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Review of equal remuneration principles

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Minimum Wages and Research Branch—Fair Work Australia

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The contents of this paper are the responsibility of the authors and the research has been conducted without the involvement of members of the Minimum Wage Panel of Fair Work Australia.

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List of abbreviations

ABS	Australian Bureau of Statistics
ACTU	Australian Council of Trade Unions
AFPC	Australian Fair Pay Commission
AMWU	Australian Amalgamated Manufacturing Workers' Union
APCS	Australian Pay and Classification Scales
ASHE	Annual Survey of Hours & Earnings
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Commission	Australian Industrial Relations Commission
EEH	Employee Earnings and Hours Survey
EOWA	Equal Opportunity for Women in the Workplace Agency
ESRI	Economic and Social Research Institute
EU	European Union
FW Act	<i>Fair Work Act 2009</i> (Cth)
GPG	Gender pay gap
HILDA	Household, Income and Labour Dynamics in Australia
HREOC	Human Rights and Equal Opportunities Commission
ILO	International Labour Organisation
ISSP	International Social Survey Programme
JLC	Joint Labour Committee
LHMU	Australian Liquor, Hospitality and Miscellaneous Union
LIS	Luxembourg Income Study
LPC	United Kingdom Low Pay Commission
NATSEM	National Centre for Economic and Social Modelling
NES	National Employment Standards
NMW	National Minimum Wage
NSW IRC	New South Wales Industrial Relations Commission
QIRC	Queensland Industrial Relations Commission
SCEWR	Standing Committee on Employment and Workplace Relations
The Panel	Minimum Wage Panel
UN	United Nations

Executive summary

The *Fair Work Act 2009* (FW Act) requires the Minimum Wage Panel (the Panel) of Fair Work Australia to undertake an annual wage review of minimum wages in each financial year. As part of this review, the Panel must review modern award minimum wages and make a national minimum wage order for award/agreement free employees to take effect by 1 July in the next financial year.

In performing and exercising its functions and powers as part of the annual wage review, the Panel is required to consider the section 284 minimum wages objective (with relation to modern award minimum wages and the national minimum wage order) and the section 134 modern awards objective (with relation to modern award minimum wages). Both objectives require that, among other factors, 'the principle of equal remuneration for work of equal or comparable value' be taken into account.

Section 1 of this paper identifies the relevant legislative provisions of the FW Act which consider 'the principle of equal remuneration for work of equal or comparable value' including the range of mechanisms by which minimum wages may be varied under the FW Act that require consideration of the principle of equal remuneration for work of equal or comparable value, which is defined in section 12 (with reference to section 302(2)) of the FW Act. The scope of the paper is limited to a 'historic' review of equal remuneration principles in light of the ongoing Equal Remuneration Case (C2010/3131).

Section 2 provides an overview of the historical application of equal remuneration principles in the context of minimum wage setting in the Australian federal, state and territory jurisdictions. Consideration of the major decisions relating to the consideration of equal remuneration principles in each of these jurisdictions reveals similarities, but also important differences. The jurisdictions have developed their responses to the same international treaties and conventions, but those instruments are not prescriptive about the way in which equal remuneration in minimum wage setting should be achieved. As a result, approaches have been developed within different jurisdictional legislative frameworks and in response to the particular facts, circumstances and claims that have emerged. In addition, different interpretations by these jurisdictions of the wording of key international conventions have contributed to different approaches to equal remuneration issues. Approaches built on the concept of gender-related undervaluation (rather than discrimination) emerged in some states and marked the most significant new direction for equal remuneration since the federal equal pay decisions of the late 1960s and early 1970s. The application of wage fixing principles based on an assessment of undervaluation overcame many of the limitations of past approaches and resulted in a number of successful equal remuneration applications in New South Wales and Queensland.

Section 3 reviews the extensive literature on equal remuneration in minimum wage setting both in Australia and abroad. In particular, the section considers the literature on the determinants of the gender pay gap (GPG) with a focus on minimum wages. As a result of differences in data, design, methodology and changing labour market conditions, studies of the determinants of the GPG have produced a range of results. However, they have been consistent over a number of years in their general finding that there is a significant, persistent, unexplained wage gap between men and women. The findings suggest that only a relatively small proportion of the GPG can be attributed to differences in the productivity-related characteristics of men and women (such as work experience, education, training and so on). The larger, unexplained gender wage effect is suggested by the literature to be the result of systemic gender bias in the wage system and/or the undervaluation of women's work.

The literature also suggests that gender pay ratios differ significantly by industry, sector and earnings distribution—with Australian studies revealing significantly higher gaps for employees in the private than the public sector, in large workplaces, and at the top of the wage distribution than for those at the bottom.

The regulatory and institutional arrangements of wage determination (including factors such as the degree of centralisation or coordination of wage determination and the presence and role, if any, of minimum wages) have been found to be important in determining the overall size of the GPG. Such factors can help to explain some of the variation in the GPG between countries, and sometimes within countries that have different institutional arrangements at a regional level. The literature suggests that countries with weak collective bargaining coverage and no or low minimum wages tend to have wider GPGs. However, some researchers have emphasised that the mere presence of minimum wages offers women little protection, and that it is the level, application and enforcement of minimum wages, as well as the coverage of collective bargaining, that is important.

Section 4 overviews equal remuneration matters considered by minimum wage-setting bodies including in the United Kingdom, New Zealand, Ireland and Canada. It identifies relevant United Nations (UN) and International Labour Organisation (ILO) treaties and conventions and outlines their requirements. Although not required under Equal Remuneration Convention (ILO No. 100), it is noted that minimum wages have been recognised by the ILO as being an important means by which the convention may be applied.

There is a wide diversity of law and practice in minimum wage setting internationally. However, no other country has established a statutory framework for a comprehensive range of minimum wages determined by an independent, statutory tribunal, as occurs in Australia. For this reason, consideration of the approaches to equal remuneration matters taken by international minimum wage-setting bodies focuses on national and regional minimum wage setting arrangements.

The review of available information suggests that in some countries there has been discussion of the use of minimum wages as a means of preventing gender pay discrimination when minimum wage arrangements were established. However, following the introduction of minimum wages, the issue has tended to receive more limited attention.

However, case studies of the United Kingdom and New Zealand show that continuing consideration has been given to the issue in those countries. In New Zealand, current assessment criteria require consideration of the social and economic impacts of changes to the level of the minimum wage, including impacts on the GPG. In the United Kingdom, in making its recommendations for adjustment of the minimum wage, the Low Pay Commission (LPC) considers (amongst other things) the impact of the minimum wage on specific groups, including women. The LPC has repeatedly stated that the national minimum wage has had a significant impact in narrowing the GPG at the lower end of the earnings distribution. It has also emphasised that this result has been achieved with very limited evidence of any adverse impact on employment associated with previous adjustments. While the available United Kingdom and New Zealand evidence suggests that adjustments to a national minimum wage may have a significant impact at the lower end of the earnings distribution, the impact of such adjustments on the overall GPG has been found to be less significant.

1 Introduction

This paper provides an historical perspective on the consideration of equal remuneration principles, mainly in the area of minimum wage setting. In doing so, it first identifies relevant legislative provisions and recent developments to place the role of the Panel in context (section 1). It provides an overview of the historical application of equal remuneration principles in the context of minimum wage setting in the federal and state and territory jurisdictions (section 2). It also reviews the literature on equal remuneration considerations both in Australia and abroad (section 3), and overviews equal remuneration matters considered by international minimum wage-setting bodies (section 4).

The *Fair Work Act 2009* (FW Act) requires the Panel to undertake an annual wage review of minimum wages in each financial year (FW Act section 285(1)). As part of this review, the Panel must review modern award minimum wages and make a national minimum wage order to take effect by 1 July in the next financial year (FW Act section 285(2) and section 287).

In undertaking this review, the Panel is to have regard to section 284 (minimum wages objective) in setting the national minimum wage order for award/agreement free employees, and sections 284 and 134 (modern awards objective), in considering modern award minimum wages. The minimum wages objective requires that as part of establishing and maintaining a safety net of fair minimum wages, FWA must take into account a number of factors including 'the principle of equal remuneration for work of equal or comparable value' (FW Act section 284(1)(d)). As part of the modern awards objective, FWA must ensure 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 principle of equal remuneration for work of equal or comparable value' (FW Act section 134(1)(e)).

Under section 12 of the FW Act, equal remuneration for work of equal or comparable value is defined with reference to section 302(2) of the FW Act which provides 'equal remuneration for work of equal value or comparable value means equal remuneration for men and women workers for work of comparable value.'

The Act does not provide any further explanation of how the principle of equal remuneration for work of equal or comparable value should be considered as part of minimum wage setting.

In addition to the annual minimum wages review, there are other mechanisms by which minimum wages may be varied under the FW Act which would also require the consideration of 'the principle of equal remuneration for work of equal or comparable value'. These include:

- the variation of modern award minimum wages as part of the two-yearly or four-yearly reviews of modern awards;¹
- the variation of modern award minimum wages by the initiative of FWA or by the application of specified parties² for either work value reasons or as necessary to achieve the modern awards objective (FW Act section 157(2)); and
- the variation of wages or instruments as the result of an equal remuneration order made under part 2–7 of the FW Act (FW Act section 306 and *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* item 3(2), part 2, sch. 10).

On 11 March 2010, the Australian Municipal, Administrative, Clerical and Services Union, the Health

¹ The 'one off' two-year review to be conducted in 2012 is required to be conducted under item 6, part 2, sch. 5, of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the four yearly review of modern awards is required under s.156 of the FW Act.

² The parties that may apply to vary a modern award outside a four yearly review (and the kinds of applications which may be made) are outlined in s.158 of the FW Act.

Services Union, the Australian Workers' Union of Employees Queensland, the Liquor, Hospitality and Miscellaneous Union, and the Australian Education Union (ASU and others) lodged an application seeking an Equal Remuneration Order under part 2–7 of the FW Act covering employees in the Social, community and disability services industry (C2010/3131). The case may consider and make determinations regarding the legal meaning and application of the principle of equal remuneration for work of equal or comparable value. Such determinations could have impacts on its consideration in the context of minimum wage setting.

2 History of equal remuneration matters in Australia

This section provides a general review and summary of equal pay and equal remuneration decisions in state and federal jurisdictions in order to consider the historical development of principles of equal remuneration in minimum wage setting in Australia. Some of these cases have implications beyond minimum wages, which are noted, but not dealt with at any length. Literature analysing the cases and their implementation is also included.

As discussed in section 4, relevant international conventions are not prescriptive about the way in which equal remuneration should be achieved; recognising that a range of policy approaches is likely to be required and that appropriate combinations of approaches will vary depending on national circumstances. In this context, and against a background of differing legislative frameworks and provisions for wage determination, the approaches adopted by federal and state jurisdictions reveal both similarities and differences.

Appendix 1 provides a summary of current federal and state legislative provisions relevant to equal remuneration to assist a comparison of approaches and as background to the case review.

The remainder of this section is divided into three sections. The first section provides a brief overview of the application of principles of equal remuneration in federal minimum wage setting. The second section provides a general summary of the development and application of equal remuneration principles in the state jurisdictions. The final section provides a brief overview of the section. Current equal remuneration principles established by the state tribunals and referred to in the text are included at Appendix 2.

2.1 The federal jurisdiction

Courts and industrial tribunals are influenced by the context in which they operate—the legislative context and also the broader social and cultural context. It is therefore not surprising that early tribunal decisions on minimum wages reflected the prevailing social attitudes to the role of women in society and that pressure for change emerged only as social attitudes changed. However, despite a positive response by the federal tribunals to emerging social and industrial pressures for change in the late 1960s and early 1970s, economic circumstances and legislative changes interacted to impact on the implementation of equal remuneration.

2.1.1 The inception of female wage fixation

When Justice Higgins established the basic wage in the *Harvester decision* of 1907 (2 CAR 1) he based his calculations on what it would cost for a working man to support his wife and a family of three children. The basic wage was predicated on a 'needs' basis which Higgins famously described as 'the normal needs of the average employee regarded as a human being living in a civilized community'.

The *Fruit Pickers Case* (6 CAR 61) of 1912 was the first to examine the principle of equal work for equal pay and the value of work performed by women. In this case, Justice Higgins rejected the unions' demand for equal pay for equal work. He explained that the minimum wage was premised on a consideration that an average employee with a wife and children had a legal obligation to provide for his family, whereas a woman had no such obligation:

I fixed the minimum in 1907 at 7s per day by finding the sum which would meet the normal needs of an average employee, one of his normal needs being the need for domestic life. If he has a wife and children, he is under an obligation—even a legal obligation—to maintain them. How is such a minimum applicable to the case of a woman picker? She is not, unless perhaps in very exceptional circumstances, under any such obligation. The minimum cannot be based on exceptional circumstances. (6 CAR 71)

Justice Higgins considered the effect that cheaper women's labour could have on male wages and employment and established wage setting principles that resulted in two streams of female rates. The first stream applied where cheaper female labour could be deemed to place male jobs at risk. In these circumstances, Justice Higgins determined that women should be paid the same rates as men to avoid displacing men from employment. The second stream operated where women's work could not be deemed to place male labour at risk (because of gendered labour market segmentation) where women were granted a proportion of the male rate because it was presumed that they did not need to support a family (6 CAR 73; also see 13 CAR 701).

In the *Theatrical Case* of 1917 (11 CAR 133), Justice Powers determined a living wage for females and reinforced Justice Higgins' view that the wage should be assessed on the basis of the assumed needs of the sexes, rather than by reference to their productivity or other factors:

This Court allows to men a living wage based on the assumption that the average man has to keep a wife and family of three children whatever the value of the work that he does may be.

The Court allows a living wage to a woman as a single woman.

The single man often gets more than his work is worth, but if single men are paid less than married men the cheaper labour would be employed and they would not make the necessary provision for marriage. (11 CAR 147)

Thornton (1981: 469, citing 13 CAR 647) notes that in 1919, the female basic wage was set at 54 per cent of the male basic wage. She observes that following the depression, this ratio was maintained even though the criterion of 'capacity to pay' rather than 'needs' came to dominate the approach of the Court in assessing the male basic wage. However, Short (1986: 316) notes that some occupations were granted a higher proportion of the male rate (for example, female process workers were awarded 66 per cent).

It should be noted that the basic wage was set by reference to the needs of *unskilled labour* and was incorporated into awards either as the unskilled labourers' wage or as a component of the wage set for a skilled worker. The amounts in excess of the basic wage became known as 'margins' or 'margins for skill' (Hancock, 1979: 132). In some industries women earned the same margins for skill as men, while in others they earned varying percentages of the male skilled rate, with no consistent pattern prevailing. General increases in margins came to be determined by test cases undertaken under the *Metal Trades Award* which became a reference point for marginal rates in other awards (Hawke, 1969).

In 1941 the Curtin Government established the Women's Employment Board to overcome labour shortages and set women's wage rates where women were performing traditional male work during the war effort. The Women's Employment Board was required to set women's wage rates at between 60 to 100 per cent of the male rate. In most cases, the Board set women's wages at 75 per cent of the male rate. After the Board was disbanded in 1944, women's wage rates were determined by the *National Security (Female Minimum Wage) Regulations* which set female wage rates in industries vital to the war at 75 per cent of the male rate.

Following the special arrangements of the war years, the full powers of the Commonwealth Arbitration Court were restored. In the 1949–1950 *National Basic Wage Inquiry*, it was pointed out that many females were already being paid more than the traditional 54 per cent of the male rate and that there was a shortage of labour (Short, 1986: 317). In these circumstances, the Court decided to increase the female basic wage for all jobs to 75 per cent of the male basic wage (68 CAR 735). Marginal payments followed the same pattern and rose to 75 per cent of the male margin (although the proportion of the margin for skill that was paid to women continued to vary across awards and jurisdictions). Short (1986: 317) noted that for some women doing previously male work this meant a decrease from their wartime rates and

some industrial unrest resulted. For other women, however, it meant increased rates.

The United Nation's Universal Declaration of Human Rights, which was proclaimed by the General Assembly in 1948, included a right to equal pay for equal work. In 1951, the International Labour Organisation (ILO) adopted Convention no. 100 on *Equal Remuneration for Men and Women Workers for Work of Equal Value* (the Equal Remuneration Convention).³

2.1.2 1966–1969 a changing social landscape

In 1966 the Commonwealth Conciliation and Arbitration Commission introduced a minimum wage that was higher than the basic wage for males in order to raise the wages of the low paid in circumstances where no one could be found who was still being paid the basic wage. However, as Short notes (1986: 320), no female minimum wage was specified until 1974, when it was specified only for the purpose of being phased out.

In the *1967 National Wage Case*, the Commonwealth Conciliation and Arbitration 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'. This meant that increases to wage rates that were based on economic reasons would be applied to the whole wage in national wage cases. References to the basic wage were to be deleted from awards and award rates were to be expressed as a single figure 'total wage'. Awarding a male total wage that incorporated the basic wage with its needs component and the skill margin provided a reference point for assessing the value of women's work, based solely on work value criteria.

The Commonwealth Conciliation and Arbitration Commission also decided to award the same general wage increase to both men and women (118 CAR 655). In its reasons for awarding the same increase for men and women, the Commission referred to changing social attitudes to woman in the workplace and society's acceptance of sexual equality, stating:

The community is faced with economic and 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. (118 CAR 655)

In its decision the Commission also suggested that the concept of equal pay for equal work was one that required thorough investigation and debate, 'in which a policy of gradual implementation could be considered' (118 CAR 660). The introduction of the total wage and the Commission's remarks in the case helped to set the stage for the *1969 Equal Pay Case* (118 CAR 1142) which saw the introduction of the principle of equal pay for equal work.

In analysing the developments that followed, researchers (for example, Smith, 2010: 4–5; Sheridan & Stretton, 2008: 150–151) have argued that significant impetus was given to gender equity reform by developments within and outside the sphere of the tribunals. The key developments identified as setting the stage for change, included: the adoption of the Equal Remuneration Convention in 1951; the introduction of state based legislative initiatives to provide for equal pay; social change, including the abolition of legal barriers to the employment of married women; the Commonwealth Conciliation and Arbitration Commission's decision to introduce a total wage and award the same increase to adult males and females; growing public opinion in support of the principle of equal pay; and the urgency and impetus given to the campaign for equal pay by feminists in the late 1960s and 1970s.

³ These instruments are considered further in section 4.

2.1.3 The 1969 Equal Pay Case

In 1969, the unions made an application to the Commonwealth Conciliation and Arbitration Commission to increase female wages to eliminate the difference between male and female wage rates irrespective of the work they performed. The unions argued that significant technological and sociological change had altered economic structures, the community and relationships of different groups within the community. The unions noted that work performed by women was diverse and that women's status, importance and participation in the workforce had increased significantly over time. They argued that women's contribution to the expanding economy should be recognised and also referred to international conventions of the United Nations and the International Labour Organisation which emphasised that women should receive equal pay for work of equal value to that of men (118 CAR 1147–1148). Women's organisations also intervened to support the union submissions and emphasised the changing status and role of women and the need to remove gender based discrimination (118 CAR 1148–1149).

Employer groups did not address the issue of the value of women's work, seeking to rely on arguments based on maintaining traditional gender roles. They argued that the differences between male and female wage rates were not solely based on sex discrimination, but on men's more significant family and social responsibilities (118 CAR 1150–1151).

The Commonwealth Government stated that it supported the principle of equal pay, provided that four conditions were met: the work performed by females should be the same or substantially the same as that performed by males under the same award; females must perform the same range and volume of work as males; females must perform the work under the same conditions as males; and the work must not be work essentially or usually performed by females (118 CAR 1149).

The Commonwealth Conciliation and Arbitration Commission found that the concept of equal remuneration was difficult to define and apply with precision. It noted 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 (118 CAR 1155). 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:

Though we realise that the various United Nations and I.L.O declarations and conventions must carry significant weight in a general way, we must consider how, if they are to be applied they can be fitted into our community. We have certain values which have in part been created by our own institutions including a complex wage system. This Commission cannot escape its own history, including the history of the Court even if it wanted to. If the arbitration system had in the past not concerned itself with a needs or family wage but had fixed a rate for a job irrespective of the sex, marital or parental status of the worker, the probabilities are that the rate for the job would lie somewhere between the current male rate and the current female rate. This is speculation on our part but it does highlight the difficulties of finding a satisfactory solution to the issues now before us. We consider it preferable to start from a decision on principle in this case and let that principle be worked through the system. (118 CAR 1156)

The Commonwealth Conciliation and Arbitration 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:

Four states namely New South Wales, South Australia, Western Australia and Tasmania, have passed virtually identical legislation on equal pay, although the Tasmanian legislation is confined to the state public services. This fact in our view is a matter of significance for us for two reasons. The first is that the existence of this legislation demonstrates by implication that there is a belief in this community that the concept of equal pay for equal work is a socially proper one. The second is that if we did not move to bring our awards into line with state legislation we would in those states at least be adopting a different approach to this question from that applied by the laws of those states. We do not think we should merely rubber stamp the principles of state legislation, but if, after having examined them we consider them to be fair and reasonable in the circumstances we receive considerable support from their existence. (118 CAR 1153)

The Commonwealth Conciliation and Arbitration 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 (118 CAR 1156). The Commission also found that gradual implementation would address economic concerns (118 CAR 1155). It established principles to be applied in deciding future applications, which revealed a number of points of similarity with the Commonwealth's position. The principles included:

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. (118 CAR 1158–1159)

The Commonwealth Conciliation and Arbitration Commission also provided that any pay increases were to be phased in over four years (118 CAR 1159).

2.1.3.1 *Implementation and limitations of 1969 Equal Pay Case*

As the Australian labour market was highly segregated, the terms of the 1969 equal pay principle significantly limited the impact of the decision. This was primarily because the 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. In the *1972 National Minimum Wages and Equal Pay Case*, evidence was submitted to the Commission that only 18 per cent of women covered by federal awards received wage increases and pay parity with male workers as a result of the 1969 decision (147 CAR 177). Researchers have also confirmed that while the case contributed to an improvement in the relative pay of women, its impact was limited (Short, 1986: 319; Borland, 1999; Eastough & Miller, 2004; Smith, 2009: 655). The Office for Women argues that those who benefited mostly worked in occupations such as teaching and nursing (Office for Women, 2008: 3).

2.1.4 The 1972 equal pay for work of equal value decision

In the *1972 National Wage and Equal Pay Case* (147 CAR 172) the Commonwealth Conciliation and Arbitration 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.

The Commission rejected the claim for a single minimum wage on the basis that the minimum wage was determined on factors unrelated to the work performed and included a family component; a concept which had previously been accepted by all parties and advanced by the unions in previous wage cases (147 CAR 176, 180).

However, the Commonwealth Conciliation and Arbitration Commission noted the limited application of the 1969 decision, amendments since 1969 to legislation in Western Australia and South Australia, as well as legislative developments in the United Kingdom and New Zealand which marked changed approaches towards equal pay for females (147 CAR 178). It also noted the 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 was too narrow and 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 should be considered without regard to the sex of the employee. (147 CAR 178)

The Commission rejected creating a general principle for conducting work value reviews on the basis that this approach would be 'unwieldy' and concluded that a general principle applied by individual Commissioners was likely to obtain better results (147 CAR 178).

In addressing the likely cost of the implementation of equal pay for work of equal value, the Commonwealth Conciliation and Arbitration 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:

We recognise ... that the increase in the total wages bill as a result of our decision will be substantial but its effect will be minimised by the method of implementation which we have adopted. In our view the community is prepared to accept the concept of equal pay for females and should therefore be prepared to accept the economic consequences of this decision. (147 CAR 178)

The Commonwealth Conciliation and Arbitration Commission did not rescind the 1969 principles, which it said would continue to apply in appropriate cases (147 CAR 180). 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 are 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 may be necessary and that problems may be encountered, particularly where cross-award comparisons were involved. Confining comparisons within an award enabled industry characteristics, such as capacity to pay and bargaining capacity to be held constant. However, comparison across awards involved variation in these characteristics and raised novel issues.

The principle was stated as follows:

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. (147 CAR 179–180)

As discussed further below, these principles remained relevant in subsequent equal remuneration cases run in the federal jurisdiction although their operation was affected by other national wage fixing principles and post 1993 legislation.

2.1.4.1 *Implementation and assessment of 1972 equal pay for work of equal value case*

It has generally been acknowledged that the equal pay decisions of the late 1960s and early 1970s had a significant impact on women's wages and contributed to a narrowing of the GPG. Eastough and Miller (2004: 258) estimated that 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. Smith (2009: 653) noted that 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. 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 (Gregory & Duncan 1981: 426; Gregory, 1999: 277; Whitehouse, 2001: 66).

The 1972 principles remedied key deficiencies of the 1969 case and provided the opportunity for the Commonwealth Conciliation and Arbitration Commission to make comparisons between different classifications of work within and across awards, resulting in a surge in women's wages. Award-based application and collective, industry-wide remedies have been acknowledged as important in achieving the improvements under the 1972 principles (Gunderson, 1994: 67; Smith, 2009: 655, 663–5 & 2010: 6–7).

However, a number of commentators have argued that the 1972 principles failed to achieve their full potential. Some have suggested that this was largely as a result of imperfect implementation. Others have suggested that there were limitations inherent in the principles and the parties' approaches that conditioned the outcomes achieved.

Short analysed cases involving equal pay published in the *Commonwealth Arbitration Reports* after 1972 and up to 1981. She found that over half of the 54 cases identified came after the Commission's deadline and a number were for only partial implementation, necessitating repeat appearances before the

Commission (which was then the Australian Conciliation and Arbitration Commission). As a result, she found that:

... only 35 awards were changed to allow for equal pay for work of equal value. There is also a noticeable absence of any work value assessments by the Commission. In only two cases (176 CAR 69 and 183 CAR 382) did the Commission's officers make inspections ... in most it would seem that no assessment was made. Employers and unions merely agreed on integration of male and female classifications without specific studies to see if the work was of equal value. (Short, 1986: 324)

While Short identified only 35 awards that were changed to allow equal pay for work of equal value, her research did not identify how many federal awards covered female workers or the number of such awards that were not changed to allow for equal pay for work of equal value.

In attempting to explain the approach that was adopted to implementation, Short (1986: 323–325) argued that prior to 1972, the Commonwealth Conciliation and Arbitration Commission had consistently not compared work that was dissimilar. As a result, techniques of job evaluation and approaches to the systematic assessment of different jobs were rarely used and Short argued that the parties lacked the necessary skills and experience for the type of analysis that was required to implement the 1972 decision. Short (1986: 325) found that there 'appears to have been no attempt to compare dissimilar work in equal pay cases at the federal level.' Smith also emphasised the perceived difficulty that she claimed industrial tribunals have had in properly valuing the skills used by women in traditionally female occupations (Smith, 2009: 655 quoting Scutt, 1992: 282). Yet the segregated nature of the labour market necessitated rigorous, gender neutral work value assessments if equal remuneration was to be achieved.

Other researchers also observed that the 1972 equal pay for work of equal value decision was largely implemented by consent and noted that the principles did not establish a requirement for scrutiny of consent applications. While noting that consent arrangements may have resulted from the high resource requirements of full work value arbitration cases and women's under-representation in trade unions, they argued that the outcomes were problematic. In the absence of the rigorous application of gender neutral methods of work evaluation, they suggested that a number of factors combined to ensure the maintenance of gender based inequities. Important amongst these factors were employer and union self-interest and the prevalence of traditional presumptions (influenced by conscious and unconscious prejudices) about the inferiority of work that was predominantly undertaken by women (Thornton, 1981: 473, 477–480; Bennett, 1988: 540–1; Rafferty, 1994: 453–4; Smith, 2009: 655).

Research found that women fared well under some awards and in situations where unions pressed the case for equal pay competently, but results were patchy and analysis of the cases revealed situations where the principle may have been incorrectly applied. For example, Short (1986: 319–20) cites the case of Commonwealth typists who were compared to other, probably less-skilled, female classifications (clerical assistants) that may also have had discriminatory pay rates. Bennett (1988: 541–2) and Whelan (2005) cite the example of the confectioners award which eliminated the use of the words 'male' and 'female' in the wages section of the award and added a 'new' classification which reiterated the operations previously listed under 'adult female'. The new classification was slotted into the lowest paid of the male worker classifications. As Bennet observed:

Thus the women achieved parity with the lowest-paid of the male workers. The award appears to have conceded the very least possible. There appears to have been no attempt to reclassify women's work or to consider whether some women, at least, deserved more than the lowest male rate. (Bennett, 1988: 542)

2.1.5 The 1974 National Wage Case

In the *1974 National Wage Case*, the Australian Conciliation and Arbitration Commission decided to establish one minimum wage for adults, replacing the separate minimum adult male and female rates (157 CAR 299). While the Commission had rejected this approach in the 1972 decision, it stated:

We have given further consideration to the question and are acutely conscious of the difficulty of doing adequate justice to the widely varying family obligations of workers on the minimum wage. We do not have the information available to enable us to discriminate between the varying needs of such workers. In our awards, we do not distinguish between the married and the single workers, and we do not vary the wage in relation to the number of persons dependent on the worker. The Commission has pointed out that it is an industrial tribunal, not a social welfare agency. We believe that the care of family needs is principally a task for governments. For the reasons mentioned we have decided that the family component should be discarded from the minimum wage concept. (157 CAR 299)

As Short (1986: 320) notes, the Australian Conciliation and Arbitration Commission specified a female minimum wage in the 1974 case, only for the purpose of it being phased out under the decision to create one adult minimum wage. The abandonment of gender-related assumptions regarding workers' needs and the introduction of one minimum wage for adults provided a firmer basis for assessing women's work based on work value criteria.

2.1.6 The 1986 Comparable Worth Case

In the early 1980s, significant wage increases across the workforce led to a wage freeze being applied by federal and state tribunals. This situation laid the groundwork for a Prices and Incomes Accord (the Accord) between the Australian Council of Trade Unions (ACTU) and the Labour Government. Following the Accord, the Australian Conciliation and Arbitration Commission in the 1983 *National Wage Case* (1983 4 IR 429) lifted the wage freeze and established a set of wage fixing principles that defined a limited range of bases which could be used to justify wage increases (award or overaward), other than by indexation.

Against this background, in 1986 the Royal Australian Nursing Federation and the Hospital Employees' Federation of Australia, supported by the ACTU, argued that the concept of 'comparable worth' should be applied to implement the 1972 equal pay principle ((1986) 13 IR 108). The matter concerned an application made to the Commission to vary the Private Hospitals' and Doctors' Nurses (ACT) Award in relation to rates for nurses. The Royal Australian Nursing Federation sought the variation on the basis that the equal work for equal pay principle had not been implemented for nurses. The Council of Action for Equal Pay argued that the Australian Conciliation and Arbitration Commission should adopt the principle of comparable worth as a wage fixing principle which would allow for the rates of women in predominantly female occupations to be reassessed on a case-by-case basis. The Commonwealth and ACTU provided examples in the UK, Canada and US where job evaluation techniques and the concept of comparable worth had been used to assess equal pay matters. However, the Commonwealth and employers emphasised the distinctions between approaches based on comparable worth and the concept of work valuation traditionally applied by the Commission, and argued that the claim should be pursued through the anomalies and inequities provision of the wage fixing principles.

In rejecting the argument that the concept of comparable worth should be used to implement the 1972 equal pay principles, the Australian Conciliation and Arbitration Commission indicated its unease with the concept and concern that its acceptance as a wage fixing principle would open a floodgate of applications in other areas, which could undermine centralised wage fixation:

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 and related concepts, on the limited material before us 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 present wage fixing principles.
(13 IR 113)

The Australian Conciliation and Arbitration Commission also observed that on introduction of the Equal Pay Principle in 1972, it had specifically rejected in its wage setting principles assessing equal pay for work of equal value on the basis of 'worth to the employer' (Principle 5(c)).

Although the Commission rejected the arguments for implementing comparable worth, it advised the parties that the equal pay for equal work principle remained available to awards which had not implemented the principle, and could be accessed through the anomalies and inequities principle. The unions subsequently pursued their claims through this mechanism (20 IR 420).

In her analysis of the decision, Rafferty (1994: 456–7) argued that the Australian Conciliation and Arbitration Commission's rejection of the concept of comparable worth was 'more apparent than actual.' She noted that the Commission's decisions both before and after the *Comparable Worth Case* (for example, the *1985 Australian Public Service Therapists Case* and the *1990 Child Care Workers' Case*) show that the Commission was not averse to using a more objective test for evaluating women's work. She concluded that:

... the problem for the Commission in the comparable worth case lay not with the adoption of an objective test but with the adoption of an international label lacking uniform definition and, in stark contrast to the 1972 principle, defining value of work in terms of worth to the employer. (Rafferty, 1994: 457)

Smith, on the other hand, suggested that the decision revealed the Australian Conciliation and Arbitration Commission's 'unease' with the concept of comparable worth and reticence to engage in inter-award comparisons of work. She also argued that the case highlighted that while the Commission was sympathetic to the nurses' claims, it was not prepared to accommodate the claim outside the wage fixing principles (Smith, 2009: 656).

2.1.7 The anomalies and inequities process: 1984–1991

Following the *Comparable Worth Case*, pay equity claims were processed through the anomalies and inequities principle. Rafferty (1994: 454–457) provides an analysis of this period, noting that the process specified under that principle allowed the Australian Conciliation and Arbitration Commission (and later the Australian Industrial Relations Commission) to fully explore all issues relevant to the claim within the confidentiality of an Anomalies Conference, with only those matters subsequently referred to a Full Bench being determined in the public arena. If the parties could reach agreement as to the existence of an anomaly or inequity and its resolution, then the claim could be settled within the confines of the conference. In the absence of agreement, and if satisfied that there was an arguable case, the President was able to appoint a single commissioner to investigate and report to the conference on the merits of the claim. The parties were then provided with another opportunity to resolve the matter by agreement at the conference. If the commissioner's report found that the claim had merit, but the parties were unable to reach agreement, then the President could refer a claim to a Full Bench for resolution. Claims dealt with under the anomalies and inequities process during this period included the nurses claims which had been raised in the *Comparable Worth Case*, dental therapists and Australian Public Service social workers (1987) (Rafferty, (1994: 455).

While the anomalies and inequities process provided the parties with opportunities to resolve the claim by agreement, behind closed doors, Rafferty argued that it had a number of drawbacks as a vehicle for

obtaining equal pay for work of equal value. These included that it was not an objective process; being 'more of a horse-trading exercise than the work value assessment implied by the 1972 principle'. Further, she argued that the requirement under the inequities principle that 'the increase must be a once-only matter' was 'unduly restrictive'. Rafferty argued that securing equal pay requires vigilance and sustained action as 'discrimination against women for work typically performed by women has a tendency to recur' (Rafferty, 1994: 455).⁴

2.1.8 Combined anomalies and inequities and structural efficiency: 1989–1991

Rafferty (1994: 457–458) explained that from August 1989, the Australian Industrial Relations Commission (the Commission) used the structural efficiency principle as an adjunct to the anomalies and inequities principle to deal with pay equity claims. In the dental therapists' case, for example, part of the settlement of the claim for equal pay for work of equal value in the Anomalies Conference included agreement that problems related to classification and structure would be dealt with through the structural efficiency process.

The structural efficiency process allowed the economic impact of increases to be reduced by phasing-in. Rafferty noted that the two-stage process under the combined anomalies and inequities and structural efficiency principles, with phasing-in, extended the time taken to resolve claims. For example, she claimed that it took over two years to resolve the dental therapists and childcare workers claims, and a further 18 months for the childcare workers' increases to be fully implemented. However, the process did enable some claims to be resolved and increases awarded in a period of wage constraint (Rafferty, 1994: 457–458).

The anomalies and inequities principle was dropped from the Commission's guidelines in the 1991 *National Wage Case decision*. Rafferty argued that the structural efficiency principle, divorced from the anomalies and inequities process, held some promise as a vehicle for resolving pay equity claims. When rigorously and objectively applied, she argued that the minimum rates adjustment process, which was an integral part of the structural efficiency principle, enabled the alignment of male and female rates at particular levels through a gender-neutral evaluation process that recognised the equivalence of skills and training. However, Rafferty argued that there was some evidence (for example the confectionery award) where the adjustment process did not adequately reflect the value of women's work, perhaps because of gender bias in the valuation process (Rafferty, 1994: 458).

Rafferty also observed that there was some evidence that some employers attempted to use the classification system to preserve historical pay inequities between feminised and male-dominated professions. In particular, she pointed to some examples of classification compression affecting classification structures where women formed a majority of workers (for example, citing the classification of the great majority of female Family Court counsellors and social workers into the bottom two levels of a five-level classification structure, which resulted in claims by both groups for rightful classification).⁵ She argued that the restructuring of awards under the structural efficiency process highlighted the need for clear classification definitions in awards to limit employers' discretionary power to discriminate and to prevent misuse of the classification system (Rafferty, 1994: 458–460, 465).

The potential for using the structural efficiency principle as a vehicle for processing pay equity claims was curtailed when the Commission adopted the enterprise bargaining principle in 1991 (Rafferty, 1994: 461).

4 A similar point has been made by Justice Mary Gaudron who is frequently quoted as having said: 'We got equal pay once, then got it again, and then we got it again, and now we still don't have it.' For example, see Bonella (2003: 323).

5 Rafferty (1994: 462–465) notes that the Family Court counsellors' claims were eventually resolved under the work value principle and the claim was awarded in full.

2.1.9 Legislative entitlement to equal remuneration: 1993

The *Industrial Relations (Reform) Act 1993* amended the *Industrial Relations Act 1988*. It marked a significant change in Australian industrial relations as it was intended to focus the industrial relations system on collective bargaining at the workplace or enterprise level. It maintained an award safety net and, amongst other things, established a legislative commitment to a number of minimum entitlements, including equal remuneration—relying on its external affairs power and ratification of relevant ILO conventions, rather than the conciliation and arbitration power of the Constitution.⁶ The reforms permitted the Commission to make orders for individual workplaces on matters of equal remuneration, but did not facilitate attempts to address equal remuneration as a matter of global award variation.⁷

The changes were given effect by the inclusion of a new division, titled 'Equal Remuneration for Work of Equal Value' in the *Industrial Relations Act 1988*. The stated objectives of the division were to give effect to the Anti-Discrimination Conventions (which included the Equal Remuneration Convention), the Equal Remuneration Recommendation and the Discrimination (Employment and Occupation) Recommendation (section 170BA).

Importantly, definitions were covered in section 170BB which provided:

1. 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.
2. 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.

The Commission was given the power to make orders as it considered appropriate to ensure that employees covered by the orders would receive equal remuneration for work of equal value (section 170BC). Orders could only be made if the Commission was satisfied that:

- the employees to be covered by the order did not have equal remuneration for work of equal value (section 170BC(3)(a));
- making such an order would give effect to one or more of the anti-discrimination conventions or ILO Recommendation No.111 (section 170BC(3)(b));
- 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 the Sex Discrimination Commissioner (section 170BC(3)(b));
- no adequate alternative remedy was available under a state or territory law (section 170BD(a) and (b)).

When, in 1996, the Howard Coalition Government introduced the *Workplace Relations Act 1996* (the WR Act), replacing the *Industrial Relations Act 1988*, the equal remuneration provisions were essentially replicated in the 1996 legislation with the power to make equal remuneration orders conferred on the Commission.

⁶ In addition to equal remuneration, the minimum entitlements covered wages, termination of employment, parental leave and leave to care for one's immediate family.

⁷ Note that equal remuneration could still be implemented at the award level through variations to the award safety net.

In her examination of the application of the provisions, Smith found that following their proclamation in March 1994 until June 2007, there were only 18 applications under the 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 (Smith, 2009: 658; 2010: 11).

The following summarises the key cases which have discussed issues and principles affecting equal remuneration in the federal jurisdiction.

2.1.9.1 *The first HPM Case*

In the first *HPM Case*, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries*, ((1998) 94 IR 129), the Australian Manufacturing Workers' Union (AMWU) made an application in December 1995 for equal remuneration on behalf of the process and packer workers of HPM industries at its Darlinghurst site in Sydney. The employees concerned were employed under the *Metal Industry Award 1984*. A Full Bench was constituted to hear the matter, but following submissions from the Metal Trades Industry Association that the power to refer matters to a Full Bench was confined to matters involving an industrial dispute, the Full Bench decided it could not hear the matter. The matter was referred to a Commissioner for hearings and, in late 1997, proceeded to arbitration. The matter was considered a test case and, in addition to the submissions of the parties, there were submissions from a number of intervening parties.

The union argued that the majority of process and packer workers were women who performed work of equal value to work performed by the general hands store persons at HPM who were all men. In support of its claim that the work of process workers was equal to that of general hands, and the work of packers was equal to that of general hands and store persons, the union sought to rely on the competency standards process in the award. It argued that, even though the store persons and general hands were classified at C14 and C13 in the award, their rates of pay exceeded that of women process workers and general packers who had been assessed at higher competency levels within the award. The union claimed that this difference in remuneration occurred because over award payments were made to male general hands and store persons, which were not available to women process workers. The union proposed that the Commission should adopt the definition of discrimination found in the *Sex Discrimination Act 1984*. It also argued that the pay structures were discriminatory because they were based on an imputed characteristic generally applying to women; in this case, the assumption that women were not able to lift heavy weights or were not interested in performing the work of men. The union also argued that the burden of proof should lie with the discriminator to prove that the pay structures were not discriminatory as was provided for in federal anti discrimination law.

HPM argued that the nature of the work of process workers and packers was substantially different from that of store hands and general store persons and that high staff turnover of general hands and store persons had been alleviated by higher rates of pay for the general hands. The employer also argued that using the award classifications and competency standards as the only measure of work value failed to consider other elements which determined wage rates such as work intensity, the heavier nature of the work and need for product knowledge. HPM claimed that the competency standards were not designed to be used for work value comparisons and could not account for over award payments.

The legislation did not refer to, or define 'discrimination', although it did refer to the 'anti-discrimination conventions' and included a note to section 170BB in the *Workplace Relations Act 1996* that stated:

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.

Considering these words, the Commissioner decided that the legislation and associated international instruments required the Commission to be satisfied that the relevant rates of remuneration were established *without discrimination based on sex as a threshold issue*:

It follows from the definition of equal remuneration for work of equal value that *as a first step to making an order* the Commission must be satisfied that rates of remuneration have been established without discrimination based on sex. (94 IR 59) (Emphasis added.)

The Commissioner considered the definition of discrimination that should be applied and decided 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. The Commissioner therefore decided to adopt the definition of discrimination adopted by a Full Bench of the Commission in its decision in the *Third Safety Net Adjustment and Section 150A Review*, rather than the definition contained in the *Sex Discrimination Act 1984* (94 IR 159). The Full Bench's definition distinguished direct and indirect discrimination and provided that:

Direct discrimination occurs when a person is treated less favourably in the same circumstances than someone of a different race, colour, sex, sexual preference, age, marital status, religion, political opinion, national extraction or social origin would be; or is treated differently in relation to pregnancy or physical or mental disability or family responsibilities.

Indirect discrimination occurs when apparently neutral policies and practices include requirements or conditions with which a higher proportion of one group of people than another in relation to a particular attribute can comply, and the requirement or condition is unreasonable under the circumstances.' (AIRC, *Third Safety Net Adjustment and Section 150A Review*, (1995) 61 IR 247–8)

To determine whether there had been different treatment of men and women in the same circumstances—and, therefore, *direct discrimination*—the Commissioner considered whether, on the basis of the information before the Commission, the work in question was of the same value.

... the Commission must be satisfied that rates of remuneration have been established without discrimination based on sex. Both the applicant and the respondent to these proceedings, and some of the interveners addressed this question and accepted that a necessary precursor to establishing this was to establish that the work is of equal value. This must be so, as direct discrimination only arises where there is the same treatment in different circumstances. To establish the same circumstances exist, there needs to be an assessment as to the equivalence of the work. (94 IR 159)

On this point, the Commissioner decided that there was no agreement between the parties to the use of competency standards as a method of determining the equivalence of the work. Further, in the absence of agreement about the equivalence of the work, the Commissioner considered that the competency standards process was not appropriate to establish equivalence. While the Commissioner found that the competency standards provided 'an objective and gender neutral mechanism for measuring the relative competencies', they were found not to 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.' The Commissioner noted that qualifications were also recognised in the award as providing a basis for classification and that different groups of jobs within each classification had different skill requirements, which suggested that on a skill basis the work was not equal within the classifications. The Commissioner also found that other factors beyond competency standards could provide an objective, gender neutral basis for over-award remuneration, including 'timekeeping, productivity and individual merit.' (94 IR 162–170)

After considering the terms of the relevant ILO conventions, reports of the ILO's Committee of Experts, and the Commission's decision in the 1972 *Equal Pay Case*, the Commissioner concluded that the appropriate method of considering whether work was of equal value was to apply the work value criteria as described in the Commission's wage fixing principles. The Commissioner noted that it was not appropriate for a single commissioner to establish a new method of work value evaluation applying award competencies in place of the Commission's established principles (94 IR 161).

The Commissioner noted that there were difficulties involved in valuing and comparing overaward payments, as considerations with regard to such payments 'may justifiably go beyond the work itself' and include the individual circumstances of the worker. In dealing with such payments, the Commissioner suggested that 'any agreement between the parties about an appropriate method of job appraisal will be highly persuasive, if not determinative where those over award payments are the result of collective agreements' (94 IR 161).

Having decided that he was not satisfied that the evidence presented in the case had established direct discrimination, the Commissioner considered whether *indirect discrimination* had been established. The Commissioner did not consider that the reversal of onus provisions in the *Sex Discrimination Act 1984* had been imported into the *Workplace Relations Act 1996*, but in any event found that the evidence that HPM had indirectly discriminated against its female employees was inconclusive. In particular, he found that gender segmentation of the workforce did not in itself establish indirect discrimination. The fact that HPM had adopted an equal remuneration policy and employed some women in male dominated classifications at other work sites was also taken into account (94 IR 164).

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 store persons arose in circumstances that were sufficiently similar as to amount to discrimination based on sex (94 IR 162).

The case focused on the need to establish discriminatory treatment in the setting of wage rates and how such discrimination might be established.

2.1.9.2 *The second HPM Case*

In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries PTY Ltd* ((1998) Q1002) (the second HPM case), the AMWU lodged a second application for equal remuneration for female process workers and packers at HPM's Sydney site and sought a retrospective application of any order made dating back to 1985. In his decision and issue of directions of May 1998, Justice Munro found that the wording of the relevant provisions suggested that such an order could not be retrospective:

The use of the present and future tenses in section 170BC suggests that the condition precedent is satisfaction as to an existing state of affairs that "will be" overcome by appropriate orders. That construction is reinforced by the content of section 170BF. (Q1002 at 14)

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

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 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.(Q1002 at 18)

However, Justice Munro noted the necessity, and the difficulty involved, in establishing equivalence of the work (in order to establish direct discrimination):

... 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 the work resulting from the application of it. (Q1002 at 17)

In relation to over-award payments, Justice Munro indicated that the reasons and conditions for such payments needed to be articulated as they could be considered remuneration for the purposes of an equal remuneration matter:

As I understand Mr Cole's submission, the Commonwealth acknowledged that the concept of remuneration may include an over award component. The presence of that component may be attributable to considerations that have some relevance to assessment of the equivalence of the work value. Thus, an over award "experience" payment can be related to work value considerations of the kind used in award work value exercises. On the other hand, it is conceivable that "remuneration" may be also in part based upon factors that are less clearly related to the valuation of the work in the conventional sense. In this matter, whatever factors may be claimed to relevantly influence remuneration for purposes of section 170BC, if they are relied upon, will need to be articulated by the company. The existence in practice of any such factor, and the applicability of it to whatever phase of assessment in which it is argued that it should be used, may then be debated. (Q1002 at 17)

Ultimately 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. The decision certifying the agreement noted that the AMWU had agreed to withdraw and discontinue its equal remuneration application. The new classification structure under the agreement provided the same rates of pay for process workers and packers as the restructured classification in the stores area. The agreement also effectively abolished the previous performance payment system which had applied only to masculinised work in addition to the system of discretionary over award payments (URCOT, 2005: 139).

2.1.9.3 *David Syme (The Age) Case (no.1)*

In *Automotive, Food, Metals Engineering, Printing and Kindred Industries Union and David Syme & Co Ltd* ((1999) 97 IR 374) the AMWU made an application for an equal remuneration order to the Commission for female clerical employees at David Syme to be paid the same rates as male employees paid at level 4 in the publishing department and level 3 machine room operator in the machine department. The claim formed the basis of two applications.

In the first application the AMWU sought an order for female clerical employees. David Syme (the company) made four jurisdictional objections to the claim: the first related to the 'alternative remedy' provision of the legislation; the second claimed that if the application were granted it would create an inequity between male and female clerical employees; the third related to legislative restrictions on the exercise of the Commission's arbitral powers; and the fourth claimed that the application was uncertain and ambiguous (97 IR 375).

Vice President Ross ruled in the company's favour on the issue of an alternative remedy—finding that the Commission could not determine applications simultaneously under the primary and secondary operation of the *Workplace Relations Act 1996* (97 IR 379).

On the inequity issue, Vice President Ross found that the Commission needed to be satisfied that there was not, at present, equal remuneration for work of equal value. Following the original HPM decision, he asserted that the first step in the determination of an equal remuneration application was an assessment of whether the rates in question had been established without discrimination based on sex:

A first step in the determination of a 170BD application is to decide whether the rates of remuneration in question have been “established without discrimination based on sex”. In this case the AMWU would need to show that the rates of pay for the relevant clerical employees were established having regard to the gender of the employees concerned or at least a large proportion of those employees ... It follows that there is no impediment to the application referring to all clerical employees as the central issue is not the gender of the employees but whether their remuneration was “established without discrimination based on sex”. (97 IR 380)

In relation to the claimed restrictions on the Commission’s arbitral powers, Vice President Ross found that s.170N concerned matters under part VI (the dispute prevention and settlement part of the *Workplace Relations Act 1996*) and did not affect part VIA (the minimum entitlements provisions of the Act) (97 IR 381–3).

Vice President Ross did not rule on the matter of ambiguity given the conclusions he had reached on the other jurisdictional matters, but noted that the application contained a number of ambiguities. The application was struck out and it was suggested that any further application would need to address the observations concerning the inequity submissions (97 IR 384).

2.1.9.4 *David Syme (the Age) Case (No.2)*

In its second application in the David Syme matter ((1999) R5199), the AMWU sought an order applicable to all clerical workers employed by David Syme. The company 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. In responding to the submissions, Commissioner Whelan considered the matters required to make out the successful elements for an equal remuneration order. Referring to Justice Munro’s comments in the second *HPM Case*, Commissioner Whelan, agreed that ‘considerable uncertainty exists about the elements necessary to make out a proper case’ (R5199, at 20). Commissioner Whelan outlined the elements required to be established by the applicant to satisfy the AIRC that an equal remuneration order should be made, stating that:

The onus is on the applicant to establish that for the employees which it seeks to have covered by the orders:

- a. there is not equal remuneration for work of equal value;
- b. the rates of remuneration for these employees have not been established without discrimination based on sex;
- c. the orders proposed will ensure that for the employees covered by the orders, there will be equal remuneration for work of equal value. (R5199, at 28)

In making out whether there is equal remuneration for work of equal value, Commissioner Whelan stated that:

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. (R5199, at 28)

Commissioner Whelan referred to the decisions of Justice Munro and Commissioner Simmonds in the HPM cases, noting that both had discussed the use of the Commission's principles and practices in relation to work value change and evaluation to provide guidance as to what factors are relevant in evaluating whether work of an equivalent value. She determined that it would be wrong to pre-empt the parameters of sections 170BC (a) and 170BC (b) due to the absence of advice on 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 (R5199, at 34).

David Syme appealed against Commissioner Whelan's decision. Following the failure of that appeal, proceedings resumed before Commissioner Whelan, who issued further directions in June and August 1999. The matter was ultimately settled by consent (URCOT, 2005:144).

2.1.9.5 *The Gunn & Taylor case*

The *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Gunn and Taylor (Aust) Pty Ltd* case concerned Gunn and Taylor (a graphic design company), which employed four plate makers, one of whom was female ((2002) 115 IR 353). All the plate makers were qualified trades persons 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. In this case the AMWU made an application for equal remuneration for female plate makers in the company. The union argued that the employee in question should be paid at the highest rate paid in the plate making department.

The company objected to the application on the basis that a suitable alternative remedy existed under sex discrimination laws; 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 binding award and flexibility agreement did not discriminate against men and women in classifications of pay and, therefore, there was no discriminatory treatment. 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 (PR914868, at 4–9).

The matter was initially heard by Commissioner Whelan who found that over award pay set by an industrial instrument was within the definition of remuneration for the purposes of the Act. Commissioner Whelan also rejected the company's submission regarding an alternative remedy as she was not satisfied that an individual anti-discrimination application would provide a satisfactory remedy for the union's claim:

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. (PR914868, at 33)

The company appealed the decision to a Full Bench of the Commission. While the Full Bench found that a number of issues remained open to evidence and argument, in relation to the alternative remedy issue, 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 section 170BE of the WR Act. ((2002) 115 IR 358, at 23)

2.1.10 Assessments of the federal equal remuneration provisions

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 equity (URCOT, 2005: 144–147).

Smith (2009: 658–660; 2010: 11–16) provided an analysis of the 1993 legislative amendments and the HPM and David Syme proceedings. She argued that the 1993 provisions offered considerable promise. They attempted to widen the concept of 'equal pay' embedded in the 1972 principle to include 'equal remuneration', which enabled consideration of over-award earnings. They linked to the relevant international instruments, and they place no explicit restriction on the type of work value comparisons that could be made (Smith, 2010: 12). However, she suggested that important features and limitations of the provisions also need to be recognised.

In particular, although the right to equal remuneration was embodied in Australia's principle instrument of labour law, 'the right was far more external to the system of wage determination and industrial awards than that provided in 1969 and 1972' (Smith, 2010: 12). 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 (Smith, 2010: 16; also see URCOT, 2005: 148).

In addition to the contextual constraints, Smith argued that, as interpreted in specific cases, the 1993 provisions revealed important limitations that restricted their impact. She suggested that these limitations included, first, the foundation of the provisions on the external affairs power, which compromised the relationship of the provisions and other key sections of the legislation. For example, this limited the capacity of the Full Bench to hear applications under the provisions, constrained the parties from using the provisions as the basis for variation to a multi-employer award and meant that there were only a narrow range of opportunities through which the Commission could hear equal remuneration applications (Smith, 2010: 13; also see URCOT, 2005: 145).

The second limitation Smith identified was the requirement to demonstrate a sex-based discriminatory cause for earnings disparities. The use of the term 'without discrimination' in the Equal Remuneration Convention (to which the legislative equal remuneration provisions referred) was interpreted by the Commission to require the applicants to demonstrate that disparities in earnings had a discriminatory cause. Smith argued that this tightened the grounds on which equal remuneration claims could be heard, presented a difficult threshold for applicants and impeded investigation of the differences in the work and

wage structures. 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 (Smith, 2010: 14–15 & 2009: 659–660).

As will be seen in the following section, some of the state industrial tribunals have interpreted the requirements of the Equal Remuneration Convention somewhat differently—concluding that the Convention requires the establishment of equal remuneration to be free of discrimination based on sex, but not erecting as a governing criteria the establishment of discrimination per se. Principles developed in some states also avoided some of the uncertainties and limitations of the federal provisions (URCOT, 2005: 133, 145).

The cases arising from the 1993 provisions consistently support the use of work value criteria to assess whether different work was of equal value. However, Justice Munro’s decision in the second HPM case indicated that it was open to the Commission to adopt any of a range of evaluation techniques for that purpose; raising some uncertainty as to whether traditional work value criteria must be relied on exclusively. That the choice of the method of demonstrating that work was of equal value falls to the applicant was confirmed in the second HPM application and the second David Syme case (Smith, 2010: 15–16; URCOT, 2005: 145–146).

Finally, in its analysis of the 1993 equal remuneration provisions, URCOT argued that:

The case law indicates that the federal provisions have application to overaward payments. This reflects the definition of remuneration referenced by the legislation. What is not clear is whether the Commission can, on the evidence of overaward pay, adjust minimum federal award rates of pay by way of equal remuneration orders. This is a critical requirement given that women have lower levels of access to overaward payments. (URCOT, 2005: 148)

2.1.11 Workplace Relations Amendment (Work Choices) Act 2005

The *Workplace Relations Amendment (Work Choices) Act 2005* introduced amendments to the *Workplace Relations Act 1996* which came into effect in March 2006 and significantly altered the industrial relations framework and minimum wages setting. 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 amendments created the Australian Fair Pay Commission (AFPC) as the federal body responsible for the setting and adjusting of minimum wages. The legislation removed rates of pay from federal and state awards (where the awards applied to constitutional corporations and Victoria) and created preserved Australian Pay and Classification Scales (APCSs) which contained wages and certain other provisions (see section 208 *Workplace Relations Act 1996*). Under the legislation, the AFPC became the body responsible for adjusting the rates in APCSs and creating and adjusting the Federal Minimum Wages and special Federal Minimum Wages.⁸ The Commission, no longer responsible for award rates for employees employed by constitutional corporations, was responsible for adjusting loadings and allowances in awards (and wages for non-constitutional corporations within the federal jurisdiction) which continued to apply to employees covered by federal awards under the conciliation and arbitration head of power.

Within its wage setting parameters, the AFPC was required to apply the principle that men and women should receive equal remuneration for work of equal value in exercising any of its powers (section 222(a)). The AFPC informed itself on wage-setting matters through commissioned research, stakeholder consultation and public submissions.

⁸ Special federal minimum wages could be created and adjusted for employees with a disability, junior employees and employees to whom training arrangements applied.

The equal remuneration provisions (Division 3 of part 12 of the *Workplace Relations Act 1996*) were retained, but amended to:

- explicitly require applicants to make reference to a comparator group of employees (section 622); and
- exclude the Commission from hearing applications if the effect of the order sought would be to vary a minimum pay rate set under Division 2 of part 7 of the Act.

In addition, section 16(1)(c) of the amended Act 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'. A number of academic commentators have argued (for example, Smith, 2009: 662 & 2010: 15; Smith & Lyons, 2007: 30; Baird & Williamson, 2009: 335) that 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. (These approaches are discussed in the second section of this section).

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 which raised specific claims that specific pay scales did not provide equal remuneration (AFPC, Wage Setting Decision 2/2008, Reasons for Decision: 88; and AFPC, Wage Setting Decision 2/2009: 79). The Commission remained responsible for hearing equal remuneration matters outside minimum wage setting. However, from 2005 to 2009 no equal remuneration applications were made.

2.2 Developments at state level

It is beyond the scope of this paper to examine the history of the development of equal pay in the Australian state jurisdictions. This section considers only the more recent developments at state level which led to the establishment of equal remuneration principles. Commentators have suggested that these developments occurred as it became increasingly evident that the momentum of equal remuneration reform had stalled. Growing concern about the impact of enterprise bargaining on the gender pay ratio may also have been a factor (Eastough & Miller, 2004: 271). The number of state industrial awards with particular significance for women's employment no doubt also provided impetus to developments at the state level (McCallum quoted in Smith & Lyons, 2007: 29).

Government-initiated pay equity inquiries in five states (New South Wales, Queensland, Tasmania, Western Australia and Victoria) led to new equal remuneration principles in the three states in which the inquiries were conducted through the industrial tribunals (New South Wales, Queensland and Tasmania). The following sections examine the inquiries and cases that developed the principles and the key cases that have applied them, with particular attention to New South Wales and Queensland.

2.2.1 New South Wales

A number of provisions of the *Industrial Relations Act 1996* (NSW) require the New South Wales Industrial Relations Commission (NSW IRC) to consider the principle of equal remuneration when determining or reviewing award rates. The objects of the 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' (section 3 (f)). Section 10 requires the NSW IRC to make awards setting 'fair and reasonable conditions of employment'. When reviewing awards, section 19 requires the NSW IRC to take into account 'any issue of discrimination under the awards, including pay equity'. Section 4 defines 'pay equity' to mean 'equal remuneration for men and women doing work of equal or comparable value'. Section 21 requires the NSW IRC, on application, to make an award setting any of a

number of specified conditions of employment, which include 'equal remuneration and other conditions for men and women doing work of equal or comparable value'. Section 23 provides that: 'Whenever the Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.'

Section 146(1) of the *Industrial Relations Act 1996* confers general functions on the NSW IRC, including 'inquiring into, and reporting on, any industrial or other matter referred to it by the Minister'. Section 146(2) requires the NSW IRC in exercising its general functions to 'take into account' the public interest, and 'have regard to' the objects of the Act, the state of the economy of NSW and the likely effect of its decision on the economy.

2.2.1.1 *NSW Inquiry into Pay Equity, 1998*

In 1996, the NSW Government established a Pay Equity Taskforce as part of its commitment to addressing pay equity. The taskforce was required to examine the way in which state and federal laws, and arrangements in selected international countries, promoted or impeded pay equity outcomes and the implications for the labour market. As part of its investigations, it commissioned case studies to examine wage inequities in female dominated industries (Shaw, 1996). The taskforce recommended, amongst other things, that there was a need for an inquiry into work value to be undertaken by the NSW IRC. Subsequently, the Minister for Industrial Relations developed terms of reference for the inquiry, which included consideration of: whether work in female dominated occupations and industries was undervalued in terms of remuneration relative to work in comparable male dominated occupations and industries; the adequacy of tests and mechanisms for ascertaining the value of work; the extent to which, if at all, those tests and mechanisms were inequitable on the basis of gender; and any necessary remedial measures. The terms of reference also noted the need to take the requirements of section 146(2) into account. The Minister referred the inquiry to the NSW IRC. The inquiry was undertaken by Justice Glynn between December 1997 and July 1998, and a three volume report was presented to the Minister (Glynn, 1998; NSW DIR, undated; Hall, 1999).

The inquiry considered a wide range of evidence, including the history of equal pay cases at the federal and state level and case studies selected to enable comparison of female dominated and male dominated industries and occupations. The case studies included comparison of: private sector childcare workers and engineering associates in the metals industry; seafood processors and seafood butchers; public sector librarians and public sector geoscientists; private sector clerical workers and tradespersons in the metal industry; hairdressers and beauty therapists and motor mechanics; public hospital nurses and coal miners; and clothing industry outworkers and metal machinists. The case studies were selected to provide a cross section of professional, para professional, skilled, unskilled, trades and non-trades positions in the public and private sectors.

The evidence considered by Justice Glynn revealed significant issues about undervaluation of female work—leading to the conclusion that despite the introduction of the principle of equal pay for equal work over 30 years previously, undervaluation and wage discrimination remained. In particular, on the basis of the case studies, Justice Glynn found that there was evidence of undervaluation of childcare workers, hairdressers and beauty therapists, outworkers, trimmers undertaking seafood processing and librarians. However, Justice Glynn found that there was insufficient evidence to make findings for nurses and clerical employees. She also noted that comparisons with male comparators did not always add to an understanding of the dimensions of undervaluation (Glynn, 1998: vol. 1, 380–647).

The Inquiry found that undervaluation of women's work could occur for a number of reasons, including as a result of gendered assumptions in work value assessments and occupational segregation (or female domination of an occupation). A range of other factors (such as low rates of unionisation and high rates of part time and casual employment) were also found to be important. These factors impacted on the bargaining position of female dominated occupations and industries and resulted in a high incidence of variations to awards by consent, absence of work value assessments and a low incidence of over-award payments (Glynn, 1998: vol. 2, 174, 179, 273–274).

A 'profile of undervaluation' was developed which included the following indicators:

- female characterisation of work;
- female dominated occupation or industry;
- no work value exercises conducted by the Commission;
- inadequate application of equal pay principles;
- weak union or few union members;
- consent awards/agreements;
- large component of part time and casual workers;
- lack or, or inadequate recognition of qualifications (including misalignment of qualifications);
- limited access to training or career paths;
- small workplaces;
- new industry or occupation;
- service industry; and
- home-based occupations.

The Inquiry found that not all indicators would necessarily be present in every case, but it was most likely that most cases of undervaluation would contain some of them (Glynn, 1998: vol. 1, 45–46).

Justice Glynn concluded that the establishment of an equal remuneration principle within the context of the New South Wales industrial system and the use of non gender-biased work value assessments offered the best means of redressing pay inequity (Glynn, 1998: vol. 2, 244). Individual, court-based and rights based remedies, such as those contained in anti-discrimination legislation, were seen as incapable of rectifying undervaluation relating to whole occupations and industries or the systemic issues concerned with undervaluation (Glynn, 1998: vol. 2, 149, 153). In general terms, the provisions of the *Industrial Relations Act 1996* and industrial principles of the NSW IRC were considered capable of addressing equal remuneration issues, with some minor modification.

Justice Glynn considered the meaning of the words 'comparable value' in the definition of 'pay equity' in the *Industrial Relations Act 1996*, and said:

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 that a likeness of value was required but that a comparison of the value of work there may be found sufficient basis to establish inequality of remuneration. (Glynn, 1998: vol. 2, 129)

In her report, Justice Glynn proposed that Equal Remuneration Convention should be the foundation for a legislative scheme to address pay inequity and recommended that the *Industrial Relations Act 1996* be amended to clarify the distinction between undervaluation and discrimination, distinguish discrimination from equal remuneration and ensure the NSW IRC considered pay equity in all its deliberations (Glynn, 1998: vol. 2, 110, 135–136, 151, 154,165).

The report recommended that the proposed equal remuneration principle be developed through a state decision to guide the case-by-case identification of undervaluation and assessment of the 'true' value of the work in question. Elements to be included in the equal remuneration principle were outlined in the recommendations. These elements included that it no longer be presumed that rates of remuneration had been properly assessed in female dominated industries in the past or that processes such as structural efficiency or minimum rates adjustment had been correctly or fully applied. In assessing whether work had been undervalued, comparisons were considered to be useful as a guide to the reliability of rates of remuneration, but it was *not* recommended that they be a requirement. When comparisons were used, it was necessary to establish that there was a proper basis for the comparison. Assessments of undervaluation were recommended to take a broad approach; having regard to the history of the award, whether there had been any assessments made of the work in the past and whether the rates had been assessed on the basis of the sex of the worker. In considering the latter, it was recommended that regard be paid to the range of factors identified in the report that could lead to undervaluation. Assessment of work value was to occur through the application of an objective, transparent and non-discriminatory assessment of the true value of the work—not merely whether there had been changes in the work. The report also underlined the need for gender neutral assessment of traditionally female work to give adequate weight to factors such as 'dexterity, nurturing, inter-personal skills and service delivery'.⁹

In outlining the essential elements of the new equal remuneration principle, the report explicitly stated that it was not necessary to find causation by sex discrimination in order to make findings of gender-related undervaluation (Glynn, 1998: vol. 2, 174, 88–96, 150–160). On this point, Justice Glynn's interpretation of the requirements of the Equal Remuneration Convention was that it:

... requires the establishment of equal remuneration being the provision of equal remuneration for work of equal value with such establishment to be free of discrimination based on sex. It does not erect as the governing criteria discrimination *per se*. (Glynn, 1998: vol. 2, 89)

⁹ For further consideration of the issues associated with 'caring' and 'emotional labour' see Cortis (2000).

In considering the economic impact of the recommended approach, Justice Glynn observed that much of the economic evidence presented at the Inquiry that predicted adverse economic impacts lacked foundation and overstated the effects. The report noted that women's employment had been 'remarkably unresponsive' to the 1969 and 1972 equal pay decisions. It also noted that gender discrimination represented a sub-optimal allocation of resources and that changes in the composition of employment because of pay equity could represent an improvement in economic efficiency and resource allocation and higher levels of productivity. In relation to outworkers in particular, Justice Glynn considered that there was a real possibility that a degree of monopsony¹⁰ existed, the removal of which would not have negative economic impacts. An evolutionary, case-by-case approach was also endorsed as a means of moderating any economic impact. Other positive impacts were also identified, such as improvements in opportunities and choices for women by providing economic independence, reduced reliance on welfare or income support and more transparent award structures (Glynn, 1998: vol. 2, 357–372).

As Hall (1999: 48) argues, an important finding of the inquiry was that the commission should itself consider whether there was undervaluation when it reviewed an award, irrespective of whether the industrial parties made submissions on the matter. This was considered important to redress undervaluation in circumstances where unionisation was low, unions were unable or unwilling to take equal remuneration cases and consent arrangements had resulted in undervaluation. As Hall notes, the possibility of Commission-initiated reviews was significant, given the resource demands of work value and equal remuneration cases.

2.2.1.2 *Adoption of an NSW Equal Remuneration Principle, 2000*

The legislative amendments recommended by Justice Glynn were not made to the Industrial Relations Act. However, the NSW IRC developed and adopted an Equal Remuneration Principle which essentially followed Justice Glynn's recommended elements following extensive discussion with representatives of employers, unions and government (*Re Equal Remuneration Principle* [2000] NSWIRComm 113).

In its decision, the Full Bench noted that the Report of the Pay Equity Inquiry contained a wealth of information, material and recommendations that provided an appropriate starting point for its considerations. However, the Full Bench concluded that while entitled to have regard to the report, it was not bound by its findings ([2000] NSWIRComm 113, par 65).

In considering the need for a new principle, the Full Bench noted that the right of women to equal remuneration irrespective of their gender had been recognised by the UN and the ILO and enshrined in state legislation. It also noted that there was general agreement between the parties and interveners before it that an Equal Remuneration Principle should be included in the State Wage Case Principles—the focus was not on whether there should be such a principle, but what should be the terms of the principle. The Full Bench was also influenced by the general view expressed by the parties that the existing equal pay principle had been 'virtually forgotten' and needed to be updated and elevated in status. In the circumstances, the Commission decided it was appropriate to adopt the consent of the parties and develop a new principle that would be part of the IRC's wage fixing principles ([2000] NSWIRComm 113, pars 43–64).

¹⁰ Monopsony is considered further in Section 3.

In general terms, the NSW IRC considered that the new principle needed to be:

... designed to ensure there are no artificial barriers created to a proper assessment of the wages on a gender neutral basis. We consider this will be achieved if the only criterion for a revaluation of the work and its work value is that it be demonstrated the rate of payment hitherto fixed does not represent a proper valuation of the work and that any failure is related to factors associated with the sex of those performing the work. ([2000] NSWIRComm 113, par 71)

The NSW IRC considered the legislative framework, noting that the parties had been 'at significant odds with each other' as to the proper construction of the legislative provisions, particularly sections 19, 21 and 23 ([2000] NSWIRComm 113, par 71). It first dealt with the meaning of 'pay equity' and 'equal remuneration' within the Act. It noted that 'pay equity' was defined in the Act, but that 'remuneration' and 'equal remuneration' were not. After considering the decision of another Full Bench which had considered the word 'remuneration', the use of the word within sections 19, 21 and 23 and the definition of 'remuneration' within ILO Convention 100, the NSW IRC concluded that:

... the term "equal remuneration" is not used in the Act in the same way that the word remuneration and equal remuneration are defined in the Convention.' ([2000] NSWIRComm 113, par 94)

'What necessarily follows is the conclusion that the word "remuneration", where it appears in the Act in terms such as "equal remuneration and other conditions of employment", may be understood as being used, pertinently in this case, as not including overaward payments. ([2000] NSWIRComm 113, par 95)

The commission rejected submissions that it was required, when exercising its powers under sections 19, 21 or 23, to conduct a wide ranging investigation or inquiry into the question of whether pay equity had been achieved in the award by reference not only to the work to which the award applied, but also to the work of comparable occupations covered by other awards, industrial instruments or common law contracts. It concluded that the new principle would permit gender undervaluation applications to be advanced and considered separate from the Special Case Principle, and emphasised that section 10 of the *Industrial Relations Act 1996* required the NSW IRC to make awards that fixed 'fair and reasonable' conditions of employment—enabling the NSW IRC to rectify any demonstrated undervaluation ([2000] NSWIRComm 113, pars 101–131).

The Full Bench considered economic outcomes, but found that:

Claims that there may be negative employment effects cannot ... provide a proper basis for refusal of pay equity adjustments where it has been established that men and women are not being equally remunerated for work of equal or comparable value. ([2000] NSWIRComm 113, par 137).

It also noted that:

... all of the expert witnesses seemed unanimous that if genuine cases of such inequity were corrected by the Commission the effects on the labour market would be positive. ([2000] NSWIRComm 113, par 142).

In framing the Equal Remuneration Principle, the Full Bench rejected the submission of the Employers' Federation that the principle should be confined to claims of discrimination, stating:

Claims of undervaluation may be based on identification of discriminatory matters. However, if it can be demonstrated that particular work is undervalued an appropriate adjustment to the applicable award rate should follow, without the necessity of establishing also that the undervaluation flowed from a particular act of discrimination. (*Equal Remuneration Principle*, Statement of Full Bench [2000] NSWIRComm 116, par 7).

The Full Bench noted that the principle adopted was modelled on the existing Work Value principle and that it permitted appropriate comparisons to be drawn, but did not require them. However, the Full Bench emphasised that the principle did require appropriate attention to be paid to award relativities to ensure that undervaluation claims did not give rise to leapfrogging ([2000] NSWIRComm 116, par 9).

The Equal Remuneration Principle was incorporated into the NSW IRC's Wage Fixing Principles and has remained a part of those principles. The principles as most recently stated in the *State Wage Case 2008* ([2008] NSWIRComm 122) are set out at Appendix 2.

2.2.1.3 *Application of the NSW Equal Remuneration Principle—Crown librarians, library officers and archivists case, 2002*

The *NSW librarians' case* (*Re Crown Librarians, Library Officers and Archivists Award Proceedings—Applications under the Equal Remuneration Principle* [2002]) NSWIRComm 55) was the first matter heard under the NSW Equal Remuneration Principle.

In the *NSW Librarians' case*, undervaluation was not contested by the parties. However, the NSW IRC considered a range of evidence, including the Pay Equity Case Study that had been presented to Justice Glynn as part of the Inquiry into Pay Equity, which compared the work of librarians and geologists. The case study included points/factor job evaluation of the two occupations as part of evidence about the value of the work. The inquiry also undertook inspections of relevant workplaces, heard evidence from witnesses and received extensive documentary evidence.

The Full Bench accepted that the work of librarians had been undervalued on a gender basis, the main indicia being:

- the findings of the Pay Equity Case Study comparing librarians and geologists, together with Justice Glynn's findings in the Pay Equity Inquiry;
- the consensus amongst the parties that the work was undervalued;
- the fact that the occupation of librarian in the public sector was female dominated;
- that librarians were found to be persons engaged in a profession; they exercised skills based on theoretical knowledge, were required to have tertiary qualifications, were eligible for membership of independent, professional associations, were subject to standards of competence and were required to follow ethical codes of conduct. However, librarians were found to receive lower pay rates than other professional groups in the NSW public service that exhibited similar characteristics; and
- the absence of any concluded work value inquiry. While this was not of itself evidence of undervaluation, the absence of an independent assessment of the work served to strengthen the inference that the work had been undervalued ([2002] NSWIRComm 55, pars 28–29).

The work of archivists was not considered in the Pay Equity Inquiry, however, the Full Bench found that archivists were also engaged in a profession and shared a number of similarities with librarians. The close nexus which had existed between librarians and archivists, including in relation to alignment of rates of pay, and the absence of any concluded work value inquiry suggested that archivists had also been undervalued ([2002] NSWIRComm 55, pars 32–33).

Library technicians were found to be undervalued by comparison with other para-professional groups in the public service. The occupation was female dominated, and at no stage had their work been the subject of a work value inquiry, despite significant change in the 1980s with the onset of automated systems ([2002] NSWIRComm 55, pars 34–40).

The Full Bench concluded that the evidence established a career industry; where qualifications, knowledge and responsibilities increased as the individual gained experience in performing the various functions at the various levels. In these circumstances, to remedy the identified undervaluation the NSW IRC decided to increase wage rates and adopt incremental scales for library staff—an approach similar to that which had been adopted for public sector psychologists. The NSW IRC ordered the creation of a new interim award and requested the parties to confer on the terms of a new award to replace the interim award (in particular, addressing issues such as the form and content of classification descriptors). Wage increases of up to 25 per cent (16 per cent on average) resulted and the new award formalised the professional status of librarians and library technicians ([2002] NSWIRComm 55, pars 148–155).

The outcome of the decision was welcomed by employers and employees alike. Schmidmaier (2008), providing an employer’s perspective, argued that the decision confirmed librarianship’s equivalency to other professions and facilitated the development of career paths, thereby enhancing the ability of public sector libraries to retain staff and to attract high quality applicants from outside the library sector. Bonella (2003: 322–323) also welcomed the decision, which she argued ‘formalised the professional status of librarians and library technicians’ and addressed long standing grievances. However, she noted that it was the first step in what she envisaged would be a ‘protracted battle’ to see the gains spread through the library community to local government employees.

2.2.1.4 Application of the NSW Equal Remuneration Principle—Child Care Case, 2006

In *Re Miscellaneous Workers Kindergartens and Child Care Centres (State) Award* ([2006] NSWIRComm 64), a Full Bench of the NSW IRC considered the first contested matter heard under the Equal Remuneration Principle.

The Liquor, Hospitality and Miscellaneous Union (LHMU) sought a new award with appropriate career paths and increased remuneration to address claimed historical inequities, undervaluation and work value change. The award was sought to cover primary contact staff, other than teachers, employed at pre-school, long day care and out of school hour childcare centres, as well as non-contact staff, such as cooks and cleaners. In support of its claims for undervaluation, the union presented evidence on: the female domination of the industry; its ‘charitable and philanthropic origins’; the history of establishment of award rates by consent and the absence of a work value examination; and the changing nature of the work and quality of the service which had resulted from changed regulatory arrangements. The union also argued that the skills involved in childcare were not ‘innate’ but ‘learned skills, which did not come naturally to either sex’, and claimed that ‘soft skills’, including interpersonal and communication skills and teamwork had been undervalued in setting rates in the industry ([2006] NSWIRComm 64, pars 2–3, 16–23, 101–107).

Employers First (on behalf of the childcare industry employers) argued that even if there had been an historical undervaluation of the rates of pay under the award as a result of the charitable origins of the industry, appropriate rates of pay had been established when the award had been aligned with that of other awards, in particular the metal industry award, as part of the minimum rates adjustment process in 1991 and by union and employer review and consent variation in 1997. The employers also argued that substantial decreases in wages were warranted for some staff employed in pre-schools and that any wage increase would result in increased childcare fees which would affect the viability of childcare centres and would be a cost worn directly by the public ([2006] NSWIRComm 64, pars 24–31).

The NSW IRC conducted inspections and heard an extensive range of evidence relating to the industry, its regulation, funding, profitability and affordability, the history of the industry's award regulation, the nature of the workforce, the skills and responsibilities required of the work and changes that had impacted on childcare work over time. The evidence included that of expert witnesses as well as the Report of the Pay Equity Inquiry. Amongst other things, Justice Glynn had suggested in her report that the minimum rates adjustment process had not been correctly applied and subsequent consent award adjustments had failed to properly value the qualifications of the childcare worker. She had noted that pay rates for childcare workers were below those of unskilled occupations such as shop assistants and car park attendants and had suggested that increased regulation had resulted in childcare work evolving in a similar way to the work of teachers ([2006] NSWIRComm 64, par 139).

The NSW IRC stated that the starting point for its consideration of the parties' competing cases was the requirement imposed by section 10 of the *Industrial Relations Act 1996* that the NSW IRC make awards setting 'fair and reasonable conditions of employment'. It found that in cases where significant alterations were sought to existing consent arrangements, the onus fell on the applicant to demonstrate that the award no longer provided fair and reasonable conditions of employment ([2006] NSWIRComm 64, pars 160–161). Considering all the evidence, the NSW IRC concluded that:

... the evidence overwhelmingly showed that the rates of pay for childcare workers to whom the award applies, are too low. ([2006] NSWIRComm 64, par 163).

The NSW IRC rejected the employers' argument that some rates under the award should be reduced, and found that both undervaluation and work value change supported the case for improved remuneration:

We are satisfied that no evidentiary basis for any reduction in the rates of any of those employed in preschools was made out ... we are well satisfied that as far as both qualified and unqualified child care workers are concerned, a case of both undervaluation and work value change was made out in the evidence. ([2006] NSWIRComm 64, par 169)

The NSW IRC overviewed the changes in work requirements that it considered sufficient to satisfy the requirements of the Work Value Principle. The changes affected childcare workers and co-ordinators and arose, in particular, from significant and ongoing changes in the regulatory environment ([2006] NSWIRComm 64, pars 184–197).

The NSW IRC then outlined the basis for its acceptance of the case for undervaluation of childcare workers, co-ordinators and authorised supervisors, stating that:

The evidence showed that the vast preponderance of views expressed over some years as the result of various investigations, surveys and considerations conducted by Federal and State government bodies and forums, as well as in academic research, was that the work of child care workers is undervalued. Even some employer witnesses in these proceedings accepted those views, albeit only in relation to qualified staff. Child care workers are generally perceived to have low pay and low status, with the result that few males are employed in the industry. One result is that there are difficulties in the attraction and retention of such staff, more in some areas than others, notwithstanding that the cost of the service provided by these centres is underwritten by Federal and State government financial support, as well as fees paid by parents. ([2006] NSWIRComm 64, par 200)

The NSW IRC found that the award parties, through agreements which they had made and the NSW IRC had ratified, had failed to ensure that the award rates properly reflected the value of the work, and that this situation had been compounded by the inability of childcare workers to negotiate on an over-award basis. The NSW IRC noted that generally it may be difficult to detect gender based undervaluation. However, it found that, in the childcare workers' case, there was no evidence to suggest that the conclusions reached by Justice Glynn in the Pay Equity Inquiry had been erroneous, and there was 'no other explanation for the obvious undervaluation of childcare workers' ([2006] NSWIRComm 64, pars 210–211).

The NSW IRC found that there were 'serious difficulties' in drawing comparisons between the work of childcare workers and those employed in male dominated industries, but agreed with Justice Glynn that comparisons could usefully be made between teachers and childcare workers. The NSW IRC found that childcare work had evolved in a way similar to the work of teachers and noted that childcare experience was recognised in teaching awards as a factor to be considered in classification matters. However, the Commission noted that there were differences in the quality of the work and the similarities were less significant for non-qualified staff ([2006] NSWIRComm 64, pars 214–217).

In fixing fair and reasonable rates as required under section 10, the NSW IRC also took into account the difference in the hours worked by childcare workers in pre-schools as opposed to long day care centres ([2006] NSWIRComm 64, pars 231–232). Further, in balancing 'widely held concerns' for the undervaluation of pay rates and employer concerns for employment and the viability of the industry, the NSW IRC decided to phase in the award increases over a two year period ([2006] NSWIRComm 64, pars 341–348).

In their analysis of the decision, Smith and Lyons claimed that it was something of a landmark in wage fixation for the Australian children's services industry and efforts to achieve equal remuneration. In particular, in their view, adoption of the Equal Remuneration Principle by the NSW IRC allowed the union to overcome the restrictions of past tribunal principles that had been used to limit award-based wage increases for childcare workers. The union was not required to make a comparison with a male dominated industry, and teaching was finally accepted as the more appropriate comparator. Equally significant, arguments that a remedy for childcare workers was not in the 'public interest' were able to be rejected because the NSW IRC accepted that the work they performed was of importance to the community and to government (as evidenced by regulation and funding of the industry) (Smith & Lyons, 2007: 60–61). However, they noted that the decision was one of the last to be handed down before the introduction of *Work Choices* when some of the preceding coverage of the state tribunals was lost to the Commonwealth (Smith & Lyons, 2007: 62).

2.2.2 Queensland

In September 2000, the Queensland Minister for Employment, Training and Industrial Relations directed the Queensland Industrial Relations Commission (QIRC) to conduct an inquiry into pay equity in Queensland. The QIRC was asked to consider, amongst other things, the extent of pay inequity in Queensland, the adequacy of the (then) Queensland legislation for achieving pay equity and to develop a draft pay equity principle that might be adopted in Queensland.

The Queensland Inquiry into Pay Equity followed and built on the work of the New South Wales Pay Equity Inquiry conducted by Justice Glynn of the NSW IRC. Both inquiries focused on the historical undervaluation of 'traditionally' female-dominated industries, although the Queensland inquiry also considered the adequacy of Queensland's laws in addressing pay equity.

The Queensland inquiry received 28 written submissions, including one from the Queensland Government, and delivered its report, *Worth Valuing*, in March 2001. The Queensland inquiry accepted that a complex range of factors contributed to cause pay inequity, such as the concentration of women in low-paid work and precarious employment and found that the profile of undervaluation indicators developed by the New South Wales Pay Equity Inquiry was relevant to Queensland. It concluded that a multi-faceted approach was required to redress the situation, which was not exclusively focused on full-time award workers.¹¹

The Queensland inquiry resulted in the implementation of a number of industrial legislative amendments and other recommendations. The legislation required that equal remuneration for workers be ensured when approving awards, agreements, and as part of Queensland minimum wage general rulings (see Appendix 1 for a summary of the provisions). In addition, an Equal Remuneration Principle was developed and a grants program was created to provide funding assistance to organisations involved in pay equity cases under the principle.¹²

2.2.2.1 Adoption of a Queensland Equal Remuneration Principle, 2002

In Queensland, the Equal Remuneration Principle was introduced following hearings before a Full Bench which arrived at the terms of the principle by consent. The Full Bench adopted, with only minor amendment, the draft principle recommended by the report of the QIRC's 2001 Inquiry. The QIRC declared the principle by issuing a statement of policy in April 2002 (114 IR 305).

The terms of the principle are as set out in Appendix 2. In brief, the principle obliged 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 (para. 2). Under the principle, assessment of the work must be 'transparent, objective, non-discriminatory and free of assumptions based on gender' (para. 3). The principle did not require work value change to be established (para. 4).

In assessing the value of the work, the QIRC is to have regard to the history of the 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 (para. 6). In making this assessment, factors relevant to the assessment may include:

- whether the work has been characterised as 'female';
- whether the skills of female workers have been undervalued;
- whether there has been undervaluation due to women being over-represented in lower-paid areas of

¹¹ QIRC, 2001, page 51.

¹² Department of Justice and Attorney-General, 2010.

an industry or occupation (occupational segregation or segmentation);

- whether features of the industry or occupation (for example, occupational segregation, over-representation of women in part-time or casual work, low rates of unionisation and a lack of ability for workers to bargain with their employer) have influenced the value of the work; and
- whether sufficient weight has been placed on the typical work, skills and responsibilities exercised by women, working conditions and other relevant work features.

The principle specifically states that it is not necessary to establish that female workers have been discriminated against to establish undervaluation of work (para. 7). Nor does the principle require comparisons of any particular industry or occupation with any other (para. 8), although it allows comparisons to be used for guidance in ascertaining appropriate remuneration (para. 9).

If the assessment shows that the work performed by female workers has been undervalued, the QIRC is obliged to take steps to ensure equal remuneration is provided to both female and male workers through means such as reclassification of the work, establishment of new career paths, changes to incremental scales, wage increases, new allowances and reassessment of definitions and descriptions of work to properly reflect their value (para. 10). It must do so without reducing existing wages or other conditions (para. 14) and there must be no wage leapfrogging as a result of changes in relativities (para. 11). Provision is included for phasing in any decisions under the principle (para. 15).

Four successful applications have been brought under Queensland's Equal Remuneration Principle since its inception.

2.2.2.2 *Dental Assistants Case*

In late 2003, the Liquor, Hospitality and Miscellaneous Union brought a case on behalf of private sector dental assistants employed under the *Dental Assistants' (Private Practice) Award – State* ((2005)180 QGIG, no. 4: 187–213).

The QIRC considered a range of evidence, including a survey of the working conditions of dental assistants, work inspections, a case study of the work of dental assistants published in *Worth Valuing*, analysis of the award history, classification structure and qualifications, together with information about the remuneration of comparable groups, both within Queensland and interstate.

The evidence revealed a female dominated occupation, with low levels of unionisation, predominantly employed in small workplaces, with a high level of casual engagement—despite employees remaining in the occupation for long periods (paras. 51, 63). There was an absence of registered certified agreements, but some evidence that some dental assistants received informal over-award payments (para. 162). Consent arrangements characterised changes to the award and the QIRC found that no work value case had been conducted in the past for dental assistants in either the public or private sector (para. 48, 63). It also found that dental assistants had been disadvantaged by the incomplete or inappropriate application of wage adjustment processes (such as the structural efficiency, award restructuring and minimum rates adjustment processes) (para. 63). The case for undervaluation was also supported by consideration of evidence relating to training and qualifications, inadequate recognition of 'soft skills', responsibility (including delegated responsibility for infection control), and the conditions under which the work was performed (paras. 128–153).

After considering all the evidence, the QIRC accepted that undervaluation of work had occurred (para. 155) and that the work of dental assistants who possessed Certificate III qualifications were equal to those of tradespersons (para. 84).

The QIRC then considered how it should redress the undervaluation and, in particular, whether and to what extent wage rates from certified agreements that applied to predominantly male occupations should be incorporated into the dental assistants' award (para. 156). The QIRC considered relevant provisions of the *Industrial Relations Act 1999* (Qld), including: section 125 which gave the QIRC power to make, amend or repeal an award to provide fair and just employment conditions; section 126 which required the QIRC to ensure that an award provides secure, relevant and consistent wages and employment conditions and equal remuneration for men and women employees for work of equal or comparable value; and section 129, which provided that the Commission could include in an award provisions that were based on a certified agreement if such inclusions were consistent with principles established by the Full Bench and were not contrary to the public interest. The QIRC concluded that in deciding whether to incorporate a provision from a certified agreement into an award, the QIRC, in exercising its power under section 125 and discharging its duty pursuant to section 126, 'may only do so if it is not contrary to the public interest' (para. 178).

In considering the public interest, the QIRC stated that:

In our view the public interest is to ensure that the Award provides for equal remuneration by having regard to a number of factors including ensuring that relativities are properly set within and between awards; whether despite relativities being properly set, unequal remuneration still occurs either in respect of wage rates or more generally; and by consideration of rates paid to comparable occupations under awards and enterprise bargaining. (para. 181)

The QIRC found that:

The evidence is overwhelming that DAs do not benefit from enterprise bargaining. It is this lack of access to, or participation in, enterprise bargaining that we consider the single biggest contributing factor to pay inequity for DAs. (para. 183)

The QIRC found that lack of access to enterprise bargaining resulted from the small, non-corporate, non-unionised workplaces in which dental assistants were found and the overwhelmingly female composition of the occupation (para. 192).

In deciding whether to take into account certified agreement rates, the QIRC also took into account Justice Glynn's consideration of objections to the use of enterprise bargaining rates in the New South Wales Pay Equity Inquiry (paras 185–187). The QIRC noted that Justice Glynn considered that enterprise agreements were appropriate for consideration in a pay equity context because they were:

- subject to regulation and are institutionally based and therefore represent a more reliable and stable reference point than discretionary payments;
- formalised and more likely to be transparent than over awards and more likely to demonstrate different classifications and definitions; and
- subject to regulation by the QIRC so that the equal remuneration principle would be directly applicable to both awards and agreements.

The QIRC concluded that they agreed with Justice Glynn's reasoning (para. 188) and found that pay equity for dental assistants would not be achieved by merely setting appropriate relativities for dental assistants by reference to comparable classifications in the Engineering Award, without any adjustment to compensate for rates in certified agreements. It also noted that section 266 of the *Industrial Relations Act 1999* indicated that 'where pay inequity is found it must be rectified' and that its rectification will generally require a 'unique response' (para. 193).

To redress the undervaluation, the QIRC applied a two-part increase to the basic pay rates as specified in the award. The first part was a one-off 11 per cent increase (which was phased in), to compensate for the inability of dental assistants in private practice to successfully negotiate enterprise agreements or other over award payments. The second was a 1.25 per cent per cent per year Equal Remuneration Component, which was to compensate for dental assistants' likely ongoing inability to increase their wages through collective bargaining. A small part of the Equal Remuneration Component was said to compensate for disabilities in the way in which work was performed, such as dealing with human waste, exposure to chemicals and noise (paras. 192–197).

The case also resulted in a number of award amendments. The classification structure was altered to recognise the natural career path of dental assistants and the role of practice managers. Relativities were aligned with the *Engineering Award – State* (the traditional benchmark for award wages in Queensland). Other improvements to conditions included a new right for regular and systematic casual employees to become permanent after six months, requirements for employer contributions to professional development costs, a first aid allowance and a requirement that ordinary hours only be worked on five consecutive days out of seven.

In their analysis of the *Dental Assistants' Case*, Whitehouse and Rooney (2007: 88) argued that because equal remuneration was identified in the principal objects of the *Industrial Relations Act 1999* (section 3) as an outcome to be pursued by the QIRC, pay equity became a priority in itself and constitutive of the 'public interest', rather than simply something to be balanced against other considerations. They also suggested that:

... the case provides an illustration of one of the most effective strategies to address gender pay inequity under the prevailing system of "enterprise bargaining"—that is, to recognise the gendered distribution of premiums won through enterprise agreements and make appropriate corrections to awards covering female-dominated occupational groups with limited access to bargaining. As such it reflects a number of strengths of the Queensland system that bolster its ERP [Equal Remuneration Principle], such as the prioritisation of pay equity in the Act and the enhanced capacity to interpret public interest in more than simplistic economic terms. (Whitehouse & Rooney, 2007: 99)

Nevertheless, Whitehouse and Rooney noted that in spite of the gains that the private sector dental assistants made, the case still left them well below the actual earnings of many male-dominated trades occupations and also below the rates for public sector dental assistants. They also argued that further rounds of bargaining for public sector dental assistants would likely increase the gap before the phasing in of the private sector dental assistants increases were completed. This led them to raise questions about the most effective way to construct comparisons for undervaluation cases and whether opportunities under the Equal Remuneration Principle were fully exploited in this case (Whitehouse & Rooney: 99).

2.2.2.3 *Children's Services Workers Case*

The Liquor, Hospitality and Miscellaneous Union brought another case in late December 2003 on behalf of workers covered by the *Child Care Industry Award – State 2003* (the Child Care Award). Hearings began in 2005, and an interim decision was issued by the QIRC in March 2006 ((2006) 181 QGIG, no. 13: 568–570). The interim decision increased the wages of affected employees, bringing their pay rates into line with work value decisions of the federal Australian Industrial Relations Commission in respect of the Victoria and the Australian Capital Territory childcare awards. The same rates had also been passed on to Western Australia, South Australia and the Northern Territory.

The substantive decision was released in June 2006 and found significant undervaluation of work performed by childcare workers—noting ‘appallingly low wages’ ((2006) 182 QGIG, no. 11: 318–367, 357). The QIRC reviewed the award history and found that when the award had first been made, the work was characterised as ‘female’, the wage rates were set by reference to other female wage rates and the skills necessary to perform the work were not identified. Subsequent adjustments had not remedied this position.

The QIRC concluded that childcare work involved a ‘high-level duty of care, high physical and mental demand, and advising and accounting to parents.’ Many of the skills of childcare workers (such as communication, multi-tasking, teamwork and developing and implementing programs) had never been properly valued. Limited attention had also been given to work conditions (for example, lifting children, dealing with human waste and work intensity) and other relevant features of the work (such as attending meetings out of normal hours, limited access to breaks and unpaid and self-funded training requirements).

Following on from the *Dental Assistants’ Case*, the QIRC established that a Certificate III gained for a predominantly female occupation had the same value as a Certificate III gained for a predominantly male occupation. Possession of such a certificate was to attract payment of the 100 per cent rate (C10) in the Engineering Award. The QIRC said that the critical issue was not the length of time the qualification takes to achieve, but the equivalence of accountability and responsibility required for each level of qualification. However, the Commission also noted that other factors, such as the conditions under which the work was performed, or additional work requirements, could be relevant to the assignment of an occupation to the classification structure.

The QIRC did not incorporate over-award payments into the minimum rates award; noting that the union had not argued that the reason childcare workers did not receive equal remuneration was because of their lack of access to over-award payments, and stating that this was in marked contrast to the position put in the *Dental Assistants’ Case*. It also rejected attempts by employers to align the rates with those applying to other predominantly female occupations—determining that such an approach would perpetuate pay inequity.

Increased pay rates were awarded and phased in over a period of two-and-a-half years. Some improvements to conditions were also awarded and the Award was renamed the *Children's Services Award—State 2006* to better describe the range of services provided to children and their parents by childcare workers.

2.2.2.4 Social and Community Services Workers Case

The Queensland Services Union applied for a new award covering community services and crisis assistance workers in April 2008. The first stage of the application resulted in the creation of the *Queensland Community Services and Crisis Assistance Award – State 2008*, by consent, in September 2008. The new Award incorporated the wages and classifications of the federal *Social and Community Services (Queensland) Award 2001*, and the *Crisis Assistance Supported Housing (Queensland) Award 1999*. The second stage of the application sought increased pay rates for workers covered by the new Award, to correct historical undervaluation, as well as an Equal Remuneration Component to maintain ongoing wage parity because of a lack of enterprise bargaining in the sector. Similar to the previous applications under the Equal Remuneration Principle, evidence focused on the features of the industry, indicators of undervaluation, the award history, consideration of work value and comparisons with other occupations and industries.

In its decision of May 2009 ((2009) 191 QGIG, no. 2:19–59), the QIRC identified the factors contributing to the historical undervaluation of community services work as:

- female domination of the industry;
- the middle class, charitable origins of the community services sector;¹³
- cultural devaluation of ‘care work’ as ‘women’s work’ and associated undervaluation of ‘soft skills’ (such as active listening, problem solving and negotiating);
- no work value exercise conducted to review rates, except for an adjustment to the four year graduate entry rate;
- industry features such as small workplaces and low levels of unionisation;
- award rates and descriptors predominantly set by consent;
- career paths not defined in the award;
- prevalence of part-time positions, largely driven by funding;
- industrial issues resulting in barriers to bargaining and a general lack of over-award payments; and
- reliance on, and the nature of, government funding models.

The QIRC concluded that gender was ‘at the core’ of the undervaluation of the work. It considered the work, skill and responsibility and the conditions under which the work was performed to assess the appropriate value of the work. It noted that use of comparators was not mandatory, but could provide guidance, and found that Queensland Public Service professional stream and local government rates were appropriate ((2009) 191 QGIG, no. 2: 19, section 6.6.5).

The union submitted that the circumstances of the case were analogous to the *Dental Assistants’ Case* and sought an additional increase to compensate for inability to bargain. The QIRC acknowledged the similarities between the cases and noted that the employers did not oppose the concept or rationale of an Equal Remuneration Component, although they opposed the quantum sought by the union ((2009) 191 QGIG, no. 2:19, section 7.2).

¹³ Briggs et al.’s (2007) analysis of the long and ‘grinding struggle’ for non-government community services workers to secure award coverage highlighted the difficulties these workers experienced in gaining social and industrial recognition of care work as an industry rather than a vocation.

The QIRC awarded a wage increase to community service workers which included increases to basic pay rates, using a global approach to reflect present work value of each individual classification, with reference to comparable rates in relevant certified agreements. As with the *Dental Assistant's Case* in 2005, it also included an Equal Remuneration Component to compensate for the lack of access to collective bargaining. However, it included a sunset clause in recognition of continuing efforts to campaign for government to adopt funding models allowing for enterprise bargaining outcomes.

2.2.2.5 *Disability Support Workers Case*

The *Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc* ((2009) 192 QGIG, no. 4: 46–59) is the most recent case in the Queensland jurisdiction. It concerned an application by the Australian Workers Union to increase the rates of pay in the *Disability Support Workers Award – State 2003*, applicable to disability support workers in the community (non-government) sector. The union and the respondent Queensland Community Services Employers' Association tendered an agreed statement of facts, demonstrating consensus that the work of employees covered by the Disability Award had been historically undervalued for similar reasons to community services workers, and consistent with the indicators of undervaluation identified in the New South Wales Pay Equity Inquiry.

Factors identified as contributing to undervaluation in the agreed statement of facts included:

- female domination of the industry;
- the industry's connection with voluntarism and unpaid work;
- the significance of part-time and casual employment;
- government funding models;
- low levels of unionisation;
- impediments to bargaining (for example arising from low levels of unionisation, the large number of small organisations, the lack of dedicated human resource services, funding arrangements and cultural factors);
- 'care work' and the 'soft skills' involved in such work (such as emotional intelligence and communication skills) had been undervalued; and
- inadequate recognition had been given to changes to the nature of the work resulting from de-institutionalisation of the sector and changing work expectations and requirements.

The agreed statement of facts also indicated that undervaluation had raised public interest concerns, including difficulty in attracting and retaining suitable staff, and a high level of staff turnover.

In its decision of September 2009, the QIRC agreed, and awarded pay increases to employees at every level ((2009) 192 QGIG, no. 4: 46, section 6). In deciding new pay rates, the QIRC gave consideration to two relevant comparators: the newly created *Queensland Community Services and Crisis Assistance Award – State 2008*, and the *State Government Departments Certified Agreement 2006*. It noted that much of the work performed in the community sector was very similar to that performed by Queensland Government services. The increase was phased in over five adjustments.

2.2.2.6 *Pay Equity: Time to Act, 2007*

A second inquiry into pay equity was undertaken by the QIRC in 2007. The terms of reference for that inquiry included evaluating the effectiveness of the outcomes of the QIRC's 2000–01 inquiry in advancing pay equity.

In September 2007, the QIRC delivered the inquiry report, *Pay Equity: Time to Act* (QIRC, 2007). The report found that the Equal Remuneration Principle provided a useful analytical framework for the consideration of pay equity. In the context of the *Dental Assistants* and *Children's Services* cases, it discussed the usefulness of the principle in redressing the traditional undervaluation of the work performed in these predominantly female occupations. The report also emphasised that the principle has been valuable in educating the QIRC and industrial parties about pay equity. A funding program available in Queensland to support cases conducted under the principle was found to be important in addressing concerns about the resource-intensive nature of conducting cases (Department of Justice and Attorney-General, 2010).

2.2.3 **Developments in other states**

Appendix 2 includes extracts from the Western Australian, South Australian and Tasmanian industrial commission's wage fixing principles that relate to equal remuneration.

The Tasmanian principles resulted from the recommendation of the Women in Paid Work Task Force that an equal remuneration principle be established, and consideration of that position in the 1999 State Wage Case (URCOT, 2005: 74). They provide guidance to the industrial parties and share several points of similarity with the New South Wales and Queensland Equal Remuneration Principles. For example, to assess whether past valuations of the work have been affected by gender bias, the Tasmanian principles 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. However, 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 principles.

In 2004, the Western Australian Government commissioned Western Australian academics, Todd and Eveline, to conduct a pay equity inquiry, and the report of that inquiry was tabled in November 2004. Amongst other things, it recommended the enactment of equal remuneration provisions in the *Industrial Relations Act 1979* (WA) and the establishment of a fund to assist organisations to press or respond to cases taken under the provisions. However, these recommendations have not been implemented (URCOT, 2005: 75).

The Western Australian and 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.

The *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) referred almost all of the industrial relations powers of the state of Victoria to the Commonwealth, under section 51(37) of the Australian Constitution. As a result of the referral, the federal *Workplace Relations Act 1996* was amended to extend its operation to Victoria. This approach removed the need for the development at the state level of wage fixing principles that addressed equal remuneration, as had occurred in most other states. However, the Victorian Government sought to advance pay equity through a range of other initiatives (such as pay equity audits and employer recognition programs).

2.3 Contrasting federal and state approaches

Hall (1999), Whitehouse (2001: 75–76), Smith (2009: 662 & 2010: 20) and Smith and Lyons (2007: 29) have argued that the principles established in New South Wales and Queensland, in particular, were distinct from those at the federal level and provided an approach that remedied most of the limitations of past approaches as they: implicitly rejected the test of discrimination as the threshold for an equal remuneration claim; established a test of undervaluation as the basis for equal remuneration applications; did not include a presumption that proper work value assessments had been conducted in the past; were not founded on establishing a change in work value; and did not require comparators as a necessary precondition for proceeding—although they allowed comparisons to be used.

Smith explained the importance of the notion of undervaluation (as distinct from discrimination) as a key litmus test in assessing claims for equal remuneration as follows:

The equal remuneration principle in New South Wales and Queensland overcame the assumption of earlier rates being set correctly, but did not require that the applicant parties demonstrate that the rates have been set incorrectly because of sex discrimination. A careful industrial history of how the work in question has been valued was an important way of establishing undervaluation. The history needed to deal with how the traditional criteria of work value—especially skill, qualifications and working conditions—have been approached by industrial parties and tribunals. Showing undervaluation required demonstrating that significant elements of work value have not been taken into account or given enough weight in evaluating the work. The recourse to undervaluation addressed failures in the prior assessment, characterisation or valuation of feminised work. The principles in New South Wales and Queensland emphasise also the importance of new assessments of work value and there is specific guidance concerning assumptions about merit or otherwise of prior work value assessments. This test of undervaluation, as deployed in the New South Wales and Queensland jurisdictions, does not revert to a male standard in order that applications be successfully prosecuted. (Smith, 2010: 20; also see Smith, 2009: 662)

Academic analyses of the New South Wales and Queensland inquiries and related pay equity cases generally suggest that they provided a firmer basis for addressing structural gender bias in the wages system. Nevertheless, the number of cases run under the state principles has not been large. The literature proposes two main reasons for this. First, as noted above, it has been argued that *Work Choices* limited the application of approaches to equal remuneration that had begun to develop at the state level (for example, Smith, 2009: 662 & 2010: 15; Smith & Lyons, 2007: 30; Baird & Williamson, 2009: 335).

Secondly, Hall argued that few cases were run under the New South Wales equal remuneration principles due to limitations associated with the approach adopted. These limitations included: a failure to provide funding to support participation in pay equity cases (which can be ‘costly, controversial and complex’); the focus of the principles on remedial action at the award level, when the ‘greatest inequalities are in enterprise agreements and over-award payments’¹⁴; and the very limited proactive workplace-based change strategies for addressing equity in enterprise-level behaviours and systems (Hall, 2007: 36–37). However, some gender undervaluation cases also proceeded in New South Wales under the Work Value Principle.

¹⁴ This limitation does not apply under the Queensland principles.

2.4 Overview and assessment

Consideration of the major decisions relating to equal remuneration at the federal and state levels reveals both similarities and differences. This is not surprising given that while the jurisdictions have developed their responses to the same international instruments, they have done so in the context of their own legislative frameworks and in response to the particular facts, circumstances and claims of the parties before them. However, different interpretations of the same wording of the key conventions have also emerged to drive different approaches.

As academic commentators have observed (for example, Hall, 1999; Smith 2009 & 2010; URCOT, 2005), approaches which built on the concept of undervaluation developed by the New South Wales Pay Equity Inquiry¹⁵ marked the most significant new direction for equal remuneration since the 1972 Equal Pay Case. The most substantial divergence in approach between the federal and state systems has hinged on the adoption of undervaluation as a threshold issue in the New South Wales and Queensland jurisdictions, in particular, and the adoption of discrimination as a threshold matter following the 1993 amendments to the federal legislation. These different approaches appear to have been driven by different interpretations of that part of Article 1 of the Equal Remuneration Convention which indicates 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.’

In practice the different approaches have produced very different outcomes. The discrimination threshold proved to be a difficult hurdle for applicants; and there were no successful applications in the federal jurisdiction under that approach. However, the test of undervaluation, focused on the history of the establishment of rates in the award, and guided by the profile and indicators of undervaluation established by Justice Glynn and the specific terms of the respective Equal Remuneration Principles, has seen a number of successful applications in the New South Wales and Queensland jurisdictions. Those cases have confirmed the findings of the New South Wales Pay Equity Inquiry that the undervaluation of women’s work may be reflected in inappropriate classification structures, inadequate recognition of qualifications, the absence of previous work value assessments, and/or the inadequate application of previous equal pay principles—as some or a combination of these factors have been found in all the cases.

However, similarities between the federal and state approaches may be noted. Generally, a two stage process has emerged; with similarities evident in relation to the second stage. As noted above, in the federal sphere, after 1993, the first stage involved establishing that the wage rates in question resulted from discrimination, while in New South Wales and Queensland it involved establishing that undervaluation had occurred—a marked divergence. The second stage—which was not generally reached in the federal sphere after 1993, due to the difficulties associated with the first stage—involved the application of work value methods to determine appropriate value in all the jurisdictions. This includes in New South Wales and Queensland where, once undervaluation was established, cases generally proceeded along more traditional work value lines—without the necessity to establish work value change.

¹⁵ Also reflected in explanatory documents on ILO 100 prepared by the International Labour Office (see section 4).

The cases have generally recognised that it is difficult to determine work value in a vacuum, as value is a relative concept. In most cases, comparisons have been used as a guide to determining appropriate remuneration; in some cases by identifying similar (sometimes female dominated) work, in others by referencing dissimilar, comparators to determine appropriate relativities. While much has been written about the role and type of comparisons to be used in work value assessments, it is to be noted that none of the tribunals has been prescriptive in this regard. The (federal) 1972 Equal Pay Case made a range of different types of comparison possible (refer principle 5 (b)) and Justice Munro emphasised in the second HPM case that a number of evaluation techniques have been used over the history of work value assessment in the federal sphere and that the exercise of judgement was also necessary. The New South Wales and Queensland principles also provided considerable flexibility on this issue—with the Queensland principles specifying that comparisons were not required to establish undervaluation (stage 1), but ‘may’ be used ‘for guidance in ascertaining appropriate remuneration’ (stage 2).

The cases considered demonstrate that the resource requirements of equal remuneration and work value cases can be significant. In Queensland, the number of successful applications may, in part, reflect the role of the grants program, which was created to provide funding assistance to organisations involved in pay equity cases. This program not only assisted organisations to address resource requirements, but encouraged the parties to develop agreed statement of facts, by making such statements a condition for accessing funding. This helped to reduce the scope for litigation and the length and complexity of cases.

As a final point, the history of equal remuneration case law and inquiries does suggest that the nature and content of the guidance provided to the parties by equal remuneration principles is important to the progression of claims and to remedying pay inequity. However, it also suggests the importance of supervision of the application of relevant principles. The literature and case history considered above indicate that in the absence of close scrutiny (and the presence of consent arrangements) a range of processes (not only the equal pay principles, but also other processes such as structural efficiency and minimum rates adjustment) have been applied or not fully applied to female dominated occupations taking into account equal remuneration issues, thereby perpetuating inequity.

3 Review of the literature concerning equal remuneration in minimum wage setting

3.1 Introduction

In considering the principle of equal remuneration for work of equal or comparable value, the Minimum Wage Panel (the Panel) is limited in its remit under the *Fair Work Act 2009* (FW Act) to the consideration of minimum wages in modern awards, transitional instruments (including transitional APCS's and award based transitional instruments) and the national minimum wage order (applying to award/agreement free employees).

In addition to the annual minimum wages review, there are other mechanisms by which minimum wages may be varied under the FW Act which would also require the consideration of 'the principle of equal remuneration for work of equal or comparable value'. These include:

- the variation of modern award minimum wages as part of the two-yearly or four-yearly reviews of modern awards;¹⁶
- the variation of modern award minimum wages by the initiative of FWA or by the application of specified parties¹⁷ for either work value reasons or as necessary to achieve the modern awards objective (FW Act section 157(2)); and
- the variation of wages or instruments as the result of an equal remuneration order made under part 2–7 of the FW Act (FW Act section 306) and *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* item 3(2), part 2, sch.10).

However, in some international instruments, the consideration of equal remuneration is not limited to rates of pay. International Labour Organisation (ILO) Convention No. 100 (ILO 100) defines equal remuneration to include 'the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment' (Article 1 (a)). The principle applies to legally binding minimum wages, and it also applies to over-award wages rates, productivity-related pay and competency-based wage arrangements whether determined through collective bargaining or unilaterally. The relevant international instruments are considered further in section 4.

This literature review is focussed on identifying equal remuneration considerations relevant to minimum wages in the academic literature. The literature on issues associated with equal remuneration is extensive and this review has necessarily had to be selective. It first provides background to the subject to set the role and importance of minimum wage fixation in the context of the broad range of factors and responses relevant to the attainment of equal remuneration. It then examines the significant body of economic literature that is devoted to understanding the GPG¹⁸. This body of literature, which is largely based on regression analysis and econometric modelling, covers issues such as how best to measure gender wage inequality, the size of the GPG, as variously defined and discussed, its growth or reduction over time, the

16 The 'one off' two-year review to be conducted in 2012 is required to be conducted under item 6, part 2, sch.5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the four yearly review of modern awards is required under s.156 of the FW Act.

17 The parties that may apply to vary a modern award outside of a four-yearly review (and the kinds of applications which may be made) are outlined in s.158 of the FW Act.

18 The GPG (sometimes referred to as the gender wage gap) refers to the difference between the wages earned by men and women. It is generally expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis. As we will see, there is no such thing as 'the' GPG as the GPG may be expressed and measured in a number of different ways. Measurement of the GPG is discussed in section 3.4.

relative contribution that different factors (or determinants) make to the gap and variation in the gap across sectors and between income levels. Another significant strand of the literature considers the impact of institutional arrangements on the GPG.

The review is most directly concerned with the component of the GPG directly related to minimum wages, however, it does touch on broader equal remuneration issues in relation to over award rates of pay (the most commonly measured) and lifetime earnings. The literature analysing tribunal approaches and key decisions relating to equal remuneration is covered in Section 2.

3.2 Background

Researchers from the National Centre for Economic and Social Modelling (NATSEM) overviewed the significant social changes occurring over the last century that have contributed to changes in the ways in which Australian women participate in society and the economy. They noted important legislative changes made to the *Matrimonial Causes Act* in 1961, and the federal *Sex Discrimination Act* and the *Affirmative Action (Equal Opportunity for Women) Act* in 1986, major industrial tribunal decisions on equal pay as well as other developments, such as the introduction of the contraceptive pill, the rise of the feminist movement and the increased availability of childcare. These changes have all made contributions towards women's changing role in society and the workplace. They showed that, no longer confined to marriage and child rearing, Australian women's labour force participation has been climbing since World War II (WWII), as has their participation in education. High school retention rates for women now outstrip men's and more women are enrolled in a bachelor degree course or higher at universities than men. Despite these profound social changes, NATSEM's research revealed a significant GPG as well as lifetime earnings differentials. Despite fluctuations and marked improvement in the GPG in the late 1960s and 1970s, the gap has persisted over the past two decades—rising quite sharply over the period 2005–09 (Cassells et al. 2009a: 25–26; Cassells et al. 2009b: 2–4; also see Office for Women, 2009).

There are a number of reasons why the GPG and wage inequity is of concern. As discussed in section 4, wage inequity challenges important human and workplace rights that have been recognised internationally. It also imposes costs on individual women and their families in terms of loss of income—losses that accumulate over a lifetime. Recent research suggests that these costs are significant and affect women's economic independence and economic security. Cassells et al. (2009a: 27–30) found that gender pay gaps contribute to significant differences in expected lifetime earnings for men and women, as well as gaps in the capacity of men and women to accumulate wealth.¹⁹ They note that, despite women's superannuation balances being on the rise, 'they are still not coming close to that of men' (Cassells et al., 2009a: 28). While they found partnered women were better off financially, women's generally lower retirement incomes were found to be of concern, given the incidence of divorce (Cassells et al., 2009a: 8, 35). The ILO emphasised that severe and persistent discrimination at work can contribute to poverty and social exclusion (ILO, 2007: 10). Eastough & Miller (2004: 271) suggested that at the lower end of the wage distribution, pay inequity can have important ramifications for health, welfare and community policy. Impacts on the economy have also been noted as a result of suboptimal allocation of resources which impact on the efficiency of the labour market—affecting labour supply, labour turnover, productivity and economic growth (SCEWR, 2009: 1–3; Cassells et al., 2009b: 20–28; and see section 2).

¹⁹ It should be noted that other factors, including unpaid time spent out of the workforce (for example as a result of employment breaks and/or part-time work), are also important contributors to lifetime earnings and retirement income differentials.

3.3 Overview: potential determinants of the GPG

It is generally acknowledged that the determinants of the GPG are complex (for example, see HREOC, 2007; Swepston, 2000; Gunderson, 1994: 5–9; SCEWR, 2009: 8–9; Preston & Whitehouse, 2004:311–12). It is also generally acknowledged that a significant cause of the GPG and women’s lower lifetime earnings is that, despite the profound social changes of the last century, women remain the primary carers for young children and dependent adults and continue to bear the main responsibility for unpaid domestic work. Bearing this ‘double burden’ can impede women’s workforce engagement and career prospects. For example, women may seek out part-time work and breaks from employment to assist them to balance their paid, unpaid and caring responsibilities. Part-time work is often associated with fewer training opportunities and this, combined with periods out of the workforce associated with childbirth and caring responsibilities, tends to impact on women’s skills, experience and promotional prospects, resulting in lower levels of pay and lifetime earnings (Office for Women, 2008: 5–10; Human Rights and Equal Opportunities Commission (HREOC), 2007; Gunderson, 1994: 7; Cassells, et al., 2009a; Rentsch & Eastale, 2007; Carney, 2009).

However, an increasing body of literature suggests that these explanations provide only part of the story and that various forms of discrimination and other factors also need to be considered. Becker (1957) suggested that some employers may have what he termed a ‘taste for discrimination’ (a prejudice) so that they only hire or promote minority workers (including women) if they can pay them lower salaries than men or make other cost savings. Others (for example, Phelps, 1972; Arrow, 1973; Aigner & Glen, 1977, cited by Alonso-Villar & del Rio, 2008: 3; McGuinness et al., 2009: 8) suggested that employers do not have perfect information about individuals, so they base their employment decisions on their perceptions about the characteristics of a group—their perceived productivity, absenteeism, turnover and so on. These perceptions, which are often the product of social norms and stereotypes, may not only affect recruitment decisions, but also result in unequal access to discretionary payments (such as starting salaries, pay raises and bonuses), training opportunities and career progression (Office for Women, 2008: 10–15; SCEWR, 2009: 90).

Short & Nowak (2009) proposed an explanation of how social and cultural values and expectations and their ‘feedback’ effects can interact to constrain²⁰ women’s employment options:

Gender-related values pervade educational choices; education undertaken then affects the jobs offered to women, as does potential employers’ and co-workers’ values and attitudes towards women’s family responsibilities. This affects the opportunities offered to and sought by women for training and developmental experience on the job. The economic value put on an occupation is, in turn, affected by the value put on human capital associated with the occupation by employers and industrial relations commissioners in the industrial relations system. Socially constructed personal values held by these powerful (and mostly male) actors are perceived by interviewees as affecting their assessment of that value. Societal and personal values also affect the monetary value put on skills, particularly those associated with being feminine, such as caring skills used in the service sector... This all feeds back into educational choice when individuals and their parents anticipate the different treatment of women in the labour market and channel women away from more ‘difficult’ well-paid male jobs. (Short & Nowak, 2009: 273–4)

²⁰ There has been an ongoing debate in the literature over whether women ‘choose’ to give preference to work or home/family or whether they are ‘constrained’ structurally and normatively in the choices available to them (see Corby and Stanworth, 2009 for a recent review of this literature). On the basis of interviews with working women, Corby and Stanworth (2009) argued that the concept of ‘satisficing’—which combines elements of choice and constraint—is a more appropriate way to view women’s working lives than are either choice or constraint theories.

Such factors contribute to the high degree of segregation in the labour market, with a majority of women engaged in a narrow range of occupations and industries, often involving elements of care and service (such as health care, childcare, education, social assistance and retail trade) and often regarded as 'unskilled' work. It is frequently argued that these 'women's jobs' and their associated inter-personal, emotional, coordination and other skills, have been undervalued.²¹ This may have occurred for a number of reasons, for example, because of a tendency to assign more worth to features that are characteristic of the work performed by men, and because women's low levels of unionisation contribute to limited attention being paid to their claims of undervaluation (for example, Smith, 2009; Cortis, 2000).

It has also been suggested that occupational segregation may affect wages due to the effects of 'crowding' (that is, an increased supply of labour competition for a restricted number of jobs) (Gunderson: 1994: 7). Other explanations include that employers with some degree of monopsony power may take advantage of their superior bargaining strength to push wages down below the value of the worker's contribution (Austen & Preston, 1999: 7; Rogers & Rubery, 2003: 545–6; Rubery & Grimshaw, 2009).²²

²¹ Also see the New South Wales and Queensland cases considered in section 2 for examples.

²² Some commentators suggest that in sectors such as community services, government control over funding effectively creates a monopsony situation and has suppressed wages below the level required to fill vacancies, for example, see WACOSS (2009: 8).

Table 3.1 summarises factors identified by the ILO as contributing to the GPG.

Table 3.1: Causes and dimensions of the gender pay gap

Causes	Dimensions
Differences in productivity characteristics (or human capital) of men and women	<ul style="list-style-type: none"> • Years of education • Fields of specialisation • Years of work experience • Seniority in the job
Differences in the characteristics of enterprises and sectors employing men and women	<ul style="list-style-type: none"> • Size of the enterprise • Type of industry • Unionisation
Differences in the jobs held by men and women	<ul style="list-style-type: none"> • Women under-represented in higher-paid jobs • Women over-represented in a smaller and lower-paying range of occupations than men • Women and men concentrated in different segments of the same broad occupations • Women over-represented in part-time work
Differences in the number of hours devoted to paid work	<ul style="list-style-type: none"> • Men work longer hours (in paid work) than women
Discrimination in remuneration	
<i>Direct discrimination</i>	<ul style="list-style-type: none"> • Different pay for men (higher) and women doing the same or similar jobs • Different job titles (and pay) for the same or similar occupations
<i>Indirect discrimination</i>	<ul style="list-style-type: none"> • Undervaluation of the skills, competencies and responsibilities associated with 'female' jobs • Gender biases in job evaluation methods • Gender biases in job classification and job grading systems • Gender biases in job remuneration systems

Source: ILO (2007: 73)

3.4 Measuring the GPG

Before considering the literature which has focused on identifying the relative contribution of the various potential determinants of the GPG, it is worth noting some measurement issues associated with the GPG.

There is general acceptance in the literature that a GPG exists, both in Australia and internationally. The GPG is generally expressed as a ratio that converts average female earnings into a proportion of average male earnings to calculate the pay gap between the sexes. The most frequently quoted measure of the GPG in Australia is the ratio between women and men's average weekly ordinary time earnings for full-time employees. However, as the Office for Women (2008: 2; 2009) and the Equal Opportunity for Women in the Workplace Agency (EOWA, 2010) explain, there are a number of different ways to measure the gap, each of which produces quite different results using Australian data.

A GPG calculated using average total weekly earnings for all employees produces a GPG of 34.3 per cent (as at May 2009) (EOWA: 2010). However, this measure has the disadvantage that it makes no adjustment for the fact that a much larger proportion of women work part-time than men—and are therefore paid for fewer working hours.

When only the average total weekly earnings of full-time adult employees are considered, the GPG reduces to 20.2 per cent (as at May 2009) (EOWA: 2010). However, this measure is also problematic. First, it makes no adjustment for the fact that men are much more likely to work and be paid overtime than women. Secondly, it excludes part-time employees from the analysis—the majority of whom are women. Lips (2003: 90) is highly critical of this approach noting that much ‘of the data used by governments around the world to measure the earnings gap between women and men is based on a model that makes men’s pattern of work the standard, or the norm against which women’s outcomes are judged. If women cannot fit that model, they are omitted from the comparisons or their lower pay is said to be justified.’ Converting average total weekly earnings of adult employees to an hourly rate, for full-time and part-time employees, can assist in addressing this issue, however, there are a number of limitations with deriving hourly rates of pay.

Excluding overtime earnings and measuring only *ordinary time earnings* results in a GPG of around 17.4 per cent for full-time adult employees (as at May 2009)(EOWA:2010). However, it should be noted that measures of ordinary time earnings exclude bonuses as well as overtime. Discrimination in the allocation of bonuses may be a factor contributing to the size of the GPG.

Another measure of the GPG uses hourly rates. This is considered by some to be a more accurate measure of women’s earnings as it removes the need to control for differences in the hours worked and allows part-time workers to be included. However, some international commentators have raised issues about the accuracy of hourly data (Lips, 2003: 89). Based on hourly data, the GPG was 13.1 per cent (as at May 2009) (EOWA: 2010).

The above measures derive from the Australian Bureau of Statistics’ (ABS) *Average Weekly Earnings* survey (ABS Cat. no. 6302.0) Another measure of the GPG also uses hourly rates, and generally derives from the bi-annual ABS *Employee Earnings and Hours* Survey (EEH). The EEH provides more detailed data, but only includes estimates for non-managerial employees. A smaller gap is indicated on the basis of these figures, as fewer women are managers and managerial earnings are higher.

- In 2008, based on average hourly ordinary time earnings of full-time non-managerial adults, the EEH found a GPG of 11 per cent.
- In 2008, based on average hourly total earnings for all non-managerial employees, the EEH found a GPG of 13 per cent (Office for Women, 2009: 9–10).

3.5 Analysing determinants of the GPG

As Booth (2009: 4) explains, a fundamental challenge for labour economists has been to identify the extent to which observed gender differences in labour market outcomes for apparently identical men and women are due to 'discrimination', other unobserved factors, or intrinsic differences between men and women. Thus, they have sought to assess the effect on the GPG of measurable differences between men and women which can be explained as deriving from rewards for different individual characteristics (such as differences in education, training and work experience). They have also sought to identify that proportion of the GPG that cannot be explained by such characteristics—or in other words, to identify the extent to which similar characteristics of males and females are rewarded differently by employers. Researchers have variously termed the variables that can be explained 'wage-related characteristics', 'productivity-related characteristics' or 'endowments'.

The different returns received by men and women with the same characteristics are generally interpreted as measuring 'discrimination', but may also include other factors. As Cassells et al. (2009b: 4–5) explain, the proportion of the wage gap that cannot be explained by 'rewards' for wage-related or productivity-related characteristics (or endowments) represents:

... the extent to which women are paid less than men once all other measurable characteristics are held constant, and may include discrimination as well as any other unobserved differences between men and women ...

Cassells et al. (2009b) provide a clear, comprehensive, recent review of the literature which considers the human capital, personality characteristics and labour market differences between men and women which, together with other factors, assist in developing an understanding of the GPG. Their analysis is followed closely in the following sections, although additional material is included, in particular in relation to the international literature and the role of institutional factors. Before considering the literature, it is worth noting some methodological issues associated with decomposition analysis.

Most of the studies that attempt to explain why women have continued to earn less than men use regression analysis to decompose the GPG; generally using the Oaxaca-Binder method or variations of that method²³ to measure female wage disadvantage. However, it is important to note that studies have varied considerably in terms of their coverage (for example, whether they cover all employees, non-managerial employees, workers in specific age groups, full-time or part-time workers, or only low paid employees), definition of the dependent variable (for example, hourly or weekly earnings) and specification of the estimating equations (Eastough & Miller, 2004: 259). These different approaches mean that the results of the studies are often not directly comparable. However, general conclusions may be drawn, particularly when supported by different studies.

Further, Cassells et al. (2009b: 4, 7, 27–8) observe that the task of decomposing the GPG has proved to be difficult because the factors that may influence the GPG are complex and likely to vary over time, and because they may interact, causing 'feedback effects' which make isolating particular factors difficult. They also note differences and flaws in the way in which particular variables (such as previous work experience) are measured which generally result from inadequacies in the data available for some variables. They emphasise that the assumptions underpinning the design of different models can also affect findings. As a result, they conclude that despite extensive research, 'drawing firm conclusions about the key determinants of the wage gap in Australia from the literature is difficult due to the range of findings, and the wide variation in samples, methods and focus in earlier studies' (Cassells et al., 2009b: 27).²⁴

²³ Cassells et al. (2009b: 4, 12–14 and Appendix A) provide an explanation of this method.

²⁴ Weichselbaumer and Winter-Ember (2003) undertake an analysis of the empirical literature on gender wage discrimination and highlight the potential for data restrictions, missing and imprecise data to produce biases that affect calculation of the discrimination component of the GPG.

3.6 Human capital variables

Walby and Olsen (2002: 22) defined 'human capital' as the skills and experience that a person brings to employment that are relevant to that employment. As Cassells et al. (2009b: 6) explained, studies of the GPG generally measure human capital through formal educational attainment and years of work experience. Some studies also include additional variables, such as the use of employer-provided training. The literature usually takes as given the human capital developed at the point of entry to the labour market, focusing on post-school training. A data limitation in any study attempting to control for human capital is the non-formal acquisition of skills. Historical attribution of capabilities such as 'caring' and 'dexterity' are not captured by quantitative data variables and have historically been undervalued in the industrial and wages contexts.²⁵

Australian studies have found that returns on education for women are generally lower than those for men, despite women's somewhat higher level of educational attainment (Miller 2005; Rummery 1992; Barón and Cobb-Clark, 2008; Cobb-Clark and Tan, 2009: 19). As Miller (2005) noted: 'additional schooling opens up access to better paying positions more readily for males than for females' (Miller 2005: 413). Analysing gender differences in the likelihood of low pay in Australia, Austen (2003: 168) found that there were substantial differences between men and women in terms of the insurance provided by education against the risk of low-paid employment. For males, she found that each educational qualification reduced the probability of low-paid employment relative to that recorded by those who left school at 15. However, for females, none of these effects was found to be statistically significant. Thus Austen noted that her findings added further weight to studies that showed the rates of return to investments in tertiary qualifications are lower for women than for men. Cassells et al. (2009b: 7) observed that the Australian findings on returns to education are suggestive of discrimination and labour market rigidities.

Previous work experience is widely acknowledged in the literature as important, but has proved to be more difficult to measure. It has generally been measured through a range of proxy variables, some of which Cassells et al. (2009b: 8) claim have serious flaws, for example, where measures of experience do not take into account breaks in labour market experience or participation in part-time work. Despite these difficulties, Cassells et al. (2009b: 8) found that the results from Australian studies (Miller, 2004; Miller 2005; Rummery, 1992) generally confirmed that returns to work experience are higher for men than women. In other words, additional years of labour market experience translate into greater increases in wages for men than for women.

The effects on the GPG of interruptions and alterations to labour market experience (that is, not working or working part-time) due to child bearing and caring duties are also widely acknowledged in the literature as potentially impacting on pay. Cassells et al. (2009b: 8) noted that the effects of interruptions are not limited to the reduction in earnings for the period not worked. They observed that the possible repercussions of interruptions to work for lifetime levels of pay may arise because:

- non-continuous work is associated with shorter periods of job tenure, which in turn is associated with lower pay;
- the value of human capital may deteriorate while women are out of the workforce. When they return these effects may result in a lower likelihood of promotion or lower wages;
- women facing interruptions to their career may choose not to participate in training, or may decide to accept low-wage jobs;

²⁵ See Section 2 for further consideration of this issue.

- labour market withdrawals may coincide with the beginning of women's careers—a time at which the acquisition of job skills (and therefore job advancement and wages growth) is particularly strong for non-withdrawers; and
- withdrawals from the labour force can have a negative impact on earnings through discrimination (Cassells et al., 2009b: 8, citing Drolet, 2002:7, Olsen & Walby, 2004).

In Australian studies, interruptions to work have generally been captured through variables that measure how many children women have. The presence of children, particularly young children, has also been found to contribute to lower female earnings as it is generally associated with women either withdrawing from the labour market, or participating less in the labour market and working fewer hours than women without children or men (Cassells et al., 2009b: 8–9, citing Lundberg & Rose 2000, Sigle-Rushton & Waldfogel 2006, Eastough & Miller, 2004). Interestingly, Eastough and Miller (2004) found that in Australia, among full-time wage and salary earners, women with dependent children earned 7.5 per cent less than women without dependent children, whilst men with dependent children had slightly higher earnings than men who did not have dependent children. The presence of children has also been found to influence men's and women's lifetime earnings (Cassells et al. 2009a).

Cassells et al. (2009b: 9, citing Booth & Wood 2006 and Rodgers 2004) observed that in contrast to international findings, in Australia current part-time work status has not been found to be a significant driver of the GPG. However, they noted that a prolonged history of part-time work may be associated with lower pay, due to factors such as lower on-the-job training being offered and taken up. Analysis undertaken by Austen et al. (2008: 52) found 'unexplained' differences in gender earnings and noted that the 'penalty' for working on a part-time or casual basis appeared to be higher among women than among men. Watson (2005: 382), analysing earnings and taking casual loadings into account, also found that both men and women were penalised by part-time and/or casual jobs, but that women experience a higher penalty.

In the UK context, Olsen and Walby (2004, cited in Cassells et al. 2009b: 9) pointed out that part-time work in itself may be associated with lower rates of human capital attainment because years of experience in part-time work may not equate to the same level of skills acquisition (and therefore pay rate) as years of experience in full-time work.

Polachek and Xiang (2009) focused on demographic variables to test whether women's incentive for lifetime labour force participation is an important determinant of the GPG. They used three data sets covering 40 countries and undertook analysis at the country rather than the individual level.²⁶ They found a country's fertility rate, the age gap between husband and wife at the first marriage²⁷ and the top marginal tax rate to be positively associated with the GPG. They explained that these factors influence women's incentive to participate in the labour market over their lifetime and, hence, their human capital development.

²⁶ Polachek and Xiang (2009) computed the GPG based on hourly earnings for full-time workers—defining full-time workers as those working at least 30 hours per week. They used information from the International Social Survey programme (ISSP), the Luxembourg Income Study (LIS) and OECD wage data as each of these data sets contained information on weekly working hours and allowed hourly earnings to be computed. Of the three data sets, Polachek and Xiang (2009: 17) suggested that the OECD's was the most reliable. They performed their analysis using all three data sets combined, and also ran the analysis using only OECD data.

²⁷ Polachek & Xiang (2009: 19) suggest that the larger the age gap, the more likely it is that men will have higher incomes than their wives and the more pronounced the division of labour in the family.

Taking a different perspective, Healy et al. (2008) noted substantial variation in the GPG across industries. Analysing the extent to which the GPG²⁸ could be accounted for by women and men's different productive characteristics, they found that 'industries with smaller overall GPGs (i.e. retail and accommodation) also have the smallest proportion explained by gender-specific differences in human capital.' In contrast, in property and health, where the GPG was larger, human capital characteristics were found to explain a much larger proportion of the overall gap. Healey et al. (2008: 239, 261) suggested that one interpretation of this result may be that industries with a strong award structure successfully limit the size of the GPG, but also decrease the wage variance and the consequent returns to human capital.

3.7 Personality traits

Booth (2009) found that studies using survey-based psychological variables and studies generated from laboratory experiments both observed gender differences in competitive behaviour and risk-taking. For example, Booth observed that a number of studies have found women to be unwilling or unable to bargain on their own account. Studies have also found that women tend to ask for and receive less than men in negotiations (Booth, 2009: 6–7; Peetz and Preston, 2007: 29; Rentsch & Eastal, 2007: 327). However, Booth noted that some studies suggest that these differences cannot be considered innate and can be shaped by the environment in which individuals are placed. Booth suggested that such differences could explain 'some small part' of GPGs and, in particular, the observed widening of the GPG across the income distribution (discussed further below)—identifying this as an area for further investigation (Booth, 2009: 23–4).

Cassells et al. (2009b: 6) noted that some recent literature examines the effects of personality characteristics which may affect occupation choice, hours of work, promotion and so on, and thus wages. They observed that Fortin (2008) and Cobb-Clark and Tan (2009) studied the effects of 'non-cognitive' traits (for example, interpersonal skills, work/life preferences and personality traits such as self-efficacy) on wages and the GPG.

Fortin (2008) focused particularly on factors which were 'known to differ by gender' (such as the relative importance put on money/work and people/family) and found a modest but significant role for these variables.

Cobb-Clark and Tan (2009) examined the influence of non-cognitive factors on occupational attainment and wages. Using data from the Housing, Income and Labour Dynamics in Australia (HILDA) Survey, they found that non-cognitive traits had a substantial effect on the probability of employment in many, but by no means all occupations. Segregation into some occupations was found to occur because Australian men and women with the same characteristics had very different propensities to enter certain occupations. Examining the effects of the non-cognitive factors (along with other factors likely to influence wage gaps) for each occupation separately, they found that such factors did not provide an explanation for the GPG in Australia (Cobb-Clark and Tan, 2009: 22).

3.8 Age

Australian and international studies have found that the GPG is smaller among young workers, but increases with age. The European Commission found that the GPG tends to widen with age, with women's relative pay lowest for those over 55 years of age (Plantenga & Remery, 2006: 21). In a study of US college graduates, the American Association of University Women found that after controlling for hours worked, training and education and other factors, the proportion of the GPG gap that remained unexplained was 5 per cent one year after graduation, and 12 per cent 10 years after graduation (Billitteri, 2008: 245).

²⁸ Measured by reference to the average hourly ordinary time pay of adult non-managerial men and women.

In an Australian study of occupational segmentation using data from the 1993 Survey of Training and Education, Wooden (1999) found that among young workers, females were better paid than males, although he noted that the gap was quite small. However, he found that among workers aged 30 to 44, occupational segmentation added around four per cent to the GPG, while among the oldest workers in the study it added around nine per cent. Wooden suggested two possible interpretations of these findings. One interpretation was that the effects of occupational segmentation on pay equity may be declining over time. Alternatively, he suggested that if the effects of gender discrimination occur through unequal access to promotion, or through women's productivity being undervalued after spending time out of the labour force, then it is to be expected that gender pay inequity would increase with age (Wooden, 1999: 168–9).

In a more recent study using HILDA data, Cassells et al. (2009a: 25) also found that the wage gap was smaller amongst young workers—with Generation Y women having the lowest wage gap amongst the generations. All Generation Y women were found to receive on average 85 per cent of the average Generation Y men's wage; Generation X women received 62 per cent and Baby Boomers around 64 per cent. After taking into account characteristics that affect income (including hours of work, number of children, occupation, industry of employment and work experience), Cassells et al. (2009a: 26) found that for Baby Boomer women, the adjusted wage gap was over 13 per cent, while for Generation X women it was 3.5 per cent and for Generation Y women it was 'almost non-existent' at 0.6 per cent. As noted above and suggested by Wooden, these results may reflect the effects of cumulative disadvantage with increased labour market experience.

While not specifically concerned with the GPG, Austen (2003: 168) analysed gender differences in the likelihood of low pay in Australia. She noted that increases in an individual's age generally reduce their risk of low-paid employment. However, she found an important gender-based difference in the relationship between age and the chances of low paid employment for the 50–60 years age group. In Austen's study, women in the 50–60 years age group had a 20.3 per cent higher chance of low-paid employment than women in their twenties. By contrast, she found that men aged between 50 and 60 years had a 4.8 per cent *lower* chance of low-paid employment than 20 to 30 year old men. She concluded that age does not appear to offer women the same protection against low-paid employment as it does men (Austen, 2003: 169–174).

3.9 Labour market factors

As Cassells et al. (2009b: 9) explain, possible determinants of the GPG cannot all be characterised as related to individual characteristics (such as age, education and experience). Interest has also focused on the role of failures in the market for labour; particularly labour market rigidities associated with occupation and industrial segregation, insufficient flexibility in the labour market to allow women to combine work with child-rearing, and discrimination. They note that a series of labour market factors broadly associated with wage determination (including occupational segregation, unionisation, public versus private sector employment, industrial sector and firm size) have been the focus of research interest. Their review shows that, while many of these appear to play some role in the persistence of the GPG in Australia, findings are mixed.

3.9.1 Occupational segregation

Occupational segregation by sex has been defined as the extent to which 'women and men are differently distributed across occupations than is consistent with their overall shares of employment' (Cassells et al.: 9, citing Watts 2003: 631). It has been a 'persistent phenomenon in contemporary labour markets', including the Australian where marked differences between men's and women's occupational distribution have been noted (Preston & Whitehouse: 2004: 309).

Occupational segregation is 'widely assumed to contribute to ongoing earnings inequality' (Preston & Whitehouse, 2004: 309). However, as Cassells et al. (2009b: 10) noted, occupational segregation is a complex area of research, with a range of theoretical and empirical approaches available and different results possible depending on the ways in which occupation and occupational segregation are included in different models (also see Cobb-Clark & Tan, 2009: 22).

International studies have attributed an important role to occupational segregation when explaining the GPG (for example, Anker, 1998; Alonso-Villar & del Rio, 2008). However, following a review of the Australian literature, Cassells et al. (2009b: 10) concluded that the effects of occupational segregation on the GPG are not clear. Some studies have found that occupational segregation contributes to the GPG in Australia (for example, Miller, 1994; Preston & Whitehouse, 2004; Robinson, 1998; Wooden 1999). For example, Wooden (1999: 167) found that women employed in occupations where less than 20 per cent of the employees were women earned nearly 14 per cent more than comparable women employed in female-dominated occupations.

Other work, however, has found that occupational segregation has the opposite effect, so that if occupations were desegregated and no longer had unequal representations of men and women, women's pay would be lower, not higher (Barón & Cobb-Clark 2008; Preston & Crockett 1999; Watts 2003). For example, Cobb-Clark and Tan (2009: 22) concluded that:

... occupational segregation is not the main driver of the gender wage gap. Australian women earn less on average because they earn less than their male colleagues employed in the same occupation, not because they work in different occupations.

Short and Nowak (2009: 273) suggested that apparent differences in findings between studies of occupational segregation may be explained by the level of aggregation of the data. They pointed out that Pocock and Alexander (1999) and Wooden (1999) found an inter-occupational effect using two digit occupational data, rather than the one digit data used 'by most articles studied'. In addition, Whitehouse (2001: 73) showed that falling male occupational wages (relative to the occupational average) in some areas of the labour market had effectively 'bolstered' intra-occupational gender pay ratios, making analysis of trends more difficult.

Difficulties with incorporating concepts of 'work value' in quantitative analysis further complicate analysis of the GPG at the occupational level. As discussed in section 3.5, human capital poses particular difficulties in GPG analysis and this problem is compounded in occupational analysis and exacerbated in Australia given the degree of gendered labour market segmentation.

3.9.2 Industrial segregation

International studies have found industrial segregation to be an important factor in explaining the GPG. However, the relative importance of occupational and industrial segregation has been found to vary from one country to another; reflecting variation in the level of occupational segregation and industrial segregation between countries (Alonso-Villar & del Rio, 2008: 24, 28).

Australian studies have generally shown that industrial segregation widens the GPG (Cassells et al., 2009b: 10, citing Cassells et al. 2008; Miller, 1994; Preston & Crockett 1999). Preston and Crockett (1999) found that industrial segregation accounted for around 45 per cent of the explained portion of the GPG—with a particularly strong industry effect in Western Australia and Queensland. Cassells et al. (2009b: 10) observed that Australian findings are consistent with those of a number of international studies which have also found that industrial segregation is associated with a larger GPG (for example, Grimshaw & Rubery 2002; Drolet, 2001).

In a report prepared for the Australian Fair Pay Commission (AFPC), Healy et al. (2008) found that much of the growth of women's employment over the period 1998 to 2006 had been in four 'low pay' industries: retail, accommodation, property and health services. They also found that changes in employment composition over that period, including the movement of women into low-paid sectors, had increased the GPG, although they noted that the overall effect was small.

3.9.3 Public and private sector

In a US study, Miller (2009: 69) found that regardless of sector of employment, females had lower hourly rates of pay than males, other things being equal. However, Miller also found the GPG to be generally larger in the private sector than among government employees. He suggested that the explanation may be differences in pay comparability practices and public sector collective bargaining.

Cassells et al. (2009b: 11) reviewing Australian studies of the public-private sector effects on the GPG, also found that the wage gap is generally larger in the private than the public sector (Barón & Cobb-Clarke 2008; Kee, 2006; Preston, 2000; Preston & Jefferson, 2009: 326). As Kee (2006: 424) explains:

The principal finding is that in the public sector, the gender gap exists but is distributed fairly evenly across the distribution of wages. However, in the private sector, even after controlling for occupation and industry, the gender gap accelerated at the upper tail of the conditional wage distribution, and hence there is a glass ceiling.²⁹ Clearly, the observed GPG in both sectors is a result of *differences in returns* to gender characteristics.

It has been suggested that the smaller GPG in the public sector may be related to more intensive anti-discrimination enforcement in that sector (Gregory & Borland, 1999; Austen et al., 2004: vii). Like Miller in the US, Kee (2006: 424) suggested that a possible explanation of the identified difference between the public and private sectors could be the adoption of different pay schemes between the two sectors. In particular, the lack of standardised pay schemes across companies and firms in the private sector may provide greater scope for wage settlements for perceived 'high fliers' to favour men. In a review of international experience, Robinson (1998: 30) suggested that the enlargement of the GPG in public sector employment in some countries may arise from the spread of personal assessment as the basis for granting annual wage increases, 'since women tend to do less well under this sort of payment system.'³⁰

In Australia the greater prevalence of family friendly arrangements in the public sector has been noted as potentially important in contributing to a reduction of the glass ceiling (Kee, 2006: 424). However, recent remuneration surveys of the Australian Public Service, commissioned by the Department of Education, Employment and Workplace Relations, have found gender differences across remuneration at the Senior Executive Service (SES) levels and for nearly all non-SES classifications (Australian Public Service Commission, 2010). These differences may be related to the emergence of performance pay.

²⁹ In the literature, the term 'glass ceiling' is used to describe the situation where women do quite well in the labour market up to a point where there is effectively a barrier (or ceiling) limiting their future progression. The phenomenon may reflect inequality in earnings and/or unequal access to promotion and results in a GPG that increases across the wages distribution; accelerating in the upper tail. By contrast, a 'sticky floor' is said to exist where the GPG widens at the bottom of the wage distribution (Booth, 2009: 3). These effects are considered further below.

³⁰ In principle, paying workers more in accordance with their performance may be favourable to women. However, the use of subjective evaluation criteria, combined with differences in competitive behaviour between men and women (noted above) and the exclusion of women from variable pay systems may work to their disadvantage (see Plantenga & Remery, 2006: 31–32).

3.9.4 Firm size

Cassells et al. (2009b: 11) found that firm size is associated in the international and Australian literature with higher levels of pay—that is, larger firms pay more than smaller firms on average. They cited work by Daly et al. (2006) which found that for both men and women, hourly rates of pay were higher in larger firms. Austen (2003: 166) also noted the strong link between small firms and the chances of low-paid employment. Firm size can also be a function of sector—with some industries and sectors having a higher incidence of small firms than others. Therefore, separating out causality is important in firm size analysis.

Australian and international studies have found that while larger firms tend to pay their employees higher wages, this does not necessarily mean that they have lower GPGs. A study by Mitra (2003) in the United States found that significant wage differentials existed among male and female professionals in every category of establishment size even after controlling for human capital variables and other characteristics.³¹ Mitra suggested that one factor contributing to the significant GPG in large firms may be unequal access and returns to supervisory jobs in such establishments.

In Australia, Le and Miller (2001: 45) found that women working in 'very large' workplaces (100 or more employees) were more likely to experience gender wage disadvantage than women working in smaller workplaces. They also found that women working in smaller workplaces had a lower probability of remaining at a wage disadvantage in contiguous years.³² They concluded that large workplaces played a key role in both generating and perpetuating gender wage inequality (Le & Miller, 2001: 47–48). In addition, Cassells et al. (2009b: 11) cited findings from the 2008 EEH survey showing that as firm size increases, the raw gender wage gap³³ also increases (ABS 2008).

These findings may need to be understood in the context of other studies which examine the GPG along the income distribution.

3.9.5 Income distribution

Both international and Australian studies have found that the GPG increases as income increases. Miller (2009: 55) noted that Arulampalam et al. (2007) found the GPG to be larger at the top of the wage distribution than it is in the middle of the distribution across each of the 11 European countries included in that study.³⁴ In Arulampalam et al.'s study, Spain and Ireland were the only countries not to have a glass ceiling in the private sector, whereas Finland and Ireland were the only countries not to have a glass ceiling in the public sector.

Cassells et al. (2009b: 11) identified several studies that investigated the GPG along the income distribution in Australia. Barón and Cobb-Clarke (2008), Kee (2006), Miller (2005 and 2009), Austin et al. (2008) and Preston and Jefferson (2009: 326–7) all found that the GPG increases at the top end of the income distribution; suggesting the prevalence of a glass ceiling in the Australian labour market. For example, Miller (2005: 413), using data from the 2001 Australian Census of Population and Housing Household Sample, found that the standardised gender wage differential increased from around 10 per cent for low-wage earners to 25 per cent or more for high-wage earners. However, both Barón and Cobb-Clarke (2008) and Kee (2006) noted that this effect was most evident in the private sector.

31 Mitra found that, after controlling for human capital variables and other characteristics, the GPG between professional men and women was highest for 'small' firms (1–25 employees) at 29 per cent (that is, Mitra found that professional men were paid 29 per cent more than professional women in small establishments). The adjusted GPG was second highest for 'very large' firms (over 500 employees) at 24 per cent, fell to 17 per cent for 'large' firms (101–500 employees) and was the lowest for 'medium' firms (26–100) at 15 per cent.

32 Their study followed individuals over a three-year period.

33 That is, the wage gap unadjusted for differences in education, experience and other measurable variables that may contribute to wage differences.

34 The countries studied were: Austria, Belgium, Britain, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands and Spain.

Analysing the determinants of the GPG along the income distribution more closely, Miller (2005: 414) found that the gap between the pay-offs to education for men and women was greater among higher wage earners than it was among the low-wage group. He observed that this was 'symptomatic' of the 'undervaluation of women's skills.'

Barón and Cobb-Clarke (2008: 20–21) used HILDA data from 2001 to 2006 and found that for low-paid workers, the proportion of the GPG explained by workers' productivity-related characteristics was much larger than for higher paid workers:

Our results suggest that, irrespective of sector of employment, the gender wage gap among low-paid workers is fully explained by gender differences in productivity-related characteristics. Among high-wage workers, however, the wage gap faced by women is mostly (approximately 60 per cent) unexplained in the private sector and is completely unexplained in the public sector.

It should be noted, however, that Barón and Cobb-Clarke's analysis was focused on public and private sector employment and excluded those working for private not-for-profit and other non-commercial organisations (Barón & Cobb-Clarke: 7).

Healy et al. (2008) add further insight to findings for the low paid, noting that:

These differences by industry and occupation highlight an important feature of the low-paid labour market, in that there are generally smaller differences between male and female wages in the sectors where award reliance is high. But the gender differential is only one of several important dimensions of earnings inequality. In the lowest-paid sectors, the problem of inequality manifests less in the specific form of gender disparities, and more in the form of a distribution which is highly-skewed towards low hourly wages. While employees remain within these industries their prospects of attaining better-paying jobs are curtailed by the very small number of such jobs on offer. Male and female wages may be more closely aligned in these sectors, but only because both sexes are disadvantaged in these sectors relative to most other Australian employees. (Healy et al. 2008: 239)

As Cassells et al. noted, whilst finding variation in the GPG along the income distribution, researchers have emphasised that a substantial GPG exists at all points of the income distribution, and that efforts to address the gap need to be targeted at all income levels (Cassells et al., 2009b: 11; Kee, 2006: 424; Miller, 2005: 414).

3.9.6 Unionisation

Gunderson (1994: 7) argued that unions can be an important vehicle for influencing the jobs available for women and the remuneration for those jobs. However, he observed that while in general unions tend to facilitate greater equality of pay between men and women, they can also contribute to the GPG, for example, where they devote more resources to male-dominated employment which is more likely to be unionised. It should be noted, however, that there have been significant changes to union density and shifts in union attitudes towards female members since Gunderson's study was undertaken.

Cassells et al. (2009b: 11) found that some of the Australian literature (Barón and Cobb-Clarke 2008; Miller 2005) suggested that unionisation may have contributed to reducing the GPG, particularly for lower wage workers. However, they observed that conclusions about this relationship have been mixed, with Wooden (1999), for example, finding insignificant or weak negatively significant effects of union membership on wages, and Cai and Liu (2008) finding that unions have a larger effect on men's wages than on women's. Wooden (1999: 165, citing Miller & Mulvey, 1996) suggested that some research may have overestimated the relative wage effects of unions by not controlling for the effects of firm size.

3.9.7 The 'unexplained' gap

Turning from consideration of the nature, composition and determinants of gender pay ratios, what conclusions have been drawn about the size of the GPG in Australia that can be 'explained' and that which is 'unexplained' (and may result from discrimination, or other unobserved differences between men and women)?

As a result of differences in data, design, methodology and changing labour market conditions, Australian studies have produced a range of results. However, the results of the studies have been consistent over a number of years in their general finding that there is a significant, persistent, unexplained wage gap between men and women. The findings show that only a small proportion of the GPG can be attributed to differences in the productivity-related characteristics of men and women. The larger, unexplained gender wage effect suggests systemic gender bias in the wage system or the undervaluation of women's work.

For example, Le and Miller (2001) summarised the findings of Australian studies as follows:

Most studies report a difference in the mean hourly earnings of men and women of between 15 and 20 per cent. When account is taken of the different skill levels of men and women, a gender wage differential of between 10 and 15 per cent remains. The division of the wage differential between men and women into explained and unexplained components is reasonably robust across studies (for example, Kidd and Shannon 1996; Kidd and Meng 1997; Meng 1999; Wooden 1999), with around one-quarter being explained, and three-quarters unexplained. (Le & Miller, 2001: 34)

Following a subsequent review of the Australian literature, Eastough and Miller (2005) concluded:

There is ... quite an array of results, but most research conducted since 1980 shows that between 60 and 90 per cent of the difference between average male and average female wages in the working population remains once account is taken of the differences between males and females in the mean value of regressors included in the econometric model of wages. Thus, measures of the gender wage gap range from 7 to 18 per cent, with most estimates being between 12 and 14 per cent. (Eastough & Miller, 2005: 259)

Similarly, Short and Nowak (2009) concluded from their recent review of the Australian literature that:

These studies find a raw wage gap³⁵ of between 11.5 per cent (Wooden, 1999) and 19.2 per cent (Preston and Crockett, 1999) and an adjusted wage gap (unexplained by the variables used) of between 8.9 per cent (excluding managerial employees; Wooden, 1999) and 16 per cent (Le and Miller, 2001). These studies confirm the continuation of an 'unexplained' and persistent wage gap between men and women, after allowance for the impact of the range of measured measurable variables, which impact productivity and hours worked. (Short & Nowak, 2009: 265)

Cobb-Clark and Tan's (2009) recent study also found a significant component of the GPG which was unexplained, but highlighted the larger intra-occupational component of the gap:

Almost three-fourths of the wage penalty that women face stems from gender differences in the wage returns to human capital, demographic characteristics, and noncognitive skills within occupations. These results are consistent with research on Australian data from the early 1980s which also shows that most of the intra-occupation component of the gender wage gap resulted from the unequal returns to men's and women's characteristic (Kidd 1993). Thus, there appears to be an enduring gap in relative wages within the same detailed occupational classification which remains to be explained. Moreover, this is by far the most important source of the overall gap in women's wages.

Although the inter-occupational component of the gender wage gap is very small, it is completely unexplained by worker characteristics ... (Cobb-Clark & Tan, 2009: 19)

³⁵ See footnote 33 for an explanation of this term.

Cassells et al.'s (2009b) review of the literature also led them to conclude that:

Findings about the determinants of the Australian gender wage gap generally show that rewards for endowments are more important than endowments themselves ... overall there is substantial evidence to suggest that a combination of discrimination or other unobserved characteristics play an important role in maintaining the wage gap in Australia. (Cassells et al., 2009b: 5)

Following on from their literature review, Cassells et al. (2009b) identified a set of key variables to include in a decomposition of the GPG and undertook further analysis using data from the HILDA Survey (which includes part-time workers). They used a simulation approach pioneered by Olsen and Walby to minimise the drawbacks of traditional decomposition methodologies (particularly in relation to feedback effects).³⁶ They summarised the findings of their research as follows:

Utilising robust microeconomic modelling techniques, based on a comprehensive and critical evaluation of several methodologies, we found that simply being a woman is the major contributing factor to the gap in Australia, accounting for 60 per cent of the difference between women's and men's earnings, a finding which reflects other Australian research in this area. Indeed, using wage gap analysis from the HILDA survey, the results showed that if the effects of being a woman were removed, the average wage of an Australian woman would increase by \$1.87 per hour, equating to an additional \$65 per week or \$3,394 annually, based on a 35 hour week.

Other key determinants of the gap that were identified and quantified as part of the microeconomic modelling component of our research were industrial segregation (25 per cent), labour force history (seven per cent), under-representation of women with vocational qualifications (five per cent) and under representation of women in large firms (three per cent).

Overall ...our finding that simply being a woman is the major contributing factor to the wage gap in Australia is significant. Consistent with results from other Australian studies it highlights the considerable impact that discrimination and other differences between men and women, including differing motivations and preferences, can have on reducing the earnings of women relative to men, irrespective of similar labour force and work-related characteristics. (Cassells et al., 2009b: v)

³⁶ For further explanation, refer Cassells et al. (2009b: 12–14).

3.10 Institutional arrangements

Researchers have observed marked variation in the overall size of the GPG in different countries and sometimes between regions within a country. This has led them to consider whether and how the institutional arrangements in different countries and regions impact on the GPG. In particular, attention has focused on the regulatory and institutional arrangements of wage determination (including the degree of centralisation or coordination of collective bargaining and the presence and role, if any, of minimum wages).

Before proceeding it is important to clarify some key concepts. In the international literature, references to 'minimum wages' are generally to national or regional, statutory minima that establish a wage floor. There are a variety of approaches to such minima, which are discussed further in section 4. However, commonly they establish a single minimum rate for adults and a minimum rate for junior employees. In some countries where collective bargaining coverage is extensive (such as the Scandinavian countries—Sweden, Norway, Denmark and Finland), collective bargaining agreements set wage floors, but in many other countries statutory mechanisms give effect to national minima.

By contrast, in Australia multiple minimum wage rates are established through an extensive framework of awards that set a legally binding minimum safety net of wages and conditions of employment. These award rates are not only relevant for award-reliant employees, but also establish legally binding minima for those whose actual rates of pay are determined by over-award payments and collective agreements. For award-reliant employees, award rates may have a direct impact on pay equity. For others, there may be a less direct impact to the extent that over award payments or collectively bargained rates are influenced by or replicate the relativities in awards.³⁷

Women have been found to be disproportionately represented amongst the low-paid internationally (Salverda & Mayhew, 2009: 151) and in Australia are much more likely than men to be dependent on the award rate (Van Wanrooy, 2009: 626; Jefferson & Preston, 2010: 347). While around 20 per cent of employees are estimated to be totally reliant on awards, award reliance varies across and within major occupational groups (Bolton & Wheatley, 2010: 15); with a number of female dominated occupations (such as community and personal service workers, sales workers and hairdressers) showing high degrees of award reliance.

Due to the over-representation of women amongst the low-paid and award-reliant, raising workers' minimum wages tends to impact on both earnings and gender pay equity for these employees.

3.10.1 International comparative studies

Numerous early studies found that decentralised approaches to wage determination were generally less favourable to women than centralised systems, particularly for women on relatively low earnings (for example, Gunderson, 1989; Mincer, 1985; Blau & Kahn, 1992 & 1997; Gregory & Daly, 1991; Gregory & Ho, 1985, Rowthorn, 1992; Rubery, 1992; Whitehouse, 1992; Preston and Crockett, 1999a; Swepston, 2000: 10; OECD, 2002;). There were two main reasons for this. First, centralised systems tend to reduce the extent of wage variation across industries and firms and thereby reduce inequality. Secondly, because women are over-represented at the bottom of the wage distribution, centralised approaches that raise minimum pay levels, regardless of gender, also tend to reduce inequality and narrow the GPG.

³⁷ For a discussion of the significance of minimum wages for the broader wage setting environment, see Buchanan & Considine (2008).

Summarising the findings from the literature, Gunderson (1994: 13) noted that the earnings gap tended to be smaller in countries with centralised collective bargaining arrangements that emphasised 'egalitarian' wage policies³⁸ in general (such as Sweden, Norway and Australia) and largest in countries that emphasised a traditional, 'non-egalitarian' role for women in the labour market (such as Japan) or had decentralised, market-oriented wage determination with enterprise-level bargaining (such as the United States and Canada). He also noted that these latter countries had a greater degree of wage inequality in general, and that this accounted for much of the greater GPG because of the over-representation of women at the lower end of the wage distribution.

Building on their earlier work, Blau and Kahn (2003) used micro-data from the International Social Survey Programme for 22 countries over the period 1985 to 1994 to examine the effect of institutions and market forces on the GPG. They found that countries with a more compressed male wage structure (i.e. a narrower male earnings distribution) combined with low female labour supply relative to demand were associated with a lower GPG. They argued that the inverse relationship between the GPG and male wage inequality suggested that wage-fixing mechanisms, such as 'encompassing collective bargaining agreements that provide for relatively high wage floors', raised the relative pay of women (who were found to be at the bottom of the wage distribution in all countries). Consistent with this view, they found that *the extent of collective bargaining coverage* in each country was significantly negatively related to the GPG—that is, the greater the extent of collective bargaining coverage, the smaller the GPG (Blau and Kahn, 2003: 138–9). More recently, using a 40 country data set covering the period 1970 to 2002, Polacheck and Xiang (2009) confirmed Blau and Kahn's (2003) conclusion that greater male or female wage dispersion is associated with a wider GPG, and that nation-wide collective bargaining helps to reduce the GPG.

Using census data, Eastough and Miller (2004: 270–271) compared wage outcomes in the wage and salary sector with those for the self-employed in Australia and the United States. They found the GPG to be significantly larger for the self-employed than among wage and salary earners; suggesting that the award system had offered females some degree of wage protection and more equitable earnings. By contrast, their analysis of the United States showed GPGs more than double those in Australia. They also observed that females in self-employment experienced a proportionately greater disadvantage in the US than those in Australia. They concluded that in a deregulated environment, women experience significantly lower relative earnings, with those in self-employment suffering a more pronounced disadvantage.

Daly et al. (2006) analysed institutional arrangements and the GPG in four countries (Australia, France, Japan and the United Kingdom) to assess their role and whether major changes in these countries over the last 30 years had affected the GPG. Their analysis confirmed work published in the 1980s by Gregory and others which found that country specific factors, especially the institutional environment, were important in explaining the GPG. Based on 1997 OECD data, Daley et al. (2006: 4) classified Australia and Britain as having the 'most decentralised and uncoordinated wage bargaining systems' of the four countries studied. They found that the GPG did not change substantially for those working full-time over the 1990s in Australia, France and Britain, although it declined in size in Japan. The change in Japan was attributed to the shift away from seniority-based pay structures to structures linked to results which were found to have benefited Japanese women compared to men. They concluded that deregulation and decentralisation did not appear to have disadvantaged Australian or British women. However, they emphasised that their findings were based on data for females working full-time and might differ if part-time workers had been included in the analysis. Other Australian studies discussed below (3.10.2) highlight the limits of aggregate data for analysing the impact of institutional arrangements on women. It should also be noted that Daley

³⁸ That is, wages policies based on the notion that income should be distributed equitably and that efficiency and fairness are complementary objectives. Such policies tend to ensure that those with limited bargaining power are not left behind, and are generally associated with more compressed wage structures.

et al.'s (2006) study was based on 1997 data and that further deregulation of the Australian industrial relations system occurred after that time; particularly following the introduction of the *Work Choices* amendments in 2005.

Rubery and Grimshaw (2009) examined OECD data, and data from the Eurostat Structure of Earnings Survey, and found support for 'the argument that institutional arrangements for regulating low wage work can make a difference in reducing women's vulnerability to low pay.' They also suggested that their findings 'complement the more general finding that more coordinated and centralised wage bargaining institutions generate a more egalitarian wage structure and contribute to closing the pay gap.' In particular, they found that in countries with 'either no or a low level minimum wage coupled with weak collective bargaining coverage' women were almost three times as likely to be low-paid compared to men. Further, they concluded that countries with no or a low minimum wage and weak bargaining were more likely to register wide GPGs (Rubery & Grimshaw, 2009: 5–7).

A recent major study conducted by the ILO examined the literature and wage trends in member countries (ILO, 2008). The ILO expressed disappointment at the limited progress in closing the GPG in many countries, given women's significant educational achievements. The study found that higher minimum wages were generally associated with reduced wage inequality and gender wage differentials in the bottom half of the wage distribution (ILO, 2008: 43–45). The study also confirmed 'a strong relationship between centralised and/or coordinated bargaining and lower wage disparity, including a narrower gender pay gap' (ILO, 2008: 41). However, it noted that international trends in these two important factors were often in different directions—with a 'revival in minimum wages' contrasted with low and/or declining rates of collective bargaining coverage observed in a number of countries (ILO, 2008: 34–40). The ILO study noted that in some countries, complex systems of minimum wages had emerged to compensate for the absence of effective collective bargaining arrangements. In its conclusions, the ILO emphasised the importance of 'using minimum wages as an instrument of social protection, to provide a decent wage floor, and not—as is often the case—as a permanent substitute for bargaining among social partners'. The ILO underlined the importance of 'coherent articulation between minimum wages and collective bargaining' such that minimum wages and collective bargaining operate as complementary and mutually reinforcing elements of comprehensive wage policies (ILO, 2008: 33, 67).

Similar conclusions were drawn by the European Commission's Group of Experts on Gender, Social Inclusion and Employment following a review of the literature and a comparative review of the experience of 30 European countries.³⁹ They noted the importance of wage structures and institutional arrangements in reducing the GPG, and expressed concern at the trend towards more decentralised and individualised arrangements. They concluded that women seemed to be 'swimming upstream'. That is, although women were found to have improved their educational attainment, had fewer children and shorter periods of employment disruption, they were 'confronted with a labour market with growing wage differentials and a reduced share of collectively agreed wages and wage components. As a result, the differences in wages 'remain more or less the same' (Plantenga & Remery, 2006: 8).

³⁹ The study was mainly based on data from the Structure of Earnings Survey which covers all European Union states, except Malta. The survey only covers employees in the private sector and excludes education and healthcare.

Finally, Salverda and Mayhew (2009) examined the incidence of low pay in 13 European countries and the USA. They found that countries with more 'inclusive' wage-setting institutions experienced lower incidences of low pay. They defined 'inclusive' to mean 'the existence of mechanisms, formal or informal, to extend terms and conditions negotiated by workers with strong bargaining power to workers with less bargaining power.' However, they found that collective bargaining coverage was not necessarily sufficient on its own to avoid a high incidence of low pay. They observed that 'bargaining inclusiveness can be bolstered or weakened by other institutions', including minimum wage legislation, employment protection legislation, product market regulation, social benefits and the regulation of temporary employment (Salverda & Mayhew, 2009: 145, 147, 150). With respect to the role of minimum wages, they concluded:

... it is clear that the mere presence of a minimum wage offers little protection; to the contrary in the USA and the Netherlands.⁴⁰ Its level, its universal application, and its enforcement are essential. (Salverda & Mayhew, 2009: 152)

While Salverda and Mayhew (2009: 151) observed that the incidence of low pay varied from country to country, like numerous other researchers, they found that the composition of the low paid showed 'strong similarities across all countries' studied. In particular, part-timers, the young, women and minorities were disproportionately represented in the low paid group (Salverda & Mayhew, 2009: 151).

3.10.2 Australian studies

Consistent with the findings of international studies, Jefferson and Preston (2007:127) argued that by 'compressing the wage distribution and raising the relative wage of those on the bottom, the Australian wage setting system was able to deliver greater levels of gender equity than those observed in most other Western developed economies.' Other Australian literature has also demonstrated links between wage setting institutions, wage negotiation and gendered outcomes (Preston & Jefferson, 2009: 326; Peetz & Preston, 2007; Preston et al. 2006; Neville and Kriesler, 2008).

In the context of concern for Australia's move towards individual employment contracts and enterprise level bargaining, Austin et al. (2008) used an analytical method developed by Fortin and Lemieux to identify links between minimum wage decisions and gender differences in earnings in the Australian labour market between 1995–96 and 2005–06. They found that in Australia the real value of the minimum wage was maintained between 1995 and 2005. Considering the implications for gender wage differences, they concluded that in the 'minimum wage adjustments awarded between 1995 and 2005 contributed to a reduction in the GPG⁴¹ by approximately 1.2 percentage points' (Austin et al., 2008: 6, 33). In addition, they noted that studies of women's labour supply suggested that wage increases have links with women's willingness to participate in the labour force. This led them to conclude that 'minimum wage decisions can play a dual role — increasing wage equity and encouraging labour force participation, particularly among low-wage employees' (Austin et al., 2008: 52).

40 Salverda & Mayhew (2009: 148) note that the minimum wage in the USA and the Netherlands had 'suffered a strong decline since 1979'; falling in both level and employment incidence.

41 Austen et al. (2008: 25) noted that GPGs are sensitive to the measure of earnings used in the analysis. They observed that the GPG is larger when hourly earnings are compared across all workers, rather than full-time workers, and that the GPG is larger still if adjusted to compensate for the casual loading. To examine how the hourly earnings of men and women in low-paid industries varied over time, and the role that minimum wages played in shaping gender differentials, they relied on unpublished data from the ABS *Survey of Income and Housing* to derive hourly earnings information for all wage and salary earners (including part-time employees).

Whitehouse (2001) challenged the notion that Australia's GPG had remained stable despite a prolonged period of deregulation by looking beyond the aggregate statistics. Using unpublished data from the *ABS Employee Earnings and Hours* survey to analyse total (rather than ordinary time) hourly earnings, she found that a number of different trends were evident underneath the relatively static picture of the aggregate statistics. In particular, she found a continuing widening of the part-time/full-time earnings gap which she argued had 'negative implications for the gender pay ratio in the longer term so long as women remain overrepresented in part-time employment' (Whitehouse, 2001: 70). She also found evidence that the aggregate gender pay ratio was being bolstered by falling male occupational wages (relative to the occupational average) in some areas of the labour market (Whitehouse, 2001: 73). She argued that a 'more divided labour market with increasing differences between full-time and part-time jobs, and casual and permanent jobs' was adversely affecting both men and women in irregular employment, 'although it is the women who currently bear the greatest cost given their overrepresentation in such jobs' (Whitehouse, 2001: 74). Her calls for greater regulation of part-time and casual work (Whitehouse, 2001: 75) have been echoed by others (for example, Pocock et al., 2004).⁴²

Preston and Jefferson (2007) also examined the apparent stability of Australia's GPG throughout a prolonged period of significant labour market deregulation and cautioned against the use of aggregate trend data as an accurate measure of men's and women's labour-market experiences. They found that apparent stability in the GPG (measured by reference to data for all full-time employees) at a national level, neglected important variations between state-level data⁴³ and the growing significance of part-time employment. They also argued that apparent improvements or stability in the GPG at the national level may have been a result of men's deteriorating labour market position. Confirming measurement issues noted above, they argued that measures of the GPG that focused on full-time employment understated the effects of women's employment in labour market sectors traditionally reliant on award wage-setting processes, including the increasingly important area of part-time employment. They concluded that to gain a more accurate picture required monitoring time-series data on hourly earnings, disaggregated by industry, occupation, sector, sex and method of pay setting (Preston & Jefferson, 2007: 80).

Peetz (2007) examined the impact of the *Workplace Relations Amendment (Work Choices) Act 2005* one year after its introduction. Using data from the *ABS Employee Earnings and Hours Survey*, he found that 'all of the gains in reducing the GPG between 1996 and 2004 were wiped out by 2006' (Peetz, 2007: ix-x, 54). He also noted that the gap between male and female earnings was the most adverse for women on registered individual agreements (at 19 per cent) by comparison with those on collective agreements (at 10 per cent) (Peetz, 2007: x, 55-56). Using data from the *ABS Average Weekly Earnings Survey*, Peetz (2007: x, 56-57) found poor outcomes for women in the private sector where there was a lower level of collective agreement protection and higher reliance on awards. He suggested that workers reliant on awards (predominantly women) were particularly vulnerable to losing conditions under *Work Choices*, as they were in the weakest bargaining position and adversely affected by delays in minimum wage increases. However, as the study was undertaken only one year after the introduction of *Work Choices*, Peetz (2007: iv, 3) emphasised that its results could only be regarded as preliminary.

Commenting on trends in the GPG⁴⁴ overtime, Cassells et al. (2009b: 3-4) found that between 1996 and 2005 the gap exhibited a downward trend, falling from 16.8 per cent to 15.1 per cent. Whilst not attributing changes since 2005 to the impact of *Work Choices*, they noted that 'in the four years since then it has risen quite sharply, wiping out the previous gains and in effect leaving the gap slightly above the level it was almost 20 years earlier.'

42 Defenders of casual employment suggest that it provides greater capacity for preferences to be matched within the labour market. See Nelms & Tsingas, 2010, for a discussion of the literature.

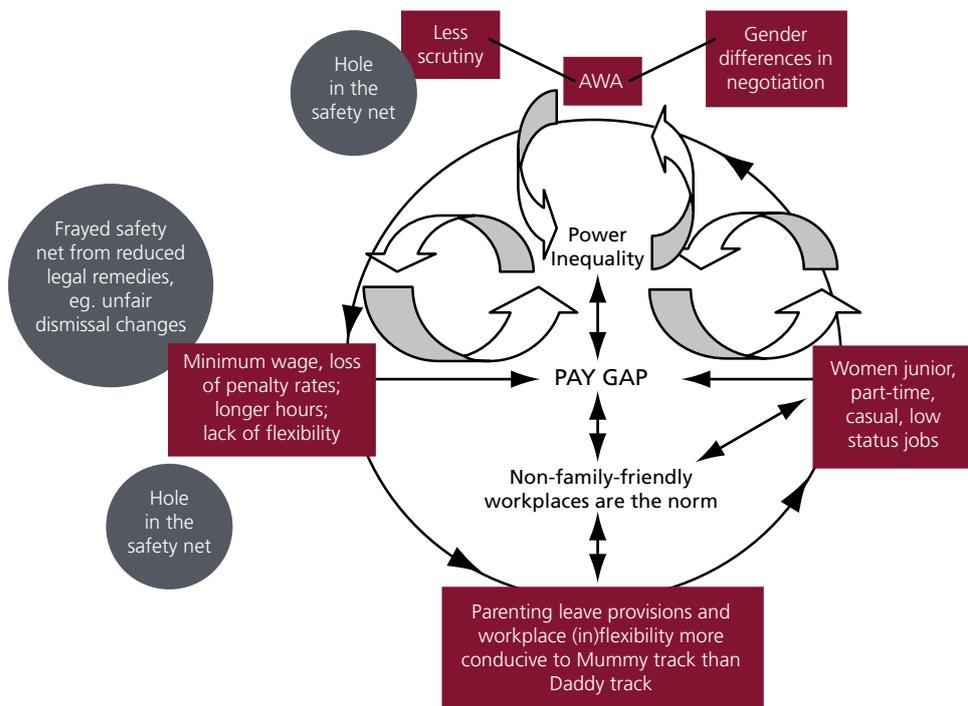
43 Deterioration was noted in the relative pay position of women in Western Australia, South Australia and Victoria, with improvements in other states (Preston & Jefferson, 2007: 70-71).

44 Calculated for full-time, ordinary time adult employees, using *ABS Average Weekly Earnings* data.

Rentsch and Easteal (2007: 316–317) developed a theoretical, schematic model to illustrate how institutional and cultural factors could influence the GPG. They highlighted the importance of the division of labour between the domestic and public spheres and its influence on men’s and women’s relative power positions in the workplace. They argued that the pay and power differences between the sexes have flow-on effects back into the gendered division of labour in the home and the vertical and horizontal segmentation in paid employment. These relationships impact on men as well as on women. For example, Rentsch and Easteal argue that while there may be flexibility available to men to enable them to share parenting responsibilities, in practice, men’s generally higher earnings and advancement prospects make this choice less economically feasible—and make it more likely that the flexibility will be sought by women (and see HREOC, 2007: 80). Rentsch and Easteal used their theoretical model to explain how changes put in place by the *Work Choices* reforms could exacerbate the power inequality associated with the gendered division of labour; with potentially adverse impacts for the GPG, as shown in Figure 3.1.

In addition to the impact of *Work Choices* on pay, a number of the studies suggested that the changes undermined the move towards more ‘family friendly’ arrangements⁴⁵ (for example, Jefferson & Preston, 2008; Jefferson & Preston, 2007a; Williamson & Baird, 2007; Rentsch & Easteal, 2007; Pocock et al., 2008; McDonald, 2009; van Gellecum et al., 2008). Such arrangements have been widely recognised as important in advancing gender pay equity. They have the potential to break down the culturally perceived, stereotypical concepts and assumptions that underpin the gendered division of labour in the home and contribute to gender stratification and the GPG in the workplace (Rentsch & Easteal, 2007: 319–20).

Figure 3.1: Potential gendered impacts of *Work Choices*



Source: Rentsch & Easteal (2007: 339)

45 Flexible working arrangements and family-friendly working arrangements are not necessarily synonymous, see HREOC (1997: 1).

At the state level, Jefferson and Preston (2007) examined Western Australia's record with respect to gender equality (as measured by the GPG) and found it 'the most disappointing' (2007: 124). Using ABS data for adult, full-time, non-managerial ordinary time earnings, they found the GPG in Western Australia as at May 2007 to be 74.1 per cent compared to 83.8 per cent nationally (Jefferson & Preston, 2007: 124). They also considered hourly earnings for full-time and part-time employees, together with information on forms of employment contract. They found the 'worst outcomes' for employees on AWAs—observing that nationally the GPG for employees on AWAs was around 20 per cent, but in Western Australia it was closer to 37 per cent (Jefferson & Preston, 2007: 123). They argued that institutional arrangements affecting wage determination at both the federal and state levels had impacted on the relative pay position of women within Western Australia—noting Western Australia's relatively longer period of experience with individual agreements and decentralised wage bargaining (Jefferson & Preston, 2007: 124).

Todd and Eveline (2007) also reviewed issues and trends associated with the GPG in Western Australia based on the findings and recommendations of a report they had prepared for the Western Australian government in 2004 and analysis of more recent data. Comparing measures of the GPG based on ABS data for full-time adult ordinary time earnings and full-time adult total earnings for Western Australia and Australia for 2007, they observed that the 'difference between the GPG in WA and the rest of Australia is extraordinary' (Todd & Eveline, 2007; 107). They noted that while scholars such as Jefferson and Preston had managed to provide explanations for some of the Western Australian GPG phenomenon, they had not managed to locate all of the causes of the gap. They found that the extent to which the size of the GPG was perceived to be a 'problem' varied significantly across interest groups and also argued that the complex and multi-factoral nature of the problem was itself a barrier to progress, as improvements in one contributing factor could be offset by new developments in another (Todd & Eveline, 2007: 117). Commenting on the findings of their 2004 report, they noted the importance of institutional arrangements, but also placed those arrangements within the context of a broad range of other factors:

Economic analysts are usually forced to admit that the factors they identify as causes of the GPG—human capital, demographic factors and job characteristics—tell only part of the story. To tell the whole story researchers must add institutional arrangements such as minimum wages systems, centralisation or decentralisation of wage determination, and job evaluation systems. But they must also suggest ways of combating the social norms entrenched historically in relation to 'breadwinning' and 'caring' responsibilities.

In a more recent analysis following the transition from *Work Choices* and the onset of the Global Financial Crisis, Jefferson and Preston (2010a: 329) found that the ratio of ordinary time earnings of men and women in full-time employment had widened by 1.6 percentage points between February 2007 and February 2010. They found that the widening of the GPG was largely a result of deterioration in the relative pay of women in private sector employment and noted that industries with below average wage growth included manufacturing, retail trade, accommodation and food services, finance and insurance services, administrative support services and other services. They emphasised, however, that the data relied on could say little about trends in the part-time and casual labour market. They argued that the significant increase in part-time work, together with the decline in average hours worked and increase in labour underutilisation, suggested that the GPG could be much wider, and noted that part-timers 'typically have worse (pro rata) earnings outcomes than full-timers'. They also observed that it was likely that the decision of the AFPC in 2009 to freeze the minimum wage 'would have done little to improve gender pay differences and may have served to exacerbate them' as women were disproportionately reliant on minimum award conditions (Jefferson & Preston, 2010: 332).

3.10.3 The role of a national minimum wage

Healy (2009: 48) suggested that there was 'compelling international evidence' that minimum wages reduce inequality by raising pay at the bottom of the distribution relative to the middle. However, he observed that a more controversial issue is whether a National Minimum Wage (NMW) (that is, a single rate specified as a wage floor, as distinct from a framework of minimum award rates) helps to reduce the overall GPG. As Healy (2009) explains, there are inherent limitations to the role which a NMW can play:

The effect of the NMW on the *average* gender pay gap cannot be very large, because this gap reflects factors beyond the control of a minimum wage, such as the division of men and women between different types of employment and inequalities in pay near the top of the distribution ... Where the NMW can have a larger effect on gender inequality is at the bottom of the distribution, where there are disproportionate numbers of women. (Healy, 2009: 50–51)

Robinson (2002: 418) noted that the issue had been subject to some debate in the United Kingdom (UK), with some suggesting that since women are disproportionately represented amongst the low paid, it would be expected that the UK NMW would overly affect this group and so reduce the GPG. On the other hand, Robinson noted that others (Dex et al., 2000; Shannon & Kidd, 2000) had argued that a single UK NMW can have only a small effect on the GPG because it affects both male and female wages and, because it only changes wages at the bottom end of the distribution, can do little to affect average wages.

Analysis of the impact of a UK NMW has been assisted in the United States (US) by irregular minimum wage increases and variation at the state level. In the UK, the introduction in 1999 of a new NMW in industries without a pre-existing wage floor assisted researchers to isolate its effects.

Fortin and Lemieux (1997) demonstrated a clear relationship between the decline in the real value of the minimum wage in the US and both rising levels of wage inequality and an increase in the GPG (Austen and Preston, 1999: 8). Lee (1999) used regional variation in the relative level of the federal minimum wage in the US to identify the impact of the minimum wage from national growth in wage dispersion⁴⁶ during the 1980s. His analysis suggested that the decline in the minimum wage could account for much of the rise in dispersion in the lower tail of the wage distribution, particularly for women.

In a British study, Robinson (2002: 439) used UK Labour Force Survey data (which excludes bonus payments) to consider the impact of the introduction of the NMW on the GPG. She derived hourly pay by dividing gross weekly wages by the usual weekly paid hours, including paid overtime, and deflated these wages by the retail price index using January 2000 as a base. She then compared estimates from the third quarter of 1999 (September to November)⁴⁷ with those from the same quarter in the five years leading up to the introduction of the NMW. She measured the unadjusted pay gap, controlled for other determinants of the wage (including educational qualifications, marital status, number of dependent children, and job-specific influences, such as job tenure and union membership) and also analysed the GPG at different points of the wage distribution.

⁴⁶ Wage dispersion generally refers to the amount of variation in wages across the economy. Generally, greater wage dispersion is associated with less equity in the wage distribution (Bray, 1993: 114).

⁴⁷ So as to measure wages six months after the introduction of the NMW.

Robinson (2002: 427) found that the largest fall in the proportion of workers earning less than the NMW was experienced by women, particularly in the non-union sector, amongst small firms and for part-time workers. She also found that those at the bottom of the hourly wage distribution (both full-time and part-time workers) received larger nominal annual percentage increases than in the year earlier, and that this pattern was not observed higher up the wage distribution. While these findings suggested that the UK NMW had some impact at the point of the wage distribution where it was expected to have most effect, Robinson (2002: 436, 439) concluded that the 'immediate effect' of the UK NMW on the overall pay gap had been 'limited'. The raw mean GPG fell by around 2 percentage points between 1998 and 1999, but Robinson noted that this fall was on the border of statistical significance and that the rate of decline in the GPG was similar to that in years before 1998. She found that the gap fell by another 2.5 points between 1999 and 2000, but observed that this appeared to have been driven more by changes at the top of the pay distribution than at the bottom. Based on a simulation, she observed that at the initial UK NMW level of £3.60, the gender pay ratio was 73.7 per cent and suggested that it would take a NMW as high as £5.00 to reduce the average gap by 3 percentage points (Robinson, 2002: 438). She concluded that:

It is clear ... that the NMW would never be set at sufficiently high a threshold to make more than an inroad of a few percentage points into the gender pay gap. Further eradication of gender wage inequality would need to come from reducing areas such as the occupation and skills gap. It is clear that the NMW is operating to bring pay levels up at the lower end of the wage distribution but this is only a small part of the story in overall gender wage inequality. (Robinson, 2002: 433)

It should be noted that Robinson's findings were based on the impact of a single NMW on the overall pay gap. In addition, she observed that in the UK the NMW had worked against a 'background of 15 years of rising wage inequality', which she noted would be expected to work in the opposite direction to the impact of the NMW on the GPG (Robinson, 2002: 418). Section 4 provides further consideration of the impact of the UK NMW on the GPG by reference to the analysis and recommendations of the UK Low Pay Commission.

3.11 Overview

As a result of differences in data, design, methodology and changing labour market conditions, studies of the GPG have produced a range of results. However, the studies have been consistent over a number of years in their general finding that there is a significant, persistent, unexplained wage gap between men and women. The findings suggest that only a relatively small proportion of the GPG can be attributed to differences in the productivity-related characteristics of men and women. The larger, unexplained gender wage effect suggests systemic gender bias in the wage system or the undervaluation of women's work.

The literature also suggests that gender pay ratios differ significantly by industry, sector and earnings distribution—with Australian studies revealing significantly higher gaps for employees in the private than the public sector, in large workplaces, and at the top of the wage distribution than for those at the bottom.

The literature suggests that regulatory and institutional arrangements of wage determination (including factors such as the degree of centralisation or coordination of wage determination and the presence and role, if any, of minimum wages) are important in determining the overall size of the GPG. Such factors can help to explain some of the variation in the GPG between countries, and sometimes within countries that have different institutional arrangements at a regional level. The literature suggests that countries with weak collective bargaining coverage and no or low minimum wages tend to have wider GPGs.

However, as the GPG reflects the operation of factors that are both within and beyond the influence of minimum wages, the literature suggests that attaining equal remuneration will require responses within and beyond the award sphere. In addition to minimum wages, the literature suggests that responses may, for example, need to address inequities in pay introduced through over-award arrangements and bargaining, as well as discrimination arising from employment practices in areas such as hiring, promotion, payment systems and access to training. Complementary and supportive reforms to develop more 'family friendly' workplaces have also been highlighted.

Not surprisingly, the need for the adoption of a multi-faceted policy agenda to address gender-based discrimination has been emphasised by Australian and international commentators (for example, HREOC, 2007; AHRC, 2010; Sweptson, 2000) and recent Australian parliamentary inquiries (SCEWR, 2009). The Committee of Experts of the ILO has emphasised that 'wage discrimination cannot be tackled effectively unless action is also taken simultaneously to deal with all of its sources' and that this will involve 'societal, political, cultural and labour market interventions' (ILO, 2003: 81). In addition to wage setting approaches, other suggested reforms have included: community and school education and vocational guidance; paid parental leave; more family-friendly workplaces; accessible and affordable childcare; improved anti-discrimination protection; strategies to promote women in leadership roles; a strengthening of the role currently undertaken by the Equal Opportunity for Women in the Workplace Agency, and changes to superannuation arrangements (SCEWR, 2009; HREOC, 2007; AHRC, 2010).

4 An overview of equal remuneration matters considered by international minimum wage-setting bodies

The first part of this section outlines United Nations (UN) and International Labour Organisation (ILO) instruments relating to equal remuneration, examines information provided by the ILO on the intended application of relevant conventions and considers international comparative data on minimum wage fixing. The second part overviews international approaches to minimum wage fixing, includes country studies of approaches to national minimum wage setting and available information on the consideration of equal remuneration matters by minimum wage fixing bodies. However, as its focus is on equal remuneration and minimum wages, it does not consider human rights approaches to pay equity that are based on individual women or groups of women making complaints about discrimination or unequal pay. Approaches that require employers to develop pay equity plans or to undertake objective job evaluations are also excluded from the analysis.

It should be noted that while a number of countries have national minimum wages which establish wage floors for adults and youths, there are no other examples of countries with an extensive framework of minimum wage rates determined by tribunals as occurs in Australia. As Wooden (2010: 325) observes:

Australia is ... relatively unique among industrial nations in having not one single minimum wage, but a whole raft of different minima that vary both across awards and within awards.

The absence of countries with comparable arrangements necessitates a focus on national minimum wage arrangements.

4.1 International instruments and equal remuneration

As Weichselbaumer and Winter-Ebmer (2007: 245) note, historically international conventions and treaties developed by organisations such as the UN and its agency the ILO have aimed to protect those seen as too weak to receive proper treatment in the market and who lack the political voice to influence legislation. Initially, the concerns of international organisations were often directed towards women and children, and over time conventions to prevent discrimination were established to complement other protections. Australia has obligations under a number of UN and ILO conventions of relevance to equal remuneration.

4.1.1 United Nations conventions

The UN is an international organisation founded after the Second World War to maintain international peace and security, develop friendly relations among nations, and promote social progress, better living standards and human rights. The *Universal Declaration of Human Rights*, proclaimed by the General Assembly in 1948, sets out basic rights and freedoms to which all women and men are entitled—among them the rights to: life, liberty and nationality; freedom of thought, conscience and religion; work and education; food and housing; and the right to take part in government. These are legally binding rights by virtue of two international covenants to which most member states are parties. One covenant deals with economic, social and cultural rights. The other covenant deals with civil and political rights. The declaration also laid the groundwork for a number of conventions and declarations on human rights, including: conventions to eliminate racial discrimination and discrimination against women; conventions on the rights of the child, against torture, on the status of refugees, the prevention and punishment of genocide; and declarations on the rights of minorities, the right to development, the rights of human rights defenders and the rights of indigenous peoples (United Nations, 2010).

4.1.1.1 *The Universal Declaration of Human Rights*

The *Universal Declaration of Human Rights* seeks to establish a common standard internationally by protecting fundamental human rights. The protection and promotion of equality between men and women are concepts underlying international human rights, as expressed in this declaration. In particular, the declaration provides that:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.' (Article 23) (Emphasis added.)

Australia was a signatory to the *Universal Declaration of Human Rights* in 1948.

4.1.1.2 *The International Covenant on Economic, Social and Cultural Rights, 1966*

Amongst other things, the *International Covenant on Economic, Social and Cultural Rights, 1966* (ICESCR) provides that:

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- a. Remuneration which provides all workers, as a minimum, with:
 - i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - ii. A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- b. Safe and healthy working conditions;
- c. Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- d. Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. (Article 7) (Emphasis added.)

Australia ratified the *International Covenant on Economic, Social and Cultural Rights* in 1975.

4.1.1.3 *Convention on the Elimination of All Forms of Discrimination against Women*

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) was adopted in 1979 by the UN General Assembly. The convention defines what constitutes discrimination against women and establishes an agenda to end such discrimination. It is sometimes referred to as an international bill of rights for women.

Article 1 of the convention defines discrimination against women as ‘...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.

By ratifying the convention, states agree to ‘take all appropriate measures to eliminate discrimination against women in ... employment’ and to ‘encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities (Article 11(1)).

Article 11(1) (d) provides for equal employment opportunity, training and promotion and, in particular, equal pay for work of equal value:

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

(d) *the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.* (Emphasis added.)

The UN CEDAW Committee adopted an *Equal Remuneration Recommendation* which proposes that to overcome gender segregation and implement UN and ILO pay equity obligations, states adopt gender neutral job evaluation systems and compare the ‘value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate.’ The results are reported to the committee as part of the periodic country reporting process (CEDAW, General Recommendation no. 13, 1989, paragraphs 2 & 3).

Australia ratified the *Convention on the Elimination of All Forms of Discrimination against Women* in 1983.

4.1.2 **International Labour Organisation (ILO) conventions**

The ILO was founded in 1919 and became the first specialised agency of the UN in 1946. It is the global body that establishes and oversees international labour standards. Since its foundation, the ILO has aimed to secure the right of men and women in labour markets to equal remuneration for work of equal value. This is evident in the inclusion of the principle in the original text of the ILO Constitution and in the ILO *Convention on Equal Remuneration for Work of Equal Value, 1951* (ILO 100) and the *Discrimination (Employment and Occupation) Convention, 1958* (ILO 111). In 1995, the Copenhagen Programme of Action and the Beijing Platform for Action highlighted the continuing relevance and importance of the principle and encouraged all states to ratify and implement ILO 100. When the ILO sought to reinvigorate its agenda by focusing on the implementation of what it regarded as ‘fundamental’ conventions and their associated ‘core’ labour standards, ILO 100 and ILO 111 were included in the ILO’s *1998 Declaration on Fundamental Principles and Rights at Work*. ILO 100 is the second most highly ratified international labour standard. Australia ratified ILO 111 in 1973 and ILO 100 in 1974 (Romeyn, 2007; Swepston, 2000).

4.1.2.1 *Convention on Equal Remuneration for Work of Equal Value, 1951 (ILO 100)*

ILO 100 requires the application of the principle that all male and female workers receive equal remuneration for work of equal value. Article 1 provides that for the purpose of the convention:

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

Article 2 provides that:

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
2. This principle may be applied by means of:
 - a. national laws or regulations;
 - b. legally established or recognised machinery for wage determination;
 - c. collective agreements between employers and workers; or
 - d. a combination of these various means.

Article 3 provides that:

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.
2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.
3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

A recent report of the ILO's Director-General emphasised that ILO 100 is intended to redress the undervaluation of work typically performed by women:

... ensuring equal remuneration for work of equal value, a fundamental right enshrined in ILO Convention No. 100, is essential. Pay equity is not about men and women earning the same; nor is it about changing the work that women do. *Pay equity is about redressing the undervaluation of jobs typically performed by women and remunerating them according to their value.* This is not necessarily a reflection of market factors or skill requirements, but may mirror differences in collective bargaining power, preconceived ideas about scarce skills/market rates or the historical undervaluing of "female" jobs. (ILO, 2007: 74) (Emphasis added.)

In relation to the definition of 'remuneration' in Article 1, the ILO has said that:

This definition is couched in the broadest possible terms with a view to ensuring that equality is not limited to the basic or ordinary wage, nor in any other way restricted according to semantic distinctions. It is important to emphasise that the principle set forth in the Convention covers both the minimum wage and remuneration determined in any other way. (ILO, 2003: 70)⁴⁸

⁴⁸ This publication includes a summary of the principles developed by the ILO's Committee of Experts in relation to the fundamental conventions and their core labour standards.

The ILO has also emphasised that ILO 100 is not limited to providing equal remuneration for the same or similar work, as the convention:

... goes beyond equal remuneration for "equal", the "same" or "similar" work: it also encompasses work of an entirely different nature, but nevertheless of equal value. This concept is essential in order to address the occupational segregation where men and women often perform different jobs, in different conditions, and even in different establishments. (ILO, 2009: 16; also see ILO, 2010: 52) (Emphasis added.)

In relation to the term 'value', the ILO has said that:

Value, while not defined specifically in the Convention, refers to the worth of the job for the purposes of computing remuneration. (ILO, 2003: 70)

The ILO has explained that ILO 100 does not limit application of the equal remuneration principle to implementation through a particular methodology, such as comparable worth, although it does indicate that the evaluation of jobs should be objective, which suggests that something other than market forces should be used to ensure application:

The Convention does not limit the application of the concept of equal value to implementation through the methodology of comparable worth, but it certainly indicates that something other than market forces should be used to ensure application of the principle. It suggests that objective job appraisals should be used to determine valuation where deemed useful, on the basis of the work to be performed and not on the basis of the sex of the job holder. While job appraisal systems are still a common feature of wage setting, other bases for the calculation of wages—including minimum wages, productivity pay and new competency-based wage systems—are covered by the Convention. (ILO, 2003: 70)

The ILO Director-General emphasised that when using methods of job evaluation to implement the principle of equal remuneration, care must be exercised to ensure that such methods are free from gender bias:

Achieving pay equity requires comparing and establishing the relative value of two jobs that differ in content, by breaking jobs down into components or "factors" and "sub-factors" and assigning points to them ... To assess "male" and "female" jobs fairly, job evaluation must be free from gender bias, otherwise key requirements of women's jobs are either disregarded or scored lower than those of male jobs, thus reinforcing the undervaluation of women's jobs. The process whereby job evaluation methods are developed and applied is at least as important as these methods and their technical content ... Possible and unintentional gender biases and prejudices may arise at any stage in its design and application. (ILO, 2007: 74)

In discussing the means of application of the principle of equal remuneration (paragraph 2 of Article 2), the ILO has indicated that:

In many countries there are bodies at the national level responsible for determining the applicable wage levels, and they should do so in accordance with the Convention. The composition of these bodies and the criteria used are often determining factors in the application of the principle. The minimum wage is also an important means of applying the principle of equal remuneration. (ILO, 2003: 71)

4.1.2.2 Other related ILO conventions and recommendations

Swepton⁴⁹ observed that ‘the sources of wage discrimination are many and complex’ and emphasised that policies to deal with the issue must deal with factors within and outside the labour market. He explained that this was recognised at the time ILO 100 was being developed and was reflected in a number of ILO instruments:

During the preparation of Convention No. 100 and its accompanying Recommendation, the International Labour Conference (33rd Session, Geneva, 1950) recognised that there are multiple and complex links between the principle of equal remuneration and the position and status of men and women more generally in employment and society. These considerations led the Conference to propose a series of measures in Recommendation No. 90 to facilitate application of the principle of Convention No. 100 ... Thus, social policies intended to facilitate application of the principle of equal remuneration should include measures aimed at ensuring that men and women workers have equal or equivalent facilities for vocational guidance, training and placement, equal access to jobs and occupations and welfare and social services designed to meet the needs of women workers, particularly those with family responsibilities. These broader objectives implied in application of the principle of the Convention have subsequently been incorporated into other ILO instruments such as the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Workers with Family Responsibilities Convention, 1981 (No. 156). (Swepton, 2000)

The *Discrimination (Employment and Occupation) Convention, 1958* (ILO 111) defines discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It requires ratifying states to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in these fields. This includes discrimination in relation to access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. In addition to prohibiting discrimination in employment and occupation, ILO 111 advises that the ‘principle of remuneration for work of equal value should be upheld and implemented’ and recognises the importance of pay equity as a measure of more general equality.

It is generally acknowledged that a significant cause of the GPG is that, despite the profound social changes of the last century, women remain the primary carers for young children and dependent adults and continue to bear the main responsibility for unpaid domestic work.⁵⁰ Bearing this ‘double burden’ can impede women’s workforce engagement and career prospects. Amongst other things, the *Workers with Family Responsibilities Convention, 1981* (ILO 156) obliges ratifying states to take account of the needs of workers with family responsibilities in terms and conditions of employment (Article 4 (b)) and ensure that family responsibilities do not constitute a valid reason for termination of employment (Article 8).

Swepton (2000; and see ILO, 2003: 71) emphasised that although ‘not required under Convention No. 100, minimum wages are an important means by which the Convention is applied’ and noted that there were three ILO conventions on minimum wage fixing (ILO Conventions Nos. 26, 99 and 131) which complement the operation of ILO 100. The *Minimum Wage-Fixing Machinery Convention, 1928* (ILO 26) sought to ensure that minimum wages complemented collective bargaining, by providing that:

Each Member of the International Labour Organisation which ratifies this Convention undertakes to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of the trades ... in which no arrangements exists for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low. (Article 1)

⁴⁹ Then the Chief, Equality and Employment Branch, International Labour Office.

⁵⁰ See Section 3 for further discussion of this issue.

Explanatory material and articles produced by the ILO reaffirm the role of minimum wages in achieving equal remuneration, particularly in circumstances where there is no effective bargaining (for example ILO, 2003: 79; ILO, 2008: 29–31; Rubery & Grimshaw, 2009). The year of ratification by Australia of the ILO conventions mentioned above is shown in Table 4.1.

Table 4.1: Selected ILO Conventions and year of ratification by Australia

ILO Convention	Year ratified by Australia
Minimum Wage-Fixing Machinery Convention (ILO 26)	1931
Minimum Wage Fixing Machinery (Agriculture) Convention (ILO 99)	1969
Minimum Wage Fixing Convention (ILO 131)	1973
Discrimination (Employment and Occupation) Convention (ILO 111)	1973
Equal Remuneration Convention (ILO 100)	1974
Workers with Family Responsibilities Convention (ILO 156)	1990

Source: ILO (2010), ILOLEX database of international labour standards.

4.1.3 Taking equal remuneration into account

Commenting on provisions in the *Fair Work Act 2009* which require Fair Work Australia to ‘take into account’ the principle of equal remuneration for work of equal or comparable value (for example, section 284), the Standing Committee on Employment and Workplace Relations stated:

The general duty to take Australia’s international obligations ‘into account’ is a traditional administrative law approach that gives an indirect effect to international obligations in domestic law. From a modern human rights law perspective, this approach falls short of providing a guarantee that the rights recognised in international law will be implemented. ...

In its current form, equality rights and pay equity obligations undertaken by Australia and enshrined in ILO, CEDAW and ICESCR are incorporated as relevant matters to take into account, but may be discounted or given lesser weight provided Fair Work Australia has turned its mind to its relevant obligation. Consequently, it is arguable that the current approach is not a sufficiently strong mechanism to guarantee the implementation of pay equity obligations in a systemic way, because pay equity has been accorded no greater status than other relevant factors. (SCEWRC, 2008: 78)

4.1.4 International comparisons

Figures 4.1 and 4.2 are produced by the OECD to compare GPG⁵¹ performance across selected OECD countries. It should be noted that countries use different statistical collection methodologies, have different weekly working hours and different working age ranges, reflecting their social security and retirement provisions. For this reason, the figures should be regarded as providing an indicative, rather than a precise, guide to the GPG and a country’s position in the rank order.

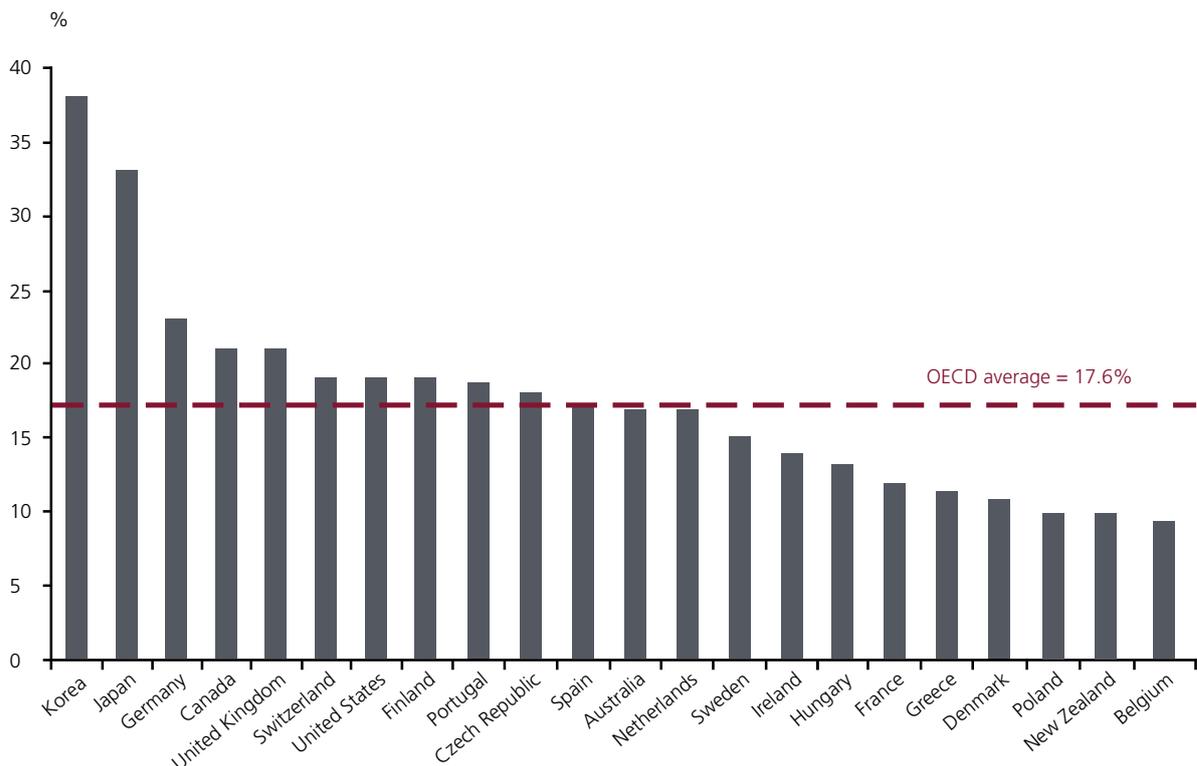
⁵¹ See section 3, for a definition of the GPG and discussion of different measures of the gap.

Figure 4.1 presents the GPG in median earnings of full-time employees. This specific measure of the GPG is used by the OECD due to difficulties in obtaining comparable data at the international level. It excludes part-time employees from the analysis, many of whom are low-paid women. Figure 4.1 provides indicative comparative information in the absence of data which would allow cross-country comparison of other measures. Figure 4.2 shows the GPG in earnings at the lower (20th percentile) and higher (80th percentile) points in the earnings distribution.

Figures 4.1 and 4.2 show that, using these measures, GPGs are largest in the selected Asian OECD countries—in Japan and Korea, men’s median earnings are more than 30 per cent higher than those of women, and near the top of the earnings distribution they are 40 per cent higher in Korea. Gender pay gaps are smallest in Belgium, Denmark, France, Greece, Poland, Portugal and New Zealand—in Belgium and New Zealand they fall below 10 per cent. Australia’s performance on the measure reported in Figure 4.1 is marginally better than the OECD average. However, Australia has the lowest GPG of the selected OECD countries for full-time employees at the lower end (20th percentile) of the earnings distribution.

While the information presented in figures 4.1 and 4.2 the figures are static, Polachek and Xiang (2009: 17) note that the GPG has been declining relatively more quickly in Canada, Korea and the UK than in other countries.

Figure 4.1: Gender gap in median earnings of full-time employees, 2006 or latest year available

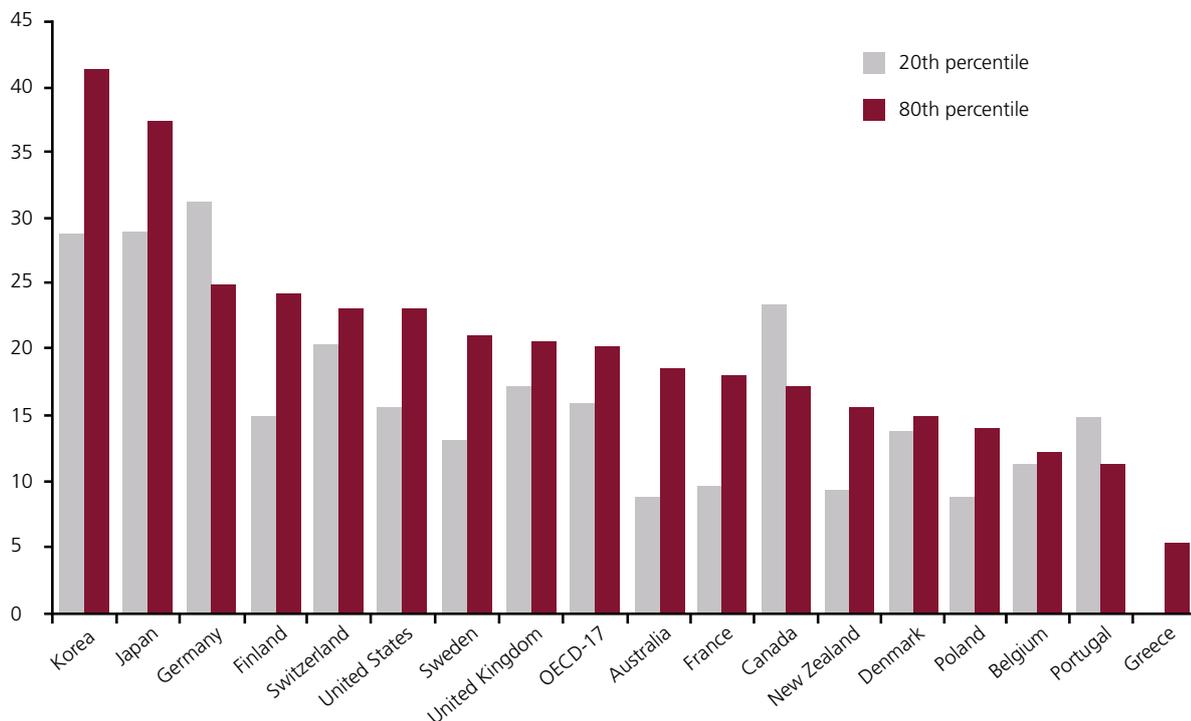


Countries are ranked in decreasing order of the gender wage gap.

1) Data refer to 2003 (instead of 2006) for Belgium, Portugal and Greece; 2004 for Poland and Sweden; and to 2005 for Finland, France, Germany and the Netherlands.

Source: OECD earnings database

Figure 4.2: Gender gap in full-time earnings at the top and bottom of the earnings distribution, 2006 or latest year available



Countries are ranked in decreasing order of the gender wage gap for top earnings.

1) Data refers to 2005 for Australia, Denmark, France, Germany and the United States; 2004 for Finland, Switzerland, Sweden and Poland; 2003 for Belgium, Greece and Portugal.

Source: OECD earnings database

Table 4.2 provides international comparative information on minimum wage levels as background to the analysis that follows. It shows gross earnings of full-time minimum wage earners as a percentage of gross average wages for selected OECD countries. As the table shows, using this measure, in 2006, minimum wage levels were relatively high in Ireland (52 per cent), New Zealand (50 per cent), Australia and France (47 per cent).

Table 4.2: Relative minimum-wage levels, 2000-2006—gross earnings of full-time minimum wage earners as a per cent of gross average wages

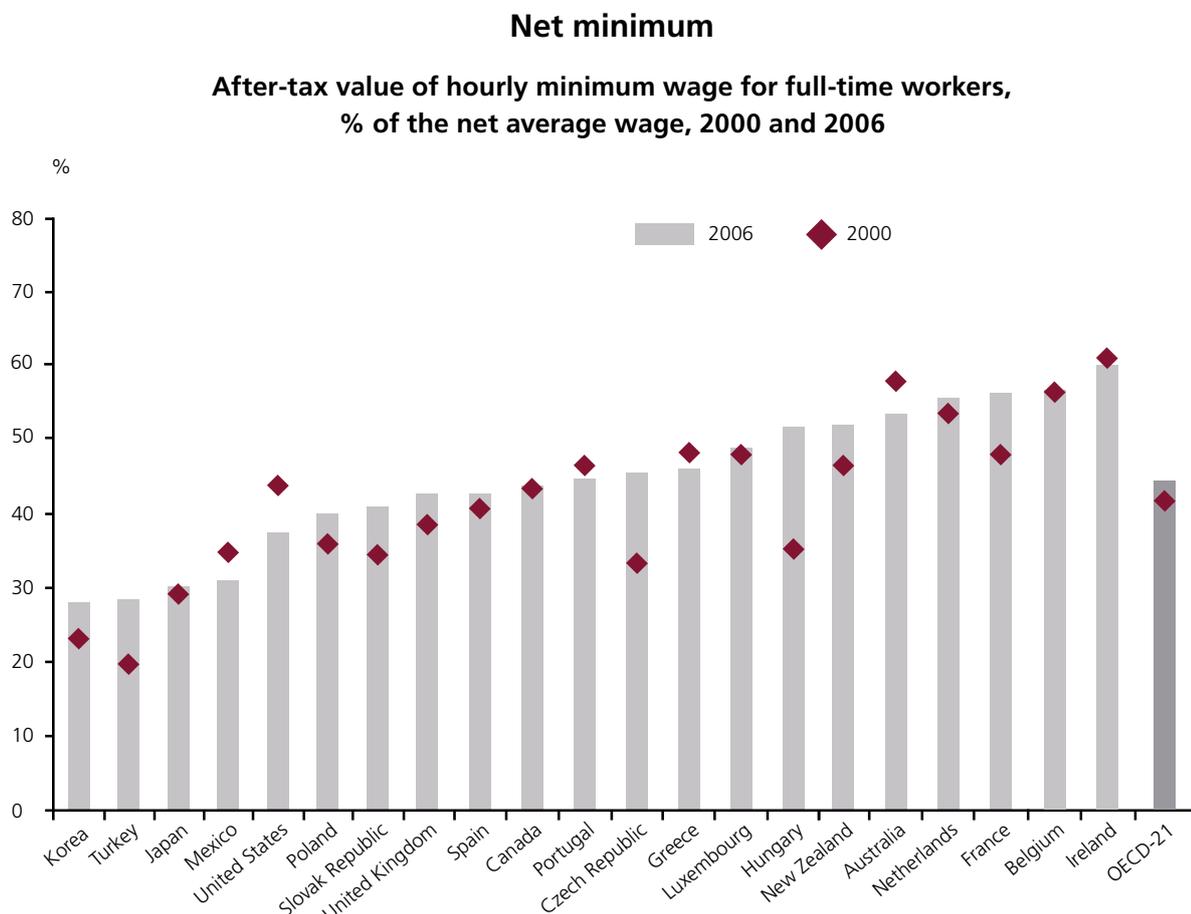
	2000	2001	2002	2003	2004	2005	2006
Australia	50	51	50	49	48	48	47
Belgium	42	41	41	41	40	40	40
Canada	38	38	38	38	38	38	38
Czech Republic	30	36	38	40	40	41	41
France	43	43	44	44	45	47	47
Greece	43	43	43	43	41	39	39
Hungary	28	38	42	39	37	38	39
Ireland	53	51	49	51	50	53	52
Japan	27	27	28	28	28	28	28
Korea	22	22	23	24	23	25	26
Luxembourg	40	41	41	42	41	42	41
Mexico	27	25	25	24	24	24	24
Netherlands	46	45	45	45	43	42	43
New Zealand	45	44	45	46	47	48	50
Poland	33	34	33	34	34	36	37
Portugal	41	41	40	40	39	39	39
Slovak Republic	31	32	35	37	34	37	36
Spain	34	34	33	33	34	35	36
Turkey	18	16	19	21	27	27	27
United Kingdom	32	33	33	34	35	35	35
United States	39	38	37	36	35	34	33
OECD-21	36	37	37	38	38	38	38

Source: OECD Secretariat calculations based on the OECD minimum wage database, <http://dx.doi.org/10.1787/233275325270>.

Note: The available average wage figure for the US currently excludes supervisory and managerial workers. The ratio shown for the US would therefore be considerably lower if US average wages were available on the same basis as in other countries. Average wages for Ireland, Korea and Turkey refer to the average production worker (manual workers in the manufacturing industry).

Figure 4.3 shows that when taxation effects are also included, the countries with the highest minimum wage levels in 2006 were Ireland, Belgium, France, Netherlands and Australia.

Figure 4.3: Net minimum after-tax value of hourly minimum wage for full-time workers



Source: OECD (2007), Taxing Wages, Paris Statlink: <http://dx.doi.org/10.1783/203355843027>

4.2 Institutional approaches and country studies

As noted above, international conventions are not prescriptive about the way that equal remuneration should be achieved; recognising that a range of policy approaches are likely to be required and that appropriate combinations of approaches will vary depending on national circumstances. The range and combinations of approaches adopted internationally makes it difficult to identify the critical features of successful approaches and means that care must be exercised in linking outcomes with particular components of country approaches. Frequently, it is a combination of approaches, both within and beyond the labour market, which drives outcomes in any particular country.

A number of reviews have categorised approaches into broad groups to facilitate analysis; recognising a role for minimum wages within a multi-faceted approach. For example, the European Commission's Group of Experts on Gender, Social Inclusion and Employment identified three broad approaches from a comparative review of 30 European countries (Plantenga & Remery, 2006: 35; also see NSW Pay Equity Taskforce, 1996), namely:

- equal pay policy aiming at tackling direct or indirect gender discrimination (e.g. anti-discrimination laws);
- wage policies aimed at reducing wage inequality and improving the remuneration of low-paid and female-dominated jobs (e.g. introduction of a mandatory minimum wage to set a floor to the wage structure, centralisation of wage bargaining to decrease inter-industry and inter-firm wage differentials, re-evaluation of low-paid and/or female dominated jobs and application of gender-neutral systems of job evaluation); and
- equal opportunity policy aimed at encouraging women to have continuous employment patterns, and de-segregating employment by gender (e.g. childcare, parental leave, education, vocational and career guidance, work-life balance).

It is not the purpose of this section to consider the broad range of policies applied in various international jurisdictions, but merely to place the role of minimum wages within the broader context. Information on broader country approaches is available elsewhere (for example, Swepston, 2000; Chicha, 2006; Plantenga & Remery, 2006; Fisher, 2007; Ponzellini et al., 2010). The following sections focus on observations from the literature and institutions on international developments regarding equal remuneration and minimum wages.

4.2.1 Minimum wages and the GPG

In its *Global Wage Report 2008/09*, the ILO observed that in recent years 'minimum wages have enjoyed something of a revival' (ILO, 2008: 35). The ILO highlighted developments in the UK, but also noted that a number of other developed and developing countries had introduced or reinvigorated their minimum wages, in part encouraged by the creation of the European Union (EU):

Perhaps most symbolic of the revival of minimum wages in developed countries is the case of the United Kingdom, which, after having dismantled its system of industry level minimum wages in the 1980s, adopted a new national minimum wage in 1999. Since then, the national minimum wage has increased 3.5 per cent per year in real terms. In addition to the UK example, Spain has increased its minimum wage relatively rapidly, and Ireland introduced a national minimum wage for the first time in the year 2000.⁵² Among the newer members of the EU, minimum wages were generally raised substantially, with a view to progressively catching up with the levels in older Member States.

Developing countries are also increasingly uprating their minimum wages to provide social protection to vulnerable and unorganized categories of workers. Regional powers such as Brazil, China and South Africa are among the main drivers of this upward trend...

In the United States, the federal minimum wage lost about 17 per cent of its real value between 2001 and 2007—at the end of 2007 it was increased for the first time in ten years. This loss in value will now be compensated by a series of increases planned for 2008 and 2009. (ILO, 2008: 35)⁵³

52 In addition to the creation of the EU, impetus was given to the introduction of a national minimum wage in Ireland by developments in the United Kingdom. The OECD advised the National Minimum Wage Commission, which was established to consider a national minimum wage for Ireland, that in view of the high degree of labour mobility between the two countries, the level of the Irish minimum wage and other key features of the system would have to give due weight to the choices made for the minimum wage in the UK (OECD 1997: 4).

53 It should also be noted that in the USA a low federal minimum wage may be offset by higher minimum wages at the state level, for example, Hurley (2007: 5) notes that 30 US states with approximately 70 per cent of the American workforce mandated minimum wages higher than the federal minimum.

Similarly, in 2007 the OEDC observed that 21 of the OECD's 30 member countries had statutory minimum wages and in just over half of those countries, minimum wages were found to have risen slightly faster than average wage levels in the immediately preceding years. The OECD found that only in the US had real earnings of workers on the minimum wage dropped sharply, but noted 'strong pressure to raise them again' (Martin & Immervoll, 2007). The OECD also pointed out that the benefit of minimum wage increases for low wage workers depended not only on the size of the increase, but also on taxation and social contribution arrangements. It noted that over the period 2000–06, the sharpest tax deductions for minimum wage workers had been in Belgium, France, Ireland, the Netherlands and Hungary (Martin & Immervoll, 2007; and see Figure 4.3).⁵⁴

The ILO's *Global Wage Report 2008/09* noted that data difficulties impeded an analysis of the GPG from a global perspective. However, on the basis of available data, it found that while the overall pay gap had been decreasing; it was decreasing only very slowly, and in some countries was stable. The ILO commented that the slow decline in wage inequality between men and women confirmed that the relationship between growing income levels and narrowing GPGs was not straightforward. It suggested that a 'major challenge for the future' was 'to ensure that men and women doing work that is different but of equal value are remunerated equally', but noted that minimum wages also had an important role to play in reducing GPGs (ILO, 2008: 29–31).

The ILO emphasised that research had found that higher minimum wages are generally associated with reduced wage inequality and gender wage differentials in the bottom half of the wage distribution (ILO, 2008: 43–45). Its research also confirmed 'a strong relationship between centralised and/or coordinated bargaining and lower wage disparity, including a narrower GPG' (ILO, 2008: 41). However, it noted that international trends in these two important factors were often in different directions—with a 'revival in minimum wages' contrasted with low and/or declining rates of collective bargaining coverage observed in a number of countries (ILO, 2008: 34–40). The ILO found that in some countries, complex systems of minimum wages had emerged to compensate for the absence of effective collective bargaining arrangements. In its conclusions, the ILO emphasised the importance of 'using minimum wages as an instrument of social protection, to provide a decent wage floor, and not—as is too often the case—as a permanent substitute for bargaining among social partners'. It also underlined the importance of 'coherent articulation between minimum wages and collective bargaining' such that minimum wages and collective bargaining operate as complementary and mutually reinforcing elements of comprehensive wage policies (ILO, 2008: 33, 67).

Updating its *Global Wage Report* in 2009, the ILO suggested that in the context of the global economic crisis continued minimum wage adjustments may be more difficult to make, but observed that minimum wages had continued to increase, either through long-term adjustment plans (as in Brazil and the United Kingdom) or through annual or ad hoc reviews. It also noted that there was little systematic global data available on how the global economic crisis had changed the distribution of wages, but on average across the 22 countries sampled, the ILO did not find any significant change to the GPG (ILO, 2009a: 7–12).

⁵⁴ For a more detailed discussion on the interaction of minimum wages with the tax/benefits systems, see OECD (1998:54–57).

4.2.2 Approaches to setting national minimum wages

Boeri (2009) observed that the process leading to the setting of national minimum wages has tended to be overlooked by economists. In a review of 69 countries, he found wide cross-country variation in minimum wages setting regimes, but suggested that they could be categorised into one of three broad approaches, involving:

- a bargaining process—24 countries were found to have a minimum wage set by ‘social partners’ and then ratified by the government or determined by a tripartite body (a commission, council or independent agency) where representatives of the government, unions and employers’ organisations were represented;
- a consultation process—28 countries were found to set the minimum wage after formal consultations with government and representatives of employers and workers; or
- government legislation—17 countries had the minimum wage set by the government without any formal consultations with the ‘social partners’.

Table 4.3 shows the countries included in Boeri’s study, categorised by approach to minimum wage setting. He notes that in practice the distinction between the various categories can be blurred, with variations to the approaches within each category. For example, while New Zealand’s national minimum wage is government legislated, the government engages in significant consultation with employer and union representatives and other interest groups. Nevertheless, using a data set on minimum wages in these countries, Boeri (2009) found that a government legislated minimum wage was generally lower than a wage floor set within collective agreements or by other means.

Table 4.3: International approaches to national minimum wage setting

Bargaining process	Consultation process	Government legislated
Argentina	Albania	Azerbaijan
Bangladesh	Algeria	Belarus
Belgium	Australia	Bolivia
Columbia	Bulgaria	Brazil
Costa Rica	Burkina Faso	Cameroon
Dominican Republic	Canada	Chile
Ecuador	China	Ethiopia
El Salvador	Czech Republic	Israel
Estonia	France	Kyrgyzstan
Ghana	Guatemala	Netherlands
Greece	Hungary	New Zealand
South Korea	India	Nigeria
Lithuania	Indonesia	Pakistan
Madagascar	Ireland	Poland
Mexico	Jamaica	Russia
Nicaragua	Japan	Unites States
Paraguay	Jordan	Uruguay
Peru	Kenya	
Philippines	Latvia	
Poland	Morocco	
Thailand	Nepal	
Turkey	Poland	
Ukraine	Portugal	
Venezuela	Romania	
	Spain	
	Sri Lanka	
	United Kingdom	
	Vietnam	

Source: Derived from Boeri (2009: 12–14)

Boeri (2009: 14) explained that countries like Germany and Italy were not included in his study because they did not have a national minimum wage set by bargaining, consultation or legislation. Nine OECD countries fall into this category; including Germany, Austria, Italy and the Scandinavian countries. These countries have traditionally relied on collective bargaining agreements to set wage floors covering sectors and occupations which account for a very high proportion of the workforce. However, where some workers are not covered by these collectively-negotiated wage minima, legislation has sometimes been used to address sectoral issues. For example, it was partly to prevent unfair ‘wage dumping’ from contractors using cheap labour from abroad that led Germany to adopt a wage floor for the construction sector in 1997. In 2007 a minimum wage floor was also set for cleaners in Germany (Martin & Immervoll, 2007; also see McLaughlin, 2007: 6 in relation to Denmark). More recent developments in Germany are noted below (see Table 4.4).

The OECD examined national or statutory minimum wages in 17 OECD countries and found that there were substantial differences in the way they were set and operated (OECD, 1998: 31–36). The main differences were found to concern:

- how the minimum wage was initially set;
- the level of the minimum relative to average wages;
- coverage and exclusions;
- the extent (if any) of differentiation by age (such as lower minima for youth and/or apprentices) and region;
- mechanisms for adjustment (such as automatic indexation, periodic or ad hoc review and adjustment);
- criteria to be taken into account in determining adjustments; and
- the roles of governments and the social partners in minimum wage setting.

Summarising approaches to settlement, the OECD noted that:

In most cases, minimum wages are set by the government unilaterally or following consultations with, or recommendations by, a tripartite body (France, Japan, Korea⁵⁵, Portugal and Spain). Belgium and Greece have hybrid systems: the minimum is set through a national agreement between the social partners, but is legally binding in all sectors (the private sector only in Greece). Only Belgium and Luxembourg appear to automatically index for price inflation, while in France, Greece, Japan, Portugal and Spain, both price and wage movements are either explicitly or implicitly taken into consideration in annual reviews of the minimum rate. In the Netherlands, minimum wages are linked to the average, collective bargained, wage increase, but this link is conditional: indexing can be suspended ... In a few countries, criteria, such as the “expected” impact on employment, unemployment and competitiveness, are explicitly taken into account in annual or biennial reviews of the minimum wage. (Luxembourg, New Zealand, Portugal and Spain). (OECD, 1998: 36)

⁵⁵ Japan and Korea use minimum wage councils for this purpose.

Table 4.4 summarises information on minimum wage setting in selected overseas countries published in reports of the UK Low Pay Commission (LPC):

Table 4.4: Adjustment of minimum wages, by country

Country	Method of adjustment
Austria	Minimum pay regulations are not set by statutory law (except for the public sector), but are laid down in sectoral and branch level collective agreements. About 98 per cent of employees are covered by sectorally agreed minimum wage rates, due to the country's high level of collective bargaining. Minimum wage levels vary across sectors and are dependent on the bargaining power of unions.
Belgium	The minimum monthly average guaranteed income is set for the private sector by a collective employment agreement reached by the National Labour Council (social partners). All workers benefit from salary indexation which was set at 5.1 per cent until 2010 (this varies according to inflation).
Canada	<p>In most provinces, minimum wages are fixed (and increased) by regulation. A provincial Governor-in-Council has the authority to change regulations which are frequently based on recommendations of a Minimum Wages Board, Review Committee, Labour Standards Board or the Minister of Labour.</p> <p>In Quebec, minimum wage increases are based on eleven indicators, including the ratio between the minimum wage and the average hourly wage. Other indicators measure the impact of the minimum wage on purchasing power, enterprise competitiveness, employment and the incentive to work. However, increases are still made by regulation.</p> <p>In the Yukon, the Employment Standards Board provides regular annual minimum wage rate increases for the following year based on the consumer price index for the territory's capital.</p> <p>In the Northwest Territories and Nunavut, minimum wage rates are set by statute, therefore any rate increases require a legislative amendment to be passed by the legislature.</p> <p>The rate for the federal jurisdiction is the general adult minimum wage rate of the province or territory where the work is performed.</p>
France	The minimum wage is reassessed each year on 1 July. The adjustment must be at least half that of the increase in purchasing power of the average hourly wage. During the course of the year if the price increases by over two per cent, the minimum wage is increased automatically by the same amount. The government has a discretionary power to increase the minimum wage at any time by an amount additional to these adjustments, but has not exercised this power recently. A group of experts commissioned by the French Employment Minister recommended that the minimum wage be frozen in 2010.
Germany	There is no statutory national minimum wage, although new legislation has led to the extension of sectoral minimum wages. In sectors where more than 50 per cent of employees are covered by collective wage agreements, these agreements can be made binding for all companies in the sector. In sectors where less than 50 per cent of employees are covered by sectoral agreements, the government can decide on the introduction of a minimum wage based on the analysis of a council of experts. In 2009, the Grand Coalition voted to extend the rules to six sectors (including security guards, carers and waste collectors). A separate Cabinet agreement is expected to set a wage floor for temporary agency workers following the agreement of the main employers' organisations to a single minimum wage rate for that sector.

Table 4.4: Adjustment of minimum wages, by country (*continued*)

Country	Method of adjustment
Hong Kong	Passed legislation on a statutory minimum wage in July 2010. A Minimum Wage Commission will study and advise on the level of the minimum wage. The commission is tasked to review the wage level once every two years.
Ireland	Minimum wage may be adjusted by the government on a recommendation arising from a national economic agreement (between the social partners) or on the recommendation of the Labour Court. The Labour Court has recommended that the minimum wage be frozen—it was last adjusted in July 2007.
Sweden	Minimum wages are traditionally fixed by sectoral collective bargaining. Following a 2007 decision of the European Court of Justice, the Swedish Government has been considering options for preserving the structure of its current wage model to avoid conflict with EU law relating to the legal minimum wages that must be paid to workers from member countries temporarily posted to another member country.
United States	Statutory minimum wages are set at federal and state level. At the federal level, from 1997 to 2006 the Republican-controlled Congress blocked Democratic efforts to raise minimum wages. In 2007 legislation was passed to provide three, equal annual increases to the federal minimum wage.

Source: Low Pay Commission (2009: 307, Extract from figure A5.1, appendix 5: Minimum wage systems in other countries; and 2010: 233–238, appendix 3: Comparison of minimum wages in other countries). Updated with information from: European Employment Review (2010); SMH (2010) & US Congressional Record.

4.2.3 United Kingdom—the Low Pay Commission

When the LPC was established in 1997, collective bargaining in the United Kingdom was highly decentralized; with most bargaining occurring at a company or workplace level and little multi-employer bargaining outside the public sector. The findings of the 1998 *Workplace Employment Relations Survey* (Cully et al., 1999) found that pay for 28 per cent of employees in the private sector was determined by collective bargaining—compared with 49 per cent in 1990 when the previous survey was undertaken. In the public sector, the pay of 54 per cent of employees was determined by collective bargaining—compared with just over 90 per cent in 1990. Low-paid workers were predominantly female and more likely to be found in smaller, private sector workplaces. Some were covered by minimum pay rates set by wages councils. However, during the period of the Conservative Government, the pay rates set by wages councils declined relative to average pay, those under 21 were removed from their coverage and ‘enforcement efforts ground to a halt’ (Metcalfe, 1999: 48–49).

The LPC was established with minimal terms of reference, namely to:

- recommend the initial level at which the National Minimum Wage (NMW) might be introduced;
- make recommendations on lower rates or exemptions for those aged 16–25; and
- consider and report on any matters referred by ministers.

In making recommendations the LPC was required to have regard to:

- wider economic and social implications;
- the likely effect on employment and inflation;
- the impact on competitiveness of business, particularly small firms; and
- the potential impact on costs to industry and the Exchequer (Metcalf, 1999: 48).

The LPC comprised its chair, and nine commissioners representing the interests of unions and employees, employers and the academic community, but sitting as individuals not as delegates (Metcalf, 1999: 48). From the outset, the LPC engaged in an open consultation process, considered written and oral evidence and visited local communities to encourage informal and open discussion (Metcalf, 1999: 48).

Examining the early operation of the LPC, Brown (2007) found that key challenges for the LPC in achieving its terms of reference were for it to operate independent of government, to have its advice accepted by government and to maintain internal unanimity. Generally, the LPC has been regarded as very successful in its role: with all its major recommendations accepted, the minimum wage quickly winning all-party support and becoming politically uncontroversial in spite of significant pay rises being achieved by the low paid (Brown, 2007: 429). Brown attributed this success to the diversity of the backgrounds of members of the LPC which made them an effective panel for 'digesting the data', strong internal bargaining relationships, heavy reliance on research, responsiveness to changing economic circumstances and a sufficient balance being achieved 'in sympathies to the low payers on the one hand and the low paid on the other' (Brown, 2007: 443).

On the central issue of the level of the minimum wage, the LPC's stated goal has been to 'have a minimum wage that helps as many low-paid people as possible without any significant adverse impact on the economy' (Brown, 2007: 438, citing the LPC, 2003: 173). However, as Metcalf (1999: 52–55) notes, the process of choosing the level of the NMW was 'pretty fraught' and included consideration of the previous wage council rates, international evidence and the coverage and cost of various potential NMWs—including a detailed analysis for the main sectors covered and possible knock-on effects on wage differentials and inflation. Evidence from selected OECD countries showed coverage rates for minimum wages ranging from one to 12 per cent of employees. When introduced in 1999, the NMW was set at £3.60 an hour for those aged 21 and over, with an estimated coverage of eight per cent of adult employees. This placed the United Kingdom in the middle range by international coverage standards—higher than the USA, but below France—and boosted the pay of around two million workers by, on average, nearly a third (Metcalf, 1999: 55, 65).

In determining 'upratings' since that time, the LPC has continued to consider a range of evidence—including average earnings growth, economic prospects, the implications of a minimum wage increase for earnings and costs, likely employment effects, stakeholder views and the value of the UK minimum wage relative to that of other OECD countries.

At the government's request⁵⁶, the LPC's reports have also considered the impact of the minimum wage and minimum wage adjustments not only on the economy and the low paid generally, but on specific groups of people; including women, older workers, youth, ethnic minorities, migrants, workers with disabilities, unqualified workers, agency workers, homeworkers and volunteers.

⁵⁶ The LPC's reports note that its 'terms of reference' from the government require it to consider the impact of the minimum wage on different groups of workers, see for example LPC (2008: xii).

In considering the pattern of low pay, in its first report the LPC noted that women had 'generally experienced higher earnings growth than men since the introduction of the *Equal Pay Act 1970*, but they remain disproportionately lower paid.' The commission also noted that 'women still earn 20% less than men even after 25 years of equal pay legislation and this gap is even larger in lower paid and part-time work' (LPC, 1998: 36).

In its third report, the LPC observed that between 1998 and 1999, the GPG (defined as the ratio of female to male hourly earnings) narrowed by a full percentage point. It added that for full-time workers the gap narrowed by a further percentage point between April 1999 and April 2000; with a more significant increase over the same period for part-time workers. The LPC conceded that not all of this improvement could be attributed to the impact of the minimum wage. It acknowledged that the GPG was narrowing before the minimum wage was introduced and other factors (such as changes in the composition of the workforce and changes in hours) were also important. However, it noted that research by Dex et al. (2000) had modelled the likely effect of the introduction of the minimum wage on the GPG and found that 'the minimum wage produced small increases in the overall female/male hourly pay ratio, with larger changes for manual workers, and for part-time female employees compared with all men' (LPC, 2001: 25–26).

In subsequent reports, the LPC examined a range of information and concluded that there was 'clear evidence' that the minimum wage had a 'major impact' in narrowing the gap between the pay of women workers and that of men at the lower end of the earnings distribution (LPC, 2005: 101–105, 108). The commission also noted a narrowing in the middle of the distribution, observing that:

The only area where there has been no progress in reducing disparities is from the ninetieth percentile and above. At the highest levels of pay women remain considerably disadvantaged with respect to men, but this is clearly not a disadvantage on which the minimum wage can have any influence. (LPC, 2005: 105)

The commission concluded that:

The minimum wage has now had such a marked effect at the bottom of the distribution that only a very large uprating in relation to average earnings would have much further effect. (LPC, 2005: xiv)

Importantly, the LPC found that these results had been achieved without harming the job prospects of women; noting that since the introduction of the minimum wage, female unemployment had consistently been lower than that for males (LPC, 2005: xiv, 101).

The LPC reached very similar conclusions in more recent reports—repeatedly emphasising that the minimum wage continued to have a positive effect on narrowing the GPG and that there was little evidence of an adverse impact on employment (for example, LPC, 2007: 132–140; LPC, 2008: 71; LPC, 2009: xv, 99–101). Over time, the LPC has progressively extended its analysis of the GPG, considering a broader range of survey data as it became available.

Table 4.5: Hourly gender pay gap of full-time workers aged 18 and over, UK, 1997–2009

Year	£ per hour						Per cent		
	Men			Women			Pay gap		
	Lowest decile	Median	Upper decile	Lowest decile	Median	Upper decile	Lowest decile	Median	Upper decile
1997	4.44	8.19	17.24	3.87	6.87	13.83	12.9	16.1	19.7
1998	4.62	8.54	18.10	4.08	7.14	14.44	11.6	16.4	20.2
1999	4.85	8.85	18.89	4.29	7.46	15.22	11.5	15.7	19.4
2000	4.94	8.87	19.45	4.41	7.65	15.67	10.8	13.8	19.4
2001	5.15	9.32	20.84	4.65	8.02	16.54	9.7	14.0	20.6
2002	5.40	5.40	9.72	21.94	4.88	17.43	9.6	13.5	20.6
2003	5.63	10.03	22.53	5.11	8.75	18.00	9.1	12.7	20.1
2004	5.81	10.48	23.44	5.36	9.21	18.94	7.6	12.1	19.2
2004	5.76	10.36	23.02	5.33	9.10	18.75	7.4	12.2	18.6
2005	6.00	10.80	24.24	5.60	9.60	19.76	6.7	11.1	18.5
2006	6.24	11.22	25.38	5.84	10.00	20.28	6.4	10.9	20.1
2006	6.20	11.14	25.25	5.75	9.86	20.12	7.3	11.5	20.3
2007	6.50	11.61	26.25	6.08	10.34	20.87	6.5	11.0	20.5
2008	6.73	12.16	27.27	6.25	10.74	21.50	7.1	11.6	21.2
2009	7.00	12.65	28.19	6.54	11.24	22.53	6.6	11.1	20.1

Source: LPC (2010: 87).

Note: LPC estimates based on *Annual Survey of Hours & Earnings* (ASHE) without supplementary information, April 1997–2004, ASHE with supplementary information, April 2002–2006 and ASHE 2007 methodology, April 2006–2009, standard weights, UK. Direct comparisons before and after 2004 and those before and after 2006, should be made with care due to changes in the data series.

In its 2010 report, the LPC consider the information presented in Table 4.5 above. The LPC noted that it tended to focus on the median GPG for full-time workers, as it more closely compared like-with-like and was less affected by extreme earnings than the mean. The LPC concluded that the table:

... shows that the median gender pay gap has gradually closed from above 16 per cent before the introduction of the minimum wage to 11.1 per cent in April 2009. There were small increases in some years, which tended to be when the minimum wage was increased by less than the growth in average earnings. The gender pay gap at the lowest decile is smaller and, as expected, appears more sensitive to the level of the uprating. (LPC, 2010: 88)

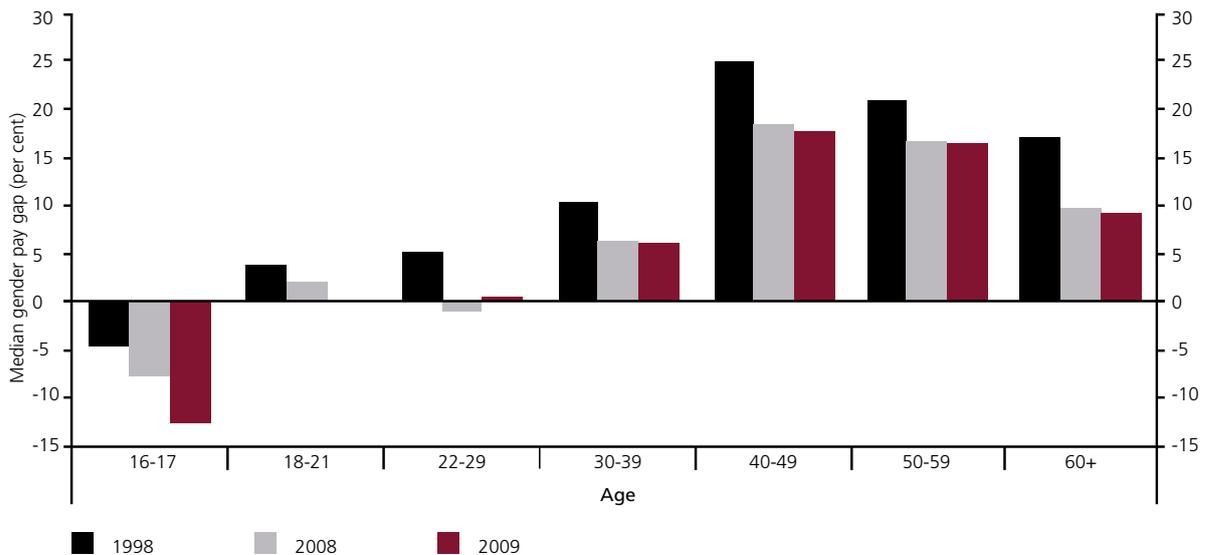
The LPC then considered the GPG by age by reference to the information in Figure 2 below. The LPC observed that:

In 2009 the gender pay gap for women only existed from age 30. Between ages 18 and 29 the gap was non-existent, but it was negative for 16–17 year olds (men had lower earnings than women in this age group). For all age groups, the pay of women has improved relative to men since 1998, although the pay gap for those aged over 18 was similar in 2008 and 2009. The gap became more negative for 16–17 year olds in 2009, as men's average earnings growth was lower than women's.

Overall, there is evidence that the positive impact of the minimum wage goes some way to outweighing the negative effect of the recession on women's earnings. Further, it appears that men's earnings have been particularly affected by the recession and that 16–17 year olds have been hit hardest. (LPC, 2010: 88–89)

The LPC found that there had been a fall in the employment rate for women (down 0.8 percentage points) and a rise in their unemployment rate (up 1.4 percentage points), but noted that 60–70 per cent of redundancies had been men and that women have continued to increase their participation in the labour market throughout the recession. The LPC concluded that while women had been adversely affected by the recession, they had not been affected to the same extent as men (LPC, 2010: 89).

Figure 4.4: Hourly median gender pay gap of full-time workers by age, UK, 1998 and 2008–2009



Source: LPC estimates based on ASHE without supplementary information, April 1998, and ASHE 2007 methodology, April 2008–2009, low pay weights, UK

Note: Direct comparisons with 1998 should be made with care due to changes in data series.

The LPC's 2010 report also includes the findings of research on the impact of the minimum wage on the wage distribution undertaken by Butcher and Dickens. That research noted that when the NMW was introduced in 1998, wage inequality at the bottom of the wage distribution started to fall; having risen over the preceding 20 years. The falls relative to the median went up to the 25th decile and it was thought that these falls could not be assigned to the minimum wage because it only directly affected around five per cent of employees. However, Butcher and Dickens found that in addition to the direct effects of the minimum wage, there were also 'spill-over effects.'⁵⁷ These effects were found to be greater for women—being largest for women at the 8th percentile with smaller effects observed up to the 20th percentile. Butcher and Dickens also found that areas most affected by the minimum wage, the lowest-paying areas, had the largest spill-over effects—with effects evident up to the 25th percentile. They concluded that the spill-over effects of the minimum wage may be larger than previously thought and were much greater than the direct effect (LPC, 2010: 226). The research suggests that the NMW has an effect beyond those directly covered, and may provide a benchmark or reference point for other wage rates.

Metcalf (2008: 506) found that in Britain the NMW had 'raised the real and relative pay of low paid workers, tempered wage inequality and contributed to the narrowing of the gender pay gap.' Noting that some two million workers directly receive higher pay than they would have done without the NMW, Metcalf examined evidence of employment effects and confirmed that, on the basis of available evidence, such effects were 'small or non-existent' (Metcalf, 2008: 497). However, he observed that the employment effects of the larger relative rise in the NMW over the period 2003 to 2006 had, as yet, been insufficiently studied, and that employment effects may only emerge in the long run (Metcalf, 2008: 507). Metcalf rejected suggestions that the NMW had been set below the competitive wage or had been ineffective due to incomplete coverage (Metcalf, 2008: 497). He suggested (Metcalf, 2008: 500–506) that probable reasons for its limited employment effect included:

- productivity and effort—there was evidence that some firms affected by the NMW intensified work effort, altered work organisation and raised their investment in human capital;
- price adjustments—where labour costs increased, some of this increase was passed on via higher prices and this was reflected in an increase in the relative price of minimum wage produced consumer services;
- profits—profits in firms employing low wage workers fell relative to other firms and, at the macro level, the share of profit in national income fell;
- hours—there was some evidence that firms adjusted hours rather than workers; and
- labour market frictions, such as imperfect information, mobility costs and tastes, give the employer some market power. Metcalf argued that these 'frictions' gave firms some power over their employees, creating monopsony conditions in which a minimum wage set modestly above the existing wage might raise both pay and employment. He noted that this was contrary to the standard economic textbook model which suggests that raising wages will reduce employment.

57 Spill-over effects are secondary effects that follow from the primary effect of an activity or action, impacting on those not directly involved in the activity.

Metcalf (2008: 507–8) concluded that the LPC, via its evidence-based approach, had succeeded in raising the real and relative wages of low-paid workers and that the NMW had ‘an important impact on the distribution of pay and national income (equity) without offsetting adverse employment effects (efficiency).’ He also emphasised the significance of these achievements in the context in which they occurred:

Since 1999 the NMW alone has reversed half the growth in inequality that occurred in the previous two decades. This is a remarkable achievement because there are so many forces working in the opposite direction to increase wage inequality. These include the huge increase in the supply of less skilled labour caused by immigration, declining trade union density and collective bargaining coverage and greater use of performance related pay. (Metcalf, 2008: 508)

4.2.4 Ireland

Since 1987, the national level has been the most important for setting wages and working conditions in Ireland, through tripartite bargaining or ‘social partnership’ agreements. These centralised agreements are generally applied to public sector employees and to unionised and some non-union employees in the private sector.⁵⁸ They may be supplemented at the enterprise level by agreements relating to productivity, restructuring or new work practices, but national agreements have prohibited ‘cost-increasing’ pay claims. Some sectoral bargaining also occurs, but is reported to have declined significantly (Dobbins, 2009 & 2009a; Kelly et al., 2009).

After 1987 social partnership agreements became a vehicle for economic and social progress in Ireland. *Partnership 2000* (1997–2000) and the *Programme for Prosperity and Fairness* (2000–2003) both included a strong focus on achieving greater social inclusion and gender equality. In 1997, the Irish government made a commitment to introduce a national minimum wage, which it described as ‘a social policy commitment placed in the framework of an assault on exclusion, marginalisation and poverty’ and as ‘one of a number of measures designed to alleviate social exclusion in our society’ (Harney, 2000: 1267).

Prior to 2000, minimum wages applied to some sectors of employment and were agreed by Joint Labour Committees (JLCs).⁵⁹ These rates established sectoral minima, but were not universal in their coverage. O’Neill et al. (2006: 64) reported that the wages set by JLCs were quite low and their level of enforcement was weak, which undoubtedly contributed to pressures for change and a more effective minimum wage regime.

A National Minimum Wage Commission was appointed by the government to advise it on the best way to implement a minimum wage and received submissions from a range of parties, including the OECD (OECD, 1997). The commission submitted its report in 1998. It recommended a national minimum rate, rather than an extension to coverage of the JLC arrangements, as it considered the latter would be complex and difficult to enforce. It did not recommend specific changes to the JLC arrangements, but suggested that the role and function of the JLC system would need to change following the introduction of a national minimum. The commission recommended a single adult minimum rate, rather than regional or sectoral variations to avoid confusion. It also recommended a target date of 1 April 2000 for the introduction of a minimum wage to enable employers to make necessary adjustments. The commission recommended that the initial minimum wage rate should be set at ‘around two-thirds of median earnings and should take into account employment, overall economic conditions and competitiveness’. A separate rate was recommended for employees under 18 years of age; set at 70 per cent of the full rate. The commission estimated that at the time of its report around 23 per cent of employees were earning less than £4.40 (or two-thirds of median earnings) and that a rate of £4.40 was about 20 per

⁵⁸ However, the agreements generally include provisions that provide for some flexibility to respond to the circumstances of particular firms, including the option to claim ‘inability to pay’ (see Kelly et al., p.347).

⁵⁹ JLCs could be established by a statutory order of the Labour Court and comprised equal numbers of employer and worker representatives appointed by the Labour Court, with a chair appointed by the Minister for Enterprise, Trade and Innovation.

cent higher than the average payable to adults under the JLC system. The commission's report also included recommendations as to the content of minimum wage legislation. The report did not include consideration of the possible impact of a minimum wage on the GPG; being primarily focused on employment and poverty. However, it did observe that a minimum wage would have implications for the value placed by society on work that had been traditionally low-paid (Dobbins, 2010; O'Neill et al.: 65; Harney, 2000: 1267–8; O'Neill, 2010).

Following the 1998 report, the government established an inter-departmental group to analyse the impact of the recommended minimum rate on employment, competitiveness and inflation. The group commissioned a number of further studies, examined survey evidence and considered UK experience, before finalising its report to the Minister for Enterprise, Trade and Employment. Amongst other things, the analysis predicted that any impact on employment levels would be quite limited in the context of a rapidly growing economy, a tightening labour market and the recommended target date for introduction of the statutory minimum (Nolan et al., 1999; Harney, 2000: 1268).

Ireland's *National Minimum Wage Act 2000* enables the minister to declare a 'national minimum hourly rate of pay' after taking into account 'the impact the proposed rate may have on employment, the overall economic conditions in the State and national competitiveness ...' (section 11). The minister is required to review the national minimum hourly rate 'from time to time'. Where there is a 'national economic agreement' in place which includes a recommendation in relation to the national minimum hourly rate of pay, the minister must accept, vary or reject the recommendation within three months (section 12 (2)).

The National Minimum Wage Act enables the Labour Court⁶⁰ to make recommendations to the minister on a national minimum hourly rate of pay where there is no national economic agreement. Before the Court makes such recommendations, it must consult representatives of employers and employees and satisfy itself that an agreement cannot be reached. Where it is satisfied that an agreement cannot be reached, the court may make a recommendation to the minister, having regard to:

- the movement of earnings of employees since the last national minimum wage adjustment;
- relevant exchange rate movements; and
- the likely impact of any proposed change on the level of unemployment, employment, inflation and national competitiveness (section 13).

Since the introduction of the national minimum wage, minimum wages have been raised in response to provisions in social partnership agreements, which have included some special pay rises for low-paid workers (Labour Relations Commission, 2000: 18; McLaughlin, 2007: 17). However, some adjustments to the national minimum wage have followed recommendations of the Labour Court where the parties have been unable to reach agreement (Labour Relations Commission, 2004: 9–10, 2006: 9 & 2007: 10). Because the Labour Court does not publish the text of its recommendations to the minister it is not possible to examine its supporting reasons.

⁶⁰ The Labour Court generally operates in three separate divisions, but may also meet as the Full Court. A division is made up of the Chairman or Deputy Chairman, an employers' member and a workers' member (Labour Court, undated: 7).

In addition to the national minimum wage, JLCs have continued to establish industry and sub-industry level agreements that set minimum terms and conditions of employment for various categories of workers. When proposals submitted by a JLC are confirmed by the Labour Court through the making of an Employment Regulation Order, they become statutory minimum pay and conditions of employment for the workers concerned. JLC wage rates begin marginally above the national minimum wage, which may explain why Ireland has comparatively few workers on the national minimum wage (around five per cent), but a high number (over 20 per cent) classified as 'low-paid' (McLaughlin, 2007:17).

Public statements made by the government suggest that the national minimum wage is regarded as one of a range of policy initiatives to address gender inequality. For example, in response to a UN questionnaire on implementing gender equality commitments, the government reported that:

Among significant mainstream measures to benefit women was the introduction of the Statutory Minimum Wage in 2000. (Government of Ireland, 2004: 2)

Further, in response to the UN's *Beijing Declaration and Platform for Action for Equality, Development and Peace*, the Government of Ireland published a *National Women's Strategy 2007–2016* (DJELR, 2007). One of the major objectives of the strategy is to equalise socio-economic opportunities for women by, amongst other things, decreasing the GPG. Ensuring effective monitoring and enforcement of the national minimum wage is one of the strategies identified for achieving this objective.

An evaluation of the impact of the introduction of the national minimum wage, conducted by the Economic and Social Research Institute (ESRI), found that only about five per cent of employees had received an increase in pay as a direct result of the minimum wage, and about 13 per cent of the firms surveyed said they had increased pay for employees above the minimum wage to restore differentials. However, over 80 per cent of firms said that, in the context of a rapidly growing economy and a tightening labour market, they would have had to increase wage rates anyway (Nolan et al., 2002: ii). In relation to the impact of the national minimum wage on the GPG in the years immediately after its introduction, ESRI found that:

... our figures suggest that the National Minimum Wage has had little effect on the mean gender pay gap to date, in part because the differences in pay between men and women in the bottom two deciles were already relatively narrow before its introduction. (ESRI, 2002: 6)

The impact of the Global Financial Crisis and deteriorating economic conditions in Ireland has meant that the last national minimum wage uprating was in July 2007. In 2009, Ireland's Labour Court recommended that the minimum wage should be frozen (LPC, 2010: 237).

In conclusion, while social inclusion and gender equality commitments underpinned the introduction of the national minimum wage in Ireland, there has been little discussion of these objectives in either the reports leading to the establishment of the minimum wage, or its adjustment since that time. It is also notable that the *Minimum Wage Act 2000* does not include equal remuneration amongst the matters to be taken into account in determining the minimum wage.

4.2.5 New Zealand

Reforms introduced by the New Zealand Government after 1999 aimed to address issues of labour market inequality (McLaughlin, 2007: 12). In a context where individual bargaining had become the norm and collective bargaining was predominantly enterprise based, low-paid workers, particularly those in small workplaces, were dependent on employment legislation to improve their position (McLaughlin, 2007: 13). Hyman (2004) estimated that 29 per cent of New Zealand employees were low-paid, which she noted was high by OECD standards. Women, especially Maori and Pacific women and new migrants, are over-represented in low waged work in New Zealand (Hyman, 2004: 1–3).

The *Minimum Wage Act 1983* enables the Governor-General, by Order in Council, to prescribe minimum rates of pay (section 4). The Minister of Labour is required under the legislation to review any minimum rate prescribed and make recommendations to the Governor-General regarding the adjustments that should be made to the minimum rates (section 5). To fulfil these responsibilities, the New Zealand Department of Labour prepares an annual minimum wage review report and ‘regulatory impact statements’. The department’s assessments examine alternative options for adjusting the minimum wage (including a no-adjustment option), and their likely impacts by reference to ‘formal international commitments’ and (since 2000) the Government’s stated objectives for the minimum wage (as determined by Cabinet). In preparing regulatory impact statements, the department generally invites submissions and meets with relevant parties (women’s interest groups, employee representatives, employer representatives and business interests) and consults with other relevant government agencies, including the Treasury.

Formal objectives and criteria for determining the minimum wage were introduced in 2000. The four objectives adopted in 2000 were:

- Fairness—to ensure that wages paid are no lower than a socially acceptable minimum;
- Protection—to offer wage protection to vulnerable workers;
- Income distribution—to ensure that incomes of people on low incomes do not deteriorate relative to those of other workers; and
- Work incentives—to increase the incentives for people considering work.

In addition, ‘criteria’ were established against which the government would assess the options and recommendations for adjustment, as follows:

- Do changes in the minimum wage produce gains that are more significant than any losses?
- Is the minimum wage the least cost way of meeting the objectives in the policy?
- Does the level of the minimum wage form part of the most appropriate mix of measures to meet the broader objectives of the government? (Hyman, 2004: 8–9).

Over time, the objectives and criteria have been further refined. For the Minimum Wage Review 2009, the minimum wage objective was:

... to set a wage floor that balances the protection of the lowest paid with employment impacts, in the context of current and forecast labour market and economic conditions, and social impacts. (Department of Labour, 2010: 11)

Two assessment criteria and related considerations were also identified for the 2009 review, as the Department of Labour explained:

The first assessment criterion is the extent to which any change to the minimum wage would produce gains that are more significant than any losses. The assessment criteria for this criterion include consideration of:

- consistency with the principles of fairness, protection, income distribution and work incentives
- comparison with other income benchmarks and international benchmarks
- consideration of the social and economic impacts of any change to the level of the minimum wage, including on groups likely to be low paid, the net effects of any corresponding withdrawal of social assistance and impacts on the GPG, and
- consideration of the forecast labour and economic impacts of changing the minimum wage, including on earnings, employment and unemployment, labour productivity, the number of employees and the hours they work, industry sectors, nominal gross domestic product and inflation.

The second assessment criterion is the consideration of whether a change to the minimum wage would be the best way to protect the lowest paid in the context of the broader package of income and employment-related interventions, and would meet the broader objectives of the Government.

As per Cabinet's decision, the assessment criteria and considerations are not weighted. Their relative importance depends on the conditions at the time of the review and the Government's judgement. For instance, if adverse employment or economic impacts are the forecast result of a minimum wage rate change, this may be a risk for Ministers to consider. Employment opportunities may need to be protected as well as wages. If adverse impacts are not forecast, then the risks around a minimum wage rate change may be low. Raising minimum wages, however, can also increase labour supply by changing thresholds for participation. (Department of Labour, 2010: 11–12) (Emphasis added)

The inclusion of 'impacts on the gender pay gap' as part of the assessment criteria (but not the objectives) is notable. Treasury is reported to have opposed a proposal to include 'an objective to reduce the gender pay gap' in the 2008 Minimum Wage Review (Department of Labour, 2007: 6).

In its regulatory impact statements, the Department of Labour has noted New Zealand's 'formal international commitments', in particular mentioning ILO 26 relating to minimum wage-fixing machinery (for example, Department of Labour, 2009: 4). It has also noted that increasing the minimum wage would have 'a small role' in reducing the GPG (for example, Department of Labour, 2005: 5). In its most recent report, however, the Department of Labour cautioned against expecting to significantly narrow the GPG through minimum wage increases:

The impact of a minimum wage increase on the gender pay gap would be minimal. If for instance the minimum wage was raised to \$13.10 (option 3),⁶¹ then the gender pay gap narrows by a negligible amount from 85.6% to 85.7%. The level of potential impacts is similar to that of previous years. (Department of Labour, 2010: 14)

61 There were five options considered, ranging from setting the adult minimum wage at \$12.50 an hour (option one) to \$16.75 an hour (option five). The report does not specify the GPG measure used for this assessment.

As a result, the Department of Labour's impact analysis has tended to focus on implications for employment growth, inflation, work incentives and the real value of the minimum wage, rather than the GPG.

The department's analysis (2010: 7–8) shows that between 1997 and 2000, the adult minimum wage increased at a slower rate than average wages, the Producers Price Index or the Consumer Price Index, but that since 2000 it has increased at a considerably faster rate than these benchmarks. However, further reform has been achieved in relation to the minimum wages for young people in New Zealand.⁶²

Dixon (2004) noted that the GPG in New Zealand had narrowed by four percentage points between 1997 and 2003. She examined the reasons for this, concluding that increases in the human capital of women relative to men, and changes in the employment distribution of men and women had made a 'fairly substantial contribution' to the reduction in the GPG (Dixon, 2004; 15–16). She also considered the impact of changes to the minimum wage for both youth and adults. She concluded that youth minimum wage reforms had 'no great impact' on the GPG for this age group, and suggested this was probably because the gap was already very small (around three per cent in 1997/98) before the reforms—limiting the scope for further improvement. She noted that there was greater potential for the improvements in real value of the minimum wage since 2000 to impact on the adult GPG, but noted that based on British research, the contribution was likely to be positive but small; 'probably contributing only a fraction of one per cent of the total contraction in the gender pay gap' (Dixon, 2004: 5–17). In relation to the last point, it should be noted that while British research suggests that the national minimum wage had a small impact on the overall GPG, the LPC's reports suggest that there has been a more significant impact at the lower end of the earnings distribution.

4.2.6 Canada

Under the Canadian Constitution's division of powers, the responsibility for enacting and enforcing labour laws resides with the provinces. Canadian provinces introduced minimum wage legislation early in the twentieth century—initially to 'protect' women. Between 1918 and 1920, all but three provinces set up boards to establish minimum wages for women on an industry-by-industry basis. Subsequently every province introduced minimum wage legislation for both men and women, as did the federal government (Armstrong, 2007: 17).

Under Canadian approaches, the minimum wage constitutes a floor above which employers, employees and their unions may negotiate for higher remuneration. Typically, a board is created that has the power to make general or specific orders. A general order will regulate all employees covered by the empowering legislation; a specific order will be aimed at workers in one or more particular industries (Blanpain, 2001: 120–12).

A minimum wage board is usually made up of employer and employee representatives, sometimes a public representative, and an impartial chair. In some jurisdictions, the board merely makes recommendations and orders are issued by the Lieutenant-Governor in Council⁶³ who may then authorise the board to make an order. In others, the Lieutenant-Governor in Council will set minimum wages by regulation. Minimum wages are set on the basis of an hourly rate. Typically a rate is set for adults and for persons under 17 or 18 years of age (Blanpain, 2001: 120–121; HRSDC, 2005).

62 Over half of those earning the minimum wage in New Zealand are aged between 18 and 24 (Department of labour, 2010: 15). Hyslop and Stillman (2007) describe and examine the impact of changes to the youth minimum wage.

63 That is, the Lieutenant Governor (the Queen's representative in the province) acting on and with the advice of the Executive Council or Cabinet.

Recent reports of the Minimum Wage Review Committee (2009; 2009a) for the province of Nova Scotia have been published on the internet. Unlike some committees, the Nova Scotia Minimum Wage Review Committee is made up of equal numbers of employer and employee representatives, and has no independent chair. The committee makes recommendations to the Minister for Labour and Workforce Development in relation to the minimum wage. Analysis of the committee's reports suggests that when setting the minimum wage, the major principles considered by the committee are the need to:

- maintain fairness for the lowest paid members of the workforce;
- recognise minimum wage and cost of living trends;
- prepare for labour shortages due to demographic trends; and
- balance the issues relative to economic competitiveness for industry.

While the reports note that women are overrepresented among minimum wage earners, and that the minimum wage has an important role as a 'benchmark wage' (or reference point) for employers who pay lower wages, they make no specific mention of equal remuneration or gender pay issues.

Armstrong (2007: 18) argued that minimum wage legislation in Canada has been an effective strategy for supporting women's wages 'because it is virtually universal, simple to understand and thus demand, and relatively easy to enforce.' She also noted that it was 'particularly useful to women because they are more than twice as likely as men to be paid the minimum.' However, she argued that there have been difficulties associated with minimum wages in Canada—with some jobs excluded from minimum wage coverage, 'employers finding ways around minimum wage legislation', and governments in effect reducing minimum wages by failing to raise them in line with inflation. In relation to the last mentioned issue, in 2008, the ILO's Committee of Experts on the Application of Conventions and Recommendations expressed concern that minimum wage levels had remained unrevised in certain Canadian provinces, such as Ontario and the Northwest Territories. Noting that the fundamental objective of ILO 26 is to ensure a decent standard of living to low-paid workers and their families, the committee requested the Canadian Government 'to further elaborate on whether minimum pay rates which have remained unchanged for more than 16 years may still be deemed to offer adequate protection and to cover the needs of low income workers (CEACR, 2008: 2).

4.3 Overview

A number of fundamental UN and ILO treaties and conventions to which Australia is signatory are designed to prevent discrimination on the basis of gender and make reference to the principle of equal pay or equal remuneration for work of equal value. The key ILO instrument is ILO 100, but that convention is complemented by other conventions, in particular, ILO 111 and ILO156, as well as the minimum wages conventions (ILO 26, 99 and 131). International conventions are not prescriptive about the way in which equal remuneration should be achieved; recognising that a range of policy approaches is likely to be required and that appropriate combinations of approaches will vary depending on national circumstances.

Although not required under Convention No. 100, minimum wages have been recognised by the ILO as being an important means by which the convention may be applied. The ILO has indicated that bodies responsible for determining applicable wage levels should do so in accordance with ILO 100, which requires 'objective appraisal of jobs on the basis of the work to be performed' (Article 3), without gender bias.

While emphasising that research has found a link between higher minimum wages, reduced wage inequality and gender wage differentials in the bottom half of the wage distribution, the ILO has also underlined the need for 'coherent articulation between minimum wages and collective bargaining' (ILO, 2008: 33) in achieving gender equality. As noted in section 3, research suggests that the mere presence of minimum wages offers women little protection; it is the level, application and enforcement of minimum wages, as well as the coverage of collective bargaining, that has been found to be important.

There is a wide diversity of law and practice in minimum wage setting internationally. However, no other country has established a statutory framework for a comprehensive range of minimum wages determined by an independent, statutory tribunal, as occurs in Australia. For this reason, consideration of the approaches to equal remuneration matters taken by international minimum wage-setting bodies has of necessity focused on national and regional minimum wage setting arrangements. Even this presents some difficulties, as adjustments to such wages are not always accompanied by published reasons for decisions. In some cases, formulae are used to assist in determining the minimum wage. In others, wages boards or committees that include representatives of employers and employees formulate agreed recommendations for ministers to consider. In other cases, ministers decide on minimum wage adjustments after considering the recommendations of panels of experts or the reports of reviews and assessments undertaken by government departments.

The available information suggests that in a number of countries there has been discussion of the use of minimum wages as a means of preventing gender pay discrimination when minimum wage arrangements were established. However, following the introduction of minimum wages, the issue has received more limited attention. Nevertheless, the case studies of the United Kingdom and New Zealand, in particular, show that consideration has been given to the issue in those countries. In the UK, in making its recommendations for adjustment of the minimum wage, the LPC considers (amongst other things) the impact of the minimum wage on specific groups, including women. Similarly, in New Zealand, current assessment criteria require consideration of the social and economic impacts of changes to the level of the minimum wage, including impacts on the GPG. In the UK, the LPC has repeatedly stated that the national minimum wage has had a significant impact in narrowing the GPG at the lower end of the earnings distribution. Further, the LPC has emphasised that this result has been achieved with very limited evidence of any adverse impact on employment associated with previous adjustments.

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Appendix 1: Summary of current federal and state equal remuneration provisions

	Fair Work Act 2009 (Cth)	Industrial Relations Act 1996 (NSW)	Industrial Relations Act 1999 (QLD)	Fair Work Act 1994 (SA)	Industrial Relations Act 1979 (WA)	Industrial Relations Act 1984 (TAS)
Definitions	Defined in s 302 (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."	Section 4 defines "pay equity" to mean equal remuneration for men and women doing work of equal or comparable value".	Defined in s 59: "equal remuneration for work of equal or comparable value means equal remuneration for men and women employees for work of equal or comparable value."	Defined in schedule 6: "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."	Equal remuneration is not defined in the legislation.	No mention or definition of equal remuneration in the legislation.
Is ERP a tribunal wage fixing principle?	The principle of equal remuneration is part of the modern awards objective, s 134 (1), and the minimum wages objective, s 284 (1)(d).	Yes, it is a matter to be considered in making and reviewing award rates, s 19 & s 23. Legislative provisions are supplemented by State Wage Case principles which allow claims where work, skill or responsibility or the conditions under which the work is performed have been undervalued on a gender basis. ⁶⁴	Yes. Section 128 (1) requires the commission when fixing wage rates payable to employees in a calling to fix the rates on the basis of equal remuneration. Legislative provision supplemented by Equal Remuneration Principle. ⁶⁵	Yes. Under State Wage Case principles awards may be varied to provide for equal remuneration for work of equal value. ⁶⁶	Yes, wage fixing principles are expressed in the legislation and include equal remuneration, s 50A (3) (a) (vii). Principle 10, State Wage Case, also provides for award variations on the basis of equal remuneration. ⁶⁷	Yes. State Wage Case Principle 10 establishes a "Pay Equity" principle, and defines pay equity to mean equal remuneration for men and women doing work of equal value (10.1). ⁶⁸

64 NSWIRC, *State Wage Case 2008* [2008] NSWIRC Commission 122, Annexure A 14.

65 QIRC, *Statement of Policy: Equal Remuneration Principle*, 29 April 2002.

66 SAIRC, *State Wage Case 2005* [2005] SAIRC Commission 29, Principle 4.9.

67 WAIRC, *State Wage Case 2008* [2008] WAIRC 0366, Principle 10.

68 TAIRC, *State Wage Case 2008* [2008] TASIC, Principle 10.

Appendix 1: Summary of current federal and state equal remuneration provisions (continued)

	Fair Work Act 2009 (Cth)	Industrial Relations Act 1996 (NSW)	Industrial Relations Act 1999 (QLD)	Fair Work Act 1994 (SA)	Industrial Relations Act 1979 (WA)	Industrial Relations Act 1984 (TAS)
Provisions for equal remuneration orders	Fair Work Australia may make an order for equal remuneration where it is satisfied that there is not equal work for equal value, s 302. In considering equal remuneration matters, Fair Work Australia must take into consideration any orders or determination made by the Minimum Wage Panel (MWP) and reasons for those orders or determinations, s 302.	No provisions for equal remuneration orders in the Act.	Yes. QIRC may make any order to secure equal remuneration, s 60 (1). An order may provide for an increase in remuneration rates, including minimum rates, s 60 (2).	No provision for equal remuneration orders in the Act.	No provision for equal remuneration orders in the Act.	No provision for equal remuneration orders in the Act.
	An equal remuneration order may provide for such increases as Fair Work Australia considers appropriate, s 303 (1), but must not provide for a reduction in an employee's rate of remuneration, s 303 (2).					

Appendix 1: Summary of current federal and state equal remuneration provisions (continued)

	Fair Work Act 2009 (Cth)	Industrial Relations Act 1996 (NSW)	Industrial Relations Act 1999 (QLD)	Fair Work Act 1994 (SA)	Industrial Relations Act 1979 (WA)	Industrial Relations Act 1984 (TAS)
Refers to equal remuneration for work of comparable value	Yes, s 302, s 284 (1)(d).	Wage Fixing Principle does not use the words 'equal or comparable value', referring to 'undervaluation on a gender basis'. Gender neutral assessment is to be used to remedy the undervaluation. Comparator awards or classifications can be used to demonstrate undervaluation. ⁶⁹	Yes, sections 59, 60 (1), 63, 66.	Yes, s 3 (1) (n).	When making State Wage orders or adjusting award rates the Commission to "take into consideration" the need to provide for equal remuneration for work of equal or comparable value, s 50A (3) (a) (vii).	Pay Equity principle refers to "equal value" only (10.1). The principle allows the commission to broadly assess whether the past valuation of the work has been affected by the gender of the workers (10.4).
Orders may stagger wage increases	Yes, Fair Work Australia may implement equal remuneration in stages, s 304.	No provisions for equal remuneration orders in the Act. Wage Fixing Principle allows phased increases and absorption into over-award payments. ⁷⁰	Yes, s 63 provides for immediate or progressive introduction of equal remuneration.	No provisions for equal remuneration orders in the Act.	No provisions for equal remuneration orders in the Act.	No provisions for equal remuneration orders in the Act. Pay Equity principle does not address the issue of staggered implementation.

69 State Wage Case 2008 [2008] NSWIRComm 122.

70 State Wage Case 2008 [2008] NSWIRComm 122, Annexure A 14(i).

Appendix 1: Summary of current federal and state equal remuneration provisions (*continued*)

	Fair Work Act 2009 (Cth)	Industrial Relations Act 1996 (NSW)	Industrial Relations Act 1999 (QLD)	Fair Work Act 1994 (SA)	Industrial Relations Act 1979 (WA)	Industrial Relations Act 1984 (TAS)
Other	<p>The principle of equal remuneration is a minimum wages objective, s 284 (1). Fair Work Australia is required to apply these objectives when setting or varying minimum wages, s 284 (2). In deciding whether to make an equal remuneration order, Fair Work Australia must take into account orders and determinations of the Minimum Wage Panel in annual wage reviews and the reasons for those orders and determinations, s 302 (4). Fair Work Australia may make an equal remuneration order only if it is satisfied that the relevant employees do not have equal remuneration, s 302 (5).</p>	<p>In making equal remuneration orders the commission is to determine application of future State Wage Case increases.⁷¹</p>	<p>Section 62 provides that the QJRC must (and may only) make an order if it is satisfied that the employees to be covered by the order do not receive equal remuneration for work of equal or comparable value.</p>			<p>The Pay Equity principle is not restricted by the operation of other wage fixing principles. However, in approaching its task, the commission is to have regard to the public interest requirements of s 36 of the Act (10.5).</p>

71 State Wage Case 2008 [2008] NSWIRComm 122, Annexure A 6(i).

Appendix 1: Summary of current federal and state equal remuneration provisions (continued)

	Fair Work Act 2009 (Cth)	Industrial Relations Act 1996 (NSW)	Industrial Relations Act 1999 (QLD)	Fair Work Act 1994 (SA)	Industrial Relations Act 1979 (WA)	Industrial Relations Act 1984 (TAS)
Does not apply where alternative remedy exists	Yes, s 721 & s 724.	No provision.	Yes, s 66 (1).	No provision.	No provision.	No provision.
Equal remuneration as guiding objective	The principle of equal remuneration is part of the modern awards objective and the minimum wages objective, s 134 and s 248 (1).	The principal of equal remuneration is part of the principal objects of the Act, s 3 (f).	The principle of equal remuneration is part of the principal objects of the Act, s 3 (d).	The principle of equal remuneration is part of the principal objects of the Act, s 3 (1) (n). ILO convention forms schedule 6 of the Act.	The principal of equal remuneration is part of the principal objects of the Act, s 6 (ac).	No.
Equal remuneration in awards	The principle of equal remuneration is a modern award objective, s 134 (1). Fair Work Australia is required to apply these objectives when setting or varying minimum wages and setting or varying or revoking modern award wages, s 284 (2).	For the purpose of modernising awards, the commission must review awards at least once in every three years, taking into account any issue of discrimination, including pay equity, s 19. The commission must on application make an award setting equal remuneration, s 21. 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", s. 23.	The commission must ensure that an award provides for equal remuneration, s 126 (e).	Remuneration fixed by award must be consistent with the Equal Remuneration Convention, s 69 (2). In making an award regulating remuneration, the commission must take all reasonable steps to ensure the principle of equal remuneration is applied (insofar as it may be relevant), s 90A.	The commission must take into consideration the need to provide equal remuneration for men and women for work of equal or comparable value when making state wage orders or adjusting award rates, s 50A (3) (a) (vii).	No legislative requirement.

Appendix 1: Summary of current federal and state equal remuneration provisions (continued)

	Fair Work Act 2009 (Cth)	Industrial Relations Act 1996 (NSW)	Industrial Relations Act 1999 (QLD)	Fair Work Act 1994 (SA)	Industrial Relations Act 1979 (WA)	Industrial Relations Act 1984 (TAS)
Equal remuneration in agreements	No legislative requirement.	No legislative requirement	Commission must not certify an agreement unless it is satisfied that it provides equal remuneration, s 156 (1)(l)& (m).	Remuneration fixed by an enterprise agreement must be consistent with Equal Remuneration Convention, s 69 (2).	No legislative requirement	No legislative requirement
Other related measures	Fair Work Australia may vary award if discriminatory or on referral from Human Rights Commissioner, s 135 and s 218.	General award making power (s 10) enables the commission to make an award in accordance with the Act "setting fair and reasonable conditions of employment for employees".		Remuneration fixed by a contract of employment must be consistent with Equal Remuneration Convention, s 69 (2).	When determining rates of pay for the purposes of the <i>Minimum Conditions of Employment Act 1993 (WA)</i> the commission must take into consideration the need to provide for equal remuneration, s 50A (3) (a) (vii).	

Sources:

Commonwealth

Fair Work Act 2009

NSW

NSW: http://www.austlii.edu.au/au/legis/nsw/consol_act/ira1996242/

NSW State Wage case 2008

<http://www.lawlink.nsw.gov.au/ircjudgments/2008nswirc.nsf/c45212a2bef99be4ca256736001f37bd/ec0d7d277d1b320bca257602000ecb40?OpenDocument>

QLD

Qld: http://www.austlii.edu.au/au/legis/qld/consol_act/ira1999242/

WA

WA: Minimum Conditions of Employment Act

http://www.austlii.edu.au/au/legis/wa/consol_act/mcoea1993365/

Industrial Relations Act http://www.austlii.edu.au/au/legis/wa/consol_act/ira1979242/

WA 2008 State wage case decision:

<http://www.wairc.wa.gov.au/WageCase/SWC2008/DirectionsDecisions.aspx>

SA

SA: http://www.austlii.edu.au/au/legis/sa/consol_act/fwa1994114/

SA 2005 State wage case (reviewed wage fixing principles)

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SAIRComm/2005/29.html?query=wage%20case>

TAS

Tasmania: http://www.austlii.edu.au/au/legis/tas/consol_act/ira1984242/

Tasmanian wage fixing principles 2008:

http://www.tic.tas.gov.au/decisions_issued/state_wage_case_decisions/principles_2008

Appendix 2: 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.

<http://www.lawlink.nsw.gov.au/ircjudgments/2008nswirc.nsf/c45212a2bef99be4ca256736001f37bd/ec0d7d277d1b320bca257602000ecb40?OpenDocument>

Queensland equal remuneration principle

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

Schedule 2 STATEMENT OF PRINCIPLES – July 2008

17. 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.

<http://www.wairc.wa.gov.au/WageCase/SWC2008/DirectionsDecisions.aspx>

South Australia

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)

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SAIRComm/2005/29.html?query=wage%20case>

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.

http://www.tic.tas.gov.au/decisions_issued/state_wage_case_decisions/principles_2008.

