Summary of Decision

30 November 2015

Equal Remuneration Decision 2015

(C2013/5139 and C2013/6333)

[2015] FWCFB 8200

[1] United Voice and the Australian Education Union (Victorian Branch) (United Voice and AEU) 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). A number of amendments have been made to the applications filed. These applications were heard concurrently and are collectively referred to as the Equal Remuneration Case.

[2] 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'.[1]

[3] The IEUA's 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*',[2] other than those employed by a state or territory government.[3]

[4] 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 addressing those issues first.[4] Accordingly, the Commission 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.[5]

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[1] 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, paras. 2A-3.

[2] Independent Education Union of Australia, *Amended application by the Independent Education Union of Australia*, 28 November 2013, Annexure A, para. 4.1.

[3] Ibid, Annexure B, para. 4.

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

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

[5] 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.

[6] The decision deals with the proper construction of Part 2–7, Equal Remuneration, of the FW Act and addresses most of the legal and conceptual issues identified in the final directions issued by the Full Bench. Attachment 1 is an annotated version of that list of issues containing answers to identified issues by reference to the Full Bench decision. Not all of the issues are addressed.

[7] Part 2–7 has been the subject of previous consideration by a Full Bench of the Commission in *SACS Case No 1*[6] and *SACS Case No 2*[7].

[8] In the 2015 Equal Remuneration Decision the Full Bench was in accord with many of the views expressed in *SACS Case No 1* and with the majority in *SACS Case No 2* but the Full Bench departs from the conclusions reached in the SACS cases, in three respects:

> 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.
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> 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.
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> 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.

[9] The Full Bench was satisfied that there are cogent reasons for departing from the SACS decisions in these respects and details those reasons in its decision.

[10] The Full Bench confirmed that if the Commission is satisfied that the jurisdictional requirement in s.302(5) is met, then it has a discretion as to whether an equal remuneration order is made or not. Referring to s.302(1), the Full Bench said:

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[6] [2011] FWAFB 2700, (2011) 208 IR 345)

[7] [2012] FWAFB 1000, (2012) 2008 IR 446

> '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).'

[11] The Full Bench noted that there are a range of considerations which may be relevant to the exercise of the discretion to make an equal remuneration order. Some of these considerations are set out at paragraphs 16 and 17 of the attached summary (see Attachment 2).

[12] he Full Bench was satisfied that it had the power to develop guiding principles in relation to the operation of Part 2–7 but declined to do so, stating:

> '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.'

[13] A summary of the matters determined is set out in Section 6 of the decision (see Attachment 2).

[14] 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 the Full Bench noted that United Voice had filed an amended application on 3 September 2015 and that given the range of issues canvassed in the decision the parties will want some time to consider the implications for their respective cases. Accordingly the Full Bench did not set a 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.

[2015] FWCFB 8200

This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.

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ATTACHMENT 1 – Annotated list of legal and conceptual issues parties were directed to address

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 we have 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.

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 [278]-[279]).

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 [292]).

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 [273] and [291]).

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 [292]).

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 although depending upon the specific characteristics of the work under consideration it may be necessary 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 [282]).

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'. 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 [305]).

11. *Can the undervaluation of work be demonstrated by reference to factors or 'indicia' including the following:*

    i. 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 [274] and [291]).

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.*

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 variation of job descriptors.

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.

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]-[232] and [237]-[242]).

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 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 [197]-[216]).

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.

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 [342]-[347]).

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 [237]-[242]).

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 [168]-[170] and [214]-[215]).

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 [171]).

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 discard 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 [212]-[213] and [230]-[236]).

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.

ATTACHMENT 2 – Summary of matters determined

This document is an extract of Part 5 of Decision [2015] FWCFB 8200.

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.