Liddell* was applied in subsequent Full Court decisions: *Fryar v Systems Services Pty Ltd*[232]; *Maggs v Comptroller General of Customs*[233] and *Morgan v Konway Express Pty Ltd*[234], albeit with some modifications to take account of subsequent legislative amendments[235].

[325] There are four aspects of the ratio in *Liddell* which are relevant for present purposes.

[326] First, the Court considered the nature of the test in s.170EB and applied the formulation adopted by Keely J in *Wylie v Carbide International Pty Ltd (Wylie).*[236] In *Wylie* Keely J accepted a submission:

> '… that, before the court declines to consider the application, it must be satisfied that (1) there is available to the employee an adequate alterative remedy ie adequate when compared with the remedy available under s.170EE of the Commonwealth Act as amended by Act No 97 of 1994; (2) that the alternative remedy is available under the existing machinery; and (3) that existing machinery satisfies the requirements of the Convention.'[237]

[327] His Honour went on to say that he accepted, as the meaning of 'adequate' in this context, a definition taken from the *Oxford English Dictionary*:

> '1. Equal in magnitude or extent; commensurate; neither more and nor less…
>
> 2. Commensurate in fitness; equal or amounting to what is required; fully sufficient, suitable or fitting.'[238]

[328] In *Liddell* Wilcox CJ and Keely J endorsed the above remarks, in the following terms:

> 'None of the present parties challenged the correctness of the *Wylie* formulation. Whether or not it is also necessary for the alternative remedy to satisfy the requirements of the Convention, that formulation is adequate for the purposes of this case. We applied it.'[239]

[329] Applying these observations in the context of s.721 the Commission would have to be satisfied that the alternative remedy was 'commensurate' in effect to an application for an equal remuneration order for the employees to whom the equal remuneration order will apply.

[330] Second, the Court considered the time at which the test in s.170EB was to be applied and concluded that it was when the matter comes under consideration by the Court and not at some earlier time. Wilcox CJ and Keely J held:

> 'The Court is required to decline to consider or determine an application if satisfied that there *is available* an adequate alternative remedy. The section uses the present tense; speaking in relation to the Court's consideration of the application. So the Court must satisfy itself about the current position, as at the time when the matter comes under consideration. It is not required to consider what was the position at an earlier point of time.'
>
> The view just expressed was tentatively adopted by Keely J in *Wylie*. Moore J did not deal expressly with the matter in *Siddons*, but his reasons assume this view. In *Grout* his Honour expressed a firm view to that effect, saying (at 376) that "it is necessary… to determine whether there is an adequate alternative remedy available at the time the Court comes to consider the matter". He said that the use of the present tense is:
>
> > "consistent with the purpose of the section which is to deny an applicant the opportunity of pursuing an application under the Act if an application to the same effect can be pursued under, ordinarily, other legislative schemes which would generally, though not exclusively, arise under State industrial laws. Thus, it must be capable of being pursued at the time the Court denies, by operation of s.170EB, the applicant the opportunity of further pursuing the application under s.170EA."
>
> von Doussa adopted this comment in *Fryar*. So do we.
>
> The question we have to determine, in each case, is whether the New South Wales Act, at this time, offers to the applicant a remedy that is commensurate with that provided under Div 3 of Pt VIA of the *Industrial Relations Act* and which is available under machinery that satisfies the requirements of the Termination of Employment Convention.'[240]

[331] Gray J, who delivered a separate concurring judgement in *Liddell,* reached the same conclusion:

> 'It cannot have been intended that an application should be defeated when an adequate alterative once existed, but has ceased to exist when the Court informs the applicant that the application will not be considered. When the Court comes to consider the merits of an application under s.170EA, if the issue is raised of the availability of an adequate alterative remedy, the Court must then consider whether such a remedy is available to the employee at that time. If so, the Court must refrain from considering and determining the application.'[241]

[332] We note that s.721(1) of the FW Act also speaks in terms of the Commission being satisfied that an adequate alternative remedy 'is available'. Applying the reasoning of the Court in *Liddell*, the use of the present tense means that the Commission must satisfy itself about whether there is an adequate alternative remedy, at the time the Commission comes to consider the matter and not at some earlier time (such as the time when the application for an equal remuneration order is made).

[333] This issue is important because the time at which the test in s.721 is to be applied may well have a bearing on whether an adequate alternative remedy '*is available*'. For example, legislative change or time limits on the lodgement of applications under other laws may operate such that the Commission is *not* satisfied that the other law is an adequate alternative remedy. These issues were discussed in *Liddell*[242] and we refer later to the Court's consideration of the time limits provided in the NSW law.

[334] Third, the Court considered the nature of the comparison required by s.170EB and concluded that what was required was more than a mere comparison between remedies and that it was not sufficient to just look at the orders available in each jurisdiction. Wilcox CJ and Keely J put it this way:

> 'The simple point we make is that the criterion selected by the New South Wales legislature, in making remedies available to dismissed employees, is much narrower in its application than the criteria selected by the Commonwealth Parliament.
>
> Counsel for the respondents and counsel for New South Wales both submitted that the orders able to be made by the New South Wales Industrial Commission are as favourable to applicants as those available in this Court. Although counsel for Mr Gibson suggested that the compensation provisions of the New South Wales Act are less generous than those in the Commonwealth Act, because more discretionary, we think that there is no substantial difference between the available orders. But both counsel put their submission as if this were the end of the argument; as if it were appropriate merely to look at the orders available, without considering the circumstances under which they could be made or the rights they are intended to vindicate. Such an approach is fundamentally unsound. The remedy cannot be divorced from the right.'[243]

[335] The Court applied the *Wylie* formulation and unanimously concluded that the NSW law did not constitute an adequate alternative remedy within the meaning of s.170EB. A matter of significance in the Court's determination was that the NSW law did not provide for the vindication of a legal right; it merely empowered the tribunal to make reinstatement or compensation orders when it was of the opinion that the dismissal of the applicant was harsh, unjust or unreasonable.

[336] The Court also had regard to the fact that the NSW law required an application to be lodged 'not later than 21 days after … termination of employment'. Only an employee who had lodged an application within the time prescribed would be entitled to a determination of his or her claim on its merits. Applicants who lodge a claim outside of the requisite period may seek the Tribunal's leave to proceed. Section 246(3) of the NSW law permitted the Tribunal to accept an application lodged out of time if it thought there was a sufficient reason to do so. Wilcox CJ and Keely J compared the position of the applicant for an extension of time under the NSW law to that of a person who had made an application under the IR Act, within the time required by s.170EA(3), and concluded:

> '… an entitlement to seek an extension of time for making an application for a determination on the merits is inferior to an entitlement to have a determination on the merits. The reason is obvious. The application for extension of time may fail …
>
> We appreciate that the effect of our view is that legislation that imposes a short time limit on the making of an application will rarely provide an 'adequate alternative remedy' for the purposes of s.170EB. Some may think this a curious result, having regard to the fact that Div 3 itself contains a time limit … In any event, anomalous or not, the conclusion we have expressed is that which the section requires'.[244]

[337] Gray J reached the same conclusion:

> 'An applicant should not be forced to undergo the uncertainty of an application to another tribunal, designed merely to ascertain whether he or she has the right to apply for the alternative remedy. In such a case, the Court cannot be 'satisfied' that an adequate alternative exists.'[245]

[338] The final point considered in *Liddell* which is relevant for present purposes is whether s.170EB cast a duty on the Court, in every case, to undertake its own inquiry as to the existence of alternative remedies and to consider the adequacy of any that might be found. Wilcox CJ and Keely J rejected this proposition, in the following terms:

> 'In relation to counsel's submission that the Court has a duty to undertake an inquiry as to the possible alternative remedies before embarking upon a hearing on the merits, we note that the Act does not contain any express provision to that effect. None should be implied. There is nothing in the legislation to suggest otherwise than that Parliament assumed the Court would conduct proceedings in accordance with traditional Australian methods; that is, according to adversarial – not inquisitorial – procedures … when material is before the Court that establishes the existence of an adequate alternative remedy, it must act on that material whether or not a party takes the point. But that does not mean that the Court has a duty to seek out information about alternative remedies. As Moore J said in *Siddons*, "the prohibition found in s.170EB… is enlivened when this Court is positively satisfied that an adequate alternative remedy exists". That means satisfied by material put before it, or arguments advanced, by someone participating in the case. If the court never reaches that state of satisfaction, the prohibition has no operation. Of course, it follows from this that there may be occasions when, if all the relevant material were before the Court, the Court would be satisfied that there is an adequate alternative remedy; yet, because it is not, the Court does not reach that conclusion and proceeds to hear the case on its merits. But there is nothing unusual about that position. Litigation results often depend on decisions made by parties as to the evidence they will adduce and the points they will take. This is the adversarial system.' [246]

[339] Gray J agreed, in these terms:

> 'It should also be noted that the Court is only obliged to decline to consider or determine an application under s.170EB 'if satisfied' that there is available an adequate alternative remedy. These words make it clear that there is an onus falling on the respondent to the application to raise the issue and to satisfy the Court of the availability of the other remedy. The Court is not obliged to inquire in every case as to whether such a remedy exists' [247]

[340] As was the case with s.170EA of the IR Act, s.721 does not contain any express provision to the effect that the Commission has a duty to undertake an inquiry as to the possible alternative remedies before embarking on a hearing of the merits. We see no reason for the implication of such a term.

[341] A number of the employer submissions contended that it is incumbent upon the applicant for an equal remuneration order to satisfy the Commission that an adequate alternative remedy is *not* available to the employees who are to be covered by the order sought.[248]

[342] The employer's contention would require s.721 to be read such that the Commission must not deal with an application for an equal remuneration order *unless* it is satisfied that

there is *no* adequate alternative remedy available to the employees to whom the order will apply. But that is not what the section says. As the Commonwealth submitted, the text of s.721 does not expressly require an applicant for an equal remuneration order to prove the absence of an adequate alternative remedy.[249] Moreover, the contention advanced is contrary to the reasoning of the Full Court in *Liddell* and to the general principle that the party who asserts (in this instance the respondent to the application for an equal remuneration order) bears the burden of persuasion.

[343] The party who asserts that there is an adequate alternative remedy available to the employees to whom the equal remuneration order will apply bears the burden of persuading the Commission that it should be so satisfied.

[344] Section 721 provides that if the Commission is satisfied that an adequate alternative remedy is available it must not deal with an application for an equal remuneration order. Absent such a state of affairs it must proceed to hear and determine the application. When material is before the Commission that establishes the existence of an adequate alternative remedy it must act on that material, whether or not a party takes the point. But the Commission is not under a duty to undertake an inquiry of its own motion as to possible alternative remedies before dealing with an application for an equal remuneration order.

[345] One of the 'Issues to be Addressed' in these proceedings was whether a modern award, such as the *Local Government Industry Award 2010*, or an enterprise agreement, constituted an 'adequate alternative remedy' within the meaning of s.721 (see Issue 16).

[346] We fail to see how an enterprise agreement can be said to be an adequate alternative remedy. While employees may choose to engage in enterprise bargaining as a means of securing equal remuneration for work of equal or comparable value, such an option is not an alternative remedy to an equal remuneration order, let alone an adequate alternative remedy.

[347] The FW Act provides a number of means by which the Commission may facilitate good faith bargaining and the making of enterprise agreements. But the FW Act does not require a bargaining representative to make concessions during the bargaining for an agreement, or to reach agreement on the terms that are to be included in the agreement (see s.228(2)).

[348] If an enterprise agreement applies to the employees who are the subject of an application for an equal remuneration order and that agreement provides 'equal remuneration for work of equal or comparable value' (within the meaning of s.302(2)), then the application will fail. It will fail because the Commission may only make an equal remuneration order if satisfied that there is *not* equal remuneration for work of equal or comparable value (s.302(5)). In other words the application will fail because of the absence of a requisite jurisdictional fact, not because the enterprise agreement is an adequate alternative remedy.

[349] Further, as a practical matter, enterprise bargaining is an option which is always open and hence if it were an adequate alternative remedy the Commission could never deal with an application for an equal remuneration order by or on behalf of a group of employees.

[350] As to the *Local Government Industry Award 2010*, it is difficult to see how a modern award of itself constitutes an adequate alternative remedy. As we have mentioned, it is conceivable that an application to vary modern award minimum wages may constitute an alternative remedy, within the meaning of s.724 but such a result will depend on the circumstances, including the 'remuneration' of the relevant employees, and accordingly we prefer not to express a concluded view on the issue.

[351] Finally, we turn to whether we should develop guiding principles for the application of Part 2–7 and, if so, the content of those principles.

5.4 Guiding principles?

[352] Whether it is appropriate for the Commission to develop guiding principles for the application of Part 2–7 and, if so, the content of such principles, was one of the issues in contention in the proceedings. This issue gives rise to a threshold question as to the Commission's power to develop such principles.

[353] AFEI submitted that the Commission did not have a statutory power to develop guiding principles. The Australian Childcare Alliance, Australian Childcare Centres Association, Industrial Organisation of Employers and the Creche and Kindergarten Association Ltd (jointly ACA) advanced a submission to similar effect.

[354] ACCI and others submitted that the Commission has broad discretion to provide guidance, including to develop principles in accordance with its powers as set out in ss.577 and 578 of the FW Act.[250] IEUA agreed with ACCI and others[251] and CCIWA similarly submitted that the Commission has broad discretionary powers with respect to how it performs its functions.[252] The Commonwealth noted that it was open to the Commission to develop guiding principles for the application of Part 2–7.[253]

[355] United Voice and AEU submitted there was no basis for AFEI's submission that the Commission has no power to develop guiding principles and that such principles are within the power of the Commission, similar to the establishment of wage fixation principles after 1975. It was submitted that such principles are not binding, but rather, provide guidance to the Commission and parties.[254]

[356] Implicit in the decision of the Full Bench in *SACS Case No 1* was an acceptance that the Commission had the requisite power to issue a formal statement of principles, though the Full Bench declined to exercise that power at that time. The Full Bench said:

> 'We do not at this stage think it is desirable to issue a formal statement of principles in this case. To do so on the basis of one case only would be premature and run the risk of limiting the discretion available under Pt 2-7. This decision, together with any other decision we make in these proceedings, will constitute a significant precedent in any event.'[255]

[357] We are satisfied that the Commission has the power to develop guiding principles of the type proposed. We acknowledge that there is no express power in the FW Act which states, in terms, that the Commission may develop such principles. But one of the further

functions conferred on the Commission by s.576 is to provide 'assistance and advice about its *functions* and activities' (emphasis added) (s.576(2)(b)). One such function is 'equal remuneration (Part 2–7)' (s.576(1)(f)). The provision of such guiding principles may also assist the Commission to perform its functions and exercise its powers in a manner that is 'fair and just' and 'is quick, informal and avoids unnecessary technicalities', which accords with s.577(a) and (b) of the FW Act.

[358] We also note that the Commission has a long history of developing such guiding principles, despite the absence of an express statutory power to do so. This was done as early as 1912, by Higgins J in the making of the Harvester Award[256]. Further, there was no express statutory power in the *Conciliation and Arbitration Act 1904* (Cth) at the time the Commission adopted principles applicable to 'equal pay for work of equal value' in 1972 (see paragraphs [57]–[62] above).

[359] We do not mean to suggest that were we to develop such guiding principles they would automatically bind future Full Benches, but rather that they may provide guidance to the Commission and the parties to such proceedings.

[360] United Voice and AEU, IEUA, ACCI and others, Ai Group, CCIWA and the Victorian Government supported the Commission developing guiding principles for the purposes of Part 2–7. ACA stated it did not object to the development of guiding principles. The Commonwealth and the New South Wales Government submitted that the Commission should not develop guiding principles as an outcome of these proceedings.

[361] United Voice and AEU submitted the Commission should develop 'guideline equal remuneration principles' which 'would occupy the ground between uncertainty and prescription'[257] and that such principles would give parties appropriate assistance and guidance in conducting cases under Part 2–7 of the FW Act.[258] ACA stated it did not object to the development of guiding principles but expressed concern such principles may lead to an increase in the number of claims for equal remuneration orders in other industries and occupations.[259]

[362] The IEUA adopted a similar position submitting that it would be useful for the Commission to develop principles for the application of Part 2–7 to act as a guide for both the Commission and the parties and that these proceedings are an appropriate vehicle to do so.[260]

[363] ACCI and others submitted that guidance was 'entirely appropriate' and would 'promote the efficiency of the process', however, cautioned that the Commission should give effect to s.302 rather than limit or expand the Commission's powers in a manner not contemplated by the FW Act.[261] Ai Group also supported the development of 'appropriate principles'.[262] CCIWA similarly supported the Commission clarifying the principles and factors relevant to bringing a claim under Part 2–7.[263]

[364] The Victorian Government submitted the development of guiding principles would be desirable given the discretion vested in the Commission to make an equal remuneration order and the absence of any detailed prescription of the matters to which the Commission is to have regard in dealing with such applications, or of the matters to which the Commission may have regard in forming the necessary satisfaction pursuant to s.302(5).[264]

[365] The New South Wales Government submitted that it would be premature to develop guiding principles for the application of Part 2–7 and that it is not clear what benefit, if any, would flow from the adoption of a set of guiding principles.[265]

[366] The Commonwealth submitted that a decision from the Commission in this matter would sufficiently inform any future Part 2–7 applications, without requiring the development of guiding principles.[266]

[367] We agree with the Commonwealth's submission. It seems to us that at this time a summary of the matters we have determined in this stage of the proceeding would be sufficient to inform this and future Part 2–7 applications. We set out such a summary in the next section of our decision. We will revisit the issue of whether to develop an equal pay principle and, if so, its content, after we have dealt with the merits of the current application.

6. Summary

General

1. The Commission may only make an equal remuneration order on application (by an employee to whom the order will apply, an employee organisation representing such an employee(s), or the Sex Discrimination Commissioner: s.302(3)).

2. The power to make an equal remuneration order is discretionary, but the discretion is only enlivened if the Commission is satisfied that, for the employees to whom the order will apply, 'there is not equal remuneration for men and women workers for work of equal or comparable value' (s.302(5)). Once the requisite jurisdictional fact has been established the Commission may make any equal remuneration order that it considers appropriate.

3. The applicant for an equal remuneration order bears the burden of persuading the Commission as to the existence of the requisite jurisdictional fact.

4. The general provisions in the FW Act relating to the performance of the Commission's functions and the exercise of its powers apply to equal remuneration proceedings under Part 2–7. Further, in dealing with an application for an equal remuneration order the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5–1 of the FW Act.

5. The 'modern awards objective' (s.134) and the 'minimum wages objective' (s.284), have no application to the making of equal remuneration orders.

Equal remuneration for men and women workers for work of equal or comparable value

6. Satisfaction of the jurisdictional fact in s.302(5) requires a conclusion that the employee(s) the subject of the application for an equal remuneration order receive less remuneration than identified employee(s) of the opposite gender who perform work of

equal or comparable value. Where an application for an equal remuneration order concerns a group of female employees, a male comparator group is therefore necessary.

7. Individuals or groups of employees of any size may, in principle, be used as comparators. However it is likely that the larger and more diverse the comparator groups are, the more difficult it will be to draw the conclusion that the two groups perform work of equal of comparable value. Ultimately the selection of a valid comparator will be a matter for the applicant for an equal remuneration order.

8. The inclusion of the concept of 'comparable' value serves the purpose of applying the provisions of Part 2–7 not just to the same or similar work that is equal in value, but also to dissimilar work which is none the less capable of comparison.

9. The comparison may be between different work in different occupations and industries. Traditional work value criteria will be applicable in determining whether the work of the comparator employee(s) is of equal or comparable value, but other criteria may also be relevant depending on the nature of the work. Work value enquiries have been characterised by the exercise of broad judgment. Depending upon the specific characteristics of the work under consideration, it may be appropriate to apply different or additional criteria in order to assess equality or comparability in value. Job evaluation techniques may useful in comparing work. Each case will turn on its own facts in this respect.

10. Under s.302(5), once the Commission has concluded that the employees or groups of employees being compared are performing work of equal or comparable value, the Commission only has to be satisfied that there is not equal remuneration' in order to establish the requisite jurisdictional fact. There is no warrant in the text of the section for the imposition of a further requirement to dissect any difference in remuneration, to determine the causes of the various elements of the difference, and to dismiss the application if the difference cannot be concluded to be gender-related.

11. Remuneration is, for the purpose of the comparison, not confined to wages or salary and includes all other monetary and non-monetary compensation paid as consideration for service under an employment contract.

12. The comparison of remuneration required to satisfy the jurisdictional fact requirement in s.302(5) only involves determining whether the remuneration of the employees being compared is unequal. It does not require the identification and removal from the comparison of differences which are said not to be caused by sex discrimination or not to be 'gender related'.

13. The 'gender undervaluation' approach used in other jurisdictions in relation to award rates of pay is not relevant to satisfaction of the jurisdictional fact in s.302(5).

14. There is no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2).

The Discretion

15. If the Commission is satisfied that the s.302(5) requirement is met, it has a discretion as to whether an equal remuneration order is to be made or not. The legislature did not intend that the Commission's satisfaction as to the jurisdictional fact in s.302(5) would of itself necessitate the making of an equal remuneration order. The legislature chose to confer a broad discretion on the Commission to decide on a case by case basis whether or not to make any order that it considers appropriate to ensure equal remuneration.

16. There are a range of considerations which may be relevant to the exercise of the discretion to make an equal remuneration order. In the exercise of that discretion the Commission must take into account the matters identified in s.302(4), as well those in s.578 and the objects in s.3. The nature and assessment of such factors will depend on the circumstances of the case. The considerations which may be relevant to the exercise of the discretion include:

(i) the circumstances of the employees to whom the order will apply;

(ii) eliminating gender based discrimination;

(iii) the capacity to pay of the employers to whom the order will apply;

(iv) the effect of any order on the delivery of services to the community;

(v) the effect of any order on a range of economic considerations, including any impact on employment, productivity and growth;

(vi) the effect of any order on the promotion of social inclusion by its impact on female participation in the workforce; and

(vii) the effect of any order on enterprise bargaining.

Note: These considerations are not listed in order of significance and nor is the list intended to be exhaustive.

17. Part 2–7 is not intended to operate as an automatic mechanism for creating comparative wage justice. The general purpose of the provisions is to remedy gender wage inequality and promote pay equity. It follows that in exercising its discretion it would be open for the Commission to take into account the reasons for any difference in remuneration between different gendered employees performing work of equal or comparable value.

18. To the extent that a party relies on a particular discretionary consideration, that party should provide a proper evidentiary basis for its submission. It is not enough to simply assert that an order will have a chilling effect on enterprise bargaining or that it

will promote female participation in employment, without advancing a proper basis for such a submission.

The Scope and Type of Order

19. While the scope of an equal remuneration order cannot extend beyond those in respect of whom an application has been made, the Commission has a broad discretion as to the form of such an order, which may include increases in wages or allowances, variations to bonus schemes, the establishment of new classifications or the variation of job descriptors.

20. The power in s.302(1) is expressed in broad terms, the Commission 'may make any order … it considers appropriate'. However, there are three important limitations on the power in s.302(1).

(i) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration (s.303(2)).

(ii) Once the Commission is satisfied that there is <u>not</u> equal remuneration for work of equal or comparable value (the jurisdictional fact in s.302(5)) and it decides to exercise its discretion and make an order, then the order must address the unequal remuneration. While the Commission may phase in the effect of its order (s.304) the mandatory direction in s.302(1) means that the order must be such as to *ensure* that there *will be* equal remuneration for work of equal or comparable value upon the full implementation of the order. The Commission does not have a general discretion to set a level of remuneration that the Commission may consider to be appropriate in the circumstances. There is no power to make an order which increases the remuneration of the employee(s) the subject of the application but does not equalise their remuneration to that of the comparator employee(s). A 'discounting' approach which seeks to exclude pay differences which are said not to be caused by sex discrimination or to be gender-related for the purpose of the remedy is not permissible.

(iii) Section 302(1) does not include the power to vary a modern award. Part 2–3 (and Part 2–6 to the extent it deals with modern award minimum wages) of the FW Act constitutes a code for the making and variation of modern awards. It is clear from the legislative context that the making of equal remuneration orders under Part 2–7 is intended to be quite separate from modern awards, which form part of the safety net of minimum terms and conditions under the FW Act.

21. Orders can be made in favour of a mixed gender applicant group of employees, but only if the orders are made in a particular sequence.

Adequate Alternative Remedies

22. Section 721 provides that if the Commission is satisfied that an adequate alternative remedy is available it must not deal with an application for an equal remuneration order. Section 721 is to be construed as follows:

(i) If the Commission is satisfied that an adequate alternative remedy is available it must not deal with an application for an equal remuneration order. Absent such a state of affairs it must proceed to hear and determine the application. When material is before the Commission that establishes the existence of an adequate alternative remedy it must act on that material, whether or not a party has taken the point. But the Commission is not under a duty to undertake an inquiry of its own motion as to possible alternative remedies before dealing with an application for an equal remuneration order.

(ii) To be satisfied that the alternative remedy is an 'adequate alternative remedy' the Commission will have to be satisfied that the alternative remedy was commensurate in effect to an application for an equal remuneration order for the employees to whom the equal remuneration order will apply and, in particular, that the alternative remedy 'will ensure equal remuneration for work of equal or comparable value' for the employees to whom the equal remuneration order will apply (s.721(1)(b)).

(iii) The Commission must satisfy itself about whether there is an adequate alternative remedy at the time the Commission comes to consider the matter and not at some earlier time (such as the time when the application for an equal remuneration order is made).

(iv) The party which asserts that there is an adequate alternative remedy available to the employees to whom the equal remuneration order will apply, bears the burden of persuading the Commission that it should be so satisfied.

23. While employees may choose to engage in enterprise bargaining as a means of securing equal remuneration for work of equal or comparable value, such an option is not an alternative remedy to an equal remuneration order, let alone an adequate alternative remedy. If an enterprise agreement applies to the employees who are the subject of an application for an equal remuneration order and that agreement provides 'equal remuneration for work of equal or comparable value' (within the meaning of s.302(2)), then the application will fail. It will fail because the Commission may only make an equal remuneration order if satisfied that there is *not* equal remuneration for work of equal or comparable value (s.302(5)). In other words the application will fail because of the absence of a requisite jurisdictional fact, not because the enterprise agreement is an adequate alternative remedy.

> 24. It is difficult to see how a modern award, of itself, constitutes an adequate alternative remedy. It is conceivable that an application to vary modern award minimum wages may constitute an alternative remedy within the meaning of s.724 but such a result will depend on the circumstances, including the 'remuneration' of the relevant employees. Accordingly we prefer not to express a concluded view on the issue.

7. Next steps

[368] This decision addresses most of the legal and conceptual issues relating to the applications before us, though not all of the issues have been addressed.

[369] The next step in the proceedings is to set down directions for the hearing and determination of the merits of the applications. In this regard we note that United Voice filed an amended application on 3 September 2015.

[370] Given the range of issues canvassed in this decision we expect that the parties will want some time to consider the implications for their respective cases. Accordingly we do not propose to set a specific date for the mention and programming of the merits hearing. Rather, the applications will be listed for mention and programming upon the request of any party.

PRESIDENT

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<Price code O, PR574376>

Appearances:

C Howell for United Voice and the Australian Education Union.

A Threlfall for the Australian Education Union, Victoria Branch.

I Taylor and *L Andelman* for the Independent Education Union of Australia.

K Eastman and *E Raper* for the Commonwealth.

M Rizzo for the Australian Municipal, Administrative, Clerical and Services Union.

N Ward for the Australian Chamber of Commerce and Industry, Australian Business Industrial, the New South Wales Business Chamber and the Tasmanian Chamber of Commerce and Industry.

G Vaccarro and *B Ferguson* for the Australian Industry Group.

J Gunn for Community Connections Solutions Australia.

A Dansie for the Local Government and Shires Association of New South Wales.

A Dansie, N Ward and *C McElroy* for the State and Territory Local Government Associations.

S Forster for the Australian Federation of Employers and Industries.

C Hardy and *M Coonan* for the Australian Community Services Employers Association.

L Moloney and *J Shingles* for the Australian Childcare Centres Association, Industrial Organisation of Employers, Goodstart Early Learning Ltd, Crèche and Kindergarten Association Ltd and the Australian Childcare Alliance.

H Wallgren for the South Australian Employers Chamber of Commerce and Industry and Business SA.

J Murphy for the Chamber of Commerce and Industry of Western Australia and the ACT Chamber of Commerce and Industry.

L Burke for The Association of Independent Schools of New South Wales, The Association of Independent Schools of Western Australia, The Association of Independent Schools of Tasmania and The Association of Independent Schools of South Australia.

R Graycar for the New South Wales Minister for Industrial Relations.

P O'Grady for the Victorian Minister for Industrial Relations.

Hearing details:

2013.
Sydney, Melbourne, Brisbane, Adelaide, Perth (video hearing):
September 24.
November 19.

2014.
Sydney, Melbourne (video hearing):
April 22, 23.

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[1] For convenience, the term 'Commission' has been used to also describe the various predecessor bodies in the federal jurisdiction i.e. Conciliation and Arbitration Commission, Australian Industrial Relations Commission, Fair Work Australia and the Fair Work Commission.

[2] The amended application of 3 September 2015 was served on the parties on 26 and 27 November 2015.

[3] United Voice and the Australian Education Union, *Further amended application by United Voice and the Australian Education Union*, 27 November 2013, Further Amended Annexure A at paras 2A–3.

[4] Independent Education Union of Australia, *Amended application by the Independent Education Union of Australia*, 28 November 2013, Annexure B at para 2.

[5] Ibid, Annexure A at para 4.1.

[6] Pay Equity Unit, *Proposal for facilitated consultation on data for C2013/5139*, 19 September 2013, p. 2.

[7] Romeyn, J., Archer, S-K. & Leung, E. (2011), *Review of equal remuneration principles*, Research Report 5/2011, Fair Work Australia, Melbourne.

[8] Transcript of proceedings, 24 September 2013, PN293.

[9] Transcript of proceedings, 24 September 2013, PN420.

[10] Transcript of proceedings, 24 September 2013, PN438–PN440.

[11] Transcript of proceedings, 19 November 2013, PN586.

[12] ILO (2012), '*Giving Globalisation a Human Face: General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration for Social Justice for a Fair Globalisation 2008*', ILC. 101/111/1B.

[13] See Human Rights and Equal Opportunity Commission (HREOC) (2007), *It's about time: Women, men, work and family*, HREOC, Sydney; Swepston 2000; Gunderson, M. (1994), *Comparable worth and gender discrimination: An international perspective*, International Labour Office, Geneva, pp. :5–9; *Making it Fair: Pay equity and associated issues related to increasing female participation in the workforce*, House of Representatives Standing Committee on Employment and Workplace Relations 2009: pp. 8–9; and Preston A. and Whitehouse, G. (2004), Gender differences in occupation of employment within Australia', *Australian Journal of Labour Economics*, vol. 7 no. 3, pp. 311–312..

[14] *Making it Fair: Pay equity and associated issues related to increasing female participation in the workforce*, House of Representatives Standing Committee on Employment and Workplace Relations 2009: pp. 8–9.

[15] Romeyn, J., Archer, S-K. & Leung, E. (2011), *Review of equal remuneration principles*, Research Report 5/2011, Fair Work Australia, Melbourne.

[16] FW Act, s.284(1)(d) and s.134(1)(e).

[17] [2014] FWCFB 3500 at paras 476–484.

[18] [2015] FWCFB 3500 at para 481.

[19] ABS, *Gender Indicators, Australia, August 2015*, Catalogue 4125.0.

[20] Workplace Gender Equality Agency (2015), *Australia's gender equality scorecard: Key findings from the Workplace Gender Equality Agency's 2014–15 reporting data*, Australian Government, November.

[21] Smith M (2011), 'Gender equity: The Commission's legacy and the challenge for Fair Work Australia', *Journal of Industrial Relations* 53(5) at pp. 647–661, see Figure 1 on p. 654.

[22] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 10 December 1983).

[23] *Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, 1951 (ILO 90).

[24] *Equal Remuneration Convention*, opened for signature 29 June 1951, ILO 1951 (No. 100) (entered into force 10 December 1974).

[25] *Convention concerning Discrimination in Respect of Employment and Occupation*, 1958 (ILO 111); *Recommendation concerning Discrimination in Respect of Employment and Occupation*, 1958 (ILO 111), art 2.

[26] See *Shop, Distributive and Allied Employees Association (No. 2)* (2012) 205 FCR 227 at para 35 per Tracey J.

[27] (2014) 225 FCR 154 at para 109.

[28] [2015] FWCFB 3500 at paras 492–493.

[29] See *Alcan (NT) Alumina Pty Ltd v Commissioner for Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [4]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at para 408.

[30] See *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at para 59; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042 at paras 26–37; *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* (2012) 219 IR 139 at paras 16–19.

[31] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at para 69.

[32] See *Prior v Sherwood* (1906) 3 CLR 1054; *R v Refshauge* (1976) 11 ALR 471 at p. 475.

[33] (1998) 194 CLR 355 at para 78 per McHugh, Gummow, Kirby and Hayne JJ. Also see *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9 at paras 65–66.

[34] *Ross v R* (1979) 141 CLR 432 at para 440; *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at para 479.

[35] (2009) 239 CLR 27 at para 47.

[36] *Mills v Meeking* (1990) 169 CLR 214 at para 235 per Dawson J; *R v L* (1994) 49 FCR 534 at para 538.

[37] *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at para 579; *Bowling v General Motors Holden Ltd* (1980) 33 ALR 297 at para 304.

[38] (1969) 127 CAR 1142; (1972) 147 CAR 172.

[39] For convenience, the term 'Commission' has been used to also describe the various predecessor bodies in the federal jurisdiction i.e. Conciliation and Arbitration Commission, Australian Industrial Relations Commission, Fair Work Australia and the Fair Work Commission.

[40] (1974) 157 CAR 293.

[41] (1967) 118 CAR 655.

[42] Ibid at p. 660.

[43] Ibid at p. 660.

[44] (1969) 127 CAR 1142.

[45] Ibid at p. 1156.

[46] See *Australasian Meat Industry Employees Union v Meat & Allied Trades Federation of Australia (Equal Pay Case)* (1969) 127 CAR 1142 at paras 1158–1159.

[47] See *National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172.

[48] Ibid at p. 177.

[49] Ibid at p. 177.

[50] See: Short C (1986), 'Equal pay, what happened?', *Journal of Industrial Relations*, Vol. 28, No.3, pp. 315–335; Borland J (1999), 'Earnings inequality in Australia: Changes, causes and consequences', *Economic Record* vol. 75, pp. 177–202; Eastough K and Miller P (2004), 'The gender pay gap in paid and self-employment in Australia', *Australian Economic Papers*, Vol. 43, No. 3, pp. 257–276; Smith M (2009), 'Gender pay equity reform in Australia: What in the way forward?', *Australian Bulletin of Labour*, vol. 35, no. 4, pp. 652–670.

[51] (1972) 147 CAR 172 at p.178.

[52] Ibid at p. 178.

[53] Ibid at p. 180.

[54] Ibid at pp. 179–180.

[55] (1974) 157 CAR 293.

[56] Eastough, K. & Miller, P. (2004), 'The gender pay gap in paid- and self-employment in Australia', *Australian Economic Papers*, September 2004, p. 258.

[57] Smith, M. (2009), 'Gender pay equity reform in Australia: What is the way forward?', *Australian Bulletin of Labour*, Vol. 35, No. 4, p. 653.

[58] Gregory, R. & Duncan, R. (1981) 'Segmented labor market theories and the Australian experience of equal pay for women', *Journal of Post Keynesian Economics*, Vol. 3, No. 3, p. 426; Gregory, R. (1999), 'Labour market institutions and the gender pay ratio', *Australian Economic Review*, Vol. 32, No. 3, p. 277; Whitehouse, G. (2001), 'Recent trends in pay equity: Beyond the aggregate statistics', *Journal of Industrial Relations*, Vol.43, No.1, p. 66.

[59] Kidd, M.P. & Meng, X. (1997), *Trends in the Australian gender wage differential over the 1980s: Some evidence on the effectiveness of legislative reform', Australian Economic Review*, Vol. 30, No. 1, pp. 40–41.

[60] Short, C. (1986), 'Equal pay — What happened?', *Journal of Industrial Relations*, Vol.28, No.3, p. 325.

[61] Scutt, J. (1992), 'Inequity before the law: Gender, arbitration and wages', in K. Saunders & R. Evans (eds.), *Gender domination in Australia*: *Domination and negotiation*, Harcourt Brace, Sydney, p. 282.

[62] Thornton, M (1981), '(Un)equal pay for work of equal value', *Journal of Industrial Relations*, Vol.23, No.4, p. 473, 477–480; Bennett, L. (1988), 'Equal pay and comparable worth and the Australian Conciliation and Arbitration Commission', *Journal of Industrial Relations*, vol.30, no.4, pp.540–541; Rafferty, F. (1994), 'Equal pay: The evolutionary process 1984–1994', *Journal of Industrial Relations*, vol.36, no.4, pp.453–454; Smith, M. (2009), 'Gender pay equity reform in Australia: What is the way forward?', *Australian Bulletin of Labour*, Vol.35, No.4, p. 655.

[63] See *Re Private Hospitals' and Doctors Nurses' (ACT) Award 1972* (1986) 13 IR 108.

[64] See e.g. *Re Private Hospitals' and Doctors Nurses' (ACT) Award 1972* (1987) 20 IR 420.

[65] The claims did not extend to registered nurses employed by the Australian Government in Victoria.

[66] (1986) 13 IR 108.

[67] *National Wage and Equal Pay Case* (1972) 147 CAR 172 p. 179–180 per Moore J, (Acting President) Robinson J, Coldham J Deputy Presidents, Taylor Public Service Arbitrator and Brack Commissioner, 15 December 1972.

[68] Ibid at p. 113.

[69] (1987) 20 IR 420.

[70] The Commission made no finding as to whether the work value principle had been satisfied in relation to the work of nurses at the Repatriation General Hospital, Greenslopes Queensland because no evidence was presented in respect of those nurses: (1987) 20 IR 420 at p. 443.

[71] (1987) 20 IR 420 at pp. 446–447.

[72] *National Wage Case 1991*, (1991) 39 IR 127.

[73] See Rafferty F (1994), 'Equal pay: The evolutionary process 1984–1994', *Journal of Industrial Relations* Vol. 36, No. 4 pp. 451–467.

[74] As it transpired, in *Victoria v Commonwealth* (1996) 187 CLR 416 the High Court upheld the validity of Division 2 under both the external affairs *and* conciliation and arbitration powers.

[75] Smith, M. (2009), 'Gender pay equity reform in Australia: What is the way forward?', *Australian Bulletin of Labour*, vol. 35, no. 4, pp. 658; Smith, M. (2010), 'Statement by Meg Smith in the matter of the application by the Australian Municipal, Administrative, Clerical and Services Union and others for an equal remuneration order in the social and community services industry', Fair Work Australia no. C2010/3131, p. 11.

[76] Dale et al., *Pay equity: how to address the gender pay gap*, A research report for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, Melbourne, February 2005 (URCOT 2005), pp. 144–147.

[77] Smith 2010: 16; URCOT 2005: 148.

[78] Smith 2010: 14–15; Smith, M. (2009), pp. 659–660.

[79] Smith 2009: p. 658; Smith, M. (2010).

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

[81] (1998) 94 IR 129 at para 137.

[82] Ibid at para 159.

[83] (1995) 61 IR 236.

[84] (1998) 94 IR 129 at para 159.

[85] Ibid at para 159.

[86] Ibid at para 160.

[87] Ibid at para 161.

[88] Ibid at para 165.

[89] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* Print Q1002, 19 May 1998 at paras 14–18.

[90] (1999) 97 IR 374.

[91] (1999) 97 IR 374 at paras 23–26 and 31.

[92] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (Australian Industrial Relations Commission, Print R5199, 26 May 1999).

[93] Ibid at para 20.

[94] Ibid at para 28.

[95] See *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (Australian Industrial Relations Commission, Print R5856, 10 June 1999).

[96] URCOT (2005), p. 144.

[97] PR914868, 1 March 2002.

[98] *Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor* (2002) 115 IR 353.

[99] Ibid at para 23.

[100] The WR Act, s.222(1)(a).

[101] Workplace Relations Amendment (Work Choices) Bill 2005, Explanatory Memorandum, at 2031.

[102] Smith, M. (2009), p. 15.

[103] (2008) 172 IR 119 at p. 194.

[104] (2009) 183 IR 1 at 11.

[105] NSW IR Act s.3(f).

[106] NSW IR Act ss.19, 21 and 23.

[107] Glynn J. (1998), '*Pay Equity Inquiry – Report to the Minister*', NSW Government Printer, Sydney, at Volume 1 pp. 45–46.

[108] Section 51 provides that a Full Bench of the Commission may, if satisfied that it is consistent with the objects of this Act and that there are good reasons for doing so, make a State decision setting principles or provisions for the purposes of awards and other matters under this Act.

[109] *Re Equal Remuneration Principle* (2000) 97 IR 177.

[110] State *Equal Pay Case* [1973] AR 425.

[111] *Re Equal Remuneration Principle* (2000) 97 IR 177.

[112] *Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle* (2002) 111 IR 48; *Re Miscellaneous Workers' Kindergartens and Child Care Centres etc. (State) Award* (2006) 150 IR 290.

[113] Fisher, G. (2001) *Worth Valuing: A report of the Pay Equity Inquiry*, QIRC at p. 13.

[114] Ibid at p. 5.

[115] Re Equal Remuneration Principles (2002) 114 IR 305.

[116] See *LHMU v The Australian Dental Association (Queensland Branch) Union of Employers* [2005] QIRComm 139; *Child Care Industry Award – State 2003* [2006] QIRComm 72*; LHMU v Children's Services Employers Association* [2006] QIRComm 50; *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* [2009] QIRComm 33; *AWU v Queensland Community Services Employers Association Inc.* [2009] QIRComm 69.

[117] Tasmania Department of Premier and Cabinet (2000), Annual report of the Department of Premier and Cabinet 1999–2000, Department of Premier and Cabinet, Hobart, 47–48.

[118] *State Wage Case July 1999* T8413/1999 T8483/1999 (Tasmanian Industrial Commission, 6 July 2000).

[119] WA IR Act, s.6(ac); s. 50A(3)(vii).

[120] *State Wage Order* [2014] WAIRComm 485 (16 June 2014), Schedule 2 (10.1)

[121] SA IR Act, s.1(n) , s.69(2), s.90A.

[122] See *Industrial Relations (Commonwealth Powers) Act 2009 (NSW)*; *Fair Work (Commonwealth Powers) Act 2009* (SA) and *Statutes Amendment (National Industrial Relations System) Act 2009* (Tas); *Fair Work (Commonwealth Powers) Act 2009* (Vic).

[123] The Health Services Union, the Australian Workers' Union of Employees (Queensland), United Voice and the Australian Education Union.

[124] *Queensland Community Services and Crisis Assistance Award* [2009] QIRComm33 at p. 32.

[125] *Queensland Community Services and Crisis Assistance Award – State 2008*.

[126] *Re Equal Remuneration Case* (2011) 208 IR 345.

[127] Ibid at p. 227.

[128] Ibid at pp. 233–234.

[129] Ibid at p. 232.

[130] Ibid at p. 233.

[131] Ibid at p. 252, 266.

[132] Ibid at p. 248–249.

[133] Ibid at p. 277.

[134] Ibid at p. 279.

[135] Ibid at p. 282.

[136] Ibid at p. 285.

[137] Ibid at p. 291.

[138] Ibid at para 289.

[139] *Re Equal Remuneration Case* (2012) 208 IR 446.

[140] Joint submission of Applicants and the Australian Government, 17 November 2011, para 2.23.

[141] *Re Equal Remuneration Case* (2012) 208 IR 446 at para 58.

[142] Ibid at p. 63.

[143] Ibid at p. 63.

[144] Ibid at p. 63.

[145] Ibid at pp. 64–65.

[146] Ibid at p. 84.

[147] Ibid at p. 122.

[148] Ibid at p. 96.

[149] Ibid at p. 99.

[150] Ibid at p. 86.

[151] Ibid at p. 112.

[152] Ibid at pp. 119–120.

[153] Ibid at p. 119.

[154] Layton et al at p. 104.

[155] (1990) 169 CLR 245 at [269]. Also see *R v Moore; ex parte Australian Telephone and Phonogram Officers' Association* [1982] HCA 5; (1982) 148 CLR 600 (11 February 1982).

[156] *Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers*, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C.

[157] (2003) 127 IR 205.

[158] (2003) 127 IR 205 at para 48. Also see *Re Furnishing Industry Association of Australia (Queensland) Ltd Union of Employers*, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C.

[159] The same is true in relation to any 'old' awards, agreements or pay scales that remain in effect from previous legislation: *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Schedule 10 item 3.

[160] See: Commonwealth submission dated 23 May 2014 at p. 3, paras 7–8; Ai Group submission dated 31 March 2014 at pp. 3–4; ABL submission dated 4 April 2014 at p. 11, para 42; AFEI submission dated 31 March 2014 at p. 3 paras 10-11; Transcript of proceedings, 22 April 2014 at PN1079 and PN1150.

[161] *Re McComb* [1999] 3 VR 485.

[162] FW Act, s.300.

[163] *Waugh v Kippen* (1986) 160 CLR 156 at para 164. Also see *X v Commonwealth* (1999) 200 CLR 177 at para 146 per Kirby J.

[164] *Bull v Attorney General (NSW)* (1913) 17 CLR 370 at para 384.

[165] See *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638; and *ADCO Constructions Pty Ltd v* Goudappel [2014] HCA 18 at para 29 per French CJ, Crennan, Kiefel and Keane JJ.

[166] (1997) 191 CLR 1 at 12.

[167] Section 3 only includes a general statement in respect of Australia's international labour obligations:

> 'Section 3 The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations;…' (emphasis added)

[168] HR Pay Equity Inquiry report at paragraphs 5.1–5.81 and recommendations 1–4.

[169] (2011) 208 IR 345 at para 234.

[170] (2011) 208 IR 345 at para 226.

[171] Fair Work Bill 2008, *Explanatory Memorandum* at paras 1191–1192.

[172] (2005) 221 CLR 568 at 12–13.

[173] 218 CLR 216 at para 103..

[174] *Bowker, Coombe and Zwarts v DP World and Ors* (2014) 221 CLR 568 at paras 12–13.

[175] See s.33(2A) of the *Acts Interpretation Act 1901* (Cth).

[176] Macdonald & Charlesworth 2013: 581–583.

[177] 21.4 per cent of females and 16.1 per cent of males were award reliant as at May 2014: ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No. 6306.0.

[178] [2015] FWCFB 3500 at paras 492–493.

[179] *R v Australian Broadcasting Tribunal: Ex parte 2HD Pty Limited* (1979) 144 CLR 45 at 49; *Bowling v General Motors-Holden's Pty Ltd* (1980) 50 FLR 79 at 94; *Liddell* at 465 and 473.

[180] *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at 579; *Bowling v General Motors Holden Ltd* (1980) 33 ALR 297 at p. 304).

[181] (2011) 208 IR 345 at 273–274.

[182] The practical impediments to bargaining faced by small businesses are discussed in the *4 yearly review of modern awards – Annual Leave* decision [2015] FWCFB 3406 at paras 287–301.

[183] We note that a number of employer parties in the proceedings relied on the decision of Vice President Watson in *SACS Case No. 2* and in particular his Honour's observation at para 119 that:

> 'The consequences of this are clear. If the claim in this matter is granted, it is inevitable that there will be very little or no enterprise bargaining in the entire SACS industry for very many years, probably decades. To selectively extract an entire industry from the enterprise bargaining legislative framework is a change of mammoth proportions. It is significant enough for the SACS industry alone. The precedent it creates for many other industries who cannot afford to pay significantly above the award and are female dominated highlights the need for great caution. It is not an overstatement to suggest that the future status of enterprise bargaining in this and other industries with similar attributes is at stake.'
>
> In reply to a question on notice the Commonwealth confirmed that no evidence was tendered by any party in the SACS proceedings that supported the finding set out above.

[184] Ai Group, further submissions in reply, 23 May 2014 at paras 13 and 14.

[185] See *Norbis v Norbis* (1986) 161 CLR 513 at 533 per Wilson and Dawson JJ and 537 per Brennan J.

[186] Submissions in reply of the New South Wales Minister for Industrial Relations (Intervening), 9 April 2014, para 51.

[187] See SACS No 1 Decision, (2011) 208 IR 345 at para 256; Report at p.153.

[188] Ai Group submission in reply, 14 May 2014 at paras 17–18.

[189] ACCI and others submission on the legislative and conceptual framework, 24 February 2014 at para 162.

[190] Ai Group submission in reply, 14 May 2014 at para 17.

[191] Commonwealth submission at para 58.

[192] *Explanatory Memorandum* for the Fair Work Bill 2008 at para 1196.

[193] Ai Group further submission 15 May 2014 at para 11.

[194] IEUA submission, 24 February 2014 at para 88.

[195] ACCI and others submission on the legislative and conceptual framework 24 Feb 2014 at para 114.

[196] Ai Group submission in reply 14 May 2014 at para 5.

[197](1932) 47 CLR 1 at p. 7.

[198] (1949) 78 CLR 529 at p. 550.

[199] ACCI and others submission, 24 February 2014 at para 141.

[200] (1997) 73 IR 311.

[201] Ibid at para 317.

[202] IEUA, 24 February 2014 at para 9.

[203] Ibid at para 10.

[204] Layton et al. report at p. 118.

[205] (2000) 97 IR 177.

[206] Ibid at para 154.

[207] See s.406 of the NSW IR Act.

[208] (2002) 111 IR 48.

[209] (2006) 150 IR 290.

[210] *Equal Remuneration Principle* (2002) 114 IR 305.

[211] See *LHMU v The Australian Dental Association (Queensland Branch) Union of Employers* [2005] QIRComm 139; *Child Care Industry Award – State 2003* [2006] QIRComm 72*; LHMU v Children's Services Employers Association* [2006] QIRComm 50; *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* [2009] QIRComm 33; *AWU v Queensland Community Services Employers Association Inc.* [2009] QIRComm 69.

[212] (2005) 145 IR 120 at para 25.

[213] (1997) 78 IR 78 at 81.

[214] See e.g. *Safety Net Review—Wages June 2005* (2005) 142 IR 1 at 125; *Australian Liquor Hospitality and Miscellaneous Workers Union re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998—re: Wage rates* [2005] AIRC 28 at [186]–[190]; *Re Public Hospital Nurses(State)Award (No. 4)* (2003) 131 IR 17 at [16]–[22].

[215] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* Print Q1002, 19 May 1998.

[216] Glynn J. (1998), '*Pay Equity Inquiry – Report to the Minister*', NSW Government Printer, Sydney, at Volume 2, p.129.

[217] *Re Metalliferous Mines, &c., General (State) Award* [1928] AR (NSW) 466 at 471.

[218] *Explanatory Memorandum*, Fair Work Bill 2008 (Cth), 1191.

[219] United Voice and AEU submissions, 14 May 2014 at para 4.

[220] 'Smith, M. and Stewart, A. (2014) Equal remuneration and the Social and Community Services case: Progress or diversion on the road to pay equity?, Australian Journal of Labour Law 27(31): 31–56.

[221] Ibid at 31–56.

[222] (2011) 208 IR 345 at 234.

[223] Ibid at para 286.

[224] (2012) 208 IR 446 at 60–66.

[225] Ibid at para 103.

[226] (2009) 239 CLR 27 at para 47.

[227] *Explanatory Memorandum*, Fair Work Bill 2008 (Cth), 1192.

[228] *Equal Pay Act 1970* (UK), s.1(3); 29 US Code § 206(d)(1).

[229] [1930] VLR 25 at 30; also see *O'Sullivan v Barton* [1947] SASR 4; *CFMEU v Hadgkiss* (2007) 169 FCR 151; *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFB 2042 at paras 95–98.

[230] (2002) 115 IR 353.

[231] (1994) 56 IR 447.

[232] (1995) 60 IR 68.

[233] (1995) 58 IR 40.

[234] [1996] IRCA 614 (6 December 1996).

[235] See generally: Star D. and R. Catanzariti, 'Just what is an Adequate Alternative Remedy? (1995) 8 Australian Journal of Labour Law 169; and Stewart A, 'And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal' (1995) 1 Flinders Journal of Law Reform 85.

[236] (1994) 55 IR 326.

[237] Ibid at 329.

[238] Ibid at 330.

[239] (1994) 56 IR 447 at 457.

[240] Ibid at 458–459.

[241] Ibid at 475.

[242] Ibid at 458–462.

[243] Ibid at 464. Also see Gray J at 472–473.

[244] Ibid at 460–462.

[245] Ibid at 475–476.

[246] Ibid at 455–456.

[247] Ibid at 476.

[248] Australian Federation of Employers and Industries Submissions, 24 February 2014 at [64] and Australian Industry Group, Submission on the Legislative and Conceptual Framework relevant to the equal remuneration proceedings, 24 February 2014, at p. 15.

[249] Commonwealth of Australia, Submissions for the Commonwealth of Australia in response to questions raised by the Full Bench of the Fair Work Commission on 22 April 2014, 6 May 2014 at para 10.

[250] ACCI and others submission, 24 February 2014 at p. 3, para 8.

[251] IEUA submission, 31 March 2014 at pp.4–5, para 15.

[252] CCIWA submission, 31 March 2014 at p. 1, para 3.

[253] Commonwealth submission, 24 February 2014 at p. 5, para 26.

[254] AEU and United Voice submission, 31 March 2014 at pp. 12–13, para 56.

[255] (2011) 208 IR 345 at [289]

[256] As noted by Aickin J in *R v Moore; Ex parte Australia Telephone and Phonogram Officers' Association* (*Moore*) (1982) 148 CLR 600 at 627, and see Gibbs CJ with whom Stephen J agreed) at 611–614. Also see *R v Kelly; Ex parte Australian Railways Union* (1953) 89 CLR 461 at 475 per Dixon CJ which was cited by Gibbs CJ in *Moore*, at 611, in support of the proposition that the Commission 'may in the course of settling particular disputes formulate a principle and consistently apply it to cases falling within it'.

[257] AEU and United Voice submission, 24 February 2014 at para 98.

[258] AEU and United Voice submission, 24 February 2014 at para 98; para 109.

[259] ACA et al. submission, 25 February 2014 at paras 6–7.

[260] IEUA submission, 14 November 2013 at para 3. IEUA submission, 24 February 2014 at para 11; para 37; para 107.

[261] ACCI and others submission, 24 February 2014 at paras 9–11.

[262] Ai Group submission, 24 February 2014 at p. 2.

[263] CCIWA submission, 31 March 2014 at para 3.

[264] Victorian Government submission, 24 February 2014 at para 85.

[265] New South Wales Government submission, 9 April 2014 at paras 53–54.

[266] Commonwealth submission, 23 May 2014 at paras 5–6.

LIST OF CASES

4 yearly review of modern awards – Annual Leave decision [2015] FWCFB 3406

ADCO Constructions Pty Ltd v Goudappel (2014) 254 CLR 1

Alcan (NT) Alumina Pty Ltd v Commissioner for Territory Revenue (Northern Territory) (2009) 239 CLR 27

Allianz Australia Insurance Limited v GSF Australia Pty Ltd (2005) 221 CLR 568

Annual Wage Review 2013-14 [2014] FWCFB 3500

Annual Wage Review 2014-15 [2015] FWCFB 3500

Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1

Australasian Meat Industry Employees Union v Meat & Allied Trades Federation of Australia (Equal Pay Case) (1969) 127 CAR 1142

Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc (2009) 192 QGIG 46

Automotive, Food, Metals Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd (1999) 97 IR 374

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd, Australian Industrial Relations Commission, Print R5199, 26 May 1999

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd, Australian Industrial Relations Commission, Print R5856, 10 June 1999

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Gunn and Taylor, AIRC PR914868, 1 March 2002

Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor (2002) 115 IR 353

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

Australian Liquor, Hospitality and Miscellaneous Union, re Child Care Industry (Australian Capital Territory) Award 1998, Australian Industrial Relations Commission, Print Q1002, 19 May 1998

Bowker, Coombe and Zwarts v DP World and Ors [2014] FWCFB 9227

Bowling v General Motors Holden Ltd (1980) 33 ALR 297

Bull v Attorney General (NSW) (1913) 17 CLR 370

Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (2003) 127 IR 205

Coal and Allied Operations Pty Ltd v AFMEPKIU (1997) 73 IR 311

Construction, Forestry, Mining and Energy Union v Hadgkiss (2007) 169 FCR 151

Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd (2013) 248 CLR 619

Child Care Industry Award – State 2003 [2006] QIRComm 72

Children's Services (Victoria) Award 1998 - re: Wage rates [2005] AIRC 28

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union (2012) 219 IR 139

Commissioner of Stamps v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453

Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle (2002) 111 IR 48

Elias v Federal Commissioner of Taxation (2002) 123 FCR 499

Fryar v Systems Services Pty Ltd (1995) 60 IR 68

Kelly v the Queen (2004) 218 CLR 216

Khoury v Government Insurance Office (NSW) (1984) 165 CLR 622

IW v the City of Perth (1997) 191 CLR 1

Liddell v Lembke t/a Cheryls Unisex Salon; Gibson v Bosmac Pty Ltd (1994) 56 IR 447

Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch) (2005) 180 QGIG 187

Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Queensland Union of Employers (2006) 181 QGIG 568 (interim decision)

Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association (2006) 182 QGIG 318

Maggs v Comptroller-General of Customs (1995) 58 IR 40

Mills v Meeking (1990) 169 CLR 214

Morgan v Konway Express Pty Ltd [1996] IRCA 614 (6 December 1996)

Municipal Officers' Association of Australia v Lancaster (1981) 37 ALR 559

National Retail Association v Fair Work Commission (2014) 225 FCR 154

National Wage and Equal Pay Case 1972 (1972) 147 CAR 172

National Wage Case 1967 (1967) 118 CAR 655

National Wage Case 1974 *(1974)* 157 CAR 293

National Wage Case 1991 (1991) 39 IR 127

Nestle Australia Ltd v Commissioner of Taxation (Cth) (1987) 16 FCR 167

Nguyen v Nguyen (1990) 169 CLR 245

Norbis v Norbis (In the Marriage of Norbis) (1986) 161 CLR 513

Oliveri v Australian Industrial Relations Commission (2005) 145 IR 120

One.Tel Limited (in liquidation) v John David Rich and Ors (2005) 190 FLR 443

O'Sullivan v Barton [1947] SASR 4

Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FWCFB 2042

Prior v Sherwood (1906) 3 CLR 1054

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Queensland Community Services and Crisis Assistance Award – State 2008 [2009] QIRComm 33

Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd (2009) 191 QGIG 19

Australian Municipal, Administrative, Clerical and Services Union v Australian Business Industrial (Re Equal Remuneration Case) (2012) 208 IR 446

Re Equal Remuneration Principle (2000) 97 IR 177

Re Equal Remuneration Principles (2002) 114 IR 305

Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers, Print Q9115, 27 November 1998

Re Metalliferous Mines, &c., General (State) Award [1928] AR (NSW) 466

Re Miscellaneous Workers' Kindergartens and Child Care Centres etc. (State) Award (2006) 150 IR 290

R v Australian Broadcasting Tribunal: Ex parte 2HD Pty Limited (1979) 144 CLR 45

R v Kelly; Ex parte Australian Railways Union (1953) 89 CLR 461

R v L (1994) 49 FCR 534

R v Moore; ex parte Australian Telephone and Phonogram Officers' Association (1982) 148 CLR 600

R v Refshauge (1976) 11 ALR 471

R v Schildkamp [1971] AC 1

R v Wallis; Ex parte Employers Association of Wool Selling Brokers (1949) 78 CLR 529

Re Australian Municipal, Administrative, Clerical & Services Union (Re Equal Remuneration Case) (2011) 208 IR 345

Re McComb [1999] 3 VR 485

Re The News Corp Ltd (1987) 15 FCR 227

Re Private Hospitals and Doctors Nurses (ACT) Award 1972 (1986) 13 IR 108

Re Private Hospitals and Doctors Nurses (ACT) Award 1972 (1987) 20 IR 420

Re Public Hospital Nurses (State)Award (No. 4) (2003) 131 IR 17

Rofin Australia Pty Ltd v Newton (1997) 78 IR 78

Ross v R (1979) 141 CLR 432

Safety Net Review – Wages, June 2005 (2005) 142 IR 1

Scott v Commercial Hotel Merbein Pty Ltd [1930] VLR 25

Shop, Distributive and Allied Employees Association v National Retail Association and Another (No. 2) (2012) 205 FCR 227
Shuster v Minister for Immigration and Citizenship (2008) 167 FCR 186
Solution 6 Holdings Ltd v Industrial Relations Commission of NSW (2004) 208 ALR 328
State Wage Case July 1999 T8413/1999 T8483/1999 (Tasmanian Industrial Commission, 6 July 2000)
State Wage Order [2014] WAIRComm 485 (16 June 2014)
Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 531
Third Safety Net Adjustment and Section 150A Review (1995) 61 IR 236
Transport Workers Union v School Bus Contractors Pty Ltd (2011) 201 IR 327
Victoria v Commonwealth (1996) 187 CLR 416
Wage Setting Decision July 2008 (2008) 172 IR 119
Wage Setting Decision July 2009 (2009) 183 IR 1
Waugh v Kippen (1986) 160 CLR 156
Wylie v Carbide International Pty Ltd (1994) 55 IR 326
Wong v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 204 ALR 722
X v Commonwealth (1999) 200 CLR 177

Legislation and related instruments

29 US Code § 206
Acts Interpretation Act 1901 (Cth)
Equal Pay Act 1970 (UK)
Explanatory Memorandum, *Fair Work Bill 2008* (Cth)
Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005*
Fair Work Act 2009 (Cth)
Fair Work (Commonwealth Powers) Act 2009 (SA)
Fair Work (Commonwealth Powers) Act 2009 (Vic)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Industrial Relations Act 1996 (NSW)
Industrial Relations Act 1979 (WA)
Industrial Relations (Commonwealth Powers) Act 2009 (NSW)
Queensland Community Services and Crisis Assistance Award - State 2008
Statutes Amendment (National Industrial Relations System) Act 2009 (Tas)
Workplace Relations Act 1996 (Cth)

BIBLIOGRAPHY

Journals

Baird, M. & Williamson, S. (2009), 'Women, work and industrial relations in 2008', *Journal of Industrial Relations*, vol. 51, no. 3, pp331-346

Bennett, L. (1988), 'Equal pay and comparable worth and the Australian Conciliation and Arbitration Commission', *Journal of Industrial Relations*, vol.30, no.4, pp.533-545

Borland J (1999), 'Earnings inequality in Australia: Changes, causes and consequences', *Economic Record* vol. 75, pp. 177-202

Dale et al. (2005), *Pay equity: how to address the gender pay gap*, A research report for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, Melbourne, February (URCOT 2005)

Eastough K and Miller P (2004), 'The gender pay gap in paid and self-employment in Australia', *Australian Economic Papers*, September, pp. 257-276

Fisher, G. (2001) *Worth Valuing: A report of the Pay Equity Inquiry*, QIRC

Glynn, L. (1998), *The pay equity inquiry – Report to the Minister*, NSW Government Printer, Sydney, p.129

Gregory, R. (1999), 'Labour market institutions and the gender pay ratio', *Australian Economic Review*, vol. 32, p. 277

Gregory, R. & Duncan, R. (1981) 'Segmented labor market theories and the Australian experience of equal pay for women', *Journal of Post Keynesian Economics*, vol.2, Spring, p. 426

Gunderson, M. (1994), *Comparable worth and gender discrimination: An international perspective*, International Labour Office, Geneva.

Kidd, M.P. & Meng, X. (1995), *Trends in the Australian gender wage differential over the 1980s: Some evidence on the effectiveness of legislative reform*, Centre for Economic Policy Research Discussion Paper no.321, Australian National University Centre for Economic Policy Research, Canberra, p. 25

Layton, R., Smith, M. & Stewart, A. (2013), A Report for the Pay Equity Unit of the Fair Work Commission, *Equal Remuneration under the Fair Work Act 2009.*

Macdonald, F. & Charlesworth, S. (2013), 'Equal Pay under the *Fair Work Act 2009* (Cth): Mainstream or marginalised?' *University of New South Wales Law Journal*, vol. 36, no. 2, p.563

Pay Equity Unit, *Proposal for facilitated consultation on data for C2013/5139*, 19 September 2013

Preseton, A. & Whitehouse, G. (2004), 'Gender differences in occupation of employment within Australia', *Australian Journal of Labour Economics*, vol. 7, no. 3, pp. 311-12

Rafferty, F. (1994), 'Equal pay: The evolutionary process 1984–1994', *Journal of Industrial Relations* vol 36, no. 4 pp. 451-467

Romeyn, J., Archer, S-K. & Leung, E. (2011), *Review of equal remuneration principles*, Research Report 5/2011, Fair Work Australia, Melbourne.

Scutt, J. (1992), 'Inequity before the law: Gender, arbitration and wages', in K. Saunders & R. Evans (eds.), *Gender Relations in Australia*: *Domination and negotiation*, Harcourt Brace, Sydney, p. 282

Short, C. (1986), 'Equal pay, what happened?', *Journal of Industrial Relations*, vol. 28, no.3, pp. 315-335

Smith, M. (2009), 'Gender pay equity reform in Australia: What in the way forward?', *Australian Bulletin of Labour*, vol. 35, no. 4, pp. 652-670

Smith, M. (2010), 'Statement by Meg Smith in the matter of the application by the Australian Municipal, Administrative, Clerical and Services Union and others for an equal remuneration order in the social and community services industry', Fair Work Australia no. C2010/3131

Smith M (2011), 'Gender equity: The Commission's legacy and the challenge for Fair Work Australia', *Journal of Industrial Relations* vol. 53, no.5, pp647-661

Smith, M. & Lyons, M. (2007), '2020 vision or 1920's myopia? Recent developments in gender pay equity in Australia', *International Employment Relations Review*, vol. 13, no. 2

Smith, M. and Stewart, A. (2014) Equal remuneration and the Social and Community Services case: Progress or diversion on the road to pay equity?, *Australian Journal of Labour Law* vol. 27, no.31

Star D. and R. Catanzariti (1995), 'Just what is an Adequate Alternative Remedy? 8 *Australian Journal of Labour Law* 169

Stewart A (1995), 'And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal' 1 *Flinders Journal of Law Reform* 85

Thornton, M (1981), '(Un)equal pay for work of equal value', *Journal of Industrial Relations*, vol.23, no.4, pp. 466-481

Whitehouse, G. (2001), 'Recent trends in pay equity: Beyond the aggregate statistics', *Journal of Industrial Relations*, vol.43, no.1, pp.66-78

Government and other reports

ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No. 6306.0

ABS, *Gender Indicators, Australia, August 2015*, Catalogue 4125.0.

Commonwealth (2009), *Making it Fair: Inquiry into pay equity and associated issues related to increasing female participation in the workforce*, House of Representatives Standing Committee on Employment and Workplace Relations, November.

Human Rights and Equal Opportunity Commission (HREOC) (2007), *It's about time: Women, men, work and family*, HREOC, Sydney

ILO (2012), '*Giving Globalisation a Human Face: General Survey on the Fundamental Conventions concerning rights at* work *in light of the ILO Declaration for Social Justice for a Fair Globalisation 2008*', ILC. 101/111/1B.

Tasmania (2000), *Annual report of the Department of Premier and Cabinet 1999–2000*, Department of Premier and Cabinet, Hobart.

Workplace Gender Equality Agency (2015), *Australia's gender equality scorecard: Key findings from the Workplace Gender Equality Agency's 2014–15 reporting data*, Australian Government, November.

International conventions and recommendations

Convention concerning Discrimination in Respect of Employment and Occupation, opened for signatures 25 June 1958, ILO 1958 (No. 111) (entered into force 15 June 1973).

Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 10 December 1983)

Equal Remuneration Convention, opened for signature 29 June 1951, ILO 1951 (No. 100) (entered into force 10 December 1974)

Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951 (ILO 90)

Recommendation concerning Discrimination in Respect of Employment and Occupation, 1958 (ILO 111)

Parties submissions

Australian Chamber of Commerce and Industry et al., *Submission on the legislative and conceptual framework*, 24 February 2014

Australian Childcare Alliance, et al., *Submission*, 25 February 2014

Australian Federation of Employers and Industries, *Submission*, 24 February 2014

Australian Industry Group, *Further submissions in reply*, 23 May 2014

Australian Industry Group, *Submissions in reply*, 14 May 2014

Australian Industry Group, *Submissions of the legislative and conceptual Framework relevant to the equal remuneration proceedings*, 24 February 2014

Chamber of Commerce and Industry of Western Australia, *Submission in reply regarding the legislative and conceptual framework*, 31 March 2014

Commonwealth of Australia, *Further submissions in reply*, 23 May 2014

Commonwealth of Australia, *Submissions for the Commonwealth of Australia in response to questions raised by the Full Bench of the Fair Work Commission on 22 April 2014*, 6 May 2014

Commonwealth of Australia, *Submission on the legislative and conceptual framework*, 24 February 2014

Independent Education Union of Australia, *Amended application by the Independent Education Union of Australia*, 28 November 2013

Independent Education Union of Australia, *Submission*, 24 February 2014

Independent Education Union of Australia, *Submission*, 14 November 2013

Independent Education Union of Australia, *Submissions in reply*, 31 March 2014

New South Wales Government, *Submissions in reply*, 9 April 2014

United Voice and the Australian Education Union, *Further amended application by United Voice and the Australian Education Union*, 27 November 2013

United Voice and the Australian Education Union, *Further submissions in reply*, 14 May 2014

United Voice and the Australian Education Union, *Submissions in reply*, 31 March 2014

United Voice and the Australian Education Union, *Preliminary issues submission*, 24 February 2014

United Voice, *Amended application by United Voice*, 3 September 2015

Victorian Government, *Submission on the legislative and conceptual framework*, 24 February 2014

ANNEXURE 1—Final list of legal and conceptual issues parties were directed to address

This document is an annotated version of the extract of Attachment A to Directions issued by the Full Bench on 20 December 2013.

Issues to be Addressed

Evaluating Gender Based Undervaluation

1. *Whether it is appropriate for the Fair Work Commission to develop guiding principles for the application of Part 2–7 of the Fair Work Act 2009 (Cth) (The Act) and, if so, the content of such principles?*

   At this time a summary of the matters determined in this decision will be sufficient to inform this and future Part 2–7 applications. We will revisit the issue of whether to develop an equal pay principle and, if so, its content, after we have dealt with the merits of the current application.

   (See [335]–[366])

2. *What is meant by the term "remuneration" in s. 302 of the Act?*

   'Remuneration' should be interpreted according to its ordinary meaning, so that it is not confined to wages or salary and includes all other monetary and non-monetary compensation paid as consideration for service under an employment contract

   (See [275]–[276])

3. *Should the Commission take a different approach to Part 2–7 of the Act dependent upon whether the matter is an intra-enterprise claim, an inter-enterprise claim or an inter-industry claim?*

   It is likely that the task of determining whether s 302(5) is satisfied will be easier with comparators that are small in terms of the number of employees in each, are capable of precise definition, and in which employees perform the same or similar work under the same or similar conditions, than with comparators that are large, diverse and involve significantly different work under a range of different conditions.

   But in principle there is nothing preventing the comparator groups consisting of large numbers of persons and/or persons whose remuneration is dependent on particular modern awards

   (See [290]).

4. *Does Part 2–7 of the Act require the Commission to make a finding that the remuneration in a relevant modern award causes female employees covered by that modern award to be paid differently because of gender from male employees performing work of equal or comparable value covered by other modern awards?*

   In order for the jurisdictional prerequisite for the making of an equal remuneration order in s 302(5) to be met, the Commission must be satisfied that an employee or group of employees of a particular gender to whom an equal remuneration order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. This is essentially a comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees

   There is nothing in Part 2–7 which suggests that it is concerned only with remuneration produced by modern awards

   (See [276] and [289]).

5. *Are comparisons within and between occupations and industries required in order to establish undervaluation of work on a gender basis?*

   Not directly addressed but see the answers to question 4 and question 9.

6. *Does Part 2–7 of the Act require the establishment of a reliable male benchmark or comparator to make a finding that female employees are being paid differently because of gender from male employees performing work of equal or comparable value?*

   Yes. See the answer to question 4.

7. *If the answer to question 6 is yes, on what basis should such a reliable male benchmark or comparator be identified?*

   The means by which equal or comparable value may be established will depend on the groups of male and female workers being compared.

   It is not necessary for the purpose of this decision to attempt to prescribe or establish guidelines in respect of how an appropriate comparator might be identified. It will ultimately be up to an applicant for an equal remuneration order to bring a case based on an appropriate comparator which permits the Commission to be satisfied that the jurisdictional prerequisite in s 302(5) is met

   (See [289] and [290]).

8. *If the answer to question 6 is no, what principles should the Commission adopt to make a finding that female employees are being paid differently from male employees because of gender while performing work of equal or comparable value?*

   The answer to question 6 is yes so this issue does not arise.

9. *On what basis should the Commission assess the comparison of jobs within an enterprise or between different enterprises or industries in order to determine if the work is of equal or comparable value?*

   The expression 'work of equal or comparable value' refers to equality or comparability in 'work value' in accordance with the established industrial conception of that term, as developed in decisions of this Commission's predecessor tribunals as well as by the various State industrial tribunals. Such decisions point to the nature of the work, skill and responsibility required and the conditions under which the work is performed as being the principal criteria of work value. Those criteria are relevant in determining whether the work being compared is of equal or comparative value. Work value enquiries have been characterised by the exercise of broad judgment. Depending upon the specific characteristics of the work under consideration, it may be appropriate to apply different or additional criteria in order to access equality or comparability in value. Job evaluation techniques developed in the private sector may also assist in comparing the value of the work of different individuals or groups

   (See [279]–[280]).

10. *On what basis should factors not related to gender be identified and eliminated from any comparison?*

    Under s 302(5), once the Commission has concluded that the employees or groups of employees being compared are performing work of equal, or comparable value, the Commission only then has to be satisfied that 'there is not equal remuneration' in order to establish the requisite jurisdictional fact. There is no warrant in the text of the section for the imposition of a further requirement to dissect any difference in remuneration, to determine the causes of the various elements of the difference, and to dismiss the application if the difference cannot be concluded to be 'gender related'. To do so is tantamount to searching for a sex discrimination basis for the difference in remuneration and there is no sex discrimination requirement in Part 2–7

    (See [306]).

11. *Can the undervaluation of work be demonstrated by reference to factors or 'indicia' including the following:*

i. 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;

ii. whether there has been some characterisation or labelling of the work as "female";

iii. whether there has been some underrating or undervaluation of the skills of female employees;

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

v. 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; and

vi. 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.

We do not accept that s 302(5) could be satisfied without a comparative exercise of the type referred to in response to question 4. Section 302(5) could not be satisfied on the basis that an employee or group of employees of a particular gender are considered not to be remuneration in accordance with what might be considered to be the intrinsic or true value of their work.

There is no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s 156(3) or s 157(2). Those provisions allow the variation of such minimum rare for 'work value reasons', which expression is defined broadly enough in s 156(4) to allow a wide-ranging consideration of contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequality. There is not datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding

(See [290] and [292]).

12. *How should any previous adjustments to predecessor award rates of pay made on the basis of gender undervaluation and/or work value considerations be taken into account in determining whether undervaluation exists or in measuring the extent of any such undervaluation?*

See the answer to question 11.

13. *Is there any limitation on the scope or type of order that might be made under s. 302 to ensure that there is equal remuneration for work of equal or comparable value.*

The power in s.302(1) is expressed in broad terms, the Commission 'may make any order … it considers appropriate'. While the scope of an equal remuneration order cannot extend beyond those in respect of whom an application has been made, the Commission has a broad discretion as to the form of such an order, which may include increases in wages or allowances, variations to bonus schemes, the establishment of new classifications or the variation of job descriptors.

However, there are three important limitations on the power in s.302(1).

(i) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration (s.303)2)).

(ii) Once the Commission is satisfied that there is <u>not</u> equal remuneration for work of equal or comparable value (the jurisdictional fact in s.302(5)) and it decides to exercise its discretion and make an order, then the order must address the unequal remuneration. While the Commission may phase in the effect of its order (s.304) the mandatory direction in s.302(1) means that the order must be such as to *ensure* that there *will be* equal remuneration for work of equal or comparable value upon the full implementation of the order. The Commission does not have a general discretion to set a level of remuneration that the Commission may consider to be appropriate in the circumstances. There is no power to make an order which increases the remuneration of the employee(s) the subject of the application but does not equalise their remuneration to that of the comparator employee(s). A 'discounting' approach which seeks to exclude pay differences which are said not to be caused by sex discrimination or to be gender-related for the purpose of the remedy is not permissible.

(iii) Section 302(1) does not include the power to vary a modern award. Part 2–3 (and Part 2–6 to the extent it deals with modern award minimum wages) of the FW Act constitutes a code for the making and variation of modern awards. It is clear from the legislative context that the making of equal remuneration orders under Part 2–7 is intended to be quite separate from modern awards, which form part of the safety net of minimum terms and conditions under the FW Act.

Orders can be made in favour of a mixed gender applicant group of employees, but only if the orders are made in a particular sequence

(See [218]–[243]).

Discretionary Factors

14. If a case is made out which demonstrates differences in pay because of gender, what factors should be considered by the Commission in exercising its discretion to make an Equal Remuneration Order for increases to wages at a particular level?

There are a range of considerations which may be relevant to the exercise of the discretion to make an equal remuneration order. In the exercise of that discretion the Commission must take into account the matters identified in s.302(4), as well those in s.578 and the objects in s.3. The nature and assessment of such factors will depend on the circumstances of the case. The considerations which may be relevant to the exercise of the discretion include:

(i) the circumstances of the employees to whom the order will apply;

(ii) eliminating gender based discrimination;

(iii) the capacity to pay of the employers to whom the order will apply;

(iv) the effect of any order on the delivery of services to the community;

(v) the effect of any order on a range of economic considerations, including any impact on employment, productivity and growth;

(vi) the effect of any order on the promotion of social inclusion by its impact on female participation in the workforce; and

(vii) the effect of any order on enterprise bargaining.

[Note: These considerations are not listed in order of significance and nor is the list intended to be exhaustive.]

Part 2–7 is not intended to operate as an automatic mechanism for creating comparative wage justice. The general purpose of the provisions is to remedy gender wage inequality and promote pay equity. It follows that in exercising its discretion it would be open for the Commission to take into account the reasons for any difference in remuneration between different gendered employees performing work of equal or comparable value

(See [200]–[212]).

Suitable Alternative Remedy

15. *On what basis should the Commission determine whether an adequate alternative remedy exists to an Equal Remuneration Order within the meaning of s.721 of the Act?*

    Section 721 provides that if the Commission is satisfied that an adequate alternative remedy is available it must not deal with an application for an equal remuneration order. Section 721 is to be construed as follows:

    (i) If the Commission is satisfied that an adequate alternative remedy is available it must not deal with an application for an equal remuneration order. Absent such a state of affairs it must proceed to hear and determine the application. When material is before the Commission that establishes the existence of an adequate alternative remedy it must act on that material, whether or not a party has taken the point. But the Commission is not under a duty to undertake an inquiry of its own motion as to possible alternative remedies before dealing with an application for an equal remuneration order.

    (ii) To be satisfied that the alternative remedy is an 'adequate alternative remedy' the Commission will have to be satisfied that the alternative remedy was commensurate in effect to an application for an equal remuneration order and, in particular, that the alternative remedy 'will ensure equal remuneration for work of equal or comparable value' for the employees to whom the equal remuneration order will apply (s.721(1)(b)).

    (iii) The Commission must satisfy itself about whether there is an adequate alternative remedy at the time the Commission comes to consider the matter and not at some earlier time (such as the time when the application for an equal remuneration order is made).

    (iv) The party who asserts that there is an adequate alternative remedy available to the employees to whom the equal remuneration order will apply bears the burden of persuading the Commission that it should be so satisfied.

    (See [329], [332] and [340]–[344])

16. *Does an adequate alternative remedy within the meaning of s.721 include a modern award, such as the Local Government Industry Award 2010, or an enterprise agreement?*

    No.

It is conceivable that an application to vary modern award minimum wages may constitute an adequate alternative remedy but such a result will depend on the circumstances, including the 'remuneration' of the relevant employees, and accordingly we prefer not to express a concluded view on this issue

(See [344]–[349])

Other issues

17. If the Commission was to make an Equal Remuneration Order should it only apply to the class of female employees for whom the inequity is found?

Orders can be made in favour of a mixed gender application group of employees, but only if the orders are made in a particular sequence

(See [238]–[243]).

18. What is the relationship between the requirement in section 134 for modern awards, together with the National Employment Standards, to provide a fair and relevant minimum safety net of terms and conditions, and the Commission's power to make an Equal Remuneration Order?

The 'modern awards objective' (s 134) has no application to the making of equal remuneration orders. Equal remuneration orders operate quite separately from the regime regulating modern awards. We do not conceive of an equal remuneration order as being *part* of the 'safety net' of minimum terms and conditions under the FW Act

(See [170]–[173] and [213]–[216]).

19. To what extent is the equal remuneration principle referred to in paragraph 134(1)(e) relevant to an application for an Equal Remuneration Order, given that award rates have been set and varied taking into account this element of the modern awards objective?

See the answer for question 18.

20. To what extent is the equal remuneration principle referred to in section 284(1)(d) relevant to an application for an Equal Remuneration Order, given that award rates have been set and varied taking into account this element of the minimum wages objective?

The 'minimum wages objective' has no application to the exercise of the Commission's functions or powers under Part 2–7

(See [173]).

21. *Is the preservation of relativities across the classification structures in different awards relevant when determining an application for an Equal Remuneration Order?*

    While we would not reject the possibility that the making of an equal remuneration order may disturb existing relativities within and between modern awards it is difficult to conceive how such an issue would arise, absent of specific factual context. Further, the power to make an equal remuneration order does not extend to the making of an order varying a modern award

    (see [213]–[216] and [231]–[237]).

22. *To what extent is "work value" relevant to an application for an Equal Remuneration Order?*

    See the answer to question 9.

23. *To what extent is the Act's emphasis on enterprise bargaining relevant to the Commission's discretion to make an Equal Remuneration Order?*

    The considerations which may be relevant to the exercise of the discretion in s 302(1) include the effect of any order on enterprise bargaining.

    While the impact on enterprise bargaining may well be a relevant consideration in most cases it is not appropriate to make any generalised observations about the significance of this issue – it will depend on the context. For example, the history of a particular enterprise, industry or sector may be characterised by an absence of enterprise bargaining. The absence of bargaining may be explicable for a range of reasons, including the predominance of small enterprises in the industry or sector, low levels of unionisation, high employee turnover or the enterprise, industry or sector is heavily reliant on government funding which constrains the capacity to pay. In such circumstances declining to make an equal remuneration order on the basis that it will inhibit the promotion of enterprise bargaining is unlikely to be warranted. The very factors which have impeded enterprise bargaining in the past will presumably, still provide a barrier to bargaining in the enterprise, industry or sector concerned. Hence the making of an equal remuneration order may have no practical impact on enterprise.

    To the extent that a party relied on a particular discretionary consideration it should provide a proper evidentiary basis for its submission. It is not enough to simply assert that an order will have a chilling effect on enterprise bargaining without advancing a proper basis for such a submission

    (See [204] and [207]–[209]).

24. *Does the legislative intent of Part 2–7 of the Act contemplate that an equal remuneration order should be made if it will create unequal remuneration within an enterprise or industry between employees who are in the same classification under the same award and who perform the same duties?*

    Not directly addressed but see the answer to question 17.

ANNEXURE 2—Timetable outlining key events in this process

Date	Event
15 July 2013	Application made by United Voice and the Australian Education Union (Victorian Branch) for an equal remuneration order (C2013/5139)
19 September 2013	Notice issued by the Full Bench providing draft directions and timetable and a proposal for facilitated consultation on data by the Fair Work Commission's Pay Equity Unit
23 September 2013	C2013/5139 application by United Voice and the Australian Education Union (Victorian Branch) amended
24 September 2013	Hearing of oral submissions by the Full Bench on the draft directions and proposal issued on 19 September 2013
8 October 2013	Further directions issued by the Full Bench, including a draft list of issues to be addressed and directions about the Pay Equity Unit's research consultation process
8 October 2013	Application made by Independent Education Union of Australia for an equal remuneration order (C2013/6333)
24 September 2013	Hearing of oral submissions by the Full Bench on the draft directions, timetable and list of issues published on 8 October 2013
27 November 2013	C2013/5139 application by United Voice and the Australian Education Union (Victorian Branch) amended
27 November 2013	Further directions, draft directions and timetable issued by the Full Bench, including revised list of issues to be addressed
28 November 2013	C2013/6333 application by Independent Education Union of Australia amended
20 December 2013	Final directions on legislative and conceptual framework issued by the Full Bench
5 February 2014	Pay Equity Unit conducts research roundtable
28 March 2014	'Data report - preschool and long day care sector' released by Pay Equity Unit
16 April 2014	Draft Working Document—Summary of submissions in relation to identified issues published to Case website
22–23 April 2014	Oral submissions heard by the Full Bench on the legislative and conceptual framework
30 April 2014	Amended directions issued by the Full Bench further to directions in hearings
1–2 May 2014	Submissions in reply to Question on Notice
7 May 2014	(Replacement) amended directions issued by the Full Bench
14 May 2014	Submissions in reply to responses to Question on Notice
23 May 2014	Further submissions in reply
3 September 2015	Amended application by United Voice

ANNEXURE 3—Index of material

Organisation	Document	Date
Australian Chamber of Commerce & Industry, Australian Business Industrial, New South Wales Business Chamber, Tasmanian Chamber of Commerce and Industry, and State and Territory Local Government Associations	Supplementary submissions on the legislative and conceptual framework	23 May 2014
	Submissions in reply to questions on notice by Full Bench	1 May 2014
	Submissions in reply	4 April 2014
	Correspondence	29 March 2014
	Submission on the legislative and conceptual framework	24 February 2014
Australian Chamber of Commerce and Industry, Australian Business Industrial and the Tasmanian Chamber of Commerce and Industry	Submission re preliminary matters	27 September 2013
	Submission re draft amended application	16 September 2013
Australian Childcare Alliance, Australian Childcare Centres Association, Industrial Organisation of Employers and the Creche and Kindergarten Association Ltd	Supplementary submissions on the legislative and conceptual framework	2 May 2014
	Submission on the legislative and conceptual framework	25 February 2014
Australian Childcare Centres Association, Goodstart Early Learning Limited, The Creche and Kindergarten Association Limited, Australian Childcare Alliance	Submission re preliminary matters	26 September 2013
Australian Childcare Centres Association, Industrial Organisation of Employers, Goodstart Early Learning Limited, The Creche and Kindergarten Association Limited	Submission re draft amended application	17 September 2013

Organisation	Document	Date
Australian Community Services Employers Association	Submission re preliminary matters	3 October 2013
	Submission re preliminary matters	2 October 2013
Australian Community Services Employers Association and Union of Employers	Submission re draft amended application	18 September 2013
Australian Federation of Employers & Industries	Further submissions in reply	23 May 2014
	Submissions in reply to questions on notice by Full Bench	2 May 2014
	Correspondence	29 April 2014
	Submissions in reply	31 March 2014
	Submission on the legislative and conceptual framework	24 February 2014
	Correspondence	18 September 2013
Australian Industry Group	Further submissions in reply	23 May 2014
	Submissions in reply	14 May 2014
	Submissions in reply	31 March 2014
	Submission on the legislative and conceptual framework	24 February 2014
	Submission re preliminary matters	27 September 2013
Australian Services Union	Submissions in reply	13 May 2014
Business SA	Correspondence	31 October 2013
Chamber of Commerce and Industry of Western Australia	Submissions in reply	31 March 2014
Chamber of Commerce and Industry of Western Australia (Inc) and South Australian Employers' Chamber of Commerce and Industry (Business SA)	Submission re draft amended application	17 September 2013

Organisation	Document	Date
Chamber of Commerce and Industry of Western Australia, Business SA, the Australian Capital Territory and Region Chamber of Commerce and Industry	Submission re preliminary matters	27 September 2013
Commonwealth of Australia	Further submissions in reply	23 May 2014
	Submissions in reply to questions on notice by Full Bench	2 May 2014
	Correspondence	2 May 2014
	Submissions in reply	31 March 2014
	Submission on the legislative and conceptual framework	24 February 2014
	Correspondence	4 December 2013
	Correspondence	19 November 2013
	Correspondence	15 November 2013
Community Connections Solutions Australia	Submission re preliminary matters	27 September 2013
	Submission re draft amended application	20 September 2013
Community Management Solutions & response from the Fair Work Commission	Correspondence	3 October 2013
Early Learning Association Australia	Correspondence	4 December 2013
	Correspondence	21 October 2013
	Correspondence	14 August 2013
Early Learning Association Australia & response from the Fair Work Commission	Correspondence	27 September 2013
Fair Work Commission	Correspondence	1 April 2014
	Correspondence	27 March 2014
	Correspondence	26 February 2014
Goodstart Early Learning Ltd	Correspondence	25 February 2014

Organisation	Document	Date
Independent Education Union of Australia	Submissions in reply	14 May 2014
	Submissions in reply	31 March 2014
	Submission on the legislative and conceptual framework	24 February 2014
	Submission re preliminary matters	14 November 2014
	Amended application	28 November 2013
	Application	8 October 2013
	Correspondence	23 September 2013
Local Government and Shires Association of New South Wales	Submission re preliminary matters	27 September 2013
	Submission re proposed research	20 September 2013
	Submission re draft amended application	17 September 2013
	Correspondence	27 August 2013
New South Wales Government	Correspondence	30 April 2014
	Correspondence	27 March 2014
	Correspondence	18 February 2014
New South Wales Minister for Industrial Relations (Intervening)	Submissions in reply to questions on notice by Full Bench	30 April 2014
	Submissions in reply	9 April 2014
The Association of Independent Schools of New South Wales Limited	Correspondence	24 February 2014
Association of Independent Schools of NSW, Association of Independent Schools of SA, Independent Schools Victoria, Independent Schools of Queensland, Association of Independent Schools WA and Independent Schools Tasmania	Submissions in reply	31 March 2014
United Voice	Amended application	3 September 2015
United Voice and the Australian Education Union	Final submissions	23 May 2014
	Submissions in reply	14 May 2014

Organisation	Document	Date
	Submissions in reply	31 March 2014
	Submission on the legislative and conceptual framework	24 February 2014
	Amended application	27 November 2013
United Voice and the Australian Education Union (Victorian Branch)	Correspondence	6 May 2014
	Correspondence	14 February 2014
	Submission re preliminary matters	27 September 2013
	Amended application	23 September 2013
	Correspondence	5 September 2013
	Draft amended application	5 September 2013
	Application	15 July 2013
Victorian Government	Submissions in reply to questions on notice by Full Bench	2 May 2014
	Correspondence	29 April 2014
Minister of Industrial Relations for the State of Victoria	Submission on the legislative and conceptual framework	24 February 2014
State of Victoria	Further submissions	23 May 2014

ANNEXURE 4 – State principles of wage fixation – equal remuneration

New South Wales

Industrial Relations Commission of New South Wales

State Wage Case 2008

Wage Fixing Principles

14. Equal remuneration and other conditions

a. Claims may be made in accordance with the requirements of this principle for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required, or the conditions under which the work is performed, have been undervalued on a gender basis.

b. The assessment of the work, skill and responsibility required under this principle is to be approached on a gender neutral basis and in the absence of assumptions based on gender.

c. Where the undervaluation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.

d. The application of any formula, which is inconsistent with proper consideration of the value of the work performed, is inappropriate to the implementation of this principle.

e. The assessment of wage rates and other conditions of employment under this principle is to have regard to the history of the award concerned.

f. Any change in wage relativities which may result from any adjustments under this principle, not only within the award in question but also against external classifications to which the award structure is related, must occur in such a way as to ensure there is no likelihood of wage leapfrogging arising out of changes in relative positions.

g. In applying this principle, the Commission will ensure that any alternation to wage relativities is based upon the work, skill and responsibility required, including the conditions under which the work is performed.

h. Where the requirements of this principle have been satisfied, an assessment shall be made as to how the undervaluation should be addressed in money terms or by other changes in conditions of employment, such as reclassification of the work, establishment of new career paths or changes in incremental scales. Such

assessments will reflect the wages and conditions of employment previously fixed for the work and the nature and extent of the undervaluation established.

i. Any changes made to the award as the result of this assessment may be phased in and any increase in wages may be absorbed in individual employees' overaward payments.

j. Care should be taken to ensure that work, skill and responsibility which have been taken into account in any previous work value adjustments or structural efficiency exercises are not again considered under this principle, except to the extent of any undervaluation established.

k. Where undervaluation is established only in respect of some persons covered by a particular classification, the undervaluation may be addressed by the creation of a new classification and not by increasing the rates for the classification as a whole.

l. The expression 'the conditions under which the work is performed' has the same meaning as in principle 6, Work Value Change.

m. The Commission will guard against contrived classification and over classification of jobs. It will also consider:

    i. the state of the economy of New South Wales and the likely effect of its decision on the economy;
    ii. the likely effect of its decision on the industry and/or the employers affected by the decision; and
    iii. the likely effect of its decision on employment.

n. Claims under this principle will be processed before a Full Bench of the Commission, unless otherwise allocated by the President.

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

p. In arbitrating an application made under this Principle, the Commission is required to determine whether or not future State Wage Case general increases will apply to the award.

Source: Extract from Industrial Relations Commission of New South Wales, State Wage Case 2008 [2008] NSWIRComm 122.

Queensland

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

EQUAL REMUNERATION PRINCIPLE

1. This principle applies when the Commission:

    a. makes, amends or reviews awards;

    b. makes orders under Chapter 2 Part 5 of the *Industrial Relations Act 1999*;

    c. arbitrates industrial disputes about equal remuneration; or

    d. values or assesses the work of employees in "female" industries, occupations or callings.

2. 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.

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

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

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

6. 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:

    a. whether there has been some characterisation or labeling of the work as "female";

    b. whether there has been some underrating or undervaluation of the skills of female employees;

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

    d. 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

e. 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.

7. Gender discrimination is not required to be shown to establish undervaluation of work.

8. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.

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

10. 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.

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

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

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

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

15. 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.

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

Source: Queensland Industrial Relations Commission, Equal Remuneration Principle (2002) 114 IR 305.

Western Australia

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

2008 STATE WAGE ORDER,

Schedule 2

STATEMENT OF PRINCIPLES – July 2008

10. Making or Varying an Award or issuing an Order which has the effect of varying wages or conditions above or below the award minimum conditions

10.1 An application or reference for a variation in wages which is not made by an applicant under any other Principle and which is a matter or concerns a matter to vary wages above or below the award minimum conditions may be made under this Principle. This may include but is not limited to matters such as equal remuneration for men and women for work of equal or comparable value.

10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.

10.3 All claims made under this Principle will be referred to the Chief Commissioner for him to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner.

Source: Western Australian Industrial Relations Commission, extract from 2008 State Wage Order, schedule 2, 2008 WAIRC 00366.

South Australia

SOUTH AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

STATE WAGE CASE, JULY 2005

STATEMENT OF PRINCIPLES

Statement of Principles

4. WHEN AN AWARD MAY BE VARIED OR ANOTHER AWARD MADE WITHOUT THE CLAIM BEING REGARDED AS ABOVE OR BELOW THE SAFETY NET

In the following circumstances an Award may, on application, be varied or another Award made without the application being regarded as a claim for wages and /or conditions above or below the Award safety net:

4.1 to include previous State Wage Case increases in accordance with principle 5;

4.2 to incorporate test case standards in accordance with principle 6;

4.3 to adjust allowances and service increments in accordance with principle 7;

4.4 to adjust wages pursuant to work value changes in accordance with principle 8;

4.5 to reduce standard hours to 38 per week in accordance with principle 9;

4.6 to adjust wages for Arbitrated Safety Net Wage adjustments in accordance with principles 10 and 12.3;

4.7 to vary an Award to include the State Minimum Award Wage in accordance with principle 11;

4.8 to provide procedures for Awards with outstanding adjustments in accordance with principle 12;

4.9 to vary an Award to provide for equal remuneration for work of equal value.

Source: Extract from South Australian Industrial Relations Commission, State Wage Case, July 2005 [2005] SAIR Comm 29 (29 July 2005)

Tasmania

TASMANIAN INDUSTRIAL COMMISSION REVIEW OF WAGE FIXING PRINCIPLES

JULY 2008

THE PRINCIPLES

10. PAY EQUITY

10.1 In this Principle 'pay equity' means equal remuneration for men and women doing work of equal value.

10.2 Applications may be made for making or varying an award in order to implement pay equity.
Such applications will be dealt with according to this principle.

10.3 Pay equity applications will require an assessment of the value of work performed in the industry or occupation the subject of the application, irrespective of the gender of the relevant worker. The requirement is to ascertain the value of the work rather than whether there have been changes in the value of the work. The Commission may take into account
the nature of the work, the skill, responsibility and qualifications required by the work and the conditions under which the work is performed (which has the same meaning as it does for Principle 9 - Work Value Changes).

10.4 A prior assessment by the Commission (or its predecessors) of the value of the work the subject of the application, and /or the prior setting of rates for such work, does not mean that it shall be presumed that the rates of pay applying to the work are unaffected by the gender of the relevant employees. The history of the establishment of rates in the award the subject of the application will be a consideration. The Commission shall broadly assess whether the past valuation of the work has been affected by the gender of the workers.

10.5 The operation of this principle is not restricted by the operation of other wage fixing principles. However, in approaching its task, the Commission will have regard to the public interest requirements of Section 36 of the Act.

Source: Extract from Tasmanian Industrial Relations Commission, State Wage Case Decision and Review of Wage Fixing Principles, 2008.