INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

CORAM: GLYNN J

14 DECEMBER 1998

MATTER NO. IRC6320 OF 1997

PAY EQUITY INQUIRY
Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996

REPORT TO THE MINISTER

VOLUME II

EQUAL PAY AND REMUNERATION: INTERNATIONAL INSTRUMENTS, INDUSTRIAL JURISPRUDENCE AND STATUTORY REFORM

For the greater part of the twentieth century NSW maintained, as did the rest of Australia, institutionalised gender based wage differentials through its system of centralised wage determination.

Whilst in NSW the principle of equal margins for male and female work performing the same work had been enunciated as early as *In re Hairdressers, &c, Females (State) Award* (1929 AR 39) (the *Female Hairdressers Case*), industrial legislation from 1937 required the Industrial Commission(the Commission) to use, as a basis of its basic wage determinations for female employees, a figure which was fixed at 54 percent of the male basic wage. The decision of the Commonwealth Court of Conciliation

and Arbitration in the *Basic Wage Inquiry* ((1949-50) 68 CAR 698) and the passage of the *Industrial Arbitration (Basic Wage) Amendment Act* 1950 resulted in an increase of the statutory female basic wage to 75 percent of the male rate. However, even then, the Commission decided that it would deduct one pound from the statutory figure in order to arrive at the "true and foundational" female basic wage: *In re Industrial Arbitration (Basic Wage) Amendment Act,* 1950 (1951 AR 1 at 16). Intervention by the legislature in the *Industrial Arbitration (Female Rates) Amendment Act* 1958 restored to women employees the one pound per week, and also introduced mandatory equal pay (per s.88D) by instalments over a five year period, but only for restricted categories of female employees.

These basic wage differentials were removed by the *National Wage and Equal Pay Cases* 1972 ((1972) 147 CAR 172), although gender distinctions in the minimum wage were only removed in 1974, and the *State Equal Pay Case* 1973 (the 1973 *Equal Pay Case*) (1973 AR 425). However, these decisions did not merely adjust basic wage prescriptions, noting that the adjustment in the Federal arena was made to the total wage, but also introduced a new principle for wage fixation which, broadly speaking, had as its purpose fixation of rates of pay irrespective of the sex of the worker. The principle was differently stated between the Federal and NSW jurisdictions although, again broadly speaking, the principle was one of equal pay for work of equal value (the equal pay principles).

Despite the introduction of this principle over 20 years ago there

remains wage discrimination in Australia. Furthermore, each of the selected areas and occupations raised significant issues as to the undervaluation for the predominantly female workforce examined.

This has prompted a number of parties to the Inquiry to suggest reforms to the wage fixing principles and to the industrial legislation in order to redress the pay gap. Indeed, it has been submitted in some cases that there should be established a new principle in the wage fixing principles directed to achieving pay equity. It has also been suggested that the *Industrial Relations Act* 1996 (NSW) (the 1996 Act) should be amended. Much of this discussion is predicated upon the notion that there exists deficiencies in the existing wage fixing system which have resulted in the undervaluation of women's work. A particular focus was placed upon work value assessments and other wage fixing principles. However, little attention was paid in the submissions to the equal pay principles.

This approach is to some extent understandable given the now historic nature of the equal pay principles. However, it would appear that the equal pay principles are extant. This is certainly the case in the Federal arena where a number of recent decisions have made clear that the principle remains in operation: *Australian Collieries' Staff Association v South Blackwater Coal Limited* ((1996) 64 IR 404 at 419); *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and others* ((1969) 63 IR 138 at 145) and *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (the *HPM Case*) (Print 9210, 4/3/98). In NSW the principle was

last applied in the *Universities (Equal Pay) Case* (1980 AR 616). Moreover, it has been found that the wage fixing principles do not extinguish or otherwise reduce the operation of the equal pay principles: *In re Water Resources Commission(Equal Pay) Award* (1979 AR 321). There is no decision of this Commission revoking the principle or disapproving its application since that time. No party has submitted that the principle is not extant.

Before any submission proposing a new principle may be assessed, it is necessary to consider the reach of the existing principle, both upon the literal terms of the principle and upon its application. This is a matter of commonsense but it is particularly the case where the existing principle is by its very nature designed to remove distinctions in pay based upon the sex of workers.

It is from this foundation that the Commission may commence to assess whether there exists any limitations in the principles or their application which, if rectified, could alleviate or remedy any undervaluation of the work of female workers. Moreover, the Commission will have a more precise basis upon which it may assess the extent of any new principle required.

There are, however, some caveats to this approach which must be introduced at this stage:

1. The equal pay principles require for their operation work value assessments. It will be necessary, therefore, to consider principles

or mechanisms governing work value assessments or, more generally, the valuation of work before moving to final conclusions. This assessment will be partly undertaken in this section and more fully developed in the following section dealing with work value assessments.

2. Whilst there are some significant decisions going to the application of the principles in the respective jurisdictions, it must be said that the litigation in the area is not extensive. Accordingly it would be difficult, if not impossible, to identify any particular aspect of the equal pay principles which may have caused the gap to remain. However, it is possible to identify the scope of the principles and by reference to the case examples to understand their limitations.

3. Where the parties have approached equal pay principles it has been upon the basis that there is a uniformity of approach between the NSW and Federal jurisdictions. This assumption is not entirely correct and there are some differences of approach. Whether or not those differences in practice amount to different outcomes is more difficult to assess. However, this is an Inquiry brought under the *NSW Industrial Relations Act* 1996 and at the very least the Commission should consider the particular manner in which equal pay, or equal remuneration, principles were developed in this State. The differences between the State and Federal jurisdictions may also assist in understanding the overall reach of equal pay principles.

4. Both the Federal and NSW equal pay cases are made against the background of the 1951 *Convention Concerning Remuneration for Men and Women Workers for Work of Equal Value (Convention 100) (Equal Remuneration Convention).* The NSW jurisdiction appears in fact to have largely adopted the Convention. Upon this basis, and noting that, upon the application of the appropriate legal principles, international conventions should, where applicable, guide the formulation of the Commission's recommendations, it will be necessary to consider the operation and effect of the relevant international conventions.

5. Whatever the true effect of the equal pay principles, the Federal and NSW legislatures have recently made laws with respect to equal remuneration and pay equity. In NSW, and in a similar fashion to the pay equity principles arising from industrial jurisprudence, the legislature has established mechanisms for the achievement of equal remuneration and pay equity within the context of the Commission's ordinary award making and agreement making functions. In the Federal arena, a particular mechanism is created for addressing issues concerning equal remuneration which is by and large removed from ordinary industrial processes. However, both of these statutory provisions will have a direct impact upon the maintenance, or achievement ,of equal pay, or equal remuneration, and hence need to be considered as part of

the process of considering whether reform is required.

In the light of the foregoing I will consider equal pay and equal remuneration as follows:

1. Comparisons in the judgments of the equal pay cases;
2. Application of the equal pay principles in NSW;
3. Application of the equal pay principles in the Federal arena;
4. Differences in application;
5. *Equal Remuneration Convention* - its effect and its relationship to industrial jurisprudence; and
6. Legislative regimes addressing equal pay and equal remuneration.

There is one other important preliminary point that should be made before embarking upon this analysis. The equal pay cases resulted in a substantial alteration to the earnings of female workers. In large measure this seems to have resulted from the introduction of various loadings or basic wage adjustments. As Professor Gregory (Ex 99 para 6) referred to it there was approximately a one third adjustment. Kidd and Meng (Ex 361) point out that after the introduction of the equal pay cases, subsequent legislative reform in the nature of anti-discrimination legislation had little or no impact upon male-female wage differentials. I have earlier noted that the change in the wage male-female differentials stagnated after the mid 1970s.

This is not merely an observation of interest to economists. In my

view, there is a degree of confusion, both as to the operation of the *Equal Remuneration Convention* and as to the distinction between the actual equal pay principle (however defined), and discrimination (this latter concept being more closely associated with anti-discrimination legislation or the grounds required to make out a case under that legislation). The distinction is not merely technical. Anti-discrimination principles operate, by their very nature, upon the basis that it is necessary to establish some gender based causation for the particular circumstances of female workers (either by direct or indirect discrimination). This is not true of the equal pay principles which did not require the establishment of causation (direct or indirect) for the operation of the principle. These principles did require that rates were set irrespective of the sex of the worker, but in the operation of the principle the Commission was merely required to establish equal pay for work of equal value. The remedy was obtained through the valuation process *per se*, regardless of the derivation of the problem.

COMPARISONS OF THE JUDGMENTS IN THE FEDERAL AND NSW EQUAL PAY CASES

In order to fully compare the NSW and Federal Equal Pay Decisions it is first necessary to have regard to some historical considerations.

BACKGROUND

The principle in the *Female Hairdressers Case* continued to apply throughout the period extending up to the *State Equal Pay Case* 1973 (1973 AR 425). The essential principle deriving from the *Female Hairdressers Case* is

found in the following extract:

> This wage results from following (as is the practice of all arbitration tribunals in Australia) the principle of the distinction contemplated by Parliament between the living wage for males and that for females, and from applying, after observing that basis of difference, the principle of equal pay for both sexes doing the same work, so far as the margin for skill at least is concerned (1929 AR 39 at 44).

It should be noted that the *Paint and Varnish Makers Award Case* (1957 AR 87 at 108) identified that, whatever the theory concerning equal margins might have been, the practice had developed along different lines and some awards provided for equal margins between male and female workers whilst others provided higher male margins than female margins. In the *NSW 1973 State Equal Pay Case* (1973 AR 425 at 440) the Commission noted that the tendency had been for closer adherence to the *Female Hairdressers Case* rule.

The *Industrial Arbitration (Female Rates) Amendment Act*, 1958 required the NSW Commission and conciliation committees, in certain specified circumstances, to insert provisions for equal pay as between the sexes in awards and industrial agreements. Where these circumstances were proved to exist, the tribunal was required to award the same margin or secondary rates of wages for males and females, and the total rate of wage payable to female employees was to be fixed by adding to such marginal or secondary rates the prescribed percentages of the basic wage for adult males.

The NSW Industrial Commission was required to consider the

operation of s.88D in *In re Clerks (State) Award and Other Awards* (the 1959 *Equal Pay Case*) (1959 AR 470 at 480). In the course of doing so, the Commission considered the *Equal Remuneration Convention* and its accompanying recommendation No. 90. The Commission found that the comparison between the Convention and the principles in s.88D was of assistance in the task of ascertaining the scope of the enactment but it was the marked contrasts that were revealed by the comparison which were of most significance.

In 1967 the Commonwealth Conciliation and Arbitration Commission eliminated the distinction between basic wages and margins and created a total wage.

In the formulation of the 1969 Equal Pay Principle the Commonwealth Conciliation and Arbitration Commission relied upon NSW and other State legislation and not upon the *Equal Remuneration Convention* in formulating the 1969 version of the equal pay principle in the *Equal Pay Cases* ((1969) 127 CAR 1142 at 1153, 1155 and 1156). The Commonwealth Commission did consider that the Conventions and Recommendations represented "international thinking on the question of equal pay for equal work" and must "carry significant weight in a general way" but then considered that the Convention must be applied in a way that fits into the Australian industrial system.

In 1972 the Commonwealth Commission in the *National Wage and*

Equal Pay Cases 1972 ((1972) 147 CAR 172) reconsidered the 1969 Equal Pay Principle. In doing so it did not merely amend the 1969 principle, but stated "positively a new principle", and further held that "the concept of equal pay for equal work" is "too narrow in today's world". The Commission considered that it was necessary to enlarge the concept to "equal pay for work of equal value" (ibid at 178).

The NSW Industrial Commission did not adopt in its entirety the decision of the Commonwealth Commission in its 1973 *Equal Pay Case* (1973 AR 425). Despite acknowledging the principle of comity between the Commissions, the Commission determined that, on that occasion, it would follow the Commonwealth decision "in substance but not in detail" (ibid at 439). Overall, the State Commission's decision did result in some differences, which I set out in the following discussion comparing the two decisions.

APPROACHES TO EQUAL PAY - FEDERAL AND STATE

THE BASIC WAGE

Differences of approach emerged as a result of the pre-existing distinction between the basic wage and marginal wage and adherence to the *Female Hairdressers Case* in NSW and the total wage system in the Federal arena.

These differences are eloquently stated by Charles Patrick Mills in

his classic text Industrial Laws NSW (4th Edition, 1977) as follows:

> In the Commonwealth decision, it had been announced that individual arbitrators should deal with each case by way of a work value procedure, but the NSW Commission was prepared to proceed on the basis that the State Awards had been made in accordance with the principle of the 1929 *Hairdressers Case* (although it admitted that the principle of equality of margins might not always have been strictly observed) and so the only differential that was left to be eliminated was to be found in the prescription of the basic wage in the awards. Full achievement of the principle of equal pay was therefore to be effected by raising the female basic wage in the awards to the male rate on the above timetable. This device was not available to the Commonwealth Commission, not only because it had removed the basic wage prescription from its awards in 1967, but also because it had never expressly formulated a principle of equality of margins; indeed, in the Federal Awards there had been no ascertainable general principle of relationship between male and female margins (p 188).

By way of contrast, in the 1973 *Equal Pay Case*, the Commission announced that from the end of a phasing in period the Commission and Committees would not award any wage for an adult female at less than the basic wage for an adult male (1973 AR 425 at 440). The approach of the Commission to the basic wage was to direct that the Commission and Committees, when implementing the principle, make additions totalling $9.30 per week to bring the female basic wage into alignment with male rates unless a case to the contrary was made out. The basic wage was to be adjusted by three equal pay loadings from 31 December 1973 to a date prior to 30 June 1975. From that date prior to 30 June 1975, either as agreed by the parties or as determined by an arbitrator, the rates would then comprise the amount of the "basic wage for adult males plus the margin specifically prescribed or ascertainable by calculation for the work". Once this was achieved the equal pay loadings would disappear from the Awards (1973 AR 425 at pp 439 and 441).

ADOPTION OF THE CONVENTION

The Federal Commission introduced a principle of 'equal pay for work of equal value', and defined 'equal pay for work of equal value' to mean the fixation of award rates by a comparison of the work performed irrespective of the sex of the worker. This is to be contrasted to the position adopted by the NSW Commission which was as follows:

> We believe that the time is opportune to introduce in the New South Wales system the principle of equal remuneration for men and women workers for work of equal value, meaning thereby rates of remuneration established without discrimination based on sex. This, as we understand it, is the substance of the new Commonwealth Commission principle and the fact that the Commission has made its decision is an important factor which influences us (1973 AR 425 at 439).

The source of this distinction derives from a somewhat different approach to the adoption of the *Equal Remuneration Convention.*

The NSW Commission came to the view that the new principle adopted by the Commonwealth Commission in 1972 appeared to be identical with the principle of equal remuneration for men and women workers for work of equal value referred to in Article 2 of the ILO *Equal Remuneration Convention* No. 100. By way of contrast, in the 1972 Equal Pay Decision the federal Commission recognised the existence of *Convention* 100 of the ILO (which had then not been ratified) and stated that "we do not rely on it heavily although it may be the genesis of other things on which we do rely" ((1972) 147 CAR 172 at 177).

APPLICATION TO MARGINS

The 1972 Equal Pay decision was applied to the total wage (that is it made no distinction between the margin and the basic wage). However the access to that adjustment required satisfaction of the equal pay principle stated in that case, namely the principle of equal pay for work of equal value. There were, of course, a number of other criteria that governed the operation of this principle ((1972) 147 CAR 172 at 179).

However, in relation to margins, the State Commission proceeded upon an assumption (founded in the *Female Hairdressers' Case*) that the margins for male and female workers represented the true value of work and have been fixed without regard to sex. It was held that where an award provides for one class of work, equal margins for male and females, it would be proper for tribunals implementing the new principle to assume that the work of males and females was of equal value, but it would be open to either employers or employees to show that this was not so and that the margins for females were either too low or too high. Such a determination would require a work value inquiry. The same principle would apply where the margins of males and females are not equal. The Commission's principle operated on the basis of a rebuttable presumption (1973 AR 425 at 440-441).

DISCRIMINATION

There is no reference in the "new principle" established in the Federal *Equal Pay Case* 1972 to "discrimination". In the "new principle" "equal

pay for work of equal value" is defined to mean the fixation of award rates by a consideration of the work performed irrespective of the sex of the worker ((1972-73) 147 CAR 172 at 178, 179).

On the other hand, the NSW decision does refer to rates of remuneration being established "without discrimination based on sex". This is because the NSW Commission expressly adopted the *Equal Remuneration Convention*. However, in relation to the discussion of the application of the principle, the State Commission uses the same words as the Federal Commission namely "without regard to sex". For reasons that I will later discuss in relation to the operation of the *Equal Remuneration Convention*, in my view, neither of the equal pay decisions, nor the *Equal Remuneration Convention* erects a test which requires finding that there has occurred discrimination based on sex for the operation of the respective principles. Rather, the principles, by a variety of words, describe how the principle will lead to the creation of rates of pay without regard to sex.

CHANGES FROM THE EARLIER EQUAL PAY PRINCIPLES

Both the Federal and NSW Equal Pay Cases had the effect of supplanting the existing equal pay principles deriving from the 1969 Equal Pay Case on the one hand and s.88D of the *Industrial Arbitration Act* 1940 (the 1940 Act) on the other. The earlier principles were as earlier noted essentially the same because the Federal Commission had derived the equal pay principle in 1969 from the then existing State statutes. Significantly, these earlier equal pay

principles were not based upon the *Equal Remuneration Convention*. In the 1959 *Equal Pay Case* the NSW Commission noted some significant differences between the *Equal Remuneration Convention* and s.88D of the 1940 Act (1959 AR 470 at 480-481). As earlier noted, the Federal Commission adopted the State statutes over the International Conventions.

The identification of the elements of these common earlier principles is useful in explaining the reach of the later developed principles in the early 1970s. Both the industrial legislation in NSW and the 1969 equal pay principle provided that the principle would only apply where the work performed by both males and females under such determination or award was the same or of like nature, and of equal value.

Both required the tribunal in considering that matter to examine whether the female employees were 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 and under the same conditions.

The NSW Commission in construing these provisions in the 1959 *Equal Pay Case* (1959 AR 470) made a number of important findings which are relevant to the understanding of the later 1970s equal pay principles as follows:

- The NSW Commission considered that there was a clear distinction between the requirement to find that the work performed was of the same or like nature, and the requirement that the work be of "equal value" (at p 496).

- The comparison to be made was between classes of work under an award and not comparisons based on the particular work employed at particular establishments.

- In valuing the work, the test was not the value of the work to the employer but the value which the Commission or the Conciliation Committee puts on the work, and by reference to which, it fixes rates of wages (p 485).

- The reference to the nature of the work refers to the essential features of particular work considered from the viewpoint of a wage fixing tribunal which gives the work its fundamental character. Thus, the essential feature of the work of a stenographer was said to have skill and knowledge which enabled that person to take dictation and shorthand and later transcribe the notes. Such knowledge and skill was not considered to be an essential feature of the work of a telephonist which required another type of skill and thus the work of the two is not of the same or like nature (p 492).

- The phrase "of equal value" was be construed to mean "at least equal value" (p 498). This was a rejection of the submission that what was required to be found was 100 percent equality of value. It is not clear whether the Commission accepted another notion of "equal or like value" in reaching this conclusion.

- The factors of range, volume and conditions under which work is performed were matters to be taken into consideration when considering both the nature of the work and value. However, it was possible for a tribunal to find that the work of females was of equal value to that of males, notwithstanding that the work performed by the two classes differed, either as to the range, or volume, or the conditions under which work is performed (p 499).

The 1972 Federal *Equal Pay Case* removed the reference to "same or like nature" in the determination. That was no longer a prerequisite to obtaining equal pay. It follows that requirements of that kind do not form part of the assessment which is required in ascertaining equal value under the equal pay principles.

Similarly questions as to the range, volume and conditions of the work could not be said to figure significantly in the assessment to be made. These factors were given little weight in the Commission when there was a dual requirement for the work to be of the same and like nature and of equal value.

Both of the 1969 and 1972/1973 Equal Pay decisions contemplated that any determination of value for the purposes of the principles would be made by way of a work value inquiry or work value comparisons. However, the nature of the comparisons differed. The Commonwealth Commission in 1972 identified that the work value inquiries were to be concerned with comparisons of work and

that the fixation of award rates irrespective of the sex of employees may encounter unfamiliar issues. It identified a number of situations where it was appropriate to apply the principle:

I. Work value comparisons should, where possible, be made between <u>female and male classifications applying within the award classifications</u>.

II. 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 <u>between female classifications within the award</u> and/or <u>comparisons between female classifications in different awards</u>.

III. In some cases comparisons with <u>male classifications and other awards</u> may be necessary.

The former principle required that the comparison be made between particular classes of work within an award. The 1972 case continues this form of comparison but then adds a capacity to compare female classifications within an award or in other awards and for comparisons with male classifications in other awards.

The 1972 Federal decision expressly rejects the notion that the value of work is the worth to the employer (p 180). This same conclusion had

been reached by the NSW Commission in the 1959 *Equal Pay Case* (1959 AR 470 at 485).

The apparent adoption by the NSW Commission in the 1973 *Equal Pay Case* of the *Equal Remuneration Convention* would not seem to result in any different approach from the Commonwealth Equal Pay principle. In the 1959 *Equal Pay Case* (1959 AR 470 at 480) the State Commission draws clear distinctions between s.88D and the Convention. It points out that the Convention provides for both work which is of equal value and work which is of <u>not</u> equal value. For work which is of equal value it requires equal remuneration, and for work which is not of equal value, it requires that any differential rate fixed should be one which corresponds, without regard to sex, to differences, as disclosed by the objective appraisal of the work (Article 3.3).

<u>IMPLEMENTATION OF THE NSW EQUAL PAY CASE DECISION</u>

<u>IN RE CLERKS (STATE) AWARD (1975 AR 199)</u>

I consider this case more closely in the next chapter dealing with work value. For current purposes its significance is His Honour Justice *Dey's* rejection of the employers' submission that any increases to rates of pay should take account of the fact of the application of equal pay to the award. *Dey* J found that it would be a complete contradiction of the principle of equal pay for work of equal value if the introduction of the principle for female rates of pay then led to some dilution or downgrading to the male rate of pay. (p 214)

IN RE MOTOR TRANSPORT (FEMALE SALARIED OFFICERS - SALARIES) AWARD (1975 AR 837)

The origins of this decision were in an application by the Public Service Association seeking rates for female officers be equal to the rates for male officers.

The PSA had coverage of females engaged in the Department of Motor Transport with wages and conditions governed by the Motor Transport (Female Salaried Officer - Salaries) Award. Male salaried officers in the employ of the department belonged to the Australasian Transport Officers' Federation with wages and conditions covered by the Salaried Officers Award 1971.

The decision came two years after the application was originally made to the Conciliation Committee and followed numerous attempts at conciliation. The application was dealt with as involving questions concerning the application of the principle of equal pay following the 1973 *Equal Pay Case.* The Commission found it no impediment to hearing the application that the employer had purported to effect equal pay by increasing the female salary by an amount slightly in excess of the equal pay loading, which was described as the Department's "version" of equal pay (p 843). In hearing the matter, *Dey* J had evidence of current and claimed salaries for both the male and female employees; an award history; and the evidence taken from male and female employees. The Commission described the evidence as being directed to an appreciation of the work performed, in the context of the parties differing on the

central question as to whether the same rate should be prescribed for the female officers as the male officers, or whether the existing award structure afforded just and reasonable rates of pay and should be continued (p 852).

Although the evidence was put, and submissions were made in relation to that evidence, on the basis of comparisons between the work performed by the female officers as compared to the work performed by particular male officers *Dey* J proceeded on the basis that he was required to consider the matter on a "broad basis" and accordingly did not deal specifically with the detailed jobs as juxtaposed by the parties (p 853).

Importantly, in relation to the work performed by the male salaried officers *Dey* J identified that the duties performed by the males differed greatly and yet were capable of and were covered on a common basis by one award, in particular as far as the incremental scale was applied. In this regard, the Commission found that "it seems reasonable to proceed upon the basis that the Male Salaried Officers Award prescribes rates of pay on the approach that, although the duties and responsibilities vary, the work of the various officers can properly be remunerated overall to a certain level by an incremental scale in accordance with normal principles, (see eg Scientific Officers Case [1962 AR 250 at 284]) applicable to a wide range of clerical and administrative functions" (p 854).

The Commission identifies the capacity to remunerate across one incremental scale the male salaried officers, notwithstanding the differentiation in

the work performed, as being a basis upon which a "similar averaging approach in a case of female salaried officers in adopting the principle of equal pay" can be approached (p 854).

The Commission saw the case as being one which, in accordance with the 1973 *Equal Pay Case*, the union had to rebut the prima facie presumption that the existing margins between the male and female rates were correct. The Commission finds that in hearing an application, in which the presumption is rebutted, it is necessary to have a work value inquiry in order to fix, with respect to the work concerned, rates of pay which are just and reasonable and to meet the circumstances of the case, but with the ultimate requirement being that equal remuneration shall be prescribed for work of equal value. (p 856)

In considering "whether the existing differential ... is a reflection of genuine differences in work value or whether the prima facie presumption that 'the true value of the secondary considerations have been fixed without regard to sex' is displaced" (p 858), *Dey* J noted that as the award under review only provides rates of wages for females then the presumption was that the margins correctly assess the value of the work. However, he identifies this presumption as being much weaker in circumstances where there are two awards running in parallel applying to male and female salaries officers, performing clerical duties in various sections and branches of the same department, and where there is a degree of overlap of the work (p 858). Notwithstanding that it is not a clear cut case where identical positions are filled by males and females, but rather

identifying the interchangeability of the functions performed and treating the work as "sufficiently comparable" (p 858), it is found that there is no basis for saying that the clerical work performed by female officers at a particular year of experience in the range proposed, is not work of equal value with the clerical work performed by male officers. It followed that differentiation in the rates of pay was not warranted.

The Commission expressly rejected submissions by the employer that lines of delineation in work that applied along gender lines should be taken into account as reflecting restriction on the female work as compared to male work. The Commission recognises the distinction between equal valuation and discrimination per se when it states: "It seems to me to be an inevitable concomitant of the introduction of equal pay that female employees should have the opportunity, without discrimination on the grounds of sex, to perform work and as a corollary of this, the employer should be entitled to expect and require its female officers to perform whatever duties it allocates to them within their competence. Correspondingly, male salaries officers will have to accept the situation that, with the establishment of equal pay, preconceived and traditional notions of what work could and should appropriately be performed within the sphere of clerical duties by males and females are not longer justified (p 860).

This observation is particularly apt in the light of my later discussion in this chapter of discrimination vis a vis the application of the equal pay principle. In relation to the history of the award and past relativities *Dey* J identified these matters as being part of his consideration but said that the crucial

question always remains the work being performed by those employees for whom a rate is to be fixed. Accordingly the Commission looked at the whole of the matters afresh notwithstanding past practice in relation to regard to rates being paid in the public service as a guide.

It was found that the wage indexation principles did not affect the application of the equal pay principles. In this regard *Dey* J stated as follows:

> I cannot conceive that it was contemplated that the entitlement of females to the benefits flowing from the introduction of equal pay should depend upon whether the revision of rates had been correctly concluded before the *State Wage Case May* 1975 (p 862).

His Honour also found that the case was not relevant to the anomaly provision, as discussed in the *National Wage Case September* 1975, because the issue was not one of relativities nor in relation to inequities arising from comparative wage justice, but rather "of the failure, due to a misunderstanding, to implement fully the intention to extend the principle of equal pay to these officers" (p 862).

IN RE WATER AND SEWERAGE EMPLOYEES-WAGES DIVISION (METROPOLITAN) AWARD (NO. 1) (1975 AR 377)

The Water and Sewerage Employees' Union (the union) appealed against the decision of the Chairman of the relevant Conciliation Committee who had refused a claim for payment for female employees to be paid the rate of the construction worker Class 1. The claim was brought by the union on behalf of 72 employees primarily employed in the classifications of cook, canteen assistant,

waitress, tea attendant and cashier. The union sought to apply the construction worker Class 1 rate to all wages division female employees of the Water Board. The said rate was available to males in the wages division, even if they were also employed in the canteen.

The application was not brought under the Equal Pay principle. Rather the union relied upon the adoption by the Australian Government of ILO *Convention* 111, dealing with the elimination of discrimination in employment.

In finding that there was no discrimination and refusing the claim *Watson* J, noted that there was no justification for the increase based on work value considerations or principles of comparative wage justice, that the females were already in receipt in higher than average pay for that occupation, and that the workers had already obtained an accelerated payment of the equal pay loading.

Watson J refers to the equal pay principle as specifying "equal pay for equal work irrespective of sex" (p 378). His omission of the important words "equal value" reflected the way in which this case was run, namely without reliance on any work value assessment. That this was so is confirmed when His Honour finds that the female employees are engaged specifically in a limited area of the employers' workplace and stated "not only would it no doubt come as an unpleasant surprise to a female tea attendant to be told that she could be expected to transfer to construction work if required but it would also, as I understand the position, be inconsistent with her contract of employment" (p 379).

It appears that the true basis of the Commission's decision is that it can see no interaction between the work of the females and the work performed by others employed in a lower category than construction worker Class 1 who, were they employed in that area of work, would be expected to be available to perform the work of construction worker Class 1 if required.

It is regrettably a very short judgement, based on an appeal from the Conciliation Committee, and there is accordingly no detail as to the submissions put in relation to ILO 111 or in relation to the issues generally.

In reaching this decision the Commission expressed the view that the use of work value and comparative wage justice to fix rates for female employees to avoid discrimination against them is a sound approach for fixing female rates of pay (p 378).

Finally, and notwithstanding that this is outside the award area and not strictly with the purview of the Commission, the Commission expressed the view that the above award payment of 50 cents for cleaners and 90 cents for other female officers as compared to the payment of $1.25 overaward to tradesman classifications is a differentiation which pre dates equal pay concepts and should "disappear" (p 379).

IN RE WATER AND SEWERAGE EMPLOYEES - WAGES DIVISION (METROPOLITAN) AWARD RE ANOMALY (1976 AR 379)

The union then brought a further case on behalf of the female employees. In *In re Water and Sewerage Employees - Wages Division (Metropolitan) Award* (1976 AR 379), the Full Bench of the Commission considered an appeal from a decision of the President in an Anomalies Conference under the then wage indexations guidelines. The President refused to find that an anomaly existed regarding the rates of pay of 73 female employees employed under the award in the head office canteen of their employer in the classifications for cleaner, canteen assistant, cashier, waitress, tea attendant, chef, cook and supervisor. The anomaly alleged was that a component of the wage rates paid under the award for male non-trades men employees in the employ of the Board, some 9,000 in number, was not being paid to such female employees on the basis of the sex of those employees.

The difficulty arose from an agreement reached between the Metropolitan Water Sewerage and Drainage Board (the Board) and the union which provided that an industry allowance would be extended to all employees under the award including female employees, whereas the allowance in question was only payable for male non-trades classifications. It was claimed by the Board that the allowance was paid, not because of considerations of sex, but because of the classifications in which these employees were employed. However, the Commission found that male non- tradesmen working in the head office canteen were paid the allowance but not non-tradesmen female employees working in the same place. Thus the non-female employees working

in the canteen were the only non-trades group under the award not to receive the allowance (p 381).

The Commission concluded that the employees were discriminated against as regards the allowance because there sex was female and not male (p 381). The Commission applied the *Equal Pay Case* 1973 (1973 AR 425). It noted that pursuant to that decision the differential between the male and female basic wage under the award had been removed but considered that the principles of the decision were nonetheless applicable to the payment of the non-tradesmen allowance. In particular it held that the non-payment of the allowance to females remains as "an impediment to the implementation to the award in question of the principle in the Equal Pay Case 1973 judgement..." (p 381).

The Commission noted that the case was not the usual equal pay case and was special, unusual and a self-contained case but fell within the broad intent of the equal pay principles "in order to rectify what [the Commission saw] as discriminatory rates of pay for employees because of the fact that they [were] female employees" (p 381).

The Commission noted that it was acting in accord with the conclusion by *Watson* J in *In re Water and Sewerage Employees - Wages Division (Metropolitan) Award* (1975 IR 377). It upheld the appeal and varied the relevant award by increasing the rates for "the classifications in question" by the amount of the non-tradesman allowance.

BASIC WAGE FOR ADULT FEMALES AND EQUAL PAY LOADING CASE - 1977 AR 550

In the *Basic Wage for Adult Females and Equal Pay Loadings Case* 1977 the Commission noted that its 1973 Equal Pay decision had been given effect to in awards generally (1977 AR 550 at 551). In this decision the Commission deleted references in awards to the basic wage for adult females and substituted a reference to basic wage for adult males where necessary and appropriate. It also provided for the deletion of equal pay loadings.

The Inquiry received in evidence exhibit 1 tendered in the above case (Ex 362). That exhibit shows the awards which had received the equal pay loadings by the time of the case. Interestingly the document reveals that the *Fish, Canning etc (State) Award* included the third equal pay loading. I have earlier considered the effect of this adjustment which was made by consent, and reiterate that it is significant in three respects. Firstly, there was no adjustment to the margins within the award so that the distinction between male and female margins in the award was not removed until 1989. Furthermore, there was retained within the award a reference to adult male basic wage. Finally, and most significantly for the discussion of that award, there was no work value review associated with either the adjustment to the basic wage or the margins so that there was an inappropriate convergence of the male and female classifications, the result of which was the female trimmers were aligned to a male general hand notwithstanding the lesser skills and responsibility of the general hands.

There is also mentioned in Exhibit 1 to the Basic Wage for Adult Females and Equal Pay Loadings Case the *Hairdressers &c (State) Award* and the *Nurses (Female), &c State Hospitals and Homes Award.*

IN RE SOAP AND CANDLE MAKERS (STATE) AWARD (NO.1) (1977 AR 524)

In this case the Commission considered an appeal from a decision of the Conciliation Committee refusing an application to provide equal pay for females working in positions not otherwise classified in the industry.

The Commission considered the work of employees at a number of establishments operated by Rexona Pty Ltd, Wolseley's Chemicals Pty Ltd and Lever and Kitchen Pty Ltd.

At Rexona the work embraced by the application involved liquids or powders being placed in appropriate containers which would be capped or sealed and in some cases labelled before being placed into cartons. The cartons after sealing were placed on to pallets. In the main the work was carried out by female employees. Some workers placing the cartons on the pallets were males.

At Wolseley's Chemicals Pty Ltd the liquid line was operated by females to the stage of palletising when the work of placing the cartons on to pallets was carried out by male employees except in the case of absenteeism when females were employed also on the palletising work. The work on the

liquid line involved empty bottles being placed on the line proceeding through a filling machine. After capping, a woman at the end of the line placed the bottles in cartons which she carried across to the sealing equipment from which it was placed on a pallet by the male employee. The amount of effort required by the female employee and the male employee concerned with the handling of the cartons was stated to be about the same.

At Lever and Kitchen a different picture emerged. Here there was a registered industrial agreement. In the liquid section there was an interchange of work between males and females. Except for line leaders and palletising the position which was developed seemed to involve a complete interchange irrespective of function.

In essence the claim concerned a difference in the rates of pay between the male and female rates which applied to work “not otherwise classified”. The application was brought pursuant to s.88D of the 1940 Act and the 1973 *Equal Pay Case.*

The Commission considered that the case was complicated by differences between the various establishments so that if the issue were to be considered establishment by establishment rather than in the award area overall a very mixed result would occur. However the Commission considered that approach was not consistent with the requirements of s.88D or with the approach required by the 1973 *Equal Pay Case* (p 527).

In view of that finding the Commission considered the position at Lever and Kitchen was critical as the award was specifically applied at Lever and Kitchen notwithstanding the existence of the industrial agreement.

The Commission considered that the case did not fall under the provisions of s.88D. However the case was caught by the provisions of the 1973 *Equal Pay Case*. This meant that the existing margins were presumed to be correct unless it was shown otherwise.

The Commission came to the following conclusion:

> The work of females not classified cannot be said, in my view, to be of less than equal value as compared with the work of male employees in the relevant classifications. Apart from the intermixture of employees on the liquid lines and the exclusive male employment on the powder lines at Balmain, the preponderance of male work is on palletising. This work is however, shared at Rexona and carried out by women at Scott's. The work of palletising in any event, although heavier is one requiring in general, less care, application and concentration than a number of other tasks. I would not regard it as a heavier function than that carried out before palletising at Wolseley's Chemicals. It is certainly demanding than the labelling function as seen there (p 527).

The Commission came to the view that in the handling of both liquids and powder preparations males and females were employed doing similar, if not identical, work. The differences seem to relate to historical reasons including the earlier exclusive employment of females on liquid lines. This historical factor had changed. In making that assessment the Commission did not regard the differences in speeds as an essential aspect of the difference although it may well have been significant if the strict comparison required by

s.88D had had to be made (p 527).

Although some changes in staffing had occurred the Commission considered that the situation examined did not involve a change in duties of a work value kind as contemplated by principle 7(a) of the indexation guidelines. The Commission distinguished this case from one in which a comparison of female work in an award with other female work elsewhere was involved. The distinction drawn is important and I set out that part of the decision dealing with it:

> Obviously, where an attempt is made to apply equal pay principles by comparing female work in an award with other female work elsewhere, in other words, a comparative wage justice exercise, the anomalies procedures would need to be adopted if such a claim were to be dealt with within the indexation guidelines. This particular situation is one that involves a direct application of the 1973 *Equal Pay Case* principles to a situation of discrimination within the area of the one award where males and females are engaged in palletising and other work associated with the packaging of preparations. In my view, where that is the situation, it should not be treated as a comparative wage justice argument. Nevertheless it is not a case in which an order would fall within any of the exceptions within indexation guidelines by virtue of which an adjustment can be made. The question whether or not wage indexation principles were applicable in an equal pay situation was considered by *Dey* J (see *Motor Transport Female Salaried Officers Award*) [1975 AR 837]. In that case His Honour was dealing with a special situation where the employer had purported to give effect to the *Equal Pay Case* principles prior to indexation and the Commission was amending that approach. In those special circumstances His Honour took the view that the wage indexation principles did not prevent increases directed at implementing fully the equal pay principles (p 528).

The Commission considered that the matter raised a special or extraordinary problem within principle 7(c) of the guidelines. As it did not involve a comparative wage justice argument it was considered that the matter should

be removed to the Commission in Court Session for determination (p 528).

IN RE ICE CREAM MANUFACTURERS (STATE) AWARD (1977 AR 499)

In *In re Ice Cream Manufacturers (State) Award* the Commission heard an appeal from Conciliation Commissioner *Dunn* who had declined an application for equal pay for female employees in the ice cream manufacturing industry. The Food Preservers' Union of Australia, NSW Branch (the union) had sought the application of the principles as expressed in the 1973 *State Equal Pay* case so as to apply the rate of pay of the male general hand to the females engaged as "other" under the award. The Commissioner chairing the Conciliation Committee found that "the evidence disclosed that women do not perform the work of a general hand, and the described duties of the female packers, pourers and so forth are exclusive to females, and in those circumstances it is difficult to see how any real comparison could be made on an equal pay basis" (p 500).

Notwithstanding the expression in relation to "*difficulty*" the Commissioner had found that the work performed by females was less onerous than the work performed by general hands and in the absence of any change in the value of the work of females in the relevant period the rate of wage for females was correctly assessed. The Commission, *Watson* J, accepted the submissions of the union that the lack of strict comparability of the jobs did not restrict either the Committee or the Commission, and in so doing he referred to principle 5(b) of the 1972 Federal Equal Pay Decision as having been adopted in

the 1973 *State Equal Pay Case*.

His Honour then went on to find in accordance with the 1963 *Hairdressers' Case* that the work of general hands and that of the females engaged under a non specific award classification was not of equal value. In making this finding it appears that the Commission concurred with the view of the Commissioner that the work of the general hand was more onerous and that a contributing factor to the more onerous aspect of the work was the difference in weights handled by the males as compared to those of the females being a distinguishable factor between the two areas of work. The Commission made reference to the difficulties in forming a concluded on the question given the unrelated nature of the work. It appears that the Commission took most comfort from the pre-existence of the different marginal rates and also relied on the 1973 *Equal Pay Case* having set down as a principle that the presumption is that the margins are correct with the onus being upon the applicant party to rebut that presumption.

The Commission also went to some lengths to distinguish the position in the *Furniture Trades Awards Case*, an unreported decision of 25 March 1977 No. 289 of 1976, by the Chairman of the relevant conciliation committee, saying that it did not think the Commissioner's findings should be read as going so far that any "all others rate" applicable to male employees should apply to work also not classified but performed by females. It was stated that a proper work value assessment needs to be undertaken to make a finding of equality (pp 503 - 504).

In relation to the difficulties in comparing distinctly different types of work for the purposes of establishing equality of value the Commission stated as follows:

> It is obviously a situation where more assistance may be forthcoming from considering values for other repetitive work of a like nature which has no doubt a number of counterparts in other industries. Whether or not that may or may not be produce a different result is a matter of conjecture (p 503).

In coming to its decision, the Commission expressly noted the inability of the Commission on appeal to receive fresh evidence.

<u>IN RE ICE CREAM MAKERS (STATE) AWARD (1978 AR 115)</u>

This application was also made by the Food Preservers' Union of Australia, NSW Branch. *The Ice Cream Case* discussed above was revisited in the context of the making of a new award in the following year. Once again *Watson* J was the presiding member of the Commission. Unlike the 1977 case which had involved an appeal from the Conciliation Committee, on this occasion the Commission undertook site inspections with the parties in relation to which he found “a much different case has emerged from that presented before the Conciliation Committee” (p 118).

On this occasion the Commission were taken to most establishments covered by the award in contrast with the situation with the Conciliation Committee where only three city establishments had been

inspected. The upshot of the inspections in the 1978 case was that it was found that a number of manufacturers located in rural areas engaged male employees exclusively to carry out the work of pouring and packaging ice cream which was described as work similar to that performed by females elsewhere. Although it is not expressly stated in the case it appears that the existence of male employees performing the same work of female employees and being paid at a higher level was sufficient for the Commission to contemplate that the work performed was of equal value, unlike the decision reached in the 1977 case which was to the effect that the general hands were in fact performing more valuable work than that of the female.

In other words, the 1978 decision did not involve a finding that the work performed by general hands as that work was described in the 1977 case is in fact of equal value to that of the female workers but rather that the fact of the female work being performed by males with those males being paid at a higher rate than the females gave rise to an arguable case as to the existence of a special or extraordinary problem as contemplated by the Anomalies Principle.

Accordingly the Commission referred to the case to the Full Court which in turn varied the classifications and remitted the matter to *Watson* J for determination of the claim.

IN RE WATER RESOURCES COMMISSION (EQUAL PAY) AWARD (WATER RESOURCES COMMISSION) (1979 AR 321)

In this matter a Full Bench of the Commission considered the application of wage fixing principles to a claim for implementation of equal pay

principles.

The Public Service Association of New South Wales had applied for an award to cover all clerical officers, male and female employed at the Water Resources Commission. No change was sought in the salaries of male officers, but claims were made for female officers which, if granted, in whole or in part, would have resulted in the salaries of female officers being increased. The union claimed that the female clerical officers were not receiving equal pay, and that there were separate salary and grading structures for male and female clerical officers. The union also argued that in order to achieve a fair application of the equal pay principles, it was essential that the salaries and gradings of the female officers be integrated in the salaries and gradings structures of male employees (p 322).

The Commission in Court Session considered the following questions:

> Whether the operation of the equal pay principles under the *State Equal Pay Case* 1973 with respect to the employees sought to be covered by the application is required to be determined on the basis that the applicant must establish that there is an anomaly, or a special and extraordinary problem or an inequity to which principle 7 (c) or principle 7 (d) of the principles of wage determination enunciated in the *State Wage Case - June and September Quarters* 1978 applies,?
>
> and if so,
>
> Whether there does exist any such anomaly, special and extraordinary problem or inequity.

The Commission considered the wage fixation principles established by the Australian Commission in the context of equal pay principles and came to the following conclusions:

> The Commission's general principles relating to the making of awards conform, as nearly as may be, to the principles of wage determination of the Australian Conciliation and Arbitration Commission announced on 14 September 1978 in that Commission's decision in the *Wage Fixing Principles Case* and reproduced as an appendix to this Commission's reasons for decision of 15 December 1978 in the *State Wage Case - June and September Quarters* 1978. The principles make no mention of adjustments to wages to give effect to the principles determined by the Australian Commission in the *National and Equal Pay Cases* 1972 or by this Commission in the *State Equal Pay Case* 1973. Principles 1 to 5 provide for the adjustment of wages and salaries every six months in accordance with the last two quarterly movements of the six capitals Consumer Price Index. Principle 6 provides that the Australian Commission will consider each year what increase in total wage or conditions of employment should be awarded nationally on account of productivity. Principle 7 provides that, in addition to increases awarded pursuant to principles 1 to 6 "the only other grounds which would justify increases in wages or salaries are" as itemised under the headings "Changes in work value, "Catch- up of community movements", "Anomalies" and "Inequities". If the language used in Principle 7 is interpreted according to its ordinary meaning, an increase in the wages or salaries which would be justified by the application of the principles of the equal pay cases can be awarded only on the grounds of change in work value, catch up of community movements, anomaly or inequity. [emphasis added] (1979 AR 321 at p 322-323).

The Commission was then taken to a number of cases in which the Australian Commission ignored those wage indexation guidelines in awarding increases to females based on the equal pay principles. (p 323-324).

The Commission concluded as follows:

The material before us shows us that during the currency of wage indexation eight cases concerning implementation of equal pay principles have been decided in the Australian Commission. It is probable that there have been other cases of which we are unaware. In none of the eight cases was the Commission constrained by the guidelines from awarding such sums that were necessary to implement equal pay, and a reference to the guidelines appeared in only two of the cases ... But in those two cases there was no suggestion that claims were being pursued within the guidelines on the basis of changes in work value, catch up with community movements, anomalies or special and extraordinary problems, and, in our opinion, the statements that the proposed orders would not conflict with the guidelines is not to be understood as an expression of opinion that the guidelines are applicable to claims made on behalf of female employees for the implementation of equal pay principles. We think they probably mean no more than that there were no conflict because the guidelines were irrelevant.

...

In our opinion the conclusion is inescapable that the Australian Commission did not regard the indexation guidelines as constraining the tribunal from giving effect to the principles it announced in the *National Wage and Equal Pay Case* 1972 (1979 AR 321 at 325).

And further,

The Australian Commission's expectation thus was that its new equal pay principles would be generally implemented by 30 June 1975. Two months before that date that commission introduced wage-indexation by its decision in the *National Wage Case April* 1975 ((1975) 167 CAR 18). It seems not unlikely that the Commission has not applied the guidelines to equal pay cases because of the timetable which it had laid down for the implementation of its equal pay principles. Perhaps it was thought that the 1972 decision conferred on employees something in the nature of a vested right. But whatever the reason, the fact is that the Australian Commission has not regarded itself as constrained by the guidelines from implementing the equal pay principles in cases which have come before it since the advent of indexation. In introducing its modified principles in the *Wage Fixing Principles Case* 1978, the Commission did not advert to equal pay, and we are quite unable to accept the argument advanced on behalf of the respondent that the new principles relating to inequities and service increments were designed to include the processing of equal pay claims. The decision referred to the new concepts as involving a

> "further relaxation of constraints", which would be a singularly inapt description if their introduction had the effect of applying guideline constraints to equal pay claims for the first time (1979 AR 321 at p 326).

At page 326 of the decision the Commission considers a number of cases and significantly the decision of *Dey* J in *Motor Transport (Female Salaried Officers - Salaries) Award Case*. This is a case in which *Dey* J found that the employer had failed to implement the equal pay provisions. His Honour found that it was not a case concerning relativities or inequities but the proper application of the equal pay principles and noted interestingly that it was "more analogous to the fixation of an appropriate rate in accordance with normal work evaluation principles" in the way in which the Australian Commission contemplates in its *National Wage Case September* 1975 decision where, "a fixation could take place with regard to new work for which there is no current rate". His Honour held that there was no barrier in the wage fixation principles to him reviewing the matter (at 321).

In finding that the general economic principles relating to the making of awards did not apply to claims to increase wages or salaries of female employees by the proper initial implementation of the principle of equal remuneration for work of equal value as enunciated in the *State Equal Pay Case* 1973, the Commission found:

> The basic principle which the 1973 decision introduced was the principle of equal remuneration for men and women workers for work of equal value, meaning thereby remuneration established without discrimination based on sex - see *Equal Pay Case* [1973

> AR at p. 439]. The decision laid down a procedure as to how the principle was first to be applied by raising the level of women's wages for a particular class of work to the level of men's wages for that class of work and it contemplated that, once that had been done, the level of wages thereafter would be reviewed from time to time without discrimination based on sex. It is on that basis that every claim for an award fixing wages for male and female employees is to be determined. (emphasis added) (p 328).

The underlined section of this extract supports my later analysis of the proper understanding of "discrimination" in the context of the equal pay principle, and in particular the prospective nature of the industrial relations system in its award making functions.

UNIVERSITIES (EQUAL PAY) CASE (1980 AR 616)

In the *Universities (Equal Pay) Case*, the Public Service Association contended that the 1973 *Equal Pay Case* had never been fully implemented qua the clerical staff at three universities (although the case did not ultimately proceed in relation to two of the universities). In substance, the application was that all "keyboard" scales established for stenographers and clerical assistants should be merged so as to create a single clerical scale. It was argued that the equal pay principle had not been fully implemented because the universities maintained a separate subordinate and inferior salary scale for a significant group of female employees, those comprising typists/office assistants and stenographers (p 618).

The clerks were able to progress through a fourteen year incremental scale followed by 12 grades. This contrasted with the position for stenographers for whom there was an eight year incremental scale, commencing

at first year under 17 years of age, followed by six grades. For typists, there was an eight year incremental scale followed by two grades. It was argued by the PSA that whilst the stenographers received a marginally higher rate in the first eight years of incremental progression they should receive the fourteen year incremental scale given to clerks by which they would then have access to a higher salary ceiling (p 620).

The case proceeded on the assumption that the clerical scale was a “male” scale while the “keyboard” groups, comprising stenographers, machine operators and typists/office assistants' scales were “female” scales. The evidence concerned comparisons between typists/office assistants and administrative staff in certain skills to demonstrate that the typist/office assistants carried out administrative work. Furthermore, it was shown that stenographers also carried out administrative functions and that there was an overlap of such functions so it was said that the keyboard group was of equal value with the work performed on the clerical scale (p 620).

The Commission at first instance considered that the point of comparison between clerks and stenographers and machine operators should probably be undertaken at the third year of service and then concluded that whatever the point of comparison adopted stenographers and machine operators were accorded equal pay with their male and female counterparts on the clerks general scale “having regard to the qualitatively different skills involve in the work” (p 622). The Commission at first instance considered that the typist/office assistants also have a junior rate scale and their salaries are lower than those

paid to stenographers and machine operators. This is for the reason that their skill is lower. The Commission considered, taking the broad view referred to in the 1973 *Equal Pay Case*, that the work value of these three groups is appropriately fixed by the three scales which have been established.

The test applied by the Commission at first instance was as follows:

> Whatever the reason for the predominant occupation of the 'keyboard' scales by females, it is not sufficient for the PSA to establish merely that such scales are 'predominantly female'; it has then to show that the rates are depressed by reason of this fact. Such a case was not made out by the evidence ... (p 623).

The Full Bench described the gender mix between the groups as follows:

1. The male clerical staff group is one to which at all relevant times females have had access and have in fact belonged (although as a minor group) and paid the same rates as males.

2. Stenographers and typists groups have traditionally comprised only female employees (p 624).

The principle which was applied by the Commission in this case was that of the 1973 *Equal Pay Case* which the Commission identified was in substance, but not in detail, the same as the Australian Commission's 1972 *Equal Pay Case*. Indeed the Full Bench observed that the new principle appeared to be identical with the principle laid down in Article 2 of the *Equal*

Remuneration Convention 100 adopted at the 1951 Session of the International Labour Conference, namely the principle of equal remuneration for men and women workers for work of equal value, which rates of remuneration were to be established without discrimination based on sex (p 625).

The Full Bench rejected the application for a single salary scale but nonetheless concluded that the adjustments made in 1973 were inadequate to implement equal pay and that the salaries for stenographers and typists needed further adjustment to ensure that the principles were fully satisfied (p 631).

In assessing the evidence the Commission concluded that whilst there was some overlapping work functions, it was not satisfied overall that the work value of the three groups was so similar that integration of rates should in justice take place (p 631).

The final adjustments made had regard to the fact that there had not been a full introduction of the equal pay principles and a general 4.5 percent wage increase was awarded by agreement after further negotiations between the parties (p 634).

It is clear that the Commission applied both at first instance (p 622) and on the Appeal the operation of ordinary work value principles. An illustration is given at page 630:

> Rather, we prefer the university's view that work value considerations are the basic reason for the differentiation between

> them and the salaries of clerks. We are prepared to accept that, at different steps in incremental scales based on age or years of service, work of different groups within the general clerical area might well have a different value. An example which comes readily to mind is that of two junior female employees of the same age who are accepted for employment, one within the stenographers group and the other within the typists group. If the first employee possesses and uses in the course of her employment shorthand and typing skills, or skills in machine operation, and the second employee possesses and uses typing skills or telephonists or office assistants' skills we are unable to conclude that on work value grounds both employees should necessarily be paid exactly the same salary scale. We fail to see why, in logic and fairness, the first employee should not have a legitimate claim on such grounds to be paid more than the second. If the comparison were then to be extended to include a newly-recruited junior clerk (male or female) it does not seem to us to be unfair or discriminatory for that employee's work to be separately assessed having regard to his or her qualifications and experience and the work performed and a rate fixed having regard to those considerations at a level different from (higher, lower, or in between) the rates for the other two classifications (p 630).

Finally, and most significantly, the Commission ultimately determined the proper value of the female rates by reference to the work performed by females simpliciter, and not by reference to any male or other comparator.

This case was the subject to some criticism. Ms Margaret Thornton in an article titled "(Un)Equal Pay for Work of Equal Value" (1981) (Ex 353) argued that the PSA tended to bring a case which was focussed upon showing work was identical in nature to that performed by a clerk rather than of equal value (p 474). It also put that the case demonstrated an absence of clear guidelines in determining the assessment of work of equal value. For example the question of educational attainment, a distinguishing factor regarding entry into the various scales was dealt with superficially. There is a reference to

Higher School Certificate qualification which does not appear to have featured in the judgement (Ms Thornton refers to some transcript references). She said that these educational qualifications as well as administrative experience were undervalued for those on the keyboard scales (p 475).

The author distinguishes between what she describes as a "similarity of work value" and "similarity of work content" (p 476), though it would have been helpful if this distinction had been further clarified.

The author argues for a broader perspective to give "more scope for relating the phenomenon of wage discrimination to the wider societal problem of sex discrimination in the workforce". This will overcome the "individualistic and unsystematic" presentation of the evidence which was undertaken, it was argued, by the PSA (p 475). It would avoid, for example, what the author describes as an underrating of manipulative skills of keyboard operators from the skills of clerks. Put another way, it was contended by the author that the remuneration for those on the keyboard scales was depressed because of their "female characterisation". This could have been remedied by the presentation of sociological and economic data pertaining to the segmented nature of the workforce, in conjunction with a comprehensive job evaluation study, which would have permitted a more meaningful, and hopefully more equitable, resolution of the application (p 477).

As I will later discuss in this report there are at least two difficulties with the approach proposed by Ms Thornton. Firstly there are serious difficulties

associated with job evaluation studies which I have discussed in relation to the occupations and industries. Moreover, there is no reason in principle (or one shown by the author) as to why a work value assessment could not achieve the same objective of a precise and comprehensive analysis of the work.

Finally Ms Thornton argues the need for a remedy in which it is possible to use the equal pay principle to compare female dominated occupations and male dominated occupations requiring comparable training and skill, such as nursing and carpentry, notwithstanding the dissimilarity of the jobs. I will return to this concept later in this section (p 478).

CONCLUSIONS AND FINDINGS FROM THE HISTORY OF THE IMPLEMENTATION OF THE EQUAL PAY CASE 1973 (NSW)

1. The wage fixation principle and in particular the then principle 7 did not constrain an increase in wages or salaries which would be justified by the application of the principles of the equal pay cases. In particular, equal pay cases did not need to be brought under or conform to the ordinary requirements and principles governing wages and salaries including the work value principle, catch up on community movements, anomaly or inequity: *Water Resources Commission Case.*

2. The *Water Resources Commission (Equal Pay) Case* makes it clear that the 1973 *Equal Pay Case* laid down a procedure as to how the principle was to be applied. Firstly, the level of women's

wages for a particular class of work was raised (by adjusting the basic wage) to the level of men's wages for that class of work. The principle also required that, once that initial adjustment had been undertaken, the level of wages thereafter would be reviewed from time to time without discrimination based on sex. It was on that basis that every claim for an award fixing wages for male and female employees was to be determined.

3. The Commission was not confined to the introduction of the equal pay loading and could alter awards so as to bring the award into conformity with the principle established in the 1973 *Equal Pay Case*.

4. An application under the equal pay principle is not a matter involving relativities, nor inequities arising from comparative wage justice concerns, but concerns the value of the work.

5. A case could be determined under the 1973 *Equal Pay Case* notwithstanding that s.88D of the 1940 Act does not apply: *Soap Makers.*

6. The principle established in the 1973 *Equal Pay Case* was the principle of equal remuneration for men and women workers for work of equal value which meant thereby that rates of remuneration would be established without discrimination based on sex as

contemplated in the *Equal Remuneration Convention.*

7. The *Universities Case* makes clear that the NSW Commission adopted *Equal Remuneration Convention* ILO No. 100 as opposed to the strict application of the equal pay for work of equal value principle in the 1972 *Federal Equal Pay Case.*

8. The principle could be applied to rectify non concurrence with the principle in cases concerning wages and allowances, including cases where the employer had purported to apply equal pay by the payment of some increases in wages: *Water and Sewerage Employees (No 2); Motor Transport.*

9. In some cases the test which was effectively applied by the Commission was one whereby the Commission determined whether employees were discriminated against because of their sex. However, these cases were limited and often were ultimately decided on the basis of comparative work value assessments: *Water and Sewerage Employees (No 2).*

10. The Commission found no difficulty in applying the equal pay principle in a case where there is "discrimination" within the area of one award having regard to the valuation of work. Thus the Commission found in the *Soap and Candle Makers Award Case* that the work of female employees cannot be said to be of less

than equal value when compared to the similar, but not identical, work of male employees in relevant classifications.

11. The *Universities Case* ultimately turned upon two requirements. The first was that the occupation being compared was "predominantly female". The second requirement was that the rates were depressed by reason of this fact. This did not necessarily entail an assessment of "discrimination" as the question so expressed might involve broader issues not contemplated in anti-discrimination legislation. Thus, the question may require an assessment of the female characterisation of an occupation, the effects on wages when an occupation or occupations are female dominated or a case where the consideration is a female occupation simpliciter.

12. The valuation of female work in the context of an equal pay application could be assessed by examination of the work of the females simpliciter, and did not necessarily require comparison with male or other work: *Universities.*

13. The means of rebutting the presumption that margins are properly set is by means of a work value inquiry: *Motor Transport.*

14. Consideration of the equal pay principle involves a work value assessment conducted at a broad basis rather that the basis of

individual comparisons of work performed by individuals: *Motor Transport.*

15. The absence of identical work performed by men and women does not preclude an equal pay assessment: *Soap Manufacturers.*

16. The process of award fixing whereby classifications and incremental steps are able to be determined, notwithstanding the differentiation in the work involved (and where there is an averaging process conducted to fix rates), can be extended to apply to the wage fixation of females where work is also differentiated (*Motor Transport (Female Salaried Officers - Salaries) Award).*

17. The fact of exclusively female employment does not preclude a comparison with other male work providing that there are bases to that comparison - for example where there is a female award and parallel male award for similar although not identical work: *Motor Transport.*

18. The *Universities Case* demonstrates that the Commission will apply traditional work value assessments to the comparison drawn between male and female occupations. The precise formulation in the *Universities Case* was whether the work value of the three groups in question was "so similar" that an integration of rates

should occur. The Commission also had regard to the history of the setting of rates at or about the time of the setting of the equal pay loading in order to judge whether there was some failure to properly or fully implement the equal pay decision.

19. The existence of interchangeability in the work performed by males and females is a factor to be taken into consideration when establishing female rates against male rate comparisons: *Motor Transport*.

20. The 1973 *Equal Pay Case*, by reference to principle 5(b) of the 1972 *Federal Equal Pay Case*, allows for the work value assessment of different types of work as between men and women. However, in the ordinary course of events the Commission will find difficulty in making findings as to equality when the work is quite different particularly in the absence of other material demonstrating the value of the female work: *Ice Cream Manufacturers*.

21. The heaviness of work was treated differently in the cases. In the *Soap and Candle Manufacturers Case* the heaviness of the work did not receive as much weight as the care, application and concentration of tasks performed by women. Yet, in the *Ice Cream Makers Case* the difference in weights handled by the general hands was seen as a distinguishing feature in favour of male workers.

22. The Commission was prepared to recommend a variation in overaward payments to address an issue arising under the Equal Pay Principles.

IMPLEMENTATION OF THE 1972 FEDERAL EQUAL PAY CASE

As noted earlier the 1972 Equal Pay decision contemplated work value comparisons being conducted at a number of different successive levels.

1. At the primary level a comparison would be made between male and female classifications in the same award;

2. If such comparisons were unavailable or inconclusive then comparisons could be made between female classifications within the award or in different awards; and

3. In some cases comparisons between female classifications in one award and male classifications in another was permitted ((1972) 147 CAR 172 at 180).

Ms Christine Short, in her article "Equal Pay - What Happened?" (Ex 210, attachment C), argues that the Federal Commission never applied this last basis for work value comparison. However, correct that assessment may be, this is not so in the NSW jurisdiction where in one case such comparisons

were made: *Re Motor Transport (Female Salaried Officers - Salaried) Award.*

PRE 1980 CASES

In *Wool Brokers Staffs' Association v Albany Wool Stores Pty Ltd* ((1976) 177 CAR 164) the Commission made the following findings:

1. The test in the 1969 case which required an examination of both equal value and whether an employee would perform the same or similar work was different from the test in the 1972 case where a different standard was employed by reference to equal value alone (p 167).

2. The test to be undertaken was in relation to the work or classification of work and not the individual performing it (p 169).

3. In order to conform with the 1972 decision a system of job classification had to be adopted - reference was made to the Insurance Officers award in which case a joint study of work was performed by the employers and the union (p 170).

4. The Commission altered the existing classification scales within the award in accordance with the equal pay principles (p 172).

5. Whilst the Commission recognised that comparisons between rates

of pay in awards would involve comparative wage justice assessments this was no bar to the assessment of rates of pay under the Equal Pay Case 1972 which must involve some degree of comparison of rates of pay for comparable work (p 172).

In *The Municipal Officers' Association of Australia v The City of Geelong and Others* ((1976) 179 CAR 819) the Commission considered the manner in which equal pay should be applied by parties when the parties are not in agreement. In particular the Commission considered a specific difficulty concerning transfers and advancements at particular classification levels. The Commission determined that the application of equal pay principles should not disturb pre-existing relativities as they existed within the female classifications. In reaching its decision the Commission noted that uniformity so far as possible is the aim of the Commission together with early completion of the long drawn out process of introducing equal pay (p 821).

Commissioner *Vosti* heard an application dealing with the introduction of equal pay in relation to the *Municipal Officers' (State Energy Commission of Western Australia Salaried Officers') Award* 1976 ((1977) 183 CAR 382). The major part of the award was developed by consent by the parties who were congratulated by the Commissioner for obtaining such consent in "this somewhat difficult area of introducing the concepts of equal pay and equal work in accordance with pronouncements of Full Benches of this Commission" (p 383).

The Commissioner determined that one of the issues to which he had to have regard was whether or not the variations contemplated conflicted with wage indexation guidelines and/or principles and concept of equal pay and equal work. On this question he found that the variations was not in conflict with wage index principles and guidelines (p 385).

In determining a separate issue as to the retrospectivity of the award variations the Commissioner noted his obligation to act in accordance with Commission tenets namely to settle disputes having regard to good conscience, equity and the substantial merits of the case (p 386).

In *Municipal Officers' (SA) Award,* 1973 ((1977) 184 CAR 64) the Commission introduced new definitions for classifications arising pursuant to an earlier application of the equal pay principle to the subject award. The application arose out of misunderstandings arising after the final implementation for equal pay with some employers regarding the discretion to reclassify as being "virtually unlimited". In order to address these problems the Commission granted the application to define the classifications and left the door open to possible ongoing review of classification levels. The Commission emphasised that equal pay is "very long overdue" for Municipal Officers in South Australia and indicated that equal pay should be implemented with uniformity and complete fairness as soon as possible (p 65).

The Commonwealth Commission heard an appeal against an order varying the *Local Government Officers'(WA) Award* 1975 ((1977) 191 CAR 842)

in relation to equal pay. The issues argued by the Appellants arose from the 1972 Equal pay Decision and the method of its implementation for female employees covered by the *Local Government Officers' (WA) Award* 1975. The Commission found that notwithstanding the considerable length of time which had elapsed since the decision had been made it was in the public interest to hear and determine the appeal. The Commission did not, however, detail the proper application of the equal pay principles, rather agreeing with the decision of the Full Bench on 29 October 1976 in the *Clerical and Salaried Staffs (Wool Industry) Award* 1971.

While the Commission made some minor variations to the award made at first instance, the Commission declined to find a nexus between the subject award and West Australian public servants. The Commission noted significant differences between the areas including different progression within the scale, the division of rates in the public service into male and female rates and the existence of a whole grade in the public service not existing in the subject award.

In *Federated Clerks' Union of Australia and Chrysler Australia Limited* ((1977) 192 CAR 965) the Commission considered a case where female clerks had a lower progression ceiling than male clerks. The Commission expressed the view that a translation of one set of rates into another could not occur without consideration and evaluation of the work actually performed (p 966). The Commission reached the conclusion that while the present structure of the award failed to adequately reflect a non sexist approach there was in itself

not sufficient justification to alter rates of pay. The Commission found difficulty in finding equivalent value for female employees. However, it was said that restructuring of the award might result in a common salary scale and the parties were directed to confer accordingly.

In *Municipal Officers (Tasmania) Award* 1970 ((1981) 265 CAR 17) the Commission refused an application by the MOA claiming that equal pay had not been properly implemented in the subject awards in 1975. The refusal was based on the evidence before the Commission which specifically found that it is not enough to show that salary structures of the subject awards did not conform to MOA awards in other states or other awards determined by Full Benches.

The Commission, however, found generally that the implementation of equal pay by consent and in good faith is not immutable even after a substantial time lapse if it can be shown that the implementation was not in accordance with the principles.

NURSES CASES

A further insight into the implementation of 1972 equal pay principles is gained in two cases concerning nurses: *Re Private Hospitals' and Doctors' Nurses (ACT) Award* 1972 ([1986] 13 IR 108) and *Re Private Hospitals' and Doctors' Nurses (ACT) Award 1972 and Other Awards* [1987] 20 IR 420.

COMPARABLE WORTH: THE 1986 NURSES CASE

In the first of these decisions the Australian Conciliation and Arbitration Commission decided that it would be appropriate that applications under the 1972 principle should be processed in accordance with the procedures laid down in principle 6 of the then wage fixation guidelines. It confirmed that the 1972 Equal Pay principle was available to be implemented in awards in which it had not been implemented but that all such applications should be processed through the anomalies process (p 114). This is in contrast to the NSW jurisdiction where as earlier noted the equal pay cases could be dealt with independently of the wage fixing principle procedures.

The Commission rejected an argument that the 1972 Equal Pay Principle encompassed a concept of comparable worth. It appears from the decision that the applicants did not clearly postulate the concept of comparable worth for which they contended. The Commission noted that the ACTU had not defined or explained the doctrine of comparable worth other than to say that it was a method of job evaluation used in the United States of America to implement equal pay legislation in that country ([1986] 13 IR 108 at 110).

In addressing the "comparable worth" argument, the Commission stated that:

> The [1972] principle requires comparisons between male and female rates to be made firstly within an award. Where such comparisons are unavailable or are inconclusive as may be the case where the work is performed exclusively by females it allows for comparisons to be made with female classifications in other

> awards and in some cases comparisons with male classifications in other awards. It was contended that this allows for comparisons to be made with rates outside a particular occupation where such comparisons are not available within the occupations. Presumably it is on this basis that the 1972 Equal Pay Principle is said to equate to the doctrine of comparable worth (p 110) (my emphasis).

In rejecting the argument that the 1972 Equal Pay Principle could be equated with a concept of comparable worth, the Full Bench stated that:

> It is clear that comparable worth and related concepts, on the limited material before us, have been applied differently in a number of countries. At its widest, comparable worth is capable of being applied to any classification regarded as having been improperly valued, without limitation on the kind of classification to which it is applied, with no requirement that the work performed is related or similar. It is capable of being applied to work which is essentially or usually performed by females. Such an approach would strike at the heart of long accepted methods of wage fixation in this country and would be particularly destructive of the present Wage Fixing Principles. The countries to which we were specifically referred in which the doctrine is applied, namely Canada, United States of America and the United Kingdom, have very different industrial relations backgrounds from our own. In addition, different approaches have been taken to the doctrine in each of these countries.
>
> Moreover as explained to us by the Commonwealth, in the United States at least, the doctrine of comparable worth refers to the value of the work in terms of its worth to the employer. Quoting from a decision of the US 9th Circuit Court of Appeal, in a case entitled *American Federation of State County and Municipal Employees v. The State of Washington* the Commonwealth said:
>
>> The comparable worth theory, as developed in the case before us, postulates that sex-based wage discrimination exists if employees in job classifications occupied by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar.
>
> This is quite contrary to what the Full Bench of this Commission envisaged in the 1972 Equal Pay Principle. The Principle requires equal pay for work of equal value to be implemented by work value inquiries carried out in the normal manner in which such inquiries are conducted in our wage fixing environment. This is clear from

> the methods of comparison laid down in paragraph 5 of the Principle. In addition subparagraph (c) of paragraph 5 specifically rejects the assessment of the work on the basis of its value to the employer, stating as it does that "The value of work refers to worth in terms of award wage or salary fixation, not worth to the employer".
>
> In our view the use of the term "comparable worth" in the Australian context would lead to confusion, and in particular, we believe that it would be inappropriate and confusing to equate the doctrine with the 1972 principle of equal pay for work of equal value. For all of these reasons we specifically reject the notion. (p 113) (my emphasis).

It appears that there have been no further attempts in the federal, or indeed the NSW, jurisdictions to expressly argue that the 1972 Equal Pay principle encompasses or can be extrapolated to encompass a concept of "comparable worth", such as exists in other jurisdictions.

THE 1987 NURSES CASE

In the second case the Commission considered the application under the work value, anomalies and inequities and allowances principles. I will only focus on the equal pay components.

In accordance with the decision in the 1986 *Nurses Comparable Worth Case* (discussed above), a claim was then brought in respect of the relevant nursing awards and determinations before the Anomalies Conference. At the conclusion of the conference, the President, finding an arguable case existed, referred the awards and determinations to the Full Bench of the Commission.

In relation to the anomalies claim, the Commission found that the conditions for a wage rise had been met, inter alia, on the basis of the non application of the 1972 Equal Pay case principle to the relevant awards (p 436).

In so finding, the Commission opined that "all that has happened is that differences between male and female rates within nurses awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains" and expressed the view that the situation, as it applied to nurses "is a special and isolated factor as ... it [is] unlikely that there are many occupations, in which, in 1987, wages are still depressed because of the non-application of the 1972 decision" (p 432).

The Commission stated that:

> We are satisfied that the RANF has made out its basic contention that the rates for Commonwealth nurses were assessed in 1970 prior to the 1972 *Equal Pay Case* on the basis that nursing is a predominantly female occupation; that this assessment has caused the rates to be depressed, and that there has been no subsequent adjustment to fully redress the situation ((1987) 20 IR 420 at p 432*)*.

This conclusion is significant to reaching an understanding as to the Commission's approach to the application of the equal pay principles. The circumstances referred to in that extract were as follows:

1. In 1958 the Commission had conducted a work value inquiry and

granted to qualified nurses in the first year of service the same margin as applied generally to tradesmen in the ACT. This margin was again increased in 1966 on work value grounds.

2. However, in 1970 a Full Bench of the Commission further assessed the salaries scale for nurses having regard to the wages paid to nurses elsewhere, wages paid to tradesmen and wages paid to other categories of hospital employees in Canberra. The Commission concluded that as nursing was a predominantly female occupation the Commission had been "more greatly influenced by the rates payable to other classifications of females than to those payable to males" (p 429). The Bench also stated that the fact that all parties sought the same rate for males and females had the effect of bringing into the comparisons made the rates paid to certain females who had benefited from the Equal Pay case. The Commission concluded that the result was the award provided somewhat higher rates for females than would have otherwise been prescribed. In the result the rate for the first year registered nurse became less than the rate for the tradesmen.

The significance of the 1987 decision was that the Commission concluded that this basis for assessment of female rates was inappropriate having regard to the equal pay principles.

The Commission then indicated the proper basis upon which the

assessments should be made as follows:

> We appreciate the fact that movements in New South Wales nurses' rates may have been an important element in assessing the wage settlements for Commonwealth nurses in the 1970s, and that pronouncements of the New South Wales Commission suggest that equal pay was fully implemented in that State. All of the indications however point to a situation of no positive application of the 1972 decision in any of the consent settlements in the Commonwealth area. An examination of wage rates within the ACT, for example, indicates no advance since 1972 by nurses as compared with male tradesmen. In our opinion all that has happened is that differences between male and female rates within nurses awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains (p 432).

The significant conclusions that can be drawn from this extract are as follows:

1. The reference to full implementation of pay in NSW is no doubt a reference to the rebuttable presumption referred to in the 1973 NSW Equal Pay Case.

2. This did not constrain the full implementation of the 1972 Equal Pay Case in this instance because the Commission considered that the principle had not been applied. Indeed, it indicated that there had been no positive application of the 1972 decision and was at least impliedly critical of consent settlements which had not given effect of the principle.

3. It is quite clear that the Commission considered the comparison

between nurses and male tradesmen to be an acceptable application of the equal pay principle.

4. The Commission found that "original sex bias" was caused by an assessment on the basis of a predominantly female rate.

In noting the limited application of the inequities principle in any matter before a tribunal, the Commission stated:

> ...the inequities principle is one of limited application and is subject to a number of very strict conditions. It involves a comparison of classes of work which must be truly like with like as to all relevant matters. There must be similarity in respect of the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed. Moreover the principle is subject to a number of overriding considerations, and we refer to two of these: namely that there must be no likelihood of flow on and the increase must be a once-only matter. Any purported resolution of an inequity which invites applications for pay increases by other workers is contrary to the principle. We emphasise that the principle deals with "The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason". It is inherent in the principle that resolution of the inequity must remove the dissimilarity in the rates of pay. Any purported resolution which fails to do this or which creates a further inequity is outside the terms of the principle. (p 438)

The Commission, noted that the main focus of the evidence was on work value changes (p 440). Seven factors were put forward for consideration in connection with work value, being the assessment of change for work value; new categories of work; revised career structure; transfer of education to colleges; the effect of shortages on the work value of nurses; the national character of nursing; and the need for in service and continuing education programs (p 441).

The Commission found that there had been changes in the nature of the work, skill and responsibility of nurses which constituted a significant net addition to work requirements within the terms of Principle 4 of the Wage Fixing principles (p 443).

The Commission also considered a claim that professional rates should be established for nurses. Part of this claim was based upon the Equal Pay principle. The claim was in essence a payment of salaries commensurate with those paid to other professionals in the health industry. For example reference was made to physiotherapy and medical technology. The Commission considered that the wage comparisons and the duty statements supplied in the case to be of no assistance in the analysis of the type required by the 1972 *Equal Pay Case*. However, the Commission did not rule out comparisons of that kind being applicable to equal pay considerations.

The Commission expressed some doubt as to whether the non application of the 1972 Equal Pay Case principle (earlier in time) could be used to justify the lifting of the wage rates for nurses to a professional level. This was because the RANF's final claim seeks not merely to correct the sex bias but to lift the rates for all nurses male and female to a new level on the ground that nurses should now be afforded the professional status which hitherto has been denied them. The Commission considered that this went well beyond the 1972 decision (p 446).

AUSTRALIAN MANUFACTURING WORKERS' UNION AND OTHERS V ALCOA OF AUSTRALIA LIMITED AND OTHERS (THE WEIPA CASE) ((1996) 63 IR 138)

The 1972 *Equal Pay Case* was again considered by the Australian Industrial Relations Commission in the *Weipa Case* (63 IR 138). The Commission affirmed the Principle. It is interesting to note that the Commission confirmed the continuation of the 1972 Equal Pay Case principles notwithstanding the inclusion in the federal legislation at the time of s.170BA which related directly to equal remuneration for work of equal value and the adoption of ILO *Convention* 100 by Australia.

The Commission determined that the principle did not assist the union's case (which in essence concerned the introduction of a system of individual contract) as no part of the union's case "relied upon any act of discrimination by the Company referable to the sex of the worker, nor was any part of the award sought aimed at remedying any such act of discrimination" (p 159).

Whilst the Commission refers to discrimination in this context it is doubtful that the Commission is applying a discrimination test simpliciter. This conclusion is reached for the following reasons:

1. In referring to the 1972 principles the Commission identifies that the expression "equal pay for work of equal value" means a fixation of award rates by a consideration of work performed irrespective of the sex of the worker (p 159). Thus there is a specific restatement of a test not directing itself to discrimination *per se*.

2. Again, in looking at the elements of the 1972 case it is identified that the proper approach is for the arbitrator to determine whether differences in the work performed were sufficiently significant to warrant a differentiation in rate and also whether restrictions on the performance of work by females warranted any differentiation in rate based on the relative value of work consistent with normal work value practices (p 159). This does not apply tests consistent with those used in anti-discrimination legislation.

3. The Commission identifies that the underlying principle in the 1972 *Equal Pay Case* and indeed subsequent work value principles are directed to ensuring "fairness and equity in award wages" (p 159). This is a very broad concept well outside a direct consideration of discrimination.

4. The Commission seems to have been most concerned with the fact of the case before it had not proceeded in a manner consistent with the proper application of the 1972 *Equal Pay Case.* There had been no examination of the work in question and assessment of its worth in money terms (p 160). This proposition was put "even assuming those principles are capable of application outside of the consideration of male/female wages".

5. The Commission considered that neither the *Equal Remuneration*

Convention or *Recommendation* nor the provisions of part VIA of the Act were relevant to the issues in the dispute. In coming to this view the Commission puts in perspective its use of the expression "discrimination" by expressing its reasons for the decision as follows:

> Discrimination in terms of equal pay for work of equal value based upon sex is not here the complaint of the ACTU and unions (p 161).

The Commission makes some important distinctions from the 1969 principles which were restricted to the analysis of award wages as follows:

> These exercises are undertaken by the Commission by way of an assessment of wage rates for work within classifications in the relevant award and wage rates for relevant classifications in other awards. With limited exceptions work value exercises have not been undertaken in relation to overaward payment (p 159).

This observation was significant in the instant case as the award was directing itself to the conditions applicable in various individual contracts. The Commission also doubted whether the 1972 principles were capable of application outside a consideration of male/female wages. It said that it was clear from those principles that it is not open for the Commission to automatically apply an equal for work of equal value approach or to a "formula" without undertaking the examination of work in question and an assessment of its worth in money terms.

The Commission did confirm, by answer to an argument from the company in that case that it valued the work of certain employees more highly

than others, that such an approach was at odds with the approach taken by the Commission when undertaking any work value exercise. The Commission made clear that it did not take into account the value the company places on the workers in question (p 160).

COMMENTARIES ON THE IMPLEMENTATION OF THE 1972 PRINCIPLE

Given the comparatively few commentaries that are available dealing with the 1972 and 1973 *Equal Pay* decisions and their implementation I formed the view that it was important to identify both the key conclusions of those commentaries, and also to contrast the position taken by some of the commentators with the views that I have reached, as a result of examining the original case law applying the equal pay principles. This view is strengthened by the heavy reliance of the parties upon commentaries rather than analysis of the actual decisions of the Federal and NSW Commissions.

Ms Christine Short, in an article entitled "Equal Pay - What Happened?" (1986) (attached to Ex 210), argues that part of the wages gap is attributable to the failure to fully implement the 1972 pay decision by reference to the 1986 *Nurses Case*. She raises the issue as to whether low paid female jobs such as nursing and typing have been properly assessed for work value relative to male jobs. She also raises the question of what is equal for the purposes of assessing equal value under the equal pay decision (p 321).

Ms Short argues that the change brought about by the 1972 case in

comparison with the 1969 decision was in fact small. It is argued that before 1972 male and female work was compared to see if it was exactly the same or very nearly. After 1972, work was compared to see if it was similar, looking at work content or work tasks rather than making any real attempt at valuing female work on more general criteria (p 325).

She illustrates this point by reference to American and British practices of job evaluation. In job evaluation it is argued each job is separately assessed for responsibility and skill and working conditions by looking at the task involved in each job and then scoring on these general criteria. Then when the jobs, especially different jobs, (her emphasis) are compared it is by using these general criteria scores. In Australia, it is argued that the comparison is still made at the task level, looking for similarities, rather than the more general level where different jobs can be compared. This is said to arise because Arbitration Commissions have never or rarely had to compare very different jobs (p 325). Ms Short also refers to a reference in the 1972 decision where the Commission indicates that 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 (p 323).

The failure is said to stem from the Commission's approach to past work value cases. It is said that the Commission exercised a broad judgment in such cases rather than more scientific method of work assessment. It is also said the Commission is not familiar with the process of comparing dissimilar work between males and females (p 322-323).

It is also put that there have been very few cases in the State and Federal areas implementing the equal pay principles. In particular Ms Short refers to the 1986 *Nurses Case* and the Anomalies Decision which then followed. As to the 1986 decision she refers to the finding that the equal pay principle is extant in the Nurses Decision and notes that this may seem reasonable but may not correct the position for women where the 1972 principle had been applied but incorrectly (p 331).

She concludes that Australia's wage fixing processes have discriminated against women workers despite the equal pay decisions. The gap has not been removed because of the Commission's reluctance to take "work value into the area of comparing dissimilar work" and because of the failure of unions to take such a case to the Commission (p 332). Interestingly, Ms Short argues that "comparable worth can really be rewritten in Australian terms as comparative work value, not just between the same occupations in different industries (like comparative wage justice) but between similar and even dissimilar occupations in different industries" (p 329).

The Short article was written before the 1987 *Nurses Case.* As a result of that fact some of her conclusions are invalid. The 1987 *Nurses Case* provided that misapplications of the 1972 decision may in fact be corrected in accordance with the equal pay principle. Furthermore, the Commission applied or at least apparently applied the principle by comparing dissimilar work namely nurses and tradesmen. It did this at least indirectly because the anomaly that it

corrected was based upon an error it had found in an earlier Commission assessment in which the Commission had relied upon the predominantly female nature of nursing to require comparisons between female work rather than (as historically had been the case) comparisons with male tradesmen.

Ms Rosemary Hunter in her article "Women Workers and Federal Industrial Law: From *Harvester* to Comparable Worth" (Ex 232) commented upon the introduction of the 1972 principle and contended that 'equal pay' was still not wholly conceded (p 161). She refers to the ignoring of comparisons with male classifications in other awards in favour of comparisons between female classifications and other female classifications. Ms Hunter contends that the component of the equal pay principle providing for comparisons between female employees in one award and male employees in another award has been ignored by the Commission, she contends that comparisons have been conducted between female classifications and other female classifications and that this has resulted in "the traditional undervaluation of women's work being perpetuated". She relies in support of this proposition on an article by Ms M Gaudron "Women in the Workforce and the Elimination of Discrimination - Whose Responsibility?" *Labour History No. 42 (May 1982) 106* at 107 (p 163).

However, this assessment was made upon the basis that an Anomalies Conference had been convened in April 1986 after the 1986 *Nurses Case* and that the Anomalies Conference had found an arguable case for ACT nurses but that by November 1987 the Anomalies Board had still not met to hear the case (p 169). The difficulty with this proposition is that the 1987 *Nurses*

Case had been decided by this time.

In addition the reference to Ms Gaudron's article somewhat overstates the position in fact put by Ms Gaudron, which was that "whilst the industrial tribunals have embraced the concept of equal award wages, real questions arise as to whether in areas of work which are traditionally regarded as "women's work" proper comparisons were made to bring about genuine equality" (Gaudron p 109). While this statement may extend to comparisons between female classifications, it neither expressly states that, nor does it refer to any examples. Further, the statement tends to extend to a much broader criticism of the equal pay process than a limitation to comparisons between females. Considering the significance of Ms Hunter's claim (as demonstrated by the parties' reliance on her work) and given the existence of at least one reported case that would have formed the basis of a proper examination of this issue (namely the 1987 *Nurses Case*) Ms Hunter's views in this regard attract less weight than might otherwise have been the case.

Ms Rafferty, in her article "Equal Pay: the Evolutionary Process 1984-1994" (annexed to Ex 210), indicates that there was an absence of work value assessments, particularly comparing dissimilar work as part of the implementation of the equal pay principle. She relies upon the work of Short in coming to this conclusion (p 453).

Ms Rafferty compares the work of Ms Short and Ms Bennett. She indicates that Ms Bennett speculates that the resource implications of full work

value arbitration, coupled with women's under-representation in union hierarchies, and the systematic combination of unions and employers over the years to the detriment of women workers all contributed during the period to ensure the maintenance of gender based inequalities. Ms Rafferty indicates recent case studies have confirmed the resource intensive nature of the equal pay process such studies describing it as "exhausting, frustrating and stressful" (p 453).

Furthermore, Ms Rafferty considers that Ms Bennett's observations in relation to women's involvement in union hierarchies during that period is also insightful. She says that contemporary evidence suggests that equal pay benefits flowing to women through arbitrated cases in recent years can be directly attributed to women's employment in the union movement - as women's participation in the labour force increased, so has their occupation of positions in unions. Statistics show that from 1973 to 1994 women's labour force participation increased from 41.4 per cent to 52 per cent (Ex 210, tab D, p 453).

Ms Rafferty argues that the equal pay principle requires a comparative evaluation of the work, taking into account those factors identified as central to the Commission's work value principle, namely, the nature of the work, the skill and responsibility required and the environment in which the work is performed. She argues that there is subjectivity inherent in the process and that the Commission in the 1972 *Equal Pay Case* acknowledges this by saying that the evaluation process requires the exercise of a broad judgment (p 452).

However, Ms Rafferty appears to suggest that in reality there are not substantial differences between the concepts of pay equity, comparable worth and the equal pay principle established in 1972. The principal difference with pay equity seems to be that more regard is paid to all forms of remuneration (p 452). As to comparable worth, and by reference to the 1986 *Nurses Case*, Ms Rafferty contends that "in reality, the Commission's rejection of the concept of comparable worth was more apparent than actual" (p 456). She states further:

> Commission decisions both before and after the Comparable Worth Test Case showed that the Commission was not and is not averse to a more objective test for evaluating women's work. The methodology adopted in the 1985 Australian Public Service Therapists Case, for example, was not based on establishing similarity of work but on comparability of qualification and application of scientific principles in day to day work, in addition to standard work value factors, including work environment, level of autonomy, responsibility, accountability and complexity of work (p 456).

She also points to the *Child Care Workers Case* (Print J4316) in 1990 where training experience between two dissimilar classifications was considered. In essence it is argued that unless "additional, objective measures to facilitate comparisons between work in feminized occupations and gender neutral or male dominated occupations" is utilised there may not be a fully effective use of the work value principle to address equal pay problems (p 456).

However, this assessment again does not bring into consideration the Commission's decision in the 1987 *Nurses' Case*. It would be difficult to conceive how a proposition could be put that either the Equal Pay principle and/or the Work Value principle *per se* did not act reasonably effectively in

reviewing the position of nurses in that case.

As noted earlier in this section, Ms Thornton (Ex 353) adopts a similar approach as she argues that the focus of the applicant's case in the *Universities Case* was on similarity of work content rather than on similarity of work value. She also argues for some job evaluation process to remove the so-called subjective elements of the Commission's decision.

Relying upon Ms Short's article, Professor McCallum contends that few female dominated occupations received wage increases through work value determinations. He refers to the attempts to obtain comparable worth changes in the case of nurses (Ex 210 para 10).

Ms Bennett, in her article "Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission" (Ex 360), contends that the failure of women's groups both in 1972 and 1985 to bring about non discriminatory wage fixing practices within the Commission can be attributed to two factors:

> First, to their inability to formulate a strategy based on an adequate understanding of how wage fixing practices within the Commission reproduce gender-inequalities exogenously generated; second, at a more general level, to an inability to comprehend how Commission practices and doctrine were and are shaped by its environment, perceptions and objectives (p 533).

For example, Ms Bennett considered that one of the difficulties associated with introducing comparable worth into the Australian industrial

system was that “legal concepts cannot be shorn from their institutional and political contexts and simply transferred across national jurisdictions” (p 534).

The central thesis in Ms Bennett's paper is that the 1972 Equal Pay Principle expressed a commitment to non-discriminatory wage discrimination, but the wage fixing practices used to implement this policy, “incorporated elements that reflected the gendered nature of women's workforce participation”, the two key elements in this regard being work value and consent awards (p 534).

Ms Bennett challenges the notion which is found in much of the literature that the work value principle is deficient in implementing equal pay principles because of its broad and flexible nature, as opposed to the so-called rigour of job evaluation for comparable work processes. Ms Bennett says that it is necessary to realise that the doctrinal flexibility of the Commission in relation to the work value principle is essential, because the Commission is required to reconcile the tensions between its various objectives - industrial peace, economic policy, industrial justice and equity (p 536). She goes on to say that it was precisely this flexibility which was lacking in the comparable worth doctrine. This lack of flexibility partly reflected how the doctrine had developed in a different kind of legal institution (that is conventional law courts). Comparable worth required the application of job evaluation schemes to work which schemes were insufficiently flexible to accommodate the flexibility required to administer the industrial jurisdiction. Comparable worth offered the dual problems of inflexibility in developing industrial remedies and creating limits on when and how the doctrine could be invoked. In short, the failure of the comparable worth and

job evaluation scheme in part lay in those systems being more akin to court based overseas systems than to an industrial system dealing broadly with issues of wage fixation and industrial justice. Ms Bennett eloquently identifies the difficulties faced with this approach as follows:

> Rather than arguing for the adoption of inflexible, and therefore unacceptable, wage fixing policies, it might have been better if more attention had been paid to the manner in which the existing wage fixing principles reproduce, or at least perpetuate, gender inequalities (p 536).

Ms Bennett proceeds to identify the type of approaches that might be adopted to overcome these difficulties with the use of work value criteria in the equal pay concepts. This would make more effective the implementation of the 1972 equal pay principles.

In her statement of evidence (Ex 233) Ms Bennett refers to the concepts of equal pay and work value and their relationship to redressing undervaluation of women's work.

She in fact refers to three concepts or stages in relation to equal pay. The first concept was the 1969 Equal Pay Principle. The second was the 1972 Equal Pay Principle. The third concept is to some extent prospective in that it contemplates progress towards the implementation of equal pay by critically reviewing wage fixation practices and procedures in the light of current knowledge. This concept arose from research which cast doubt on the idea that wage fixation practices developed with respect to male work could be used fairly evaluate women's work. The research which was often historically based

indicated that wage fixation principles/practices reflect the social content in which they are devised. Thus the notion involves the development of non-gender-biased wage fixing practices which need to be sufficiently open ended to develop over time by the means of case law (paras 24 and 57).

In her statement of evidence, Ms Bennett again returns to the question of whether indeterminacy of work value renders the concept inadequate to redress undervaluation of work in contrast to systems such as job evaluation. She answers the question in the negative, and considers that the work value system offers superior advantages because it is based within the collective labour or industrial law system, as opposed to a prescriptive, individual-based, comparator driven evaluation system, usually based on a court model. Job evaluation systems present significant problems as they contain gender bias in their own right. The prescriptive nature of the system is incompatible with broad based solution to undervaluation of women's work. As to the difficulties of the work value system and how those might be addressed, I will return to these in the next chapter dealing with work value.

I now turn to a consideration of the relevant ILO Conventions.

INTERNATIONAL LABOUR OFFICE CONVENTIONS

The foregoing discussion of the 1972 Equal Pay Decision indicates the relevance of ILO *Convention* 100 to this Inquiry. I note that the third Term of Reference includes ILO Conventions as a matter to be considered in making

recommendations in this Report, and it is convenient for me to address those conventions now. I note that ILO *Conventions* 100 and 111, together with the United Nations *Convention on the Elimination of All forms of Discrimination against Women* (CEDAW), and Article 119 of the *Treaty of Rome* appear as Appendix No. 9 and Appendix No. 10 to this Report.

Convention No. 100 was ratified by the Australian Federal government in 1973, as was ILO *Convention* 111 (the Convention concerning Discrimination in Respect of Employment and Occupation). CEDAW was ratified in 1983. The ratification of ILO Conventions states, *inter alia*, as follows:

The Government of Australia having considered the said Convention hereby confirms and ratifies the same for and on behalf of Australia and undertakes faithfully to carry out the stipulations therein contained.

In relation to the adoption or use of ILO Conventions in the NSW jurisdiction, I refer to numerous decisions which taken together emphasise the importance of aligning domestic law with international instruments in applying and construing domestic law and tribunals, at least, in developing and formulating relevant principles and practices. I refer to the relevant legal basis for this proposition.

(i) it is consistent with the general duties of the signatory states to bring domestic law into conformity with international law: *Brownlie* *Principles of Public International Law* (Oxford, Clarendon Press, 4th

ed, 1990 p 36)

(ii) there is a presumption that the Parliament legislates in accordance with Australia's international legal obligations

(iii) legislation should be construed to avoid or prevent breaches of fundamental human rights: *Re Bolton: ex parte Beane* ((1987) 162 CLR 514 at 523) and *Bropho v. State of Western Australia* ((1990) 171 CLR 1 at 17-18)

(iv) where the language of the state legislation is susceptible to a construction which is consistent with the terms of an international instrument and the obligations which the instrument imposes on Australia than that construction should be favoured: *Minister for Immigration and Ethnic Affairs v. Teoh* ((1995) 183 CLR 273 at 287-8).

(v) the existence of human rights treaties to which Australia is a party is a legitimate and important influence on the development of the common law of Australia and, thus, in this respect may also assist in the development of guidelines and mechanisms under the *Industrial Relations Act* :Teoh at 288.

(vi) human rights legislation should be construed beneficially to give effect to the objects and purposes of the legislation: *IW v. City of*

Perth ((1997) 146 ALR 696 at 710); *Waters v. Public Transport Corporation* ((1991) 173 CLR 349 at 359)

(vii) when construing or applying international instruments the tribunal may have regard to international cases: *Qantas Airways Limited v. Christie* ((1998) 152 ALR 365).

It is convenient to deal at this point with submissions put by the Employers' Federation to the effect that the Australian Government has already taken all requisite steps to comply with ILO Convention 100. In making this submission, the Employers' Federation relies upon a letter it obtained from the federal Department of Workplace Relations and Small Business which was evidently in response to a letter from the Employers' Federation (although as pointed out by HREOC in their oral submissions that original letter of request was not in evidence) (Ex 359). The Workplace Relations letter does suggest "it could be argued that Australia complies with its international obligations in this respect" referring to the non-expression of concern by the ILO or United Nations CEDAW Committee in relation to equal remuneration for work of equal value in Australia. The Employers' Federation also rely upon an interpretation of the ILO Convention which emphasises the requirement "to promote" equal remuneration.

However as HREOC points out in its oral submissions the Convention itself also contains the words "to ensure". In HREOC's supplementary submission (Ex 451), it is submitted that the responsibility of State parties is not only to promote the principle of equal remuneration but to

ensure its application. It is submitted that the letter tended by the Employers' Federation only considers the responsibility to promote, not the responsibility to ensure. It is submitted that the ILO R*ecommendation Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951* (*Recommendation* 90) further stipulates that the State party is to ensure as well as promote equal remuneration for work of equal value (Article 1(a) and Article 2).

This submission is confirmed, in my view, by the terms of the actual ratification of the Convention which was put before the Commission by counsel assisting. I have earlier extracted the relevant part of the ratification which makes clear, in my view, that Australia is obliged to give effect to the stipulation contained within the Convention. This approach is entirely consistent with legal principles governing the operation and application of international instruments into domestic law.

The submission which seems to be advanced through the letter from the Workplace Relations and Small Business Department, to the effect that "it could be argued that Australia complies with its international obligations" (ex 359) because neither the ILO nor the UN CEDAW Committee has expressed any concern about equal remuneration for work of equal value in Australia, is quite beside the point. The issue, in this case, is whether the international instrument should guide the decision of the Commission in this Inquiry, as to the appropriate standard to be applied in relation to the matters raised in the Terms of Reference, or generally in the implementation of laws designed to achieve equal

remuneration in NSW. In formulating principles and practices, and in interpreting state legislation, the Commission should give effect to the standards established within the relevant international Convention.

I note in further support of HREOC submission that nothing in the one page extract from the book "International Labour Law" by Professor Valticos attached to Exhibit 359 suggests any different conclusion. The limitation of the 'promotional' conventions he refers to in para 94 as including ILO 100 and ILO 111, is that the definite objective does not have to be obtained "immediately". There is nothing to indicate any different approach to the application of the international principles in domestic law than those I have identified earlier. Moreover, in the extract from the comments by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) on Australia's performance in relation to Convention No. 100 it is clear that the Committee of Experts wished to be appraised of the outcome of the Pay Equity Task Force and its recommendations in relation to gender based inequalities thereby leaving open the consideration of those issues. Again, in a one page extract from a part of the 1996 report (attached to Exhibit 359), the CEACR refers to "putting an end to occupational segregation, tackling the problem of undervalued 'women's' jobs' and ensuring equality for workers with family responsibilities", as being measures that need to be fully implemented within the context of Conventions No 111 and No 156 in the context of equal remuneration without discrimination.

ILO CONVENTIONS 100 AND 111

The international principle relied upon by the NSW Industrial

Commission in the 1973 *Equal Pay Case* was described as "*Article 2 of the Equal Remuneration Convention No. 100*" (1973 AR 425 at 438).

Article 2 of the *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (Convention 100) (the *Equal Remuneration Convention*) provides as follows:

> 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.

Article 1 provides that for the purpose of the Convention, the term "equal remuneration for men and women workers for work of equal value <u>refers to</u>: rates of remuneration established without discrimination based on sex" (Article 1(b); emphasis added). However, for reasons which I will now state the principle, so stated, does not establish 'discrimination' as the principle or criterion upon which equal remuneration determinations are to be based. The criterion is the 'value of work', the application of which will be to render remuneration setting free of discrimination based upon the sex of the worker.

In the General Survey of the Reports on the Equal Remuneration Convention (No. 100) and "Recommendation (No. 90), 1951, by the Committee of Experts of the ILO Convention in 1986 ("the Committee of Experts 1986 Report") (ex 208) the Committee of Experts discusses the relationship between value of work and discrimination for the purposes of Article 2 and having regard to the terms of Article 1(b).

The Committee of Experts gave the following consideration to the operation or application of Article 1(b):

> While clearly excluding any consideration related to the sex of the worker, this definition provides no positive indication as to how the 'value' of work is to be determined (p 10).

In my view this extract gives a preliminary understanding of the proper operation of the Convention. The reference to discrimination appearing in Article 1(b) is not to be treated as determinative of the operation of the principle. Rather, the Convention 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*

This distinction was recognised by a Full Bench of this Commission in the 1959 *Equal Pay Case*. The Commission considered the terms of the Convention together with Recommendation 90 and a Report of the International Labour Conference with the purpose of assisting the Commission in its consideration of the principles set out in s.88D. The Commission noted that the utility of the Convention was in highlighting the marked contrasts between the Convention and the statute. The Commission found that the statute under consideration related only to work performed by females that is of the same or a like nature as, and of equal value to, that performed by males. The rate of wages for work performed by females would continue to be assessed in the future, as in the past with discrimination based on sex, in that the foundational

element of such remuneration would comprise the basic wage fixed for females, as distinct from males, and would be fixed at a lower amount than the amount fixed as the basic wage for males (p 480).

The Commission found that the Convention's concept of equal remuneration for work of equal value is a much wider one than the statutory concept of "equal pay as between the sexes". A further and most important area of distinction identified by the Commission is the specification within the Convention of a method to be applied in fixing equal remuneration without discrimination based on sex. In contrast, s.88D contemplates the continued fixing of remuneration on the basis of sex, with the sex of the worker being not only relevant but decisive (p 481).

The discussion in the 1959 *Equal Pay Case* indicates that the Commission, even at this earlier time, were attuned to the limited application of "discrimination" as that term is used in the Convention.

In addition there are a number of aspects of the Conventions generally, including the terms of *Convention* 100 and the Report of the Committee of Experts which lend support to the proposition that Article 1(b) is to be read by reference to the "valuation of work" criteria and not to "discrimination" criteria.

Firstly, *Convention* 100 is clearly distinguishable in its purpose from

other Conventions relating to employment and in particular female employment, which by their nature make clear that their operating condition is focussed upon discrimination *per se*. Hence, whilst *Convention* 100 is directed to ensuring the application to all workers of the principle of equal remuneration (Article 2), *Convention* 111 and CEDAW by their title and terms direct themselves specifically to overcoming discrimination, and moreover, to a different or extended subject matter relating to equality of opportunity and treatment.

Secondly, the terms of *Convention* 100 do not other than Article 1(b) direct attention to discrimination or its resolution. The same position applies with respect to the *Recommendation Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (*Recommendation* No. 90). This Article is to be compared with Article 11 of CEDAW which directs attention to a "right to equal remuneration" (and equal treatment in respect of work of equal value) in the context of the opening words of the Article which in turn, requires State parties to take all appropriate measures to eliminate discrimination against women in the field of employment to ensure, on the basis of equality in men and women, the same rights (Ex 349).

Thirdly, the words "refers to" in Article 1(b) are not words strictly associated with definition and in my view do not purport to confine the meaning or operation of the principle. It is more likely the drafter had in mind a meaning such as "to direct attention as a reference" or "to have relation; relate; apply" in using the words "refers to" in Article 1(b) of *Convention* 100 (see Macquarie Dictionary p 1427).

Turning again to the ILO Committee of Experts 1986 Report it can be seen that it treats separately and distinctly the criteria of "work of equal value" as opposed to a discussion of the concept of "discrimination based on sex". The Committee approaches the terms "work of equal value" and "discrimination based on sex" separately for the purposes of discussing the terms of and operation of the convention.

This conclusion is further supported by reference to the Committee's discussion of the preparation of the 1951 instruments. The Committee indicated that the ILO has examined three categories of possible criteria for work of equal value:- relative performance of men and women on comparable work; cost of production or overall value to the employer; and finally, "job content". It is said that this last approach proved to be the most satisfactory. The Committee determined in the light of this finding that it would define the phrase "equal remuneration for men and women workers for work of equal value" as:

> meaning that remuneration rates shall be established on the basis of job content, no discrimination being made on the basis of the sex of the worker (p 10).

Whilst the reference to "job content" was ultimately deleted from Article 1(b) and transferred to Article 3 the form of the original proposed Article 1(b) demonstrates the intention of the drafters of the Convention was directed to the object of attaining equal remuneration for work of equal value and the means to give effect to it in Article 1(b) rather than establishing discrimination itself as

the criterion for achieving equal pay.

This proposition is further illustrated by the Committee's discussion of the term "discrimination based on sex" . In defining discrimination by reference to Article 1(b) of the Convention the Committee noted that the whole of the expression "rates of remuneration established without discrimination based on sex" is occasionally repeated in definitions under national legislation (p 43). However the Committee notes that, more generally, the prohibition of discrimination based on sex is usually made explicit also in legislation dealing with equal remuneration in terms of job comparison. The Committee of Experts then deals with the matter in the following way:

> Often, the two complementary aspects - work of equal value and non- discrimination on the basis of sex - are referred to in mutual support; while the present survey has so far considered national laws from the viewpoint of equal remuneration for work of equal value, a number of these laws indeed place that principle within the wider context of non-discrimination on the grounds of sex, particularly in employment (p 43).

The Committee then proceeds to focus upon those laws which do not mention the principle of equal pay for work of equal value but develop to a greater or lesser degree its <u>counterpart</u> "the concept of non-discrimination between men and women in remuneration or in employment in general" (p 43). The Committee gives as the illustration of this proposition the Australian *Sex Discrimination Act*, 1984 (p 45).

The primacy of the issue of valuation of the work rather than the issue of discrimination *per se* is demonstrated by a further extract from the 1986

Report:

> A distinction must be made between laws which, in referring to work within the same establishment, enterprise or employment, limit the reach of comparison for the purpose of establishing the worth of a job, and those which in more general terms call upon the employer to observe the principle of equal pay or non-discrimination on the basis of sex. In the latter case, the obligation to pay remuneration in conformity with the principle rests on the employer, but the reach of comparison for the purpose of determining his observance of the principle may extend beyond the limits of his sphere of control. (Ex 208 p 49)

Further in the same Report the Committee considers the application of job evaluation techniques to the valuation of work, again emphasising the significance of valuation, as opposed to discrimination, in this Convention (p 106). In an extract referring specifically to "work of equal value" the Committee states, stating that "[t]o compare the value of different jobs, it is important that there exist methods and procedures of easy use and ready access, capable of ensuring that the criterion of sex is not directly or indirectly taken into account in the comparison" (p 190). This discussion also highlights the prospective nature of the Convention which accords completely with the role of the industrial tribunals described earlier.

The following extract from the ILO Committee of Experts' consideration of ILO *Convention* 111 in the 1988 Report on Equality in Employment and Occupation, further illustrates the distinction between discrimination and the establishment of equal remuneration:

> With regard to equality of remuneration it should be recalled that the principle of equal remuneration for men and women workers for

> work of equal value is laid down in the Equal Remuneration Convention (No.100), supplemented by Recommendation No. 90 both of 1951, on the same subject. In its General Survey of 1986 on equal remuneration the Committee has pointed out that equal evaluation of work and equal entitlement of women and men to all elements of remuneration cannot be achieved within a general context of inequality, and that the connection between the principle of Convention No. 100 and that of Convention 111 is paramount in this respect. (Ex 208 p 129-30)

The next Report concerning *Convention* 111 published by the Committee of Experts in 1996 again underlines the distinction stating that:

> The principle underlying Convention 100 may lead to improvements as it establishes the groundwork for equality between men and women. The gap between the earnings of men and those of women with comparable qualifications often occurs because women are more likely to be employed in the branches of activity and the jobs that are least well paid even though the work is of equal value. (Ex 359 p 36)

One final quote from the 1986 Report puts beyond doubt that the correct understanding of discrimination in the application of ILO *Convention* 100 is subsidiary to the primary aim of equal remuneration for work of equal value:

> By adopting non-discriminatory evaluation criteria and applying them in a uniform manner, differences in wages resulting from traditional stereotypes with regard to the value of "women's work" are likely also to be reduced. In these cases, it is essential to ensure equal remuneration in an industry employing mostly women by having reference to a basis of comparison outside the limits of the establishment or enterprise concerned. The fact that the jobs in question may be done by few men, amongst many women, by no means indicates that the remuneration is, viewed objectively, without discrimination". (p 191)

Clearly the use of "discrimination" in the foregoing context is remote from the concept of discrimination identified in anti discrimination legislation in

the Federal and State arenas or for that matter, as I will shortly discuss, the concept of discrimination as defined in the *HPM Case* (Ex 404).

This conclusion as to the operation of *Convention* 100 gives rise to the question as to whether the *Workplace Relations Act* 1996 has the effect of altering, for the purposes of a Federal jurisdiction in Australia, the effect of, and the operation of, the Convention. I will examine this question in the context of examining the provisions of Part VIA of that Act and the interpretation of those provisions in *Automotive, Foods, Metals , Engineering, Printing and Kindred Industries Union v. HPM Industries* (*[Print P9210]* ("the *HPM Case*") (Ex 404).

OVERAWARD AND ENTERPRISE AGREEMENTS

In Just Rewards: Report of the Inquiry into Sex Discrimination in Overaward Payments (1992) a number of findings were made which are relevant to this Inquiry. These were as follows:

1. Having regard to the Australian Workplace Industrial Relations Survey (1991) (AWIRS), overaward payments represent a significant component of the private sector wage structure in Australia.

2. Women on average receive lower overaward payments than men (that is the amount received by women who are paid overawards is lower on average than that paid to men who receive overawards)

and fewer women than men receive them (that is, the incidence is lower). In May 1990 according to the ABS Annual Survey women earned on average 53.1 percent of men's overaward payments (p 17).

4. Differences in the incidence of overaward payments between men and women are generally greater in those industries and occupations in which women are concentrated. If women were distributed according to the industry pattern of men then the average overaward payment for women would increase by 10 percent. That is, industry segregation reduces female overawards by 11 percent relative to male overawards (p 72).

5. Generally women tend to work in industries and occupations which pay lower average overawards than men. Occupational segregation statistically explains part of the disparity between overaward payments received by men and women but a significant component of the gap occurs within industries and within occupations (p 72).

The Employers' Federation/Chamber argues that there are difficulties in accepting this aggregate data and that the data in any event cannot demonstrate discrimination.

However, as Dr Green points out, there is a growing disparity

between persons who rely upon award wages, who are disproportionally women, and those who rely upon overaward payments, who are mainly men. Thus, the significance of the distribution of overaward payments between men and women is that they contribute to the disparity between male and female earnings. This may or may not result from the undervaluation of work although information concerning the effect of segregation in the report of the Inquiry into Sex Discrimination in Overaward Payments may suggest this as a possible cause.

In many respects the attention of the parties has been directed to the overaward payments made by informal agreements as private and industrial arrangements rather than to overaward payments deriving from formal enterprise agreements. However, the growth of enterprise agreements under decentralised wage fixing systems represents a significant consideration for this Inquiry. I shall initially focus on this are before returning to the consideration of informal overawards.

Professor Green in his evidence indicates that overaward payments are being substituted for by enterprise bargaining. Enterprise bargaining is not replacing awards *per se* but overawards. This proposition seems to be supported in the submission by the Employers' Federation which argues that overaward payments have fallen as a proportion of total earnings since 1975 with there being a reduction in both the number of employees paid overawards and the size of earnings relative to total earnings. A number of factors are identified as causing this decline one of which is the establishment of enterprise agreements or the absorption of overaward payments into minimum rates

adjustments and other award increases (Ex 446 p 37).

Women generally have not accessed enterprise agreements at the same rate as men. Male dominated industries and occupations have tended to have a much greater access to enterprise bargaining (Ex 231 tab 2). The Australian Workplace Industrial Relations Survey (Ex 231 tab 8) indicates that there is a higher likelihood of collective agreements being made in workplaces in the electricity, gas and water supply, government administration and communication rather than in service industries in which workers are predominantly female such as retail, accommodation, cafes and restaurants (p 354). Furthermore of the occupations traditionally covered by awards and agreements, clerks and sales and personal service workers were amongst the least likely occupational groups to be involved in enterprise bargaining (Ex 231, tab 2, p 13).

The 1995 Department of Industrial Relations Annual Report on enterprise bargaining (Ex 103) noted that concern had been raised in the consultation processes, and literature (e.g. Bennett 1994)about the impact of enterprise bargaining on pay equity.

The significance of the concentration of enterprise bargaining in industries in which occupations that are male dominated it is made clear in the evidence of Professor Gregory who indicates that the decentralisation of the wage fixing system and the growth of enterprise bargaining is likely to increase the wage differential over time. This conclusion is confirmed by Professor

Wooden (1997) (Ex 416).

The Employers' Federation/Chamber in its submission (Ex 446 p 45) puts that Professor Wooden (1997) (Ex 416) had concluded that it could not be demonstrated that female dominated occupations had experienced a widening in gender earnings differentials since the introduction of enterprise bargaining in the beginning of October 1991 and that women in female dominated occupations appear to have done better in terms of earnings than men. However this overlooks the finding made by Professor Wooden at page 224 of the paper, which finding is expressed as follows:

> Furthermore, the available evidence suggests that part time workers fare less well not because enterprise bargains deliver low wage outcomes where part-time employment is more common, but because bargaining is far less likely to occur in such firms. It thus follows that if award wages fail to keep pace with average rates of increase being delivered by enterprise bargains (as seems likely), the average gender earnings differential across all workers will widen.

The fact that enterprise bargaining tends to be concentrated in male dominated industries as opposed to female dominated industries is borne out by the evidence in the proceedings. It was clear from the example of hairdressers and motor mechanics that enterprise bargains of a formal kind were concentrated in the male dominated motor mechanics area whereas in the hairdressing area there were not formal enterprise agreements and overaward payments were restricted to incentive schemes or payments. Similarly the workers at AWA Plessey were in receipt of an enterprise agreement whereas the workers in the childcare sector were not.