THE RELATIONSHIP BETWEEN INDUSTRIAL LAW AND DISCRIMINATION LAW IN THE DETERMINATION OF WOMEN'S WAGE RATES WITHIN THE AUSTRALIAN WAGE FIXING SYSTEM

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NOTE

This thesis broadly reviews the developments which have occurred in relation to the implementation of equal pay principles within the Australian wage fixing process up until March 1991. Although updated references have been included in relation to certain events occurring since this date, an analysis of the Industrial Relations Commission's decision in the National Wage Case, April 1991 is not included in this study.

It is worth noting that several issues relevant to wage discrimination were raised in this recent National Wage Case decision chiefly through submissions presented by the Australian Federation of Business and Professional Women. These submissions called for a work skills value inquiry to review all aspects of skill evaluation, including those with a bearing on the relative evaluation of male and female work. The Commission declined to convene such an inquiry, expressing the view that current wage fixing principles already provided ample scope for the review of any specific instances where work typically performed by women was claimed to be undervalued. The Commission confirmed that the 1972 equal pay principles of the Australian Conciliation and Arbitration Commission would continue to apply to special instances, and invited parties appearing before the Commissioner in individual cases to raise any issue they consider inconsistent with the provisions of Section 93 of the Industrial Relations Act 1988 (Cth).

Significantly the Commission acknowledged that enterprise bargaining - especially bargaining for overaward payments - placed those sectors of the labour force where women predominate at a relative disadvantage.

The above developments suggest that the application of equal pay principles will remain an issue relevant to industrial wage setting policy and practice into the 1990's.

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CHAPTER ONE

AN INTRODUCTION TO THE ISSUE OF DISCRIMINATION IN THE DETERMINATION OF WAGE RATES

OVERVIEW

The relationship between industrial law and discrimination law with regard to the determination of wage rates involves an area of considerable social, economic and legal complexity. This thesis is directed to examining the legal aspects of this relationship. It seeks to explore the impact that legal developments in the area of discrimination law may have upon the determination of wage rates for women within Australia's centralised wage fixing system. The primary focus of the study involves an analysis of Australia's federal industrial and discrimination laws in so far as they apply to the implementation of equal pay principles. This involves an analysis of the problems encountered with respect to indirect discrimination in the wage determination process, and a close examination of the difficulties in applying the principle of equal pay for work of equal value to assist in remedying these problems. The ways in which the provisions of the Sex Discrimination Act 1984 (Cth) may affect the functions of Australia's federal wage fixing authorities in determining industrial award wage orders, and national wage fixing principles is also considered.

For several reasons, an emphasis has been placed throughout this study on developments occurring in the area of federal industrial law. To begin with, the federal Conciliation and Arbitration Commission has, for a considerable period, been regarded as Australia's predominant single wage fixing authority.[1] Its decisions in major cases have traditionally influenced the determinations of State industrial wage tribunals. Its wage setting practices have in addition been regularly adopted within the various State industrial jurisdictions. This is no less so in the area of equal pay where the Conciliation and Arbitration Commission has played an important role in removing discriminatory wage fixing practices through a gradual round of national wage decisions. These decisions have included, the introduction of the "total wage" concept in 1967,[2] the Equal Pay decisions of 1969[3] and

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1 E J Sykes and H J Glasbeck; Labour Law in Australia, Butterworths Sydney, 1972, p 565; S Deery and D Plowman, Australian Industrial Relations, McGraw-Hill Book Company, Sydney, 1985, p 129; in relation to the area of equal pay, see C O'Donnell and N Golder, "A Comparative Analysis of Equal Pay in the United States, Britain and Australia", Australian Feminist Studies, Summer 1986, p 73; Department of Employment Education and Training, "Pay Equity: A Survey of 7 OECD Countries", Information Paper No 5, AGPS, Canberra, 1988, p 49

2 National Wage Case (1967) 118 CAR 655

3 Equal Pay Cases (1969) 127 CAR 1142

1972,[4] and the abolition of the adult male minimum wage in 1974.[5]

The industrial arbitration scheme established under federal law is, in a number of respects, comparable to that of the State industrial system in that similar wage settlement methods, and tribunal procedures apply. Although differences in approach have at times emerged between the two systems in the area of equal pay, "with the federal tribunal acting for some time as the cart rather than the horse",[6] since 1972 the development of equal pay principles has been more prominent within the federal industrial jurisdiction.[7] While signs have emerged over more recent years to suggest that certain State Government initiatives may once again be providing a lead to the practical implementation of equal pay principles within

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4 National Wage and Equal Pay Cases (1972) 147 CAR 172

5 National Wage Case (1974) 157 CAR 293

6 J Nieuwenhuysen and J Hicks, "Equal Pay for Women in Australia and New Zealand" in Pettman B (Ed), Equal Pay for Women: Progress and Problems in Seven Countries, MCB Books, Bradford 1975, p 75

7 C Short, "Equal Pay - What Happened?" (1986) 28 Journal of Industrial Relations 315, p 329

the industrial relations field,[8] the broad national focus of the federal Industrial Relations Commission suggests that the ongoing development of equal pay measures will continue to be a significant issue relevant to the area of federal industrial law.[9]

This study seeks to provide a conceptual framework for examining the issues arising as a result of the application of equal pay measures within the context of industrial conciliation and arbitration. Most importantly, a specialised study of the federal industrial law jurisdiction provides the basis for analysing the functions of the federal Industrial Relations Commission in relation to the determination of women's wages in accordance with the principles contained within the Sex Discrimination Act 1984 (Cth).

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8 Office of the Director of Equal Opportunity in Public Employment, "The Structural Efficiency Principle and Implications for Equal Employment Opportunity", Guidelines For Departments and Authorities, DEOPE, Sydney, December 1989; NSW Department of Industrial Relations and Employment, Women's Directorate, Restructuring For Excellence and Equity, Sydney, 1990; Women's Employment Branch, Department of Labour, Women and Award Restructuring, Melbourne, 1990; Commission for Equal Opportunity, Government Policies and Practices, Section 82(b) Report No 4: Job Evaluation and Broadbanding in the Western Australian Public Service, EOC, Perth, 1987; South Australian Women's Advisers Unit, Department of Labour, Award Restructuring and Women Workers, Discussion Paper, Adelaide, May 1989

9 See, for example, Child Care Industry (ACT) Award 1985 and Child Care Industry (NT) Award 1986, Decision of the Industrial Relations Commission, September 19909, Dec 1001/90 S Print J 4316 (Child Care Workers Case)

The Sex Discrimination Act 1984 (Cth) is the key legislation which implements Australia's obligations under international law resulting from the ratification of the two important international treaties relevant to the application of equal pay principles. These treaty agreements, ratified in 1974 and 1983, respectively, are the International Labour Organisation's Convention 100 Concerning Equal Remuneration For Men and Women Workers For Work of Equal Value (ILO 100), and the United Nation's Convention on the Elimination of All Forms of Discrimination against Women (the UN Convention). Both these Conventions expressly contain provisions requiring the implementation of the principles of equal pay for equal work, and equal pay for work of equal value. Significantly, it is the UN Convention which has provided, in part, the constitutional basis for the enactment of the Sex Discrimination Act 1984 (Cth) within Australian domestic law. A study of Australia's federal discrimination legislation, would appear, therefore, to provide the most comprehensive means of evaluating the legislative measures adopted with reference to Australia's treaty obligations in the area of equal pay.

As mentioned above, Australia's obligations under international law include a requirement to develop and apply the basic principle of equal pay for work of equal value. This central principle will now be examined.

EQUAL PAY FOR WORK OF EQUAL VALUE

The concept of equal pay for work of equal value has formed the subject of international debate over several years in the course of determining appropriate measures for the elimination of sex discrimination in relation to wage payments. Equal pay for work of equal value requires the determination of wage rates on the basis of the value of the work performed so as to ensure that wage rates are legitimately set without regard to the sex of an employee. It allows for comparisons to be made between identifiably male occupations, and identifiably female occupations, having regard to such factors as effort, skill, responsibility and working conditions. Such comparisons serve to identify the extent to which wage differences may possibly occur as a result of sex discrimination in the wage setting process.[10]

The underlying theory of this approach suggests that women's work has traditionally been undervalued precisely because it is work usually performed by women. The same social attitudes and institutional biases which have historically led to the prevalence of separate, and distinctly lower wage scales for women are arguably replicated in current wage setting practices. The implementation of equal pay for work of equal

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10 For a general description of the principle of equal pay for work of equal value see, C Burton, The Promise and the Price, Allen & Unwin, Sydney 1990, Chapter 11; International Labour Conference, Report III (Part 4B) General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Equal Remuneration, ILO, Geneva 1986

value has been viewed as providing a means by which the gender bias inherent in such practices may be analysed.[11] This analysis has occurred most recently through the development, and use of job evaluation procedures by which alleged discrimination in the fixing of wage rates can be systematically reviewed.

On a broader policy level, the implementation of equal pay for work of equal value may be viewed as a means of addressing the persisting wage gap which exists between men and women workers by providing a focus for reducing that part of the wage gap attributable to gender. For reasons which will shortly be outlined, it is unlikely, however, that even the complete implementation of equal pay for work of equal value will entirely remove the gender wage gap. The promotion of the principle has been recognised, nonetheless, as an important measure to ensure at least some narrowing of the ratio between male and female earnings.[12]

The principle of equal pay for work of equal value needs to be distinguished at the outset from the more widely understood concept of "equal pay for equal work". This latter expression covers the situation where work is carried out under

11 C Burton, op.cit., Chapter 11

12 id; C Burton, R Hag & G Thompson, Womens Worth, Pay Equity and Job Evaluation in Australia, AGPS, Canberra 1987, pp 1-9; C Burton, "Gender Bias in Job Evaluation", Monograph No 3, Affirmative Action Agency, Ambassador Press, Sydney, 1988; M Thornton, "(Un)equal Pay For Work of Equal Value", (1981) 23 Journal of Industrial Relations 466, p 478

conditions where both male and female employees are performing the same, or substantially similar tasks. The term "equal pay for work of equal value" expands upon the concept of "equal pay for equal work" by requiring the payment of equal wages for different jobs which are equal in value. Complex issues here arise regarding the ways in which work value should be assessed, and by whom. In response to these issues, different approaches have developed within Australia, and overseas.[13] A significant point which is worth noting here is that in Australia the value of work has consistently been held to refer to worth in terms of award wage, or salary fixation, as distinct from worth to the employer.[14]

In summary, equal pay for work of equal value extends to cover the review of wage rates in cases where male and female employees are not carrying out exactly the same, or even similar work tasks. The implementation of the principle may involve the evaluation of relative pay scales between different job classifications, for example, between such jobs

13 In relation to the assessment of work value in the implementation of the equal pay for work of equal value principle in the United Kingdom, see M Rubenstein, Equal Pay for Work of Equal Value, Macmillan, London, 1984; C McCrudden, "Equal Pay for Work of Equal Value: the Equal Pay (Amendment) Regulations 1983", (1983), The Industrial Law Journal, Vol. 12 197; E Szyszczak, "Pay Inequalities and Equal Value Claims", (1988) Modern Law Review Vol. 48 139; in relation to the U.S. experience see generally P Weiler, "The Wages of Sex: The Uses and Limits of Comparable Worth", (1986) Harvard Law Review, Vol. 99, 1728

14 Equal Pay Cases (1969) 127 CAR at 1159; National Wage and Equal Pay Cases (1972) 147 CAR 172 at 180; Private Hospitals' and Doctors' Nurses (A.C.T.) Award (1986) 300 CAR 190

as a clothing cutter and a machinist, a nurse and a fitter and turner, or even presumably a childcare worker and an engineering tradesperson.[15] The proper application of the equal pay for work of equal value principle naturally involves the comparative evaluation of work and skill in a non-discriminatory, or gender-neutral manner.

Although equal pay for work of equal value may encompass situations where jobs are like in nature and equal in value as, for example, in the case of a social worker and a psychologist, the principle does not necessarily require a comparison between like jobs. The emphasis remains on the identification of similarities in job value as distinct from similarities in job content alone.[16]

The broad outline of the principle of equal pay for work of equal value which has been described roughly accords with what is commonly referred to in the United States as "comparable worth". Due to the similarities relevant to issues of wage discrimination, the two expressions are assumed in much of the literature to be interchangeable.[17] It is to be stressed, however, that clear differences exist in relation to the respective legal models within which the two principles have

15 See Child Care Workers Case, September 1990, S Print J4316. A detailed discussion of this decision is contained in Chapter Seven

16 See C Burton, op.cit., p 132

17 See M R Killingsworth, "Comparable Worth in Australia", The Economics of Comparable Worth, W E Upjohn Institute, Michigan, 1990 p 239

developed in Australia and the United States. The concept of comparable worth as evolved in overseas jurisdictions has, moreover, been ostensibly rejected by Australia's federal wage fixing authorities as being inappropriate to the uniquely Australian industrial wage fixing system.[18] It is important to note that it is within this centralised wage fixing system that the principle of equal pay for work of equal value has traditionally been applied in Australia.

It is also important to recognise that the adoption of the equal pay for work of equal value principle, as a standard to be applied by federal industrial wage tribunals, predates the introduction of federal discrimination legislation by some twelve years. The developments which have taken place through the industrial arbitration system with respect to the implementation of equal pay principles forms the subject of Chapter Two of this thesis.

Before proceeding to this study, however, a brief discussion will be presented regarding the general nature of discrimination in the wage determination process, and the difficulties in identifying this phenomenon from the mix of factors which lead to the inequalities between men and women's earnings. The complex range of factors giving rise to an inference of wage discrimination in the wage setting process will be considered, and it will be argued that a small, but

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18 Private Hospitals' and Doctors' Nurses (A.C.T.) Award (1986) 300 CAR at p 191

significant residual of wage discrimination exists. The need to identify, and remedy the undervaluation of women's work within the Australian wage fixing system is canvassed in the course of this presentation. An overview of the legislative and non legislative responses to the application of equal pay principles is next described. An outline finally follows of the contents of the various Chapters included within this thesis.

THE PROBLEM OF WAGE DISCRIMINATION

Wage discrimination is a specific kind of employment discrimination relating to unequal treatment in the payment and setting of wage rates. It may occur directly with the payment of unequal wages to men and women performing the same, or materially similar work, or indirectly through the undervaluation of women's wages. It can arise as discrimination in the terms and conditions offered, or afforded in the course of employment, and may in some cases also be characterised as discrimination in the denial of equal opportunities for promotion.[19] Irrespective of the form it takes, the identification and treatment of wage discrimination fundamentally involves the review of wage setting practices and procedures.

In Australia direct sex discrimination in the payment of wages has been substantially remedied through the implementation of

19 See, for example, Koh v Mitsubishi (1985) EOC 92-134

the principle of equal pay for equal work within the industrial arbitration system. Although evidence of direct sex discrimination in the wage setting process has over recent years been detected,[20] explicit sex discrimination in the payment of wage rates is no longer viewed as an overriding feature of the Australian wage setting process. The large scale removal of direct wage discrimination in circumstances where men and women are performing identical work tasks has essentially resulted from the general processing of equal pay claims in the course of industrial award wage fixation, and from the extension in 1974 of the minimum award wage to female employees.[21] In contrast, the problem of indirect wage discrimination has yet to be comprehensively dealt with within the Australian wage fixing system. This is largely attributable to the difficulties in fully recognising, and treating the problem of indirect discrimination in the wage determination process. Unlike direct wage discrimination, where unfavourable treatment is apparent on the face of the employment contract, indirect wage discrimination is rarely obvious, or easy to demonstrate. Proof of indirect wage discrimination commonly involves the gathering of detailed evidence,[22] and in all cases requires a thorough assessment of the economic and social factors which may otherwise account

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20 See, for example, Equal Opportunity Commission, "Review of Industrial Awards and Agreements of Western Australia", Occasional Report, No 1, EOC, Perth 1987, p 12

21 National Wage Case (1974) 157 CAR 293

22 See Burton, Hag and Thompson, op.cit.; McCrudden; op.cit.

for differences in male and female earnings.[23] The legal, social and economic issues to be determined as part of this assessment are frequently complex and contentious. The costs in obtaining the information and expert evidence necessary to support claims of indirect wage discrimination in such circumstances will characteristically involve considerable expense. There is, not surprisingly, very little conclusive data available at the organisational level to indicate the presence of indirect discrimination in the wage fixing process at large. It is partly because of this lack of clear evidence that the extent of discrimination in the wage determination process is extremely difficult to accurately assess. As a result the incidence of wage discrimination at a macro level has essentially come to be inferred, rather than directly established.[24] There are, however, a number of factors giving rise to a strong inference of the existence of indirect sex discrimination in the payment of women's wage rates. The first of these relates to the major gap in male and female earnings.

THE MALE/FEMALE WAGE GAP

In Australia, the wage gap between men and women workers has not altered significantly over the past fifteen years, and in

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23 Weiler, op.cit., 1986, p 1779-1795; Rubenstein, op.cit., 1984 p 13-34; B Chiplin and P J Sloane, Tackling discrimination in the workplace, Cambridge University Press, London 1983 pp 122-132

24 id

all components of earnings women continue to earn less than men.[25] In 1989, average weekly total earnings for all female employees were 65% of those for all male employees. Earnings of full time female workers were 78% of male full time earnings, or 83% when average ordinary time earnings, excluding overtime are taken into account.[26] If further adjustments are made to isolate award rates of pay, a gap in the range of 8%-10.9% remains between male and female average weekly earnings.[27] In analysing these differences between male and female earnings it is important to acknowledge that the gender wage gap cannot wholly be explained by the phenomenon of wage discrimination. Clearly a variety of factors need to be taken into account in calculating the extent to which wage discrimination may contribute to the gender wage gap. These factors include, differences between men and women with respect to the length of hours worked, education and training, labour force experience, continuity of work history, demand and supply of labour, the effect of occupational and job segregation by sex, and even other forms of employment discrimination. The length of hours worked, or the lack of training received may, for example, result from discrimination in the denial of equal opportunity in employment, as distinct from discrimination in the actual

25 ABS Catalogue No 6302.0, Canberra, 1989

26 id

27 National Pay Equity Coalition, Submission to the 1988 National Wage Case, June 1984, p 4; P Hall, "The Price of Wage Justice, The Costs of Delay", Paper prepared at the Australian Federation of Business and Professional Women's Conference, Sydney, 15 July 1989, p 2

determination of wage rates. The ability to perform overtime is very likely, in turn, to be linked to the higher demands placed on women to undertake family responsibilities and domestic home duties within the unpaid labour market.

In spite of the obvious difficulties in systematically quantifying the many variables which comprise the gender wage gap, much research has been directed to analysing the possible dimensions of wage discrimination by estimating the size of the residual earnings gap between male and female earnings after all such known variables have been accounted for.[28] In much of this research, the use of economic regression analysis has been relied upon in an attempt to isolate the parameters of the residual wage gap from which the existence of wage discrimination may then be inferred. Although the size of the residual wage gap varies with the application of different methods with respect to different samples of male and female employees, estimates consistently reveal that a distinct part of the wage gap remains unexplained, even where standard

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28 See Weiler, op.cit.; Rubenstein, op.cit.; Killingsworth, op.cit.; B J Chapman and C Mulvey, "An Analysis of the Origins of Sex Differences in Australian Wages", (1986) The Journal of Industrial Relations, Vol. 28, 504; R G Gregory, A Daly, & V Ho (1986), "A Tale of Two Countries: Equal Pay For Women in Australia and Britain", Discussion Paper No. 147, Centre for Economic Policy Research, Canberra; R G Gregory and V Ho, (1985) "Equal Pay and Comparable Worth: What Can the U.S. Learn From The Australian Experience?", Discussion Paper No 123, Centre for Economic Policy Research, Canberra; R Drago, "The Extent of Wage Discrimination in Australia", Australian Bulletin of Labour, Volume 15, No 4, September 1989; N Agrawal, "Sources of Inequity Between Male and Female Wages in Australia", Australian Economic Review, No 84 Summer 1986 26

differences in worker characteristics, and other wage determination variables have been discounted.[29] It may of course be possible that mismeasurement, or other undetected factors may be responsible for the existence of any residual wage gap estimated in this way. To date, however, the persisting and unexplained presence of this residual wage gap continues to raise the inference of indirect discrimination in the payment of wages. As Gregory and Ho note:

> "The relative lack of success in explaining the pay gap therefore may indicate that pay discrimination is very large."[30]

This inference becomes stronger on a close analysis of the wage inequalities associated with the high degree of occupational segregation by gender within the labour market. This refers to the fact that most women work in a narrow concentration of jobs, occupations and industries. In 1989, 55.2% of Australian women workers were employed in clerical and sales related occupations,[31] while 81.1% of women were

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29 See for example B J Chapman and C Mulvey, op.cit., p 504; R G Gregory & V Ho, op.cit., p 314; Argrawal, op.cit., p 35; Weiler, op.cit., 1985

30 Gregory & Ho, op.cit., p 10

31 Australia Bureau of Statistics, Catalogue No 62030, Canberra, 1989

concentrated in five main industries.[32] Jobs within industries and occupations are also stratified by sex with women predominantly to be found in lower grade positions. These high levels of occupational segregation strongly correlate with differences in earnings, with women most heavily concentrated in the lowpaying jobs, industries and occupations. Women earn less than men in all major occupational groups, and in the case of plant and machinery operators the gap between male and female earnings is as high as 27.4% in the case of average weekly ordinary time earnings, and 35% in the case of average weekly total earnings.[33] The statistical data in relation to sex segregation in the workforce plainly suggests that part of the earnings gap results from the high concentration of women workers in lowpaying jobs, industries and occupations. The slow rate of desegregation of occupational segregation by sex is generally viewed as providing part of the explanation for the persisting differentials between male and female earnings, although it is interesting to note that very little research has been conducted to assess the actual impact of occupational

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32 id. For a closer analysis of the high levels of occupational segregation on the basis of sex within the Australian labour market, see S M Rimmer, "Occupational Segregation, Earnings Differentials and Status Among Australian Workers", Article to be published in the forthcoming September 1991 edition of Economic Record

33 Australian Bureau of Statistics, Catalogue No 6306.6, Canberra, 1988; For a more complete description of male and female earnings by occupation and industry, see Labour Resource Centre, Pay Equity for Women in Australia, National Women's Consultative Council, AGPS, Canberra, 1990

segregation on the relative earnings of male and female workers.[34]

While it appears that occupational segregation has a distinct influence on the nature and extent of the gender wage gap, the reasons why women are heavily concentrated in low paying areas of employment are accordingly difficult to distinguish precisely . To begin with, it may be that women are performing less productive work than men as a result of less experience, training or fewer job skills. Some female employees may simply choose to engage in less well paid work as a tradeoff for fewer job demands, or flexibility in working hours. Other female workers, though equally capable may be relegated to less productive work as a result of employment discrimination. Alternatively, women may be performing work which is less paid because it is work predominantly performed by women. It is this last possible explanation of the disparity between male and female earnings which focuses on the issue of indirect discrimination in the wage setting process resulting from the undervaluation of women's work.

The existence of this form of indirect wage discrimination is broadly supported by much evidence which indicates that large

34 See S M Rimmer, "Occupational Segregation, Earning Differentials, and Status Among Australian Workers", Unpublished paper, op.cit., p 11. Rimmer's conclusions suggest that occupational segregation per se may have less of an impact on the sex differentials in earnings than is generally assumed, and that a greater focus needs to be placed on examining the ways in which gender wage differences may be attributed to discriminatory wage practices

proportions of female workers have a negative effect on the level of wage rates across occupations, and that where the sex composition of an occupation shifts to becoming predominantly female, wage rates do not maintain their relativity.[35] The issue of the undervaluation of women's work will now be briefly examined.

THE UNDERVALUATION OF WOMEN'S WORK

Until as recently as 1974, explicit sex discrimination in the determination of wage rates historically formed an underlying feature of the Australian wage fixing system.[36] From the earliest decisions of the Arbitration Court in the exercise of its powers under the Conciliation and Arbitration Act 1904 (Cth), women's work was very clearly distinguished from that of men's, in accordance with the family wage concept by which wage rates were determined on the basis of the differential needs assumed to exist between men and women workers.[37] Women's wage rates were traditionally regarded as demanding a

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35 D T Treiman & H I Hartman, Women, Work and Wages: equal pay for jobs of equal value, National Academy Press, Washington, 1981 p 34-35; Rubenstein, op.cit., p 19; Weiler, op.cit., p 1790

36 See, Short, op.cit.; E Ryan & A Conlon, Gentle Invaders: Australian Women at Work 1788-1974, Nelson, Melbourne, 1975; R Hunter, "Women Workers and Federal Industrial Law: From Harvester to Comparable Worth", (1988) Volume 1 Number 1, Australian Journal of Labour Law, pp 147-164; M Thornton, "(Un)Equal Pay For Work of Equal Value", (1981), The Journal of Industrial Relations, Vol. 23, 466

37 In relation to the introduction and purpose of the family needs concept, see the Harvester Decision; Ex Parte Harvester v McKay (1907) 2 CAR 1

lesser entitlement than male wage rates, in a wage fixing system in which the participation of women employees was expressly discouraged.[38] Ironically, the first initiatives towards pay equity for women resulting from the earliest "equal pay" determinations of the industrial wage fixing system were primarily designed to exclude the competition of female workers from the ranks of male employment. The operation of such overt male bias in the determination of wage rates has been well documented by researchers over a period of decades.[39] Their findings indicate that until 1950, minimum rates for women in individual awards remained at around 54% of the male basic wage.[40] As late as 1974, a separate male minimum rate of pay existed within the federal industrial arbitration system. In the National Wage Case decision[41] of that year, this minimum rate was extended to women wage earners in the form of an "adult wage", and the family component finally discarded from the minimum wage concept.

The likelihood that the attitudes, and labour market forces which led to such wage setting practices would dramatically change over a period of less than 17 years would seem to be remote. Anecdotal evidence of the undervaluation of women's work, the continuing identification of discriminatory award

38 See, for example the approach by Higgins J to the "problem" of female labour in the Rural Workers Union Case (1912) 6 CAR 61

39 Supra, note 36

40 Short, op.cit., p 316

41 (1974) 157 CAR 293

wage provisions,[42] and the bringing of equal pay claims some 18 years after the 1972 Equal Pay Decision,[43] would certainly suggest as much. The expectation that past discriminatory practices have indirectly carried over into the contemporary wage determination system is also consistent with a large body of sociological findings which demonstrate the pervasiveness of discriminatory attitudes and cultural norms in the differential evaluation of male and female characteristics and work.[44] Much of this evidence points to the phenomenon of indirect discrimination through the undervaluation of women's work. Women workers are generally evaluated less highly in terms of job performance than men with whom they share the same characteristics, and the more a job is perceived to be "women's work" associated with "feminine" attributes, the less it is likely to be paid. The 'feminine' nature ascribed to

42 Anti-Discrimination Board N.S.W., "Discrimination in Legislation", Report of the Anti-Discrimination Board in Accordance with Section 121 of the Anti-Discrimination Act 1977, Part I, Volumes 1 & 2, 1978; L Philips, "Casual and Part Time Work, A Survey of the Provisions Contained in New South Wales Awards, Women's Co-Ordination Unit, NSW Premier's Department 1982; J O'Dea, C Byrt and I Beaumanis, Review of Discriminations Provisions in South Australian Awards and Agreements, South Australia, Department of Labour, 1987; D Loxton, "Discrimination in By-Laws", A Review of the By-Laws of Municipalities in Western Australia, Report No.1 Equal Opportunity Commission, Perth, 1988; Department of Employment and Training, Women's Bureau & Office of the Status of Women, Survey of Sex Differentiating Provisions in Federal Awards, Canberra, 1987; Q Bryce, Sex Discrimination Commissioner, "An Address to Worksafe Australia, National Occupational Health and Safety Commission, Paper presented to the Lead Forum, August 1990.

43 See, for example, the Child Care Workers Case, Industrial Relations Commission, September 1990, S Print J4316

44 See C Burton 1991, op.cit., p 88 ff; Weiler, op.cit., p 1790; Treiman and Hartman, op.cit., p 34 ff

this work may mean that it is not as highly valued in the employment context, and there is much literature which suggests that the skills conventionally brought by women to their jobs are perceived as requiring less ability and effort relative to the skills more commonly associated with male dominated occupations.[45] Jobs commonly held by women in such areas as secretarial and factory process work, for example, frequently require a capacity to perform interrupted, or simultaneous tasks with high levels of speed and manual dexterity. Such fine motor movement skills and co-ordination skills may, however, receive little, or no recognition, while certain skills associated with predominantly male occupations, such as lifting of weights, are implicitly rewarded. The different labour value placed on the handling of finances and machinery, relative to the remedial care of people, or the education of children, has similarly been cited to illustrate the ways in which lesser value is regularly assigned to work predominantly carried out by women.[46] A common example relates to the situation where attending to automobiles, a largely male occupation, is more highly remunerated than caring for children, even in circumstances where levels of

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45 For a summary of this literature see, C Burton 1991, op.cit., p 88 ff

46 ibid, pp 98-99. See too Department of Employment, Education and Training, The Women's Bureau, Working Party on the Role of Women in the Economy: Equal Pay Discussion Paper, Canberra, 1988, p 24

training and education are more than comparable.[47] This particular comparison of job classifications also practically illustrates the tendency to inadequately identify and compensate the negative working conditions of jobs predominantly performed by women. While dirt, grease, noise, vibration and the lifting of machinery may be taken into account in the evaluation of a mechanic's working conditions, less attention may be directed to the disadvantageous working conditions regularly encountered by child care workers with respect to exposure to noise, lifting of weights, soiled clothing, the development and behavioural problems of small children, and so on. Similar kinds of considerations arguably also apply to the work carried out by nurses, nurses aides, laundry workers, and workers engaged in other service sector occupations.

Another factor relevant to the undervaluation of the work conventionally performed by women concerns the way in which work value is determined by the assessment of certified qualifications and training. Interpersonal communication skills, organisational skills and other more specific skills such as sewing, cleaning, cooking, laundering, typing, keyboard and switch board expertise are commonly brought to the job by female employees having been acquired elsewhere. Although these skills may be a prerequisite to employment,

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47 E Sorensen, "The Wage Effects of Occupational Sex Composition: A Review and New Findings", Policy and Research Report, The Urban Institute, Washington D.C., 1988

they often receive either no formal creditation or inadequate recognition. Male dominated occupations are more likely on the other hand to be associated with preliminary training programs, such as apprenticeship, which are more likely to receive automatic accreditation, and as a result higher wage rates.[48]

A comprehensive analysis of the ways in which work conventionally performed by women may be undervalued is well beyond the scope of present discussion. The above examples attempt to provide, however, some understanding of the ways in which indirect discrimination may operate through the systematic undervaluation of women's skills and related wage levels.

The present inability to explain fully the gender wage gap, when viewed together with the propensity for the subtle undervaluation of women's worth, suggests that more effective mechanisms for the review of alleged discrimination in the payment of wages may be warranted. Even if it is assumed that only a very small proportion of the residual wage gap is attributable to such indirect forms of wage discrimination, the economic loss to women workers arising from such discrimination would arguably be substantial. The need to

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48 See Department of Employment, Education and Training, Women's Bureau, New Brooms: Restructuring and Training Issues For Women in the Service Sector, AGPS, Canberra, 1989; B Pocock, Demanding Skill, Women and technical education in Australia, Allen & Unwin, Australia, Sydney 1990, pp xiii-xvi

provide adequate measures for the treatment of wage discrimination becomes especially apparent when the potential dimensions of this economic loss are considered. If, for example, the wages of women's workers were on average undervalued by as much as 1%, Australian women might potentially be underwriting the Australian economy to an amount in excess of $669 million annually.[49] The sizeable wage injustice which these figures potentially imply starkly emphasises the need for effective procedures to enable the review of wage setting practices where indirect wage discrimination is alleged to occur. It is also important to appreciate here that discrimination constitutes a highly inefficient work practice, the removal of which should ultimately result in productivity gains to employers and industry in general.

The express recognition of the need to review discriminatory wage practices is already contained within the terms of Australia's federal sex discrimination laws, as well as several international treaty agreements ratified by the Australian Government of direct relevance to the

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49 This general figure is being calculated on the basis of current wage figures which suggest that there are over 3.12 million Australian women workers earning an average of approximately $21,450 per annum, Australian Bureau of Statistics, Catalogue, 650610, 1988; For a more conservative estimate of the costs involved in remedying discrimination in wage fixing process, see P Hall, op.cit., p 3-4

implementation of equal pay principles.[50] An overview of the legislative and non legislative methods which have been adopted to enable the review of discriminatory wage setting practices through the bringing of wage discrimination claims will now be presented.

LEGISLATIVE AND NON-LEGISLATIVE RESPONSES TO PAY EQUITY

THE AUSTRALIAN EXPERIENCE

In response to the need to ensure equal treatment in the determination of wage rates, legislation has been introduced in a number of overseas jurisdictions by which a statutory right to review alleged discrimination in the payment of wage rates is provided, and in some cases extended to include the right to equal pay for work of equal value. In the United Kingdom, for example, claims for equal pay for work of equal value may be brought pursuant to the Equal Pay Act 1970, under the terms of the Equal Pay (Amendment) Regulations 1983.[51] Proceedings brought under these statutory provisions have

50 See Convention on the Elimination of All Forms of Discrimination against Women; Equal Remuneration Convention (ILO 100); Discrimination (Employment and Occupation Convention (ILO 111)

51 See A Lester QC and D Wainwright, Equal Pay For Work of Equal Value, TMS Management Consultants, London, 1984; B Hepple, Equal Pay and the Industrial Tribunals, Sweet and Maxwell, London, 1984; Equal Opportunities Commission, Equal Pay for Work of Equal Value, A Guide to the Amended Equal Pay Act, London, 1984; S L Wilborn, "Equal Pay for Work of Equal Value: Comparable Worth in the United Kingdom", (1986), The American Journal of Comparative Law, Vol. 34, 415. By way of a closer comparison to Australia it is worth noting the recent introduction of pay equity legislation enacted in New Zealand under the Employment Equity Act 1989 (NZ)

culminated in the review of landmark equal pay cases before the House of Lords, where several decisions have highlighted the possible use of the equal value procedures established by the Equal Pay (Amendment) Regulations as a means of providing remedies for women workers seeking pay equity with male comparators.[52]

Pay equity claims have in other countries been pursued through testing the interpretation of existing discrimination laws under which the legal right to equality of treatment is broadly guaranteed. In the United States, for example, proceedings brought under Title VII of the Civil Rights Act 1964 enables parties to seek pay equity claims outside the "equal work" context,[53] although only in a limited range of circumstances.[54] The use of discrimination legislation in this way has led to considerable legal analysis and judicial

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52 Pickstone v Freemans plc [1988] 2 All E.R. 803; Hayward v Cammell Laird Shipbuilders Ltd [1988] 2 All E.R. 257; Leverton v Clywd County Council [1989] 1 All E.R. 78; See too, B Napier, "Equal value - another barrier falls", New Law Journal, July 1988, p 500; Equal Opportunities Commission, Equal Opportunities Review, Number 24 March 1989. In relation to the gradual development of UK case law in the equal pay area see, Equal Opportunities Commission, A Casebook of decisions on Sex Discrimination and Equal Pay 1976-1981, London, 1981

53 See County of Washington, Oregon v Gunther, 452 U.S. 161 (1981); American Nurses Association v Illinois, 783 F.2d 716 (7th Cir 1986); IVE v Westinghouse 631 F.2d 1094 (3rd Cir 1986); AFSCME v State of Washington 770 F.2d 1401 (9th Cir. 1985)

54 See Weiler, op.cit.; B Powers, "AFSCME v Washington: Another Barrier to Pay Equity for Women", Harvard Women's Law Journal, Vol. 9 1989

authority on the topic of indirect discrimination in the valuation of women's wages.

In Australia, by way of contrast, there has been very little legal development with respect to the identification and treatment of discrimination in the determination of wage rates. The reasons for this lack of development, though varied, relate essentially to the unique legal and institutional approach adopted in Australia in relation to the regulation of wage rates through the system of industrial arbitration. It is through the federal and State system of industrial arbitration that the wage rates for the vast majority of Australian workers are determined. The pursuit of equal pay claims, like most wage related disputes, has come to be regarded in Australia as a matter appropriately dealt with through the processes of collective bargaining, industrial arbitration and centralised wage fixing provided within the broad framework of industrial law.

The benefits which have been derived by female employees through the operation of the Australian industrial wage system have been identified by several commentators who stress the advantages which have flowed to women workers through the process of centralised wage fixing.[55] These benefits are consistently reflected in statistical wage indices which indicate that the differential in male and female earnings is

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55 C O'Donnell & N Golder, op.cit.; Gregory & Ho, op.cit.; Killingsworth, op.cit.

noticeably less when award rates of pay are considered in isolation from the overall wage rates relating to male and female average weekly earnings.[56] The relative effectiveness of the industrial arbitration system in implementing pay equity for women might also be implied from the fact that differences in the ratio between male and female earnings are considerably lower in Australia than in many other industrialised countries, including the United States, Canada, the United Kingdom and Japan, where distinctly different systems for the regulation of wage rates exist.[57]

It is no doubt partially due to the success of the Australian wage fixing system in securing relatively high levels of wage equality between men and women workers, that broader legal remedies outside the industrial arbitration system have rarely been sought as a solution to the problems of wage discrimination. The difficulties experienced in overseas jurisdictions in the use of legislative procedures under which individual legal rights to equal remuneration are provided has, in Australia, arguably also brought into question the appropriateness of legally pursuing equal pay claims within and outside the industrial relations field. More fundamentally, however, the way in which legal mechanisms can be used to review wage setting practices in Australia is largely unclear and remains untested. A detailed analysis of

56 Labour Resource Centre, op.cit., pp 36-37

57 Department of Employment, Education and Training, Women's Bureau, "Pay Equity, A Survey of 7 OECD Countries", Information Paper No 5, AGPS, Canberra, 1987, pp 59-68

this issue will be provided in Chapters Nine and Ten of this thesis. An outline of the various Chapters presented in the course of examining the relationship between industrial and discrimination law with respect to the determination of women's wage rates in Australia now follows.

THESIS OUTLINE

Chapter One of this thesis has attempted to provide a broad introduction to the issue of discrimination in the determination of women's wage rates in Australia.

Chapter Two of this thesis develops this general theme by presenting an outline of the legislative framework relevant to the regulation of industrial award wage rates in Australia. Existing State and federal laws relating to the implementation of equal pay principles are examined, and a basic description is provided of the Australian industrial award wage fixing process. Chapter Two goes on to set out the key historical developments relating to the regulation of women's wages in Australia with reference to the ways in which work predominantly performed by female workers has been traditionally valued within the industrial arbitration system.

Chapter Three describes the changes occurring in relation to the social, cultural and economic role of women in Australian society during the early 1950's and 1970's. Chapter Three relates these changes to the Australian experience with regard

to the implementation of equal pay principles within the wage determination process. The focus of this Chapter involves a study of the major equal pay decisions arising within the federal industrial law jurisdiction from 1969 to 1974. The gradual development towards the implementation of equal pay principles is traced within the Australian conciliation and arbitration system. The positive effects of the equal pay decisions determined within the general framework of industrial law is here outlined with reference to the significant reduction occurring in relation to the wage differentials between male and female workers.

From 1976-1990 the wage gap between Australian men and women appears to have largely stabilised. Chapter Four of this thesis identifies this basic pattern, and attempts to describe the broad economic and industrial relations environment relevant to these developments. The gradual deregulation of the Australian wage fixing process from 1976 to 1983 is critically examined with regard to the implications for pay equity between male and female workers. The major changes occurring within the Australian industrial wage fixing system as a result of the 1983 National Wage Case, and the incorporation of the tri-partite Accord agreement are subsequently considered.

The effects of the wage fixing procedures developed by the Australian Conciliation and Arbitration Commission in response to the 1983 Accord agreement are closely reviewed in Chapter

Four with regard to the application of equal pay principles. More particularly, a detailed description is provided of the principles adopted in the determination of work value claims, and anomalies and inequities claims within the Australian wage fixing system. The importance of these principles to the implementation of equal pay in Australia is illustrated through an analysis of the Nurses Test Case proceedings commenced in 1985.[58] Chapter Four concludes with a study of the events leading on from the decision of the Australian Conciliation and Arbitration Commission in the Nurses Case.[59] A brief critique is here included of the limitations posed by the Nurses Case decision with respect to future equal pay claims arising within the Australian industrial wage fixing system.

A broad review of the restrictions placed on the application of equal pay principles within the Australian industrial arbitration process from 1974 up to the outcome of the 1985 Nurses Case forms the subject of Chapter Five. This Chapter begins with a discussion of the limited application of the 1972 Equal Pay Case[60] to the industrial award rates fixed for predominantly female occupations. The difficulties of pursuing equal pay claims within the constraints imposed by traditional work value principles is next outlined, followed

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58 Private Hospitals' and Doctors' Nurses (ACT) Award (1986) 300 CAR 190

59 id

60 (1972) 147 CAR 172

by a short discussion of the topic of gender bias in the industrial award making process. The problems attached to ensuring the proper implementation of the principle of equal pay for work of equal value in the negotiation of consent award agreements are considered. The need to provide accessible procedures to review the effective application of equal pay principles is also canvassed as a means of removing gender discrimination in the industrial wage fixing process. Chapter Five concludes by describing the ways in which past wage relativities continue to influence the maintenance of fixed wage differentials between various occupational groups. The difficulties in transcending the subtle entrenchment of such wage relativities in the course of removing gender discrimination in the determination of wage rates are finally considered.

Chapter Six investigates the attempts made to incorporate the progressive implementation of equal pay measures within the industrial relations framework developed over the late 1980's. This Chapter examines the new directions taken within the Australian wage fixing system from 1986 to 1988 with particular reference to the initiatives relating to the process of award restructuring, and the application of the structural efficiency principle. The development of the supplementary payments principle is also considered with regard to its impact on the wage levels of Australian women workers. In the course of this review close attention is given to the decision of the Conciliation and Arbitration

Commission in the 1988 and 1989 National Wage Case decisions.[61] The impact of these decisions on the level of women's wage rates, and the removal of indirect wage discrimination is finally considered.

Chapter Seven serves to describe through practical case studies the ways in which the various wage fixing principles described in Chapters Five and Six have come to influence the determination of equal pay claims lodged within the industrial arbitration system since the 1985 Nurses Case. Chapter Seven begins by demonstrating the limitations inherent in applying the anomalies and inequities principle to resolve equal pay claims brought to remove indirect sex discrimination in the wage determination process. Several industrial award wage claims lodged within the federal industrial law jurisdiction concerned with equal pay issues are analysed. These include the Therapist's Case,[62] the Social Worker's Case,[63] and the Dental Therapist's Case.[64] The emerging shift in the approach adopted to the resolution of equal pay issues with the advent

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61 National Wage Case 1988 (1988) 25 IR 170; National Wage Case 1989 (1989) 30 IR 81

62 Re Professional Officers Association, Australian Public Service, Application re Therapists, (1985) 29 IR 343

63 Re Professional Officers Association, Australian Public Service Social Workers Award 1985, Report of Commissioner Griffin, Canberra 10 December 1987, Decision Anomalies Conference 10 February 1989, Statement in A302, President Maddern, 14 April 1988

64 Re Professional Officers Association, General Conditions of Employment, A.C.T. Health Authority Award 1986, C. No 07070 of 1986, Report of Commissioner Lewin, Adelaide, 13 July 1989

of award restructuring is then examined. The changes brought about to the application of equal pay principles by the introduction of award restructuring are discussed with special reference to the decision of the Australian Industrial Relations Commission in the Child Care Workers Case finally determined in September 1990.[65]

The case studies presented in Chapter Seven reveal the strong influence of the national wage fixing principles determined within the Australian federal industrial law jurisdiction on the methods applied, and the outcomes obtained in relation to the negotiation of equal pay award wage increases. As the Nurses Case and more recently the Child Care Workers Case have shown, variations to national wage fixing principles have an overriding and determinative effect on the procedures and policies governing the resolution of equal pay award wage increases.

Chapter Eight is directed to reviewing the ways in which national wage fixing principles may come to influence the application of equal pay principles in the 1990's. The policy initiatives introduced in relation to pay equity for Australian women workers are outlined, and the challenges for workplace reform are described. The barriers to a more comprehensive system to enable the proper implementation of equal pay principles are considered, and the need to place a

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65 Child Care Workers Case, Decision of the Industrial Relations Commission, September 1990, S Print J 74316

more explicit emphasis on the removal of indirect discrimination in the wage determination process is discussed. Chapter Nine proceeds to consider the ways in which a greater recognition of discriminatory wage practices might develop through the promotion and acceptance of the principles contained under Australia's federal discrimination laws. An overview is provided in this Chapter of the operation of discrimination legislation in the area of wage regulation with general reference to the restrictions placed on the review of alleged sex discrimination in the industrial relations field.

Chapter Ten provides a more specific and detailed analysis of the provisions of the Sex Discrimination Act 1984 (Cth) and the legal prohibitions provided under this Act in relation to discriminatory terms and conditions of employment. The Act's limited potential to assist in the identification and treatment of wage discrimination is described. Particular attention is given to the difficulties attached to establishing claims of indirect discrimination in the wage setting process in the area of over award and non award wage payments. Chapter Ten concludes by examining the broad effects of the Sex Discrimination Act 1984 (Cth) on the operation of Australia's federal wage fixing authorities. The possible legal sanctions available in circumstances where industrial wage determinations may be inconsistent with the Sex Discrimination Act 1984 (Cth) are briefly discussed. The policy influence of the principles embodied in Australia's federal discrimination laws are finally considered.

Chapter Eleven seeks to explore further the ways in which legal precepts and policies may constructively influence the implementation of equal pay principles within the Australian wage fixing system. It commences with an examination of the principles developed under international law of direct relevance to equal pay. This study is followed by a critical evaluation of further measures and steps to be introduced within the Australian industrial wage process to ensure an adequate level of compliance with international treaty obligations with respect to equal remuneration between men and women workers.

The final Chapter of this thesis, Chapter Twelve, sets out a series of broad conclusions derived from the preceding examination and analysis presented.

CHAPTER TWO

INDUSTRIAL LAW AND THE REGULATION OF WOMEN'S WAGE RATES

INTRODUCTION

In Australia the setting and determination of wage rates occurs predominantly through the operation of a unique system of industrial conciliation and arbitration. This system provides the means by which wage conditions for nearly 88% of all female employees in Australia are determined.[1] Of these female employees over 63% are covered by State industrial awards, and nearly 22% by federal industrial awards.[2]

In examining the ways in which industrial law has led to the introduction of equal pay principles within Australia, a comprehensive understanding is initially required of the operation of the industrial relations system with respect to the determination of award rates of pay. Similarly an appreciation is needed of the different wage methods, and procedures historically applied in the conciliation and arbitration of industrial disputes. This Chapter consequently begins with an outline of the legislative framework relevant to the regulation of award wage rates as provided by the Australian system of industrial

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1 Australian Bureau of Statistics, Catalogue 6315.0, Canberra, AGPS 1985

2 ibid

conciliation and arbitration. The limited statutory provisions under State and federal law requiring the implementation of equal pay principles within Australia's industrial wage fixing system is set out, and a brief description of the award wage fixing process is provided. The historical developments that have taken place within the federal wage fixing system relating to the regulation of women's wages are next described, and the ways in which women's work has come to be valued within this system are considered.

WAGE REGULATION AND EQUAL PAY PROVISIONS - THE FEDERAL LEGISLATIVE FRAMEWORK

The capacity of the Federal Parliament to legislate on the subject of industrial wage regulation arises mainly from the provisions of Section 51(xxxv) of the Australian Constitution. This head of power enables the making of laws with respect to:

> "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

The first major legislation passed in the exercise of the power conferred by Section 51(xxxv) was the Conciliation and Arbitration Act 1904 (Cth) . The main object of this Act was to prevent strikes and industrial unrest by

providing mechanisms for the resolution of industrial disputes. The Act originally provided for the establishment of the Commonwealth Court of Conciliation and Arbitration whose functions were strictly limited to the settlement of genuine industrial disputes between contesting parties extending beyond one State. Judicial and non-judicial functions were vested in the Court, and specific powers were given to prescribe minimum award wage rates. Penalty provisions were included under the Act for the enforcement of awards and other wage determination orders.

In 1956 proceedings were brought to challenge the constitutional power of the Commonwealth Parliament to vest arbitral and judicial functions in the Court of Conciliation and Arbitration. The decision of the Australian High Court in the Boilermaker's Case[3] held that it was unconstitutional for a federal judicial body to exercise both judicial and non-judicial power. The Conciliation and Arbitration Act 1956 (Cth) was consequently passed with a view to separating the judicial and arbitral functions of the conciliation and arbitration process. Under this legislation, a separate Commonwealth Industrial Court was established to exercise the judicial powers relevant to enforcement proceedings in the area of industrial wage regulation. The functions relating to the

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3 R v Kirby; Ex parte Boilermaker's Society of Australia (1956) 94 CLR 254

arbitration of industrial awards, and wage fixing orders were simultaneously vested in the Australian Conciliation and Arbitration Commission.

The Commission remained in existence as Australia's leading wage fixing authority until March 1989 when its functions in relation to the conciliation and arbitration of industrial disputes were transferred to the Industrial Relations Commission with the proclamation of the Industrial Relations Act 1988 (Cth).

Australia's federal industrial legislation has at no time contained express statutory provisions specifically requiring the implementation of equal pay principles within the wage determination process. Historically the absence of such provisions may be attributed in part to the constitutional limitations of the conciliation and arbitration power under Section 51(xxxv) of the Australian Constitution. This situation has, however, arguably altered with the ratification by the Australian Government of the United Nations Convention on the Elimination of All Forms of Discrimination against Women.

In this regard, section 93 of the Industrial Relations Act 1988 (Cth) now provides that:

> "In the performance of its functions, the Commission shall take account of the principles embodied in the

Racial Discrimination Act 1975, and the Sex Discrimination Act 1984 relating to discrimination in employment."

The constitutional validity of Section 93 presumably relies on the combined operation of the conciliation and arbitration power under Section 51(xxxv), and the external affairs power under Section 51(xxix) of the Australian Constitution. The latter head of constitutional power has only recently in Australia's legal history been interpreted to allow the Federal Parliament power to give legislative effect to areas covered by international Conventions and treaties to which Australia is a party.[4]

The terms of Section 93 of the Industrial Relations Act 1988 (Cth) are especially relevant to Australia's international obligations arising under the United Nations Convention on the Elimination Of All Forms of Discrimination against Women (the UN Convention). This Convention was ratified by the Australian Government in 1983, and implemented in part within Australia domestic law with the enactment of the Sex Discrimination Act 1984 (Cth).[5]

4 See Commonwealth v Tasmania (1983) 158 CLR 1; Koowarta v Bjelke-Peterson (1982) 153 CLR 168

5 See Section 3, Sex Discrimination Act 1984 (Cth). A more detailed discussion of this Act, and the extent to which its terms operate to implement Australia's international treaty obligations in the area of equal pay is provided in Chapters Nine, Ten and Eleven

Section 86 of the Industrial Relations (Consequential Provisions) Act 1988 (Cth) ensures that the Sex Discrimination Act 1984 (Cth) is a prescribed Act for the purposes of Section 121 of the Industrial Relations Act 1988 (Cth). The provisions of Section 86 lend weight to the argument that no new orders or awards should be made by the federal Industrial Relations Commission which are inconsistent with the terms of the federal Sex Discrimination Act. The combined effect of Section 93 and Section 121 is however uncertain regarding the extent of the Commission's statutory duty to strictly ensure the application of equal pay principles in the exercise of its powers to determine award wage rates. This issue forms the subject of more detailed consideration in Chapter Ten. For present purposes, it is simply worth noting that the existing statutory provisions contained within Australia's federal industrial laws are unclear regarding the existence of a precise statutory duty requiring the implementation of equal pay principles within the national industrial wage fixing process.

WAGE REGULATION AND EQUAL PAY PROVISIONS - THE STATE LEGISLATIVE FRAMEWORK

Unlike federal legislative power, State legislative power may deal directly with the regulation of industrial disputes. This is due to the fact that State Parliaments

are not subject to the constitutional restrictions which affect the Federal Parliament in the making of federal laws. State industrial legislation may accordingly cover areas falling outside federal legislative power. Despite the wider legislative capacity of State Governments to pass laws dealing with industrial matters, a similar approach to that adopted under federal law has been applied by the various States to the arbitration of industrial disputes.[6] Similar legislative schemes for the determination of industrial wage claims are provided under the terms of the New South Wales Industrial Arbitration Act 1940, the Victoria Industrial Relations Act 1979, the South Australian Industrial Conciliation and Arbitration Act 1972, the Western Australian Industrial Relations Act 1979, the Queensland Industrial Conciliation and Arbitration Act 1961, and the Tasmanian Industrial Relations Act 1984.

In contrast to federal law, certain express provisions are provided under State industrial legislation in relation to equal pay for female workers. These provisions vary from State to State, and require the payment of equal wage rates for men and women in a very limited range of circumstances.

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6 Report Of The Committee of Review, Industrial Relations Law and Systems, Canberra AGPS, 1985, Volume 1, Appendix VI

New South Wales

In New South Wales, Section 88D of the Industrial Arbitration Act 1940 (NSW) provides that equal pay is available where female employees are performing work of the same or like nature, and of equal value to male employees. This Section was incorporated within the NSW Industrial Arbitration Act in 1958 by the Industrial Arbitration (Female Rates) Amendment Act. Significantly, Section 88D does not extend to work essentially, or usually performed by women. Nor does it allow for the application of equal pay for work of equal value in circumstances where men and women are not performing identical work tasks. Section 88D simply provides, in summary, for the application of equal pay for equal work where work is not usually performed by women, and where men are performing the same or substantially similar tasks. No separate legislative provision is made for the application of the principle of equal pay for work of equal value.

Victoria

Victoria is one of only two States which legislatively requires the separate application of the equal pay for work of equal value principle, in addition to the principle of equal pay for equal work. The Victorian provisions introduced under the Public Service (Amendment) Act 1981 (Vic) are restricted, however, to public sector employees. Under this legislation equal pay increases

are, moreover, contingent on the existence of suitable economic conditions.[7] Outside the area of public sector employment there are no existing legislative provisions requiring the application of equal pay principles within the industrial wage determination process.

Queensland

In common with the Victorian legislation, the statutory provisions under the Queensland Industrial Conciliation and Arbitration Act 1961 ostensibly provide for the separate, but limited application of the equal pay for work of equal value principle. The Queensland provisions extend more broadly to private sector employment, and require by virtue of Section 12 (1)(a) that:

> "the same wage shall be paid to persons of either sex performing the same work or providing the same rate of profit to their employer."

For the purpose of satisfying the provisions of Section 12 of the Queensland Industrial Conciliation and Arbitration Act 1961, it has been held that:

> "The evidence required will not be evidence as to the quality and quantity of the work of individual employees but as to the general quality and quantity

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7 See Section 15A, Public Service (Amendment) Act 1984 (Vic)

of the work in each calling of the average competent employee, male or female, and as to its comparative value to the average good employer."[8]

This unique approach to comparative work value appears, however, to have only been applied in relation to male and female classifications involving the same or substantially similar job content.[9] It is also to be noted that Section 13 of this legislation continues to provide for the payment of a different male and female basic wage in keeping with the traditional family wage concept. As Sykes and Glasbeck point out, the requirement that the female basic wage rate must be calculated with regard to the family wage concept has made it clearly difficult for Queensland industrial tribunals to take Section 12(1)(a)(i) at face value.[10] Given the erosion of the family wage concept since the National Wage Case decision of 1974,[11] the existing statutory provisions under Queensland law would appear to be largely obsolete.

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8 (1917) 2 QIG 211, per McNaughton J at 214

9 See, Department of Labour and National Service, Equal Pay: Some Aspects of Australian and Overseas Practice, Melbourne, 1969, p 62

10 E I Sykes and H H Glasbeck, Labour Law in Australia, Butterworths, Sydney, 1972, p 623

11 (1974) 157 CAR 293

South Australia

In South Australia, amendments to the State Industrial Code in November 1967 provided that the South Australian Industrial Commission was empowered to grant equal pay wage increases upon application by female employees performing work of the same, or a like nature, and of equal value.[12] As in the case of New South Wales, awards and industrial agreements applying to persons engaged in work, essentially or usually performed by females, were specifically excluded from the Code, even in circumstances where male employees were also employed.

The Industrial Conciliation and Arbitration Act 1972 (SA), which replaced the South Australian Industrial Code 1967, contains no provision requiring the application of equal pay principles. The bringing of equal pay claims may nonetheless be possible under the Industrial Conciliation and Arbitration Act 1972 (SA) relying on the application of principles established by earlier equal pay decisions. Claims for equal pay may also arguably be brought under the terms of the South Australian Equal Opportunity Act 1984. The limited extent to which State discrimination legislation may operate to remedy wage discrimination on the ground of sex is further considered in Chapter Eleven.

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12 Section 79, Industrial Code 1967 (SA)

Western Australia

The Western Australian experience in relation to equal pay legislation is similar to that of South Australia. In 1968, amendments were introduced to the Western Australian Industrial Arbitration Act to allow for the application of equal pay for equal work.[13] In 1971 the exemption regarding work usually or essentially performed by women was removed.[14] Later, legislative amendments in 1973 provided for the implementation of the equal pay for work of equal value principle.[15] No equal pay provisions were, however, considered necessary for inclusion within the Industrial Relations Act 1979 (WA).[16]

As in the case of South Australia, access to equal pay principles may be available in the course of negotiating an industrial wage claim under existing State industrial legislation. A complaint of discrimination in the determination of wage rates may alternatively be brought under the Western Australian Equal Opportunity Act 1984.

Tasmania

In the State of Tasmania, no legislative provisions exist expressly requiring the application of equal pay

13 See Sections 143 and 144, Industrial Arbitration Act 1912 (WA)

14 See Section 2, Industrial Arbitration Act 1971 (WA)

15 C Short, "Equal Pay - What Happened?" (1988) 28 Journal of Industrial Relations, p 327

16 See Adult Minimum Wage Case, WAIG 60, p 1894

principles. Although legislative measures formerly existed in relation to the application of the principle of equal pay for equal work within public sector employment,[17] these provisions have since been repealed by the Tasmanian State Service Act of 1984. While containing no reference to equal pay, Section 4 of this legislation provides nonetheless that all State employees shall receive fair and equitable treatment. This provision may arguably entitle parties to lodge equal pay claims in relation to wage conditions applicable to the Tasmanian public sector.

OVERVIEW OF STATE LEGISLATIVE PROVISIONS IN RELATION TO EQUAL PAY

Very few legislative restraints are to be found within the broad field of industrial law prohibiting discrimination on the basis of sex in the payment, or determination of award wage rates. The legislative measures which do exist relate almost exclusively to the implementation of the principle of equal pay for equal work, and largely exempt the review of alleged discrimination arising in predominantly female occupations. No statutory mechanisms exist which comprehensively require the separate application of the principle of equal pay for work of equal value. It is worth recalling that the legislative initiatives adopted under State law in relation to equal

17 Public Service (Equal Pay) Act 1966 (Tas)

pay essentially date from the late 1960's and early 1970's. Current at this time were major issues concerned with direct and blatant forms of sex discriminations in the payment of wage rates to male and female workers. Since the 1970's, and the gradual removal of explicit wage discrimination in the workplace, the impact of the existing legislative measures in the area of equal pay has largely subsided. As will be demonstrated in the course of this thesis, a clearly formulated legislative response to the underlying, and ongoing, problems of indirect wage discrimination in the determination of wage rates is yet to evolve.

The limited statutory provisions relevant to the application of equal pay principles within the industrial law jurisdiction, would tend to suggest that the achievement of greater pay equity for Australian women has not occurred, nor is likely to occur as a direct result of the legislated standards presently in place. This is particularly so in respect of the federal industrial jurisdiction where there are no legislative provisions which positively require the Industrial Relations Commission to ensure the unqualified application of equal pay principles in the course of determining award rates of pay, or other wage fixing orders.

Although the impetus of State legislative reform in the 1960's and 1970's greatly assisted equal pay developments

within the Australian wage fixing system, these developments have essentially been facilitated through the broader decision making powers of industrial tribunals in the general course of industrial wage fixation. The implementation of equal pay principles through the process of industrial arbitration will now be examined, commencing with a general outline of the nature of Australian wage determination procedures.

AUSTRALIAN WAGE SETTLEMENT PROCEDURES AND INDUSTRIAL AWARD DETERMINATION

In Australia, industrial tribunals generally specify minimum wage rates and conditions in the form of industrial awards. Award provisions regulate the minimum amount of wages to be paid in respect of defined job classifications, as well as such matters as maximum hours of work, the payment of overtime rates, and shift work allowances.

While the making of a federal industrial award does not involve the exercise of judicial power by an industrial tribunal, an award represents "a document affecting rights",[18] and legally binds the parties to it. Awards are, however, only binding on persons actively or

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18 R v Hamilton Knight; Ex Parte Commonwealth Steamship Owners Association (1952) 86 CLR per Fullagar J. at 319

constructively involved in the determination of an industrial dispute or matter before an industrial tribunal.[19] It is not possible, for example, for an industrial tribunal to establish a "common rule" in relation to wage conditions binding on persons not parties to an industrial dispute.[20] Where an award is breached, penalties may be imposed by industrial courts, and employers may be ordered to pay the amount of award wages due under the award. Industrial award orders do not, however, confer rights on persons who are not parties to the industrial dispute upon which an industrial award has been based.21

Although the industrial wage determination process is commonly referred to as a "compulsory" wage arbitration system, consent agreements between the parties to an industrial dispute are regularly reached in the course of informal collective bargaining. Registered industrial agreements signed by both parties, following certification by industrial wage tribunals are deemed to be awards under

19 C P Mills & G H Sorrell, Federal Industrial Law, Butterworths Sydney, 1975, p 79

20 Australian Boot Trade Employers Federation v Whybrow & Co 1910) 11 CLR 311; R v Kelly; Ex Parte the State of Victoria, (1950) 81 CLR 64

21 Blackley v Devondale Cream (Vic) Pty Ltd (1986) 117 CLR 253; For a more complete summary of the legal effect of industrial wage determinations see generally W B Creighton, W J Ford and R J Mitchell, Labour Law: Materials and Commentary, Law Book Company, Sydney, Chts 12-19; Report of the Committee of Review, Industrial Relations Law and Systems, op.cit., pp 52-61

State and federal industrial legislation. Industrial decisions and certified agreements made in relation to award rates of pay apply to all workers covered by an industrial award.

It should be noted that other collective bargaining agreements are regularly made outside the wage fixing process in the form of over award payments. These payments, made outside the terms of industrial award provisions, are more regularly paid to male employees with women employees receiving only 47% of the over award payments paid to male employers.[22] The availability of remedies in respect of wage discrimination arising through the differential payment to men and women of overaward wage rates would appear to fall outside the terms of Australia's industrial legislation. This issue is more closely examined in Chapter Ten where the potential legal remedies under discrimination legislation are canvassed in relation to the problem of wage discrimination.

INDUSTRIAL CLAIMS INVOLVING THE IMPLEMENTATION OF EQUAL PAY PRINCIPLES

Compliance with Australian wage fixing procedures remains an important pre-requisite for the pursuit of any award wage claim, including a claim for the application of equal

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22 Australian Bureau of Statistics, Catalogue No 6306.0, Canberra AGPS, 1988

pay principles. Under federal law, notification of an industrial dispute can only be made by an employer, an organisation registered under the Industrial Relations Commission Act 1988 (Cth) , the Minister for Industrial Relations, or an Industrial Registrar of the Industrial Relations Commission.[23] The lodging of a dispute with the Industrial Relations Commission invariably involves the bringing of an industrial claim by a registered trade union organisation. Access to the industrial arbitration process is therefore largely dependent on the willingness of trade unions to pursue specific industrial disputes, including award wage claims relevant to the application of equal pay principles.

While it is conceivable that leave could be granted to persons other than registered trade unions to appear in proceedings before the Commission,[24] the award negotiation process cannot generally be instituted by interested individuals or representative groups other than those registered under the Act.[25] It is significant to note that only 44% of all female employees belong to registered

23 Section 99, Industrial Relations Act 1988 (Cth)

24 See Section 57 Industrial Relation Act 1988 (Cth)

25 See however Williams v Commonwealth Banking Corporation (1960) 98 CAR 650; R v Portus & Qantas Airways; Ex Parte McNeil (1961) 105 CLR 537. An association of employees with a common cause may in certain circumstances provide a sufficient basis to enable the determination of an industrial dispute. It is highly unlikely that any such dispute would, however, merit settlement by an award wage determination

trade union organisations, in comparison to 62% of male employees.[26] The fact that access to the wage negotiation process is determined by a requirement with which a greater proportion of men than women tend to comply, through higher levels of trade union membership, raises at the outset issues concerning men and women's equal participation within the industrial wage fixing process.[27]

Access to the industrial relations process is further subject to the requirement that an award must be made in settlement of an industrial dispute. The existence of such a dispute is a precondition to the exercise of the jurisdiction of federal industrial wage tribunals.[28] It is not possible, for example, to pursue an equal pay claim unless it can be characterised as an industrial dispute between an employer and an employee. The meaning of this expression has been very broadly interpreted by the Australian High Court to include any dispute between employers and employees with respect to work terms and conditions even where the dispute does not strictly

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26 Australian Bureau of Statistics, Catalogue No 6323.0, AGPS, Canberra, June 1989

27 See here the definition of indirect discrimination contained within Section 5(2) of the Sex Discrimination Act 1984 (Cth), which aims to protect persons from institutionalised practices resulting in a disparate impact on the basis of sex

28 Re Federated Storemans and Packers Union; Ex Parte Woodumpers (Vic) Ltd (1989) 84 ALR 80

concern an industrial, productive or organised business.[29] Such a wide definition would generally encompass equal pay claims within a large category of occupations, although problems of access to the industrial wage fixing system can in certain cases arise.

A recent example relating to the issue of restricted access to industrial arbitration procedures involved an industrial dispute arising in relation to the award coverage of family day care workers in Victoria and Tasmania. The claim was originally brought before the former Conciliation and Arbitration Commission in 1988 by the Federated Municipal and Shire Council Employee's Union.[30] The predominantly female group of family day care employees represented by the Municipal Employers' Union provided child care on the basis of an hourly rate of $1.20 per child per hour.[31] Prior to determining whether the jurisdiction of the Industrial Relations Act 1988 (Cth) could apply in this case, a threshold issue arose as to whether family day care providers could be

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29 The Queen v Coldham & Ors; Ex Parte the Australian Welfare Union 1983 CLR 297; Slonim v Fellows (1984) 15 CLR 503

30 C No 33362 of 1988

31 When considering the principle of equal pay for work of equal value it is interesting to compare this rate with the 1988 hourly wage rate assessed for a first year apprentice motor mechanic under the Federal Vehicle Industry - Repair Services and Retail Award 1983 of $3.68 per hour. This rate increases for a fourth year apprentice to $7.70 per hour

said to be employees, as opposed to contract workers, and therefore eligible for union membership. A decision of a single Commissioner of the Industrial Relations Commission held that these workers should be classified as employees.[32] This decision was, however, taken on Appeal by the employer group joined to the proceedings.

In April 1991 the case was finally determined by the Industrial Relations Commission which held that family day care workers are independent contractors rather than employees. The decision means that no award coverage exists for approximately 15,000 workers performing child care services under the family day care scheme.[33]

TRADITIONAL WAGE SETTING PRACTICES - WOMEN'S WORK VALUE AS A PERCENTAGE OF MALE WAGE RATES

In examining the ways in which women's wages are determined within the Australia wage fixing system, a preliminary understanding is required of the methods traditionally employed by industrial tribunals in setting female wage rates. This in turn requires an appreciation of the historical division within federal and State industrial awards which separated award payments into two

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32 Federal Municipal and Shire Commonwealth Employee's Union of Australia & Local Government Authorities in Victoria and Tasmania December 724/89 Print No H 9730

33 See M Davis, Financial Review, 9 April 1991, p 4

distinct categories. These two categories were known as the "basic wage", and "margins" for skill.

The basic wage represented a foundational element in award payments, and was first formalised in the Harvester Decision of 1907.[34] This decision established the family wage concept within the federal industrial arbitration system, and determined a "fair and reasonable" wage as that which allowed an unskilled worker to support himself, his wife and three children. Margins were then added to this basic wage to reflect an evaluation of different levels of skill.

From its earliest beginnings the industrial arbitration system assumed a distinct division between men and women's wage rates based on the concept of differential needs between an average female worker without dependents, and an average male worker with family responsibilities. Women's wage rates were as a result consistently fixed to

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34 Ex Parte Harvester v McKay (1907) 2 CAR 1

represent a percentage of male rates, irrespective of the content, and value of work performed.[35]

While the family wage concept established in 1907 had a major effect on determining the level of women's wage rates, it was not until 1912 that the issue of women's pay was explicitly discussed within the federal industrial arbitration system. In that year a decision was made to grant equal pay to certain classes of female workers engaged in fruitpicking for the express purpose of discouraging the replacement of male workers by female workers in the fruit picking industry.[36] Where this perceived difficulty did not exist in relation to work "essentially adapted for women",[37] a reduced minimum basic wage was assessed for women workers as a proportion of the male rate. These basic principles were consistently applied in later decisions of the Conciliation and Arbitration Court under which the value of women's work

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35 The early institutionalisation of discrimination in wage setting practices in Australia has been well researched and documented: See, for example, E Ryan and A Conlon, Gentle Invaders: Australian Women at Work 1788-1974, Nelson, Melbourne 1975; L Bennett, "Legal Intervention and the Female Workforce: The Australian Conciliation and Arbitration Court 1907 - 1921" (1984) 12 International Journal of the Sociology of Law 23, M Thornton, "(Un)equal Pay for Work of Equal Value", (1981), Journal of Industrial Relations Vol 23, 466; C Short, op.cit., p 315ff; R Hunter, "Women Workers and Federal Industrial Law: From Harvester to Comparable Worth", (1988) Vol. 1 Number 2 Australian Journal of Labour Law, 147

36 Rural Worker's Union Case (1912) 6 CAR 61

37 ibid, at p 80

was characteristically set at a lesser rate to that of male employees.[38]

The segregation of work categories on the basis of sex, and the valuation of work with reference to this gender segregation is succinctly reflected in the observations of Powers J in the 1917 Theatrical Employees case:[39]

> "It is only where the work in question is women's work - suitable work for women - that the Court awards what it considers to be the value of the work as woman's work; or if the value is less than a living wage for a woman then it allows a living wage for a woman for a week's work. This Court allows to men a living wage based on the assumption that the average man has to keep a wife and family of three children whatever the value of the work he does may be.
>
> "The Court allows a living wage to a woman as a single woman. The single man often gets more than his work is worth, but if single men are paid less than married men the cheaper labour would be employed and they

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38 Re Federal Clerk's Award 1916 10 CAR 32; Theatrical Employees Case 1917 11 CAR 85; Clothing Trades Case (1919) 13 CAR 647; Re Clothing Awards (1923) 18 CAR 1040; Re Food Preserving Award (1924) 20 CAR 60; Re Fruitpicker's Award (1929) 28 CAR 609; Re Metal Trades Industry Award (1941) 47 CAR 783

39 (1917) 11 CAR at 146

could not make the necessary provision for marriage."[40]

In 1919, an equal basic wage and margin was for the first time awarded to men and women in the clothing industry for certain limited classifications, such as cutters and machinists, where men and women were performing the same tasks.[41] For job classifications where the gradual replacement of men by women was not in issue, the female basic wage was fixed at 54% of the male basic wage. This fixed ratio was to largely influence the setting of the female basic wage for well over the next three decades.

Over the period of 1912-1967, Short identifies three basic models for the payment of female wages.[42] The first involved jobs where women could have displaced men had they been given lower wages, and where equal basic wages and margins applied. The second involved occupations where no risk to male displacement was apparent due to the nature of the job being "peculiarly suited" to female workers. Here women received 54%-75% of the male basic wage and margin. In the third category, equal margins were paid, but unequal basic wage rates were set. It was

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40 id

41 Federation Clothing Trades v JA Archer (1919) 13 CAR 617

42 C Short, op.cit., p 317

within the second and third category of wage payment that the majority of female workers fell.

THE WOMEN'S EMPLOYMENT BOARD AND POST WAR CHANGE

For a brief time during the Second World War, women's wages were determined by a separate wage authority known as the Women's Employment Board. The Board was established for the purpose of encouraging women into essential war time service employment in the absence of male workers. The measurement of work value by the Board was determined with reference to the worth of the employment services provided to the employer, and as such represented an unprecedented approach within the federal wage fixing system to the determination of women's wage rates. These were set between 60%-100% of the relevant male rate.[43] The effect of the wage increases sanctioned by the Women's Employment Board had a marked impact on the expectations and demands of women workers within the post-war industrial wage fixing system. These heightened expectations and demands were ultimately to take form in significant industrial pressure for remuneration to be set

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43 M Killingsworth, The Economics of Comparable Worth, W.E. Upjoin Institute, Michigan, 1990, p 230; A Holgate & K Milgrom, She Works Hard For The Money, Women's Legal Resources Group, Melbourne, 1985, p 15

at a more equitable rate in accordance with the value of work performed.[44]

This changing industrial climate had, in particular, an important influence on the outcome of the Basic Wage Inquiry of 1949-50[45] through which the basic wage for women under federal awards was increased from 54% to 75% of the male basic wage. Although this decision represented a clear improvement to women's basic wage standards, it nonetheless preserved earlier wage fixing methods under which the value of women's work was determined through the implicit application of the strict gender criteria adopted in the 1919 Clothing Trades decision.[46]

The Basic Wage Inquiry decision of 1949-50 did, however, represent a slight shift in emphasis from the traditional family needs concept, a development which was later reinforced in the Wage and Standard Hours Inquiry of 1952-53.[47] In the latter case, employers had sought a reduction of the 75% rate paid to women to a lesser rate of 60% of the male standard. The employers' claims were rejected by the Conciliation and Arbitration Commission on

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44 Hunter, op.cit., p 154, Ryan & Conlon, op.cit., pp 124-140

45 Basic Wage Inquiry 1949-1950 (1950) 68 CAR 698

46 Federated Clothing Trades v JA Archer (1919) 13 CAR 647

47 (1953) 77 CAR 477

the basis that no material had been placed before it to support a ruling that the rate of 75% was too high. From 1953 to 1967, adjustments to the female basic wage continued therefore to be made by systematically adding 75% of any male increase awarded to the basic female award wage rate.

The system for fixing margins for skill continued throughout the 1950's to reflect community attitudes relating to the inferior value of women's work. As Hunter points out, the work performed by women was often classified differently in keeping with such perceptions when it came to the assessment of marginal wage rates.[48] The Federal Metal Industry Award 1959 contained, for example, 42 male classifications in which different margins for skill were received. This compared to 6 classifications for female employees. A similar pattern was apparent across blue collar and white collar awards.[49] This phenomena might arguably be attributed to the fact that women were assigned to a far narrower range of unskilled tasks in the workplace. As a result the extent of wage discrimination, as distinct from other forms of employment discrimination, is difficult to evaluate. This is particularly so in circumstances where no clear methods were employed to identify and compare skill levels in the

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48 R Hunter, op.cit., p 152

49 id

course of wage negotiation. Yet as Hunter points out, the situation remained that:

> "Skills associated with men's work, including both the use of physical strength and the ability to perform a range of tasks came to be valued more highly than skills associated with women's work such as speed, dexterity, and the performance of repetitive tasks."[50]

Even when the same or similar job classifications arose, different margins were routinely awarded for male and female employees. Wage rates were regularly set without regard to any system of work value investigation. Wage outcomes accordingly involved little assessment of relevant skills brought to the job, or actual work performed. Wage agreements reached between employer and employee groups naturally reflected, moreover, the interests of the major participants in the wage negotiation process. These participants comprised on the whole, male employers and male trade unionists involving negligible representation with regard to the disadvantaged interests of women workers.

The system of setting margins for skill was underpinned by the principle of "comparative wage justice" under which it was assumed that the relative position of a particular wage within the wage structure should remain unchanged

50 id

unless job requirements increased or altered.[51] Margins were fixed separately from the basic wage, traditionally through the Metal Trades Award, and relativities were regularly restored by "wage rounds" which maintained a basic wage hierarchy between existing job classifications. Work value claims were not permitted outside of award wage claims where a change in the work being performed could be demonstrated.[52]

The above principles have played an integral role in determining work value claims throughout the post war years, up to and including the 1990's. The overriding requirement of establishing net additions to job requirements prior to the granting of work value increases, and the need to ensure, so far as possible, the maintenance of stable wage relativities remain essential and underlying features of the Australian wage fixing system. The restrictive effect of these features on the processing of industrial award claims concerned with securing wage increases through the application of equal pay principles is discussed at greater length in Chapters Four and Five.

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51 C O'Donnell and H Golder, "A Comparative Analysis of Equal Pay in the United States, Britain, and Australia, (1986) 3 Australian Feminist Studies 59 at p 74

52 id; See too National Wage Case 1981 (1981) 254 CAR 347 at 386

In 1966, the Australian Conciliation and Arbitration Commission announced its intention to replace the basic wage and margins concept with the "total wage" concept which enabled identical wage increases to be awarded to male and female employees.[53] A year later, the "total wage" concept was formally adopted by the Commission in the 1967 National Wage Case.[54] The introduction of the total wage represented a small step towards improved treatment in the setting of wage standards for women, but, significantly, did not provide for equal pay between male and female employees. The continuing gender division between the wage rates afforded to male and female workers in the application of the total wage concept is summarised in the 1967 National Wage Case as follows:

> "Although we refer to the total wage, there will for the present be a different total wage for males and females and a number of total wages for many classifications. These result from existing basic wage differentials and from the quite complex history of basic wages particularly those for females, starting many years from a concept of differing needs and responsibilities of men and women. Both basic

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53 Basic Wage Margins and Total Wage Cases (1966) 115 CAR 93

54 (1967) 118 CAR 655

wages have over the years been adjusted in a variety of ways. We are conscious of these apparent anomalies, but consider it is not practical to attempt to deal with either at this time. The Community is faced with economic, industrial and social challenges arising from the history of female wage fixation. We have on this occasion deliberately awarded the same increase to adult females and males. The recent Clothing Trades Decision affirmed the concept of equal margins for adult males and females doing equal work. The extension of that concept to the total wage would involve economic and industrial sequels and calls for a thorough investigation and debate in which the policy of gradual implementation could be considered."[55]

In addition to announcing the introduction of the "total wage" concept, the Basic Wage Margins and Total Wage Cases of 1966 also saw the introduction of the first adult minimum wage.[56] This new minimum wage did not, however, extend to women, or junior employees. Implicitly retained was the concept that wage standards were somehow referable to the sex of an employee based on assumptions relating to family responsibilities. The establishment of a male only minimum award served to maintain a marked sexual division in the payment of wage rates amongst low paid workers.

55 ibid, at 660

56 (1966) 115 CAR 93 at 194 ff

Explicit gender discrimination in the payment of minimum wage rates was to remain in force until the introduction of a gender neutral "adult wage" in 1974.[57]

Five years prior to this development, however, Australia's first major equal pay case was brought before the federal Conciliation and Arbitration Commission claiming the application of equal pay for equal work in the payment of award rates.[58] The ruling in this case was followed by a second equal pay decision in 1972 in which qualified access to the separate principle of equal pay for work of equal value was granted.[59] The National Wage Case of 1974[60] involved a third equal pay decision which saw the final abandoning of the family wage concept through the replacement of the minimum male rate with an "adult" minimum wage applicable to both male and female workers. These three cases represent the first positive attempts to secure equal treatment for Australian women workers in the setting of wage rates, and will now be separately discussed.

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57 See, National Wage Case (1974) 157 CAR 293

58 Equal Pay Cases (1969) 127 CAR 1142

59 National Wage and Equal Pay Cases (1972) 147 CAR 172

60 National Wage Case (1974) 157 CAR 293

CHAPTER THREE

NEW PERSPECTIVES ON WOMEN'S RIGHTS - THE 1960'S AND 1970'S

The early 1960's through to the mid 1970's marked a period of rapid change in the social, cultural and economic role of Australian women. Between 1961 and 1973, women's participation in the paid workforce increased from 28.96% to an estimated 41.3%, with the labour participation rate for married women increasing by nearly 22%.[1] The growing involvement of women in the labour market throughout the major western industrialised economies reflected new social attitudes relating to the status of women. Part of this changing awareness involved the recognition of the legal right to equal treatment irrespective of sex, including the right to be protected from unfair discrimination in all its forms. Internationally, a common interest in the implementation of equal pay principles emerged in response to the need to remove discriminatory employment practices, and to provide for greater equity in relation to women's working conditions. This Chapter is directed to describing the ways in which the application of these principles were to evolve in the context of the Australian industrial wage fixing system. More particularly an analysis is presented of the major equal pay decisions of the former Conciliation and Arbitration Commission from 1969 to 1974.

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1 J Nieuwenhuysen and J Hicks, "Equal Pay for Women in Australia and New Zealand" in B Pettman (Ed) Equal Pay for Women: Progress and Problems in Seven Countries, MCB Books, Bradford 1975, p 5

Instrumental to the developments towards improved wage conditions for women workers during the 1960's was the adoption in 1951 by the International Labour Conference of the International Labour Organisation's Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO 100), and the accompanying ILO Recommendation (No 90).[2] Although ILO 100 was not ratified by the Australian Government until 1974, its principles and objectives were an important impetus to the introduction of the equal pay measures incorporated within Australia's State industrial legislation from the late 1950's through to the early 1970's.[3] With the progressive enactment of equal pay provisions under State laws, equal pay claims were gradually processed over this period before State industrial tribunals.

In the majority of States, wage improvements for women were perhaps most notable in the teaching industry. In New South Wales, for example, equal margins for male and female teachers were introduced from January 1959. The basic wage component was progressively raised in this State by a series of 8% wage increases which allowed for

2 M Gaudron and M Bosworth, "Equal Pay?", in J MacKinolty and H Radi (eds), In Pursuit of Justice, Hale and Iremonger, Sydney, 1979, p 163

3 See Industrial Arbitration (Female Rates Amendment) Act 1958 (NSW), S 88D; Industrial Conciliation and Arbitration Act 1961 (Queensland); Industrial Arbitration Amendment Act 1968 (WA); Industrial Code 1967 (SA); Public Service (Equal Pay) Act 1966 (Tas)

equal male and female wage rates by 1963. In Victoria, it was determined that equal margins would be extended in 1967, and basic wage differences phased out by 1971. A similar time frame was applied for particular teaching classifications in Queensland and Tasmania. In South Australia, equality in male and female teaching salaries was to be implemented by five annual instalments from 1966 up till 1971. Finally, in Western Australia it was determined that equal pay for female teachers would be introduced over five years by 1973.[4]

The equal pay awards gained by female employees within the teaching profession were not, however, representative of changes industry wide. In other occupations and industries equal pay claims met with mixed success.[5] Throughout Australia, the equal pay award wage increases which were obtained led nevertheless to a growing awareness of equal pay issues within the general community, and provided an important foundation for further changes to the methods applied in the determination of women's wage rates. Over time these changes were to flow through to the federal industrial wage system, and by 1969 Australia's first equal pay case

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4 Department of Labour and National Service, Equal Pay: Some Aspects of Australian and Overseas Practice, Melbourne, 1969, p 74 ff

5 ibid, at pp 52-62; See too M Thornton, "(Un)equal Pay for Work of Equal Value", (1981) Journal of Industrial Relations, Volume 23, 466 at p 471

proceedings had commenced within the federal industrial law jurisdiction.

THE 1969 EQUAL PAY CASE

The implementation of equal pay principles within various award wage rates established by State industrial tribunals provided towards the end of the 1960's a direct basis for comparison for female employees within the federal wage fixing system. By this time, noticeable discrepancies in wage rates had begun to emerge between similar job categories covered under federal and State awards. Such discrepancies were arguably attributable, in part, to the fact that no legislative provisions existed within the federal industrial jurisdiction requiring the application of equal pay principles in the determination of women's wage rates.

In June 1968, an application was lodged with the federal Conciliation and Arbitration Commission by the Metal Employee's Union for the purpose of testing the application of equal pay principles in the making of federal industrial wage awards. The claim was later joined by ten additional applications brought by several Commonwealth public sector employee associations. Following an unsuccessful jurisdictional challenge by

employer groups to defeat the claims brought,[6] the combined wage claims were fully presented before the Australian Conciliation and Arbitration Commission by Australia's present Prime Minister, R J Hawke, then acting as an industrial advocate for the Australian Council of Trade Unions (the ACTU).[7] Several women's representative groups intervened in the case in support of the introduction of equal pay measures including the Australian Federation of Business and Professional Women's Clubs, the Union of Australian Women, the Australian Federation of Women Voters, and the Australian National Council of Women.

The ACTU's claim sought to increase award wage rates for female employees uniformly by an amount representing the difference in the former male and female basic wage. The applications did not, however, seek to comprehensively claim wage increases resulting from any differences arising from the "marginal" content of the total wage.[8]

The ACTU's submissions referred to changes in trade union policy which, it was suggested, had resulted in an

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6 See, The Commonwealth and Arbitration Commission & Ors; Ex Parte The Angliss Group (1969) 122 CLR 546

7 See, Equal Pay Cases, (1969) 127 CAR 1142

8 ibid, at 1147, 1158

acceptance of the concept of equal pay for equal work.[9] It was argued that by acceding to the wage claims lodged, an important step towards equal pay would be achieved, and that any anomalies which remained after the claims were granted could later be dealt with by individual Commissioners.

The Commonwealth claimed that it did not oppose the principle of equal pay provided that it was not applied where work was usually performed by women, and provided that the same type and volume of work was performed by both male and female employees.[10] The case was strongly contested, on the other hand, by the private employer organisations represented in the proceedings. These groups maintained that the claim would result in a major piece of "social engineering", and was in effect "a sort of face-saver, a sop, to be thrown to women".[11] The advocate for the employer's group went on to deplore the selfishness of "the suffragettes who thronged this Court yesterday" from seeking to divert wages away from the male breadwinner in a workplace in which women should more appropriately be safe-guarding the well-being of their

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9 id

10 ibid, 1149-1150. Query of course the extent to which the qualifications sought to the application of equal pay principles by the Commonwealth might correctly be interpreted as support for the proper implementation of equal pay

11 ibid, 1151

families by remaining outside the paid labour market.[12] The extent to which these arguments may have in any way influenced the Commission's decision in the 1969 Equal Pay Case proceedings is not entirely clear. Although the Commission finally determined that it was not prepared to grant the claim as pressed, it did however allow for the application of the principle of equal pay for equal work in a limited range of circumstances.

In coming to its decision, the Commission had regard to four basic issues. These included the history of women's wage fixation, the attitudes of the State Governments represented in the proceedings, the operation of developing international Conventions such as ILO 100, and the economic effects of any decision to allow the award wage increases sought.[13] Having considered these matters, the Unions' claims for equal pay were granted, but not in full. Most importantly, all claims for review were conditional upon compliance with nine separate principles. In summary, these principles required that male and female employees had to be working under the same award determination, and performing work of the same, or like nature, and of equal value. In applying equal pay

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12 See Transcript of the 1969 Equal Pay Case Proceedings, 25 February 1969; p 55; See too P Morrigan, "From Moses to Moore: The Legitimate Control of Women's Wages by the Australian State", Paper presented to the 55th ANZASS Congress, Melbourne, 1985, p 23 ff

13 (1969) 127 CAR 1142 at 1152-1155

principles within the award determination process, consideration was, in addition, not to be restricted to the situation in any one establishment. Rather, it had to extend to the broader employment situation under the award being considered. In reaching any decision on the issue of equal value, it was necessary that the range and volume of the work, and the overall work conditions were the same for male and female employees. Finally, equal value was held to mean equal value from the point of view of wage, or salary assessment, as opposed to equal value to the employer.[14]

Though an important decision in its time, the 1969 equal pay determination was deficient in several respects. The principles established were limited to "basic wage" differentials, and did not cover differences arising from the "marginal" content of the total wage. Significantly too, access to equal pay was not available where the work was essentially, or usually carried out by women. This aspect of the decision was in keeping with the need to bring, and maintain federal industrial wage awards in line with State industrial wage awards determined in accordance with equal pay provisions under State industrial legislation. It was a restriction which again operated to substantially entrench the principles first laid down in

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14 ibid at 1159

the 1912 Clothing Trades Case[15] under which equal pay measures were not to be applied where work was predominantly performed by women. For reasons left unexplained, the principles were held not to apply to junior employees.

The wage fixing principles dealing with the processing of equal pay claims provided that wage increases were to be introduced in several stages from October 1969 to January 1972.[16] This was to enable a gradual implementation of female basic rates to reflect 100% of the male basic wage over three years. Certain wage increases occurred over this period, including the granting in 1970 of a significant award wage increase to large numbers of women process workers under the Metal Trades Award.[17] By 1972, however, it had become apparent that the 1969 equal pay principles had had little effect on wage rates for the vast majority of women workers, who as a result of being employed in female dominated occupations had no access to the 1969 principles. It was estimated at this time that only 18% of females had received any wage increase as a

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15 (1919) 13 CAR 647

16 1969 127 CAR 1142 at 1159

17 Metal Trades Industry Association v Electrical Trades Union, (1970) 131 CAR 663; E Ryan and A Conlon, op.cit., p 159

result of the 1969 decision.[18] In 1972 a second round of equal pay claims were consequently brought before the Conciliation and Arbitration Commission which will now be examined.

THE 1972 EQUAL PAY DECISION

In 1972, seven separate union claims were joined in a hearing before the Conciliation and Arbitration Commission for the purpose of further testing the application of equal pay principles within the federal wage fixing system.[19] Several women's groups were granted leave to intervene in the proceedings, including the National Council of Women, the Union of Australian Women, and the Women's Liberation Movement. The claims sought a consideration of whether the male minimum wage should be applied to female employees, and whether any new equal pay principles should be formulated in the light of events occurring since 1969. These events included a marked change in attitude of most State Governments to equal pay issues and the introduction of legislative provisions for equal pay in Western Australia and South Australia. Of relevance too was the attitude of the newly elected federal Labor Government which had succeeded in reopening the 1972 proceedings following its election in December of

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18 National Wage and Equal Pay Cases (1972) 147 CAR 172 at 177

19 ibid

that year. Additional submissions were at this time placed before the Australian Conciliation and Arbitration Commission in support of a broader concept of equal pay by an industrial advocate who was to become Australia's first female High Court judge, the Honourable Justice Gaudron, then acting on behalf of the Commonwealth of Australia.

As in the 1969 proceedings, the Commission was prepared to accept the importance of the legislative changes occurring at State Government level in relation to equal pay developments. Reference was again made to the provisions of ILO 100, and particular recognition was afforded to the principle of equal pay for work of equal value. Recent overseas legislative reforms in the countries of New Zealand and the United Kingdom were additionally noted by the Commission. Interestingly in relation to the British Equal Pay Act 1970, the Commission made the following comments:

> "We have in this country built up over the years a system of work evaluation not inconsistent with job evaluation as envisaged in the United Kingdom Act. Accordingly, the reference to job evaluation in the

United Kingdom can fairly be translated to the work value reviews of the Australian scene."[20]

The Commission decided in the light of the various changes and international developments occurring since the 1969 Equal Pay Case to positively state a new principle regarding the implementation of equal pay:

> "In our view the concept of 'equal pay for equal work' is too narrow in today's world and we think the time has come to enlarge the concept to 'equal pay for work of equal value'. This means that award rates for all work should be determined without regard to the sex of an employee."[21]

Under the terms of the Commission's 1972 decision, the relationship between wage rates for men and women was to be governed by a fresh set of principles to be phased in by three instalments over two and a half years. Equal pay for work of equal value was first broadly defined as the fixing of award rates by a consideration of work performed irrespective of the sex of an employee. This general principle was to be applied either by agreement between industrial parties or, where no agreement could be reached, through the process of industrial arbitration. A scheme was proposed where work comparisons were to be made

20 ibid, at 178

21 id

wherever possible between male and female classifications within the same award. Where this was not possible, female rates could be determined by work value comparisons within and between other female award classifications. As a final alternative comparisons with male and female classifications in different awards were to be permitted. The circumstances which would give rise to direct comparisons between male and female classifications remained, however, unspecified.

The Commission acknowledged that awards had generally been set without a comparative evaluation of the work performed by males and females. The Commission further conceded that unfamiliar issues may be encountered in conducting the kind of work value comparisons envisaged by the proposed guidelines. The implementation of the new equal pay for work of equal value principle to be applied would continue to be guided, however, by "the exercise of the broad judgment which has characterised work value inquiries"[22] within the federal wage fixing system. Any differences in the work performed would be determined by an arbitrator in keeping with "normal work value practices."[23] The Commission here endorsed its earlier approach to the determination of work value with reference to worth in terms of salary fixation, as distinct from worth to the employer. The Commission also confirmed that

22 ibid, at 179

23 ibid, at 180

pre-existing wage relativities could be a relevant factor to the determination of any equal pay increases.

On the question of the payment of an equal minimum wage, the Commission flatly declined the unions' application. The Commission refused to extend the minimum wage to female employees on the basis that the male only minimum wage included an "essential characteristic"[24] in that it took into account family considerations. Because such considerations did not in the Commissioner's view apply to women workers, no female minimum wage was prescribed. The new equal pay principle did not therefore apply to the male minimum wage which remained to be determined from factors unconnected with work actually performed.

The view adopted by the Commission in the 1972 Equal Pay Case that the retention of the male minimum wage represented "no real bar" to its consideration of equal pay[25] revealed in part, the Commission's lack of appreciation of the effects of gender discrimination in the wage fixing process. No difficulty was perceived in attempting to provide a framework for the payment of wages irrespective of sex, while simultaneously upholding a minimum wage concept based on assumptions linking family responsibilities to the gender of an employee. The persistent characterisation of women's needs as being less

24 ibid, at 176

25 id

than that of men on the basis of perceived family responsibilities, does not appear to have been based on any clearly objective criteria nor was it referable to any evidence presented to the Commission regarding the different financial responsibilities of female and male employees with parental obligations. The implied acceptance of women's inferior economic needs would appear to have rested substantially on little more than the stereotyped concept of the traditional "male breadwinner". The inability to identify and treat such subtle forms of discriminatory treatment within the industrial arbitration process through the use of more objective criteria connected to the value of work actually performed may yet be a matter to be fully addressed by Australia's federal wage fixing authorities.[26]

Ironically in the context of an equal pay case, the Commission's refusal in 1972 to extend the minimum wage to female employees represented one of the last forms of direct discrimination in the treatment of women within the federal industrial arbitration process. In 1974 this form of explicit discrimination was finally removed in relation to minimum adult wage rates through the extension of the minimum wage to women workers. The 1974 National Wage

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26 See, C Burton, The Promise and the Price, Allen & Unwin, Sydney, 1991, Chapter 11; V Pratt, Affirmative Action Agency, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs 1989, p 20.

Case[27] decision in which the family wage concept was finally abandoned will now be outlined.

THE 1974 NATIONAL WAGE CASE

In the 1974 National Wage Case proceedings, the ACTU again sought to claim a minimum wage applicable to both adult males and females before the Australian Conciliation and Arbitration Commission.[28] In support of the ACTU's claims, submissions were presented by the Women's Electoral Lobby, the Union of Australian Women, and the National Council of Women.

In the course of determining the issues presented by the parties the Commission began by undertaking a review of the developments leading to the introduction of the male minimum wage in 1969. For the first time the Commission acknowledged that insufficient information was available to enable it to discriminate between the widely varying family responsibilities of workers within the labour market. Having decided that the subject of family needs should more correctly be dealt with by direct government measures, it was agreed that the family component should be discarded from the minimum wage concept.

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27 National Wage Case 1974 157 CAR 293

28 id

In weighing up the case for applying the minimum wage to adult female workers, the Commission accepted that strong evidence of widespread social support for the proposal existed. It was also conceded that the extension of the minimum wage to female workers was in all the circumstances economically viable. Most persuasive, it seems, were the economic arguments presented in support of the case, and the fact that large scale wage increases would be unlikely to occur:

> "The lowest rates applicable to adult females in most awards are now close to the present minimum wage. These developments make our proposal for the extension of the minimum wage to females economically feasible. We have, therefore decided to award the same minimum wage to adult males and females."[29]

The cost estimates of allowing the extension of the minimum wage to women workers were estimated to range from $50 million to $200 million per annum, and a phasing in period involving three stages was laid down to end in June 1975. These costs were in the Commission's assessment warranted to ensure the proper operation of the 1972 decision which required that award rates for all work should be considered without regard to sex. Had these financial costs been greater, or the economic factors

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29 (1974) 157 CAR 293 at 299

different, it is arguably doubtful whether the outcome of the 1974 National Wage Case would have been the same.

EQUAL PAY EFFECTS FROM 1969 TO 1975

From 1969 to 1975 substantial increases in women's earnings occurred as a direct result of the equal pay principles developed and applied within the Australian industrial wage fixing system. In 1969, average weekly ordinary time earnings for full time non-managerial adult female employees were only 65.9% of those for male employees. By 1972, this ratio had risen to around 72%, and by 1975 had reached approximately 83%.[30] While the overall wage gap between men and women remained significantly wider in relation to the total earnings of women workers (including part time employees), the above indices reveal a significant reduction of the level of wage discrimination in respect of award wage rates payable in the case of full time female employees.[31]

By 1976, the large increases in relation to women's relative wage rates began, however, to subside as the percentage of the Australian male/female wage gap began

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30 Australian Bureau of Statistics, Catalogue No 6304.0, Canberra, 1983

31 It is worth noting here that the above wage indices are of particular relevance when examining the incidence of discrimination in the wage fixing process insofar as wage differences arising from the number of hours worked are largely minimised

once again to stabilise. The application of the newly developed equal pay principles designed to facilitate the removal of direct wage discrimination had, it seems, reached its limits.

The National Wage Case of 1974,[32] marked in summary the end of a distinct era with regard to the development of national wage fixing principles designed to remove explicit sex discrimination from the wage determination process. A new phase in the equal pay debate was to emerge in the late 1970's involving a shift in focus away from issues of direct sex discrimination towards the more subtle and intractable problem of indirect discrimination in the wage determination process. The response of the federal industrial relations system to the changing nature and direction of equal pay issues following on from the 1974 National Wage Case forms the subject of the following three Chapters of this thesis.

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32 National Wage Case (1974) 157 CAR 293

CHAPTER FOUR

THE STABILISATION OF THE GENDER WAGE GAP

The period from 1976 to 1990 has been characterised by a relative stability in the earnings gap between Australian men and women workers. In the case of total average weekly earnings of male and female workers, including part-time and overtime earnings, women's wage rates have consistently remained fixed at around 65% of those of men.[1] Where full-time adult non-managerial earnings are isolated over roughly the same period, the percentage wage difference between male and female employees has roughly remained fixed at around 17%.[2] While certain other salary indices have shown a slight reduction in male/female wage differences, no substantial movement in gender wage relativities on average has occurred.[3]

The 1972 Equal Pay Case decision anticipated that all wage claims for the implementation of equal pay for work of

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1 Australian Bureau of Statistics Catalogue No 6302.0, Canberra, August 1989

2 Labour Research Centre, Pay Equity For Women in Australia, National Women's Consultative Council, AGPS, Canberra, 1990, p 26

3 See for example, the 0.01% change in the ratio of award rates of pay from 1985 to 1988: Australian Bureau of Statistics, Catalogue No 6506.0

equal value would be progressed by 1975.[4] Despite this ruling, equal pay claims have continued to arise within the federal industrial wage fixing process through the late 1970's, the 1980's, and indeed up to and including the 1990's.[5] The ongoing determination of equal pay claims before industrial wage fixing authorities has led to a series of isolated wage increases for particular groups of women workers. Important though these claims have proved, in terms of upholding the application of equal pay principles, their effect on reducing the persisting wage differences between men and women's earnings has been minimal. The relative position of women's wage rates has been essentially preserved over the past fifteen years, with only slight adjustments detectable in the comparative rates of male and female earnings with respect to most wage indices.

In appreciating how this situation has developed, some understanding is necessary of the broader economic and industrial relations context from 1975-1990. This Chapter examines this context with reference to the development of equal pay principles from 1975, up to and including the period governed by the Accord agreement endorsed by the

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4 (1972) 147 CAR 172 at 180

5 See F. Rafferty, "Equal Pay - Past Experience, Future Directions: A Practitioner's Perspective, December 1989, The Journal of Industrial Relations, 526. See too, Child Care Industry (ACT) Award 1985 and Child Care Industry (NT) Award 1986 Dec 1001/90 S Print J4316

1983 National Wage Case.[6] In the course of this examination, the establishment of national wage fixing procedures are considered in so far as they relate to the application of equal pay principles and broader issues concerning pay equity for women.

This Chapter begins with an outline of the events following the 1975 National Wage Case decision.[7] The major changes brought to the Australian wage fixing system as a result of the Accord agreement[8] will then be discussed having regard to the implementation, of equal pay principles. This discussion includes a review of the 1983 National Wage Case decision,[9] and the 1985 Nurses Case.[10]

1975 TO 1983 - TOWARDS WAGE DEREGULATION AND A WIDENING OF THE GENDER WAGE GAP

Following the 1975 National Wage Case,[11] wage indexation principles were introduced within the Australian federal wage fixing system in response to acute economic pressures relating to high unemployment and inflation. These

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6 National Wage Case 1983 (1983) 291 CAR 3

7 National Wage Case 1975 (1975) 167 CAR 18

8 See National Wage Case 1983 (1983) 291 CAR 3

9 id

10 Private Hospitals' and Doctors' Nurses (ACT) Award (1986) 300 CAR 190

11 (1975) 167 CAR 18

principles initially provided for regular quarterly adjustments to award wage rates in line with movements to the Consumer Price Index. The new wage indexation guidelines were viewed by the Conciliation and Arbitration Commission as remaining consistent with the application of the 1972 equal pay principles, and several equal pay claims were processed within the 1975 national wage fixing principles established.[12]

By 1976, full indexation had moved to partial indexation, and in 1981 the wage indexation system established under the 1975 National Wage Case was finally abandoned. This move away from centralised wage regulation, prompted by an apparent resources boom, resulted in a period of direct industry bargaining. As of 1982, little regulatory control consequently existed over the national level of wages and salaries. While this situation led to wage increases in such areas as the metal trades and transport industries, the repercussions for ordinary wage earners with less collective bargaining strength was less favourable:

> "The effect of industry bargaining over this period was that those trade unions with bargaining power in the market place obtained wage increases while those unions which either lacked power or were in the public

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12 C O'Donnell & N Golder, "A Comparative Analysis of Equal Pay in the United States, Britain and Australia", Australian Feminist Studies, Summer 1986, p 79

sector where government resisted increases were largely unable to secure such substantial increase."[13]

Women workers who fell predominantly within the latter categories of union membership did not fare well from the effects of deregulated industry bargaining. This is reflected in the 1982 figures in relation to wage earnings which showed a decline in the male/female wage ratio in respect of both average hourly earnings and average ordinary time earnings.[14] For the first time in the six year period leading on from 1976, the wage gap between male and female employees began to show noticeable signs of regressing.

By 1982, further economic downturn had led to the introduction of a general wage freeze setting the ground for a sustained period of wage restraint. In September 1983, indexation was again introduced through a new set of wage fixing arrangements laid down in the 1983 National Wage Case.[15] These arrangements were essentially modelled on a Statement of Accord agreed to by the ACTU, and the Australian Labor Party prior to the election of the federal Labor Government in March 1983. The incorporation of the terms of the Statement of Accord within the national wage

13 RC McCallum, MJ Pittard & G Smith, Australian Labour Law, Butterworths, Sydney, 1990, p 440

14 Australian Bureau of Statistics Catalogue No 6304.0, Canberra, 1983

15 (1983) 291 CAR 3

fixing guidelines determined by the federal Conciliation and Arbitration Commission represented a major shift within the Australian industrial relations system. It was a development which was to set definitively the context for Australia's next major equal pay test case proceedings, the 1985 Nurse's Case.[16] The 1983 National Wage Case decision, and its implications for equal pay for Australian women will now be discussed with particular reference to the ACTU's equal pay claim in the 1985 Nurse's Case.

1983 TO 1986 - THE ACCORD AND THE OPERATION OF EQUAL PAY PRINCIPLES

The 1983 National Wage Case[17] saw the introduction of eleven basic wage principles designed to tightly regulate national wage adjustments in line with movements in the Consumer Price Index, and increases in national productivity. These principles endorsed the main components of the Statement of Accord which, as a result of the 1983 National Wage Case, was to influence fundamentally the process of wage negotiation in Australia up to and including the 1990's. The principles held a number of implications for the setting of women's wage rates, and the implementation of equal pay for work of equal value. Of particular significance was the Commission's approach to

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16 (1986) 300 CAR 190

17 (1983) 291 CAR 3

determining the grounds for wage increases resulting from work value assessments under the work value principle.

Prior to the abandoning of wage indexation in July 1981, a strict series of principles applied to the determination of work value claims. Any party seeking a wage increase based on work value considerations was required to establish changes in the nature of the work, skills, and responsibilities required by the job being performed. Such a change had to constitute a significant net addition to work requirements, and the measurement of any increase in money terms would normally depend on the past work requirements, and the wage previously fixed.[18] In the 1983 National Wage Case decision, the Commission restated this approach for determining work value increases under Principle 4 of the 1983 national wage fixing guidelines:

> "The correct test for an alteration in wage rates is that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification. These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to

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18 National Wage Case 1981 (1981) 254 CAR 347 at 386

employees whose work has changed in accordance with this Principle."[19]

Award wage adjustments based on work value grounds were, in summary, to remain based on considerations relating to previous work requirements, and applicable wage rates. This was so even in circumstances where wage rates might be demonstrated as being partially fixed with regard to past relativities based on discriminatory criteria. No allowance was to be made, for example, for the possible undervaluation of wage rates in respect of job classifications predominantly performed by women even where the wage fixing history of the award subject to the work value claim might indisputably have been based on considerations directly connected to the family wage concept.

Most significantly in relation to the topic of equal pay, the 1983 National Wage Case was notable for its rejection of calls for a more comprehensive system for the evaluation of the value of women's work. Intervening in the proceedings to support the return to a centralised wage fixing system, and to present equal pay submissions on the subject of women's work value were the National Council of Women, the Women's Electoral Lobby (WEL) and the Union of Australian Women. These groups contended that the implementation of the 1972 equal pay principles had not

19 (1983) 291 CAR 3 at 32

been accompanied by proper work value exercises. It was suggested that work value procedures should be reappraised to enable work value assessments to be carried out as individual awards came up for variation. It was argued in essence that wage fixing methods should be revised to enable a more complete implementation of the principle of equal pay for work of equal value. The Conciliation and Arbitration Commission was, however, unprepared to accept these proposals:

> "We consider that such large scale work value inquiries would clearly provide an opportunity for the development of additional tiers of wage increases, which would be inconsistent with the centralized system which we propose for the next two years and would also be inappropriate in the current state of unemployment especially among women. Moreover, many of the problems which the WEL has raised are matters for management, unions and governments rather than for award provision."[20]

Although the Commission appeared at least to allow for the possibility that some of the pay equity matters raised during the proceedings could be treated by adjustments to award provisions, no comment is to be found on the need to accommodate such changes through a more thorough

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20 (1983) 291 CAR 3 at 31

implementation of the 1972 equal pay principles,[21] or alternatively, the application of revised wage fixing procedures. Such considerations were it seems outside the Commission's objectives of providing an acceptable framework for maintaining wage stability, and incompatible with the Commission's perception of the likely effects of any wage increases in terms of Australia's broader national economic development.

Within this framework the parameters fixed for the determination of work value issues provided little scope for work value inquiries directed towards the review of discriminatory wage practices arising from the undervaluation of women's work. It is important to recognise in this context that this form of indirect discrimination is not commonly associated with circumstances where changes in work value can be easily demonstrated in terms of significant net additions to work requirements. The review of indirect sex discrimination through the undervaluation of women work substantially fell, in short, outside the normal work value principles prescribed within the federal wage fixing system as prescribed under the terms of the 1983 National Wage Case.[22]

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21 See National Wage and Equal Pay Cases (1972) 147 CAR 172

22 (1983) 291 CAR 3

THE 1983 NATIONAL WAGE CASE AND INDUSTRIAL AWARD CLAIMS FOR EQUAL PAY INCREASES

The ways in which equal pay claims could be processed through the industrial arbitration system following the 1983 National Wage Case leads to a close consideration of Principle 6 of the 1983 national wage fixing principles. Principle 6 provided the basic mechanism for dealing with anomalies and inequities within the wage setting process. Industrial award claims for equal pay increases were to be allowed under this principle, but only in special circumstances where no wage increases would flow on to other award classifications and no economic flow on effect would result.

The anomalies and inequities procedures had their origins in submissions put by the principal parties to the 1975 and 1976 National Wage Cases proceedings.[23] The procedures developed from these proceedings were formally incorporated by the Commission as a national wage fixing device to deal with special and extraordinary cases warranting award wage increases. Although the anomalies and inequities procedures extended to facilitate equal pay claims, the principles were never specifically designed to address equal pay issues, and essentially were limited to claims of an anomalous, isolated, or unique nature.

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23 National Wage Case 1975 (1975) 171 CAR 79 at 85; National Wage Case 1976 (1976) 177 CAR 335 at 348

Principle 6 of the 1983 national wage fixing principles required an anomaly or inequity to be processed through an anomalies conference. Here, the matter would first be discussed between the parties for the purpose of seeking agreement as to the existence of the anomaly or inequity raised. Where no agreement was possible, the President of the anomalies conference would be called upon to determine the issue, and either dismiss the application, or where an arguable case existed, refer it to a Full Bench of the Commission for consideration. The 1983 guidelines provided no precise definition of the different concepts of an anomaly, or an inequity under the terms of Principle 6. This was due to the Commission's determination that an exhaustive explanation of the concepts would be inappropriate to the effective operation of the Principle.[24] The Commission here attached weight to the fact that such guidance had not been sought by any of the parties to the national wage case proceedings.[25]

The anomalies and inequities principle was strictly subject to a requirement that it could not be used as a means for generally improving wage conditions, or lead to any wage flow on effect. In the resolution of anomalies, the overriding concept is that the Commission must be satisfied that any claim under this Principle will not be a vehicle

24 National Wage Case 1983 (1983) 291 CAR 3 at 34

25 id

for wider improvements in pay and conditions. The circumstances warranting the improvements must accordingly be of a special and isolated nature.[26] These overriding requirements were to significantly effect the outcome of Australia's next major equal pay decision, the 1985 Nurse's Case.[27]

It has been suggested that the incorporation of the terms of the Accord agreement within the principles established by the 1983 National Wage Case ignored the specific rights and needs of women employees through an overriding emphasis on the maintenance of existing wage relativities, and the systematic containment of wage increases.[28] The determination of the 1985 Nurse's Case lends some support to this general view, and will now be separately considered.

THE 1985 NURSES TEST CASE - NEW LIMITS TO THE IMPLEMENTATION OF EQUAL PAY PRINCIPLES

In October 1985 an application was lodged before the Conciliation and Arbitration Commission on behalf of the Royal Australian Nurses Federation, and the Hospital

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26 ibid, at 53

27 Private Hospitals' and Doctors' Nurses (ACT) Award (1986) 300 CAR 190

28 M. Power, S. Outhwaite, & S. Rosewarne, "Writing Women Out Of The Economy", Paper Prepared for the ANZASS Centenary Congress, May 17, 1986 p 12

Employee's Federation to vary the Private Hospitals' and Doctors' Nurses (ACT) Award 1972. The proceedings were initiated by the ACTU as part of a developed strategy to reduce the structural inequality of women in the labour market by remedying the problem of the traditional undervaluation of women's work.[29] The substance of the ACTU's case was that nursing represented an occupation which had been traditionally undervalued because it was a female occupation, and that wage increases were justified to rectify this undervaluation in keeping with the principle of equal pay for work of equal value.

Prior to any detailed review of nurses' wage rates, preliminary rulings on two threshold matters were sought by the ACTU. These included first, a ruling that the 1972 equal pay decision was still available to be implemented and second, that the Commission was not constrained in implementing the 1972 decision by virtue of the 1983 national wage fixing principles. The ACTU also sought to argue that the principle of equal pay for work of equal value embraced the doctrine of comparable worth as developed within various overseas jurisdictions, most particularly the United States.

In relation to the threshold issues, the Commission acknowledged that the 1972 equal pay principles were

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29 ACTU, Working Women's Charter: Implementation Manual No 2, Equal Pay, ACTU, Melbourne, February 1985

available to be implemented, but only in cases where they had not been already applied.[30] Equal pay claims were to be constrained, but not prohibited by the 1983 national wage fixing principles, and were required to be processed in accordance with Principle 6 relating to anomalies and inequities. Equal pay claims were to be permitted, but only in circumstances where no wage flow on effect would occur.[31]

The Commission expressly dismissed the concept of comparable worth described in the submissions presented before it on the basis that it was incompatible with, and potentially threatening to the scheme of Australia's centralised wage fixing system:

> "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

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30 Private Hospitals' and Doctors' Nurses (ACT) Award (1986) 300 CAR 190 at 191

31 id

different approaches have been taken to the doctrine in each of these countries."[32]

It is important to note that in the presentation of argument to the Commission no precise definition of comparable worth was provided by the ACTU, other than to state that the concept involved methods of job evaluation employed overseas and could equate with the 1972 principle of equal pay for work of equal value.

It is possible that the Commission's blunt rejection of the comparable worth approach may possibly have been due, in part, to the lack of more detailed submissions regarding the suitability of the comparable worth approach to the review of discriminatory wage practices within the Australian industrial relations context. The absence of any clear evidence to demonstrate the presence of indirect discrimination in the determination of female wage rates, also appears to have had an important bearing on the Commission's decision in the test case proceedings. Stronger arguments showing the need for a more comprehensive approach to the application of the 1972 equal pay principles were , in the Commission's view, plainly required. As the Commission pointed out in relation to the evidence presented in the proceedings:

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32 ibid, at 190

"...there was no analysis of this Commission's decisions or the methods by which rates are fixed in its awards or determinations to indicate that...inequalities were reflected in award rates of pay."[33]

The absence of any detailed analysis of the ways in which discrimination might be reflected in award wage payments, or the award making functions of the Commission is difficult to understand given the strong emphasis placed by the ACTU on the importance of the proceedings as a test case for the implementation of equal pay principles. Another feature lacking from the case similarly involved the omission of any detailed analysis regarding the applicability of the different overseas developments for the review of gender bias to the Australian wage determination process. No proper mention was made, for example, during the proceedings as to how particular job evaluation procedures and methods could practically and effectively be employed in the context of the Australian industrial arbitration process.

The problems associated with this lack of detailed evidence are especially highlighted when examining the broad comparative analysis presented to the Commission in relation to the issue of work value assessment. The overseas countries referred to in the material put to the

33 id

Commission almost exclusively apply a measurement of work value in terms of worth to the employer. Yet, the Commission has consistently stated that work value in the Australian context refers to worth in terms of salary fixation.[34] The failure to address such a basic difference, or to propose possible solutions compatible with the Australian approach to the evaluation of work value, clearly diminished the acceptance of the concept of comparable worth proposed. The 1985 Nurse's case did not accordingly result in any substantial reform allowing access to clearer procedures to facilitate the effective comparison of work value between the sexes within the Australian industrial wage fixing process.

DISCRIMINATION LAWS AND THE DETERMINATION OF EQUAL PAY ISSUES RELEVANT TO THE 1985 NURSES TEST CASE

In direct contrast to the 1969 and 1972 equal pay decisions, it is significant to note in relation to the Commission's decision in the 1985 Nurses test case, the absence of any reference to Australia's international treaty obligations under either ILO Convention 100, Equal Remuneration For Work Of Equal Value, or ILO Convention 111, Equality in Employment and Occupation.

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34 Equal Pay Cases (1969) 127 CAR at 1159; National Wage and Equal Pay Cases (1972) 147 CAR 172 at 180

The Commission also appeared to impliedly reject the type of earlier parallels drawn with the United Kingdom in relation to the conduct of work value inquiries. Unlike the earlier equal pay decisions, the Commission appeared to discount the overseas developments in the area of equal pay as having little, or no bearing to the Australian industrial scene.

A major gap in the Commission's reasons for decision was the absence of any discussion of the provisions of the Sex Discrimination Act 1984 (Cth) . This legislation had come into force in August 1984, immediately prior to the commencement of the Nurses test case proceedings. The federal Sex Discrimination Act was introduced for the purpose of implementing certain provisions of the United Nations Convention on the Elimination of All Forms of Discrimination against Women within Australia municipal law. The United Nations Convention is scheduled to the federal Sex Discrimination Act, and provides in Article 11 1.(d) for the right to equal remuneration in respect of work of equal value including equality of treatment in the evaluation of work. In considering the legal effect of Article 11 1(d), it is significant to note the provisions of Sections 14 and 26 of the Sex Discrimination Act 1984 (Cth). Section 14 broadly prohibits both direct and indirect discrimination in the terms and conditions of employment. Section 26 of the Act broadly prohibits discrimination in relation to the acts and practices of

person exercising or performing functions under Commonwealth law.

Extracts from the above provisions were tabled by the Commonwealth in the course of the Nurses Case proceedings, and were further referred to by separate women's groups intervening in the proceedings.[35] In the course of these submissions, particular recommendations were put relating to the need to address discrimination in the workplace in accordance with the principles of the Sex Discrimination Act 1984 (Cth). Despite these submissions, the Commission's decision contained no discussion of the legal requirements, or effects of the Sex Discrimination Act 1984 (Cth), or the United Nations Convention on which the Act is largely based. One reason for this may again have been related to the absence of sufficiently detailed presentations to the Commission by the relevant parties on either the operation of Australia's domestic discrimination legislation, or Australia's international treaty obligations directed towards equal treatment in employment.

The inadequacy of the submissions presented to the Commission in the Nurses Case cannot wholly explain, however, the Commission's inability to more completely assess the role of discrimination laws in developing

35 See Submissions of the National Council of Women of Australia, and the Council For Action For Equal Pay in the Nurses Case, Private Hospitals' and Doctors' Nurses ACT (Award) 1972, Transcript of Proceedings, 12 December 1985

procedures for the application of equal pay principles. While it is possible that the Commission may have considered that these laws operated separately, or in isolation, to the Australian industrial wage fixing process with which it is concerned, such an approach rests uneasily with the terms of the Sex Discrimination Act (Cth) 1984. It should be mentioned here that orders and awards of federal industrial tribunals generally cannot be made inconsistently with laws of the Commonwealth.[36] It is also worth noting at this point that the terms of the Sex Discrimination Act (Cth) 1984 attempt to provide a legislative scheme which requires persons acting under Commonwealth law to remove direct and indirect discrimination from within the area of employment, and government decision making practices.[37]

Another reason for the Commission's lack of discussion of the effect of Australia's sex discrimination laws on the equal pay issues raised by the Nurse's case may possibly have been connected to an underlying view that no purpose was to be served by providing any explanation of the influence of discrimination laws on the operation of the federal industrial wage fixing system. The absence of any

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36 Termination, Change and Redundancy Case (1984) 8 IR 34. The issue of whether this rule applies to the provisions of the Sex Discrimination Act 1984 (Cth) forms the basis of more detailed discussion in Chapter Ten

37 See, for example Sections 14 and 26, Sex Discrimination Act 1984 (Cth)

basic guide setting out the relationship between discrimination legislation, and the operation of the federal industrial wage system, has arguably, however, led to considerable uncertainty regarding the role, if any, that discrimination legislation may have in the area of industrial conciliation and arbitration. The decision of the Conciliation and Arbitration Commission in the 1985 Nurse's Case regrettably provides little indication of the way in which the industrial wage negotiation process may be influenced or affected by such laws. The same may be said of the industrial wage proceedings following on from the Commission's decision on the threshold issues raised by the 1985 Nurses Case. The outcome of these further wage proceedings will now be discussed.

BEYOND THE THRESHOLD ISSUES - THE NURSES CASE PROCEEDINGS 1986-1987

Following the decision of the Conciliation and Arbitration Commission in the 1985 Nurse's case, an anomalies conference was held in March 1986 to determine the issue of whether an anomaly or inequity arose in relation to the several nursing awards under review.[38] The President of the anomalies conference was persuaded that there had been no prior application of the 1972 equal pay principles to the relevant award wage salaries, and that due to a range

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38 Re RANF Application (A No 257), Decision of Maddern J, President, Melbourne, 2 April 1986

of factors an arguable case existed for the issues to be referred to the Full Bench for determination. These factors included unusual features relating to the increased rates of pay for nurses under State award provisions, the shortage of nurses, changes in work value with the use of new technology, new innovations in relation to hospital administration and training procedures, added technical and administrative responsibility, as well as changes to nursing career structures.

On the basis that these circumstances constituted a rare and isolated case, the matter was referred to a hearing of the Full Bench to determine the issue of wage adjustments arising under the anomalies and inequities provision of the 1983 national wage fixing principles.[39] Because of the interrelated nature of the work value issues arising under Principle 4 of these principles, and the anomalies issues arising under Principle 6, relevant to the application of equal pay, the two matters were jointly referred for the consideration of the Full Bench.

In proceedings conducted before the Full Bench in 1987,[40] the Royal Australian Nurses Federation (RANF) claimed that the rates of pay of registered nurses had been fixed with regard to the fact that the majority of nurses are female,

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39 ibid, p 7

40 Re RANF Applications (A No. 257), Dec 224/87 Print G7200, May 1987

and that wage levels had become depressed on account of gender bias. The wage fixing history was presented in relation to the various awards being considered, and specific arguments were put regarding the effect of a 1970 Full Bench decision in which gender bias was apparent on the face of the award wage determination. This 1970 wage fixing decision involved a previous work value inquiry and was presented by the ACTU as evidence of the non application of the 1972 equal pay principle to the ACT nurses award. It was accepted by the Commission in the course of the hearing that this award had influenced the wage rate fixed in relation to all Commonwealth nurses.[41]

It is important to appreciate that the success of the applicant's claim depended on the Union establishing that the 1972 equal pay principles had not already been applied to the award classifications subject to review. The percentage increases of nurses' wages compared with the increases awarded to the predominantly male occupation of a fitter during the same period were detailed to support the Union's argument that no equal pay increases had been previously allowed. It was further submitted by the RANF that the education, training and duties of nurses were such that they were entitled to rates equivalent to other professional officers within the health care industry. It was also recommended that a single salary and career structure apply to allow for greater stability in the

41 ibid, p 19

fixation of nurses wage rates throughout Australia. Most importantly recent developments in the salary and career structures of nurses covered by State awards were detailed. These included several industrial agreements relating to wage increases and changed award structures for nurses in Victoria, N.S.W., South Australia, Western Australia, and Tasmania. These agreements occurred between 1986-87, involving wage negotiations based on various considerations relevant to work value assessment.[42]

The issue of work value was considered separately by the Commission in accordance with Principle 4 of the 1983 wage fixing principles. The major changes agreed to by Commonwealth and State Governments to the education and training of nurses were outlined by the RANF to illustrate the changing professional nature of the nursing occupation.

Numerous factors were advanced for consideration in relation to work value in terms of significant net additions to work being performed. These included such changes as increased patient dependency, educational and technological changes in medical treatment and drug administration, delegation of responsibility from medical officers, and staff shortages. Several work inspections were carried out and the evidence of 41 witnesses was

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42 M Thornton, "Pay Equity: An Australian Perspective", Paper prepared on behalf of the International Labour Organisation, May 1989, p 15

presented relating to aspects of changes to work value in keeping with the traditional work value principle.

THE COMMISSION'S DETERMINATION OF AWARD WAGE INCREASES

The decision of the Full Bench of the Conciliation and Arbitration Commission in relation to the Nurse's case was ultimately handed down in May of 1987. In recognition of the gender bias present within the determination of the 1970 ACT nurses award, the Commission was prepared to accept that the nurses' wage rates in question had been assessed in 1970 on the basis that nursing was a predominantly female occupation.[43] The Commission found, on balance, that no positive application of the 1972 equal pay decision had been demonstrated, even though it was accepted that wage rates for nurses in New South Wales, in which equal pay increases had been allowed, had probably been an influence on the wage payments set under Commonwealth rates. Had there been any prior direct application of the 1972 equal pay principles, any further equal pay increments would presumably have been refused by the Commission.

The Commission confirmed that an anomaly existed with respect to rates of all nurses covered by the awards under review, and that inequities also existed in certain awards

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43 Re RANF Application (A No 257) Dec 224/87 Print G7200, May 1987, p 19

in respect of dissimilar rates paid to nurses under State industrial awards.[44]

The Commission accepted that the factors listed in relation to the issue of work value led to a "special element within the existing situation of the pay and career structure of nurses."[45] Indeed, an emphasis was placed throughout the decision on the unusual and "possibly unique"[46] circumstances surrounding the nurses' work value claim. The Commission was satisfied on the material provided that ongoing work value changes had occurred in several areas. Changes in the nature of work skills and responsibility were established in most of the awards under consideration.[47]

The RANF's work value claim for professional rates had rested on the argument that the preparation for nursing duties was comparable to that of a scientist undertaking a three year degree. Comparative rates of pay of nurses and technical science grades were tendered, along with duty statements of employees within the fields of physiotherapy, and medial technology. This material was not, however, considered by the Commission to be pertinent to the application of work value principles:

44 ibid, p 32

45 ibid, p 25

46 id

47 ibid, p 36

"We consider this material to be of no assistance in respect of work value comparisons and we are unable to make any analysis of the type contemplated by the 1972 equal pay decision. Nor are we in a position to measure the worth or status of the UG2 nurses director in relation to the academic qualification of a hospital scientist or technician. We also express some doubt as to whether the non-application of the 1972 Equal Pay Principle can be used to justify the lifting of the wage rates of nurses to a professional level."[48]

Despite the rejection of the arguments that nurses' wages should be afforded professional status, limited wage increases were granted to the nursing award classifications under consideration. The RANF's application for a retrospective wage increase was, however, denied, and a three month transition period was established for wage increases to be phased in. These wage increases were predominantly set to match rates applicable to nurses in State public hospitals.

THE 1985 NURSES DECISION - AN EQUAL PAY CASE?

From a close analysis of the 1985 Nurse's case, it is difficult to see how the ultimate outcome of the

48 ibid, p 41

proceedings might properly be characterised as a case involving the application of the equal pay principles. As Short,[49] Hunter,[50] and Thornton[51] point out, the resolution of the 1985 Nurse's case appeared to depend not so much on the determination of equal pay issues, as on a range of special features relevant to the nursing industry at the time the proceedings were brought. These features included changes to the delivery of nursing services, the relatively strong industrial bargaining strength of the nurses' unions, the high level of trade union organisation in the nursing industry, and ongoing labour shortages in relation to nursing staff. For women in other predominantly female occupations where such special factors could not be identified, the decision of the Conciliation and Arbitration Commission in the Nurse's case offered little by way of constructive precedent for the further application of equal pay principles within the Australian wage fixing process. If anything, the Nurse's test case proceedings tended to suggest a narrowing in the range of circumstances in which wage increases might result from the application of equal pay measures. This is especially so when considering the prevailing requirement that no wage increases of any nature were to be permitted with respect

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49 C Short, "Equal Pay - What Happened?", (1986) Journal of Industrial Relations, Vol 28 Number 3,, p 33

50 R Hunter, "Women Workers and Federal Industrial Law: From Harvester to Comparable Worth" (1988) Australian Journal of Labour Law 147, p 169

51 Thornton, op. cit., p 17

to equal pay claims processed through the anomalies and inequities procedure in cases where a wage flow on effect was likely.

The Nurse's case decision serves in addition to illustrate the difficulties attached to ensuring the systematic assessment of the extent of gender bias within award wage rates in the course of collective wage bargaining. The lack of any requirement for the Commission to provide a statement of reasons as to how wage increases are arrived within an industrial award wage determination[52] largely inhibits any precise measurement or breakdown of the equal pay increment arrived at within the award determination process. The final wage increases granted as a result of the 1987 Nurses' case appear, for example, to have been substantially adjusted having regard to comparable State award wage rates.[53] Adjustments to State awards may in turn have been influenced by the "in principle" decision of the 1985 Nurses Case confirming that access to equal pay principles was still available within the Australian wage fixing system.[54] It is, however, difficult, if not impossible, to assess in these circumstances the component of the wage increase finally awarded in the 1987 Nurses Case attributable to the application of equal pay

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52 Askew v Fields 1984 57 CLR 225

53 See, Re RANF Application (A No 257) Dec 224/87 M Print G7200, p 42

54 Thornton, op. cit., p 15

principles. This situation unfortunately provides little basis for the evaluation, or review of procedures for the identification and treatment of discrimination within the conciliation and arbitration process. The problems associated with the review of gender bias through the determination of equal pay claims within the industrial arbitration process forms the subject of the following Chapter. Chapter Five presents a critical assessment of the application of equal pay principles within the conciliation and arbitration process from 1974, up to and including the conclusion of the 1986 Nurse's case proceedings.

CHAPTER FIVE

A REVIEW OF THE APPLICATION OF EQUAL PAY PRINCIPLES WITHIN THE FEDERAL INDUSTRIAL ARBITRATION SYSTEM 1974-1986

The dramatic improvement in the relative wage outcomes for women workers as a result of the 1969, 1972 and 1974 equal pay decisions[1] led to an implicit assumption on the part of some observers that institutionalised wage discrimination had been effectively treated within the Australian industrial award making system.2 This reform had presumably occurred as a combined result of equal pay legislation under State law, and the introduction of federal industrial wage fixing principles referable to the application of equal pay for equal work, and equal pay for work of equal value.

By way off contrast, other studies directed to examining the nature of the persisting male/female wage gap in Australia imply that wage discrimination continues to form an underlying component of

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1 See Equal Pay Cases (1969) 127 CAR 1142; National Wage and Equal Pay Cases (1972) 147 CAR 172; National Wage Case (1974) 157 CAR 293

2 R G Gregory and V Ho, "Equal Pay and Comparable Worth: What can the US learn from the Australian Experience?", Discussion Paper No. 123, Centre for Economic Policy Research, p 10

the male/female wage differential.[3] In analysing this issue, several commentators have identified weaknesses relating to the accessibility, and nature of the procedures laid down for determining work value in the course of implementing the equal pay for work of equal value principle within the industrial wage process. This Chapter is directed to exploring some of the themes which these writers have raised as part of a broad review of the implementation of equal pay principles within the federal industrial jurisdiction from 1972-1986.

THE LIMITED APPLICATION AND EXTENSION OF THE 1972 EQUAL PAY DECISION

A common thread within the literature directed to the analysis of equal pay developments within Australia over the past fifteen years relates to the restricted application of the equal pay principles established by the

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3 M R Killingsworth, The Economics of Comparable Worth, Rutgers University, W E Upjohn Institute, Michigan 1990, p 265; R Drago, "The Extent of Wage Discrimination in Australia", Australian Bulletin of Labour, Vol 15 No 4, 1989, 314

1972 Equal Pay decision.[4] Short records[5] that from 1972 to 1986 only 35 awards were changed to allow for equal pay for work of equal value. Work value inquiries to evaluate the training, skills, responsibilities and working conditions of award classifications were on the whole absent in the award determinations surveyed, and in all but two cases work inspections were not conducted.

As Burton points out in relation to the same period,[6] no attempt was made in the course of determining equal pay cases within the federal wage fixing process to compare dissimilar jobs, or award classifications in work value terms in such a way as to reappraise the value of work traditionally performed by women in relation to work traditionally performed by men. Comparisons between job classifications arising within the industrial wage determination process have consistently focused on similarity in work content, as distinct from work value. As Burton points out, the possibility that similarity in

4 M Thornton, "(Un)equal Pay for Work of Equal Value" (1981) The Journal of Industrial Relations, Vol. 23, Number 4, p 473; C Short "Equal Pay - What Happened?", (1986) The Journal of Industrial Relations, Vol. 28, Number 3, p 324; C O'Donnell and H Golder, "A Comparable Analysis of Equal Pay in the United States, Britain and Australia", 1986, 3 Australian Feminist Studies, p 78; P Hall and C O'Donnell, Getting Equal, Allen and Unwin, Sydney, 1988, p 54; L Bennett, "Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission", Journal of Industrial Relations, Vol. 30, 1988, p 534

5 Short op.cit. p 324

6 C Burton, The Promise and The Price, Allen & Unwin, 1991, p 132

work value could exist in dissimilar work has yet to be fully investigated.[7] While it could be argued that this approach to wage determination has been equally applied in relation to male and female award wage rates across industries and occupations, it is an approach which holds particular disadvantages for the determination of award wage increases where the implementation of equal pay for work of equal value is in issue. The reluctance to more fully compare male and female job classifications in situations involving different work tasks has arguably limited the effective review of indirect discrimination through the undervaluation of work on the basis of sex.

In the common situation where no male classifications exist with which female classifications can be compared under the same award, a comparison of male and female classifications in different awards would appear to provide the only satisfactory way of evaluating whether wage rates may have been indirectly determined with reference to the sex of an employee. The secondary option of comparing the traditionally depressed wages of one female dominated occupation, with the depressed wages of another would not appear to provide any proper basis for the implementation of the equal pay for work of equal value principle.[8]

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7 id

8 See Submission of the National Pay Equity Coalition to the 1988 National Wage Case; P Hall & C O'Donnell, op.cit.

The extremely low incidence of cases before industrial wage tribunals involving the comparison of predominantly male and female job classifications in different awards has further led to a situation where no clearly defined methods have been routinely devised to allow for the effective comparison of work value between the sexes. This is despite the availability of procedures under the broad terms of the 1972 Equal Pay Case[9] which allow for the comparison of different award classifications between predominantly male and female occupational groups. The overriding emphasis on the requirement of strict comparability of job content raises the issue of whether sufficient distinction has been maintained within the Australian wage fixing system between the two principles of equal pay for equal work on the one hand, and equal pay for work of equal value on the other. Strict comparability in job content may be highly relevant to the principle of equal pay for equal work, but should not operate as a precondition to the implementation of equal pay for work of equal value.[10]

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9 National Wage and Equal Pay Cases (1972) 147 CAR 172

10 See International Labour Office, Report III (Part 4B), General Survey of the Committee of Experts on the Application of Conventions and Recommendations on the Application of the Equal Remuneration Convention (No 100) and Recommendation (No 90) 1951, International Labaour Conference, 72nd Session, ILO, Geneva 1986, Chapter 3

For some time, the application of the equal pay for work of equal value principle has required the carrying out of work value inquiries "in the manner in which such inquiries are conducted in our wage fixing environment".[11] This approach is, however, underscored by the fact that the traditional work value principles applied in the conduct of work value inquiries may not always facilitate wage adjustments on the grounds of equal pay for work of equal value. In Australia, industrial claims seeking wage adjustments on work value grounds have traditionally been restricted to situations where significant net additions to work value could be proved. This restriction often precludes, however, the negotiation of equal pay claims where the undervaluation of work on the basis of sex is in issue, in whole or in part.

In 1986, another barrier to the determination of work value claims involving the application of equal pay principles was set by the constraints imposed by the anomalies and inequities principle.[12] From this period, industrial claims seeking to rely on the equal pay for work of equal value principle could only be determined under the conditions laid down by the national wage fixing guidelines

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11 Private Hospitals' and Doctors' Nurses (ACT) Award (1986) 300 CAR 183 at 190

12 id

concerned with the granting of anomalies or inequities. This requirement limited equal pay increases in relation to industrial award wage claims to strictly isolated circumstances in which no wage flow on effect could arise. Such a restriction was to impose major restraints on the assessment and determination of work value claims alleging indirect wage discrimination.

The qualifications placed on the access to equal pay principles within the Australian wage fixing system are difficult to reconcile with the basic legal concept of the right to equal pay for work of equal value irrespective of sex. This right is contained within the provisions of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, and ILO Convention 100, Equal Remuneration, agreed to and ratified by the Australian Government. The extent of Australia's international obligations under these conventions is more fully discussed in Chapter Eleven of this thesis which examines Australia's compliance with its international treaty obligations in the area of equal pay.

GENDER BIAS WITHIN THE INDUSTRIAL WAGE DETERMINATION PROCESSES

Burton's study of the methods employed in the determination of work value raises sensitive issues regarding the gender neutrality of the arbitral decision making process in the

determination of work value claims.[13] Under the terms of the 1972 Equal Pay Case,[14] equal pay claims were required to be processed in accordance with "normal work value practices" calling for "the exercise of the broad judgment which has characterised work value inquiries."[15] Yet as Burton suggests:

> "The exercise of broad judgment and the choice of comparable jobs for the determination of relative work value requirements appears to have been more flexible in some decisions not involving equal pay claims than paragraph 5(b) of the 1972 Equal Pay Principle would allow. It would appear that there have been different applications of the "equal pay for work of equal value" principle and that the application of it has applied to the advantage of predominantly male classifications. It has been applied more narrowly and less flexibly with respect to predominantly female classifications."[16]

It is relevant to note that even if a discernible gender bias existed in the establishment of a federal industrial

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13 Burton, op.cit., Chapter 11

14 National Wage and Equal Pay Cases (1972) 147 CAR 172

15 ibid at 179

16 Burton, op.cit., p 143

award or wage fixing principle, few, if any legal remedies would be available to review the decision making process.[17]

CONSENT AWARD AGREEMENTS - THE NEED FOR REVIEW PROCEDURES

Australia's federal industrial legislation contains no express provision by which wage fixing tribunals or individual industrial arbitrators must be satisfied that equal pay principles have been effectively incorporated within awards. This lack of a review mechanism is especially relevant to awards entered into by consent agreements negotiated between employers and trade union organisations in the course of the industrial wage negotiation process. Reflecting on the impact of the 1972 Equal Pay Case, Hall and O'Donnell summarise the situation as follows:

> "The content and adequacy of consent agreements varied considerably according to the level of women's representation and organisation in unions negotiating agreements. Many of the agreements reached in settlement of equal pay claims were for considerably less than equal pay, and some were no more than cosmetic changes to classification titles."[18]

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17 The legal effect of the Sex Discrimination Act 1984 (Cth) on the powers exercised by federal wage fixing tribunals involves a complicated set of legal issues and is more fully dealt with in Chapter Ten

18 P Hall and C O'Donnell, op.cit., p 55

For many years this situation was compounded by the lack of any available procedure for the review of equal pay claims in circumstances where equal pay increases were previously granted at some stage in the wage history of an award. This restriction would appear to apply even where equal pay principles may not have been fully, or properly implemented.[19] As will later be seen in relation to the 1988 Dental Therapist's Case,[20] the application of this principle may more recently be susceptible to a greater degree of flexibility. As will later be discussed in Chapter Eight, it would seem that the principle may be of less relevance in the 1990's where the application of the structural efficiency principle would appear to facilitate the review of discrimination in awards. The principle that no further equal pay increases may be available in circumstances where wage adjustments have already been permitted in accordance with the 1972 Equal Pay decision has yet , however, to be expressly discarded.

The development of equal pay principles by industrial tribunals within the Australian wage fixing system poses an extremely difficult task given the parameters of the arbitral functions to be performed in conciliating industrial disputes. Federal industrial wage tribunals are

19 ibid, p 58

20 Professional Officer's Association, General Conditions of Employment; A.C.T. Health Authority Award 1986 A No 344, 13 July 1989

prohibited from exercising judicial power, and are required to flexibly conciliate wage outcomes in accordance with changing national wage fixing principles. It is important to recognise in this context the limits of industrial wage fixing authorities in determining the existence of legal rights, and in enforcing legal obligations.[21]

The federal Industrial Relations Commission may not, on the other hand, make award determinations or other wage orders inconsistently with laws of the Commonwealth. This raises difficult issues regarding the operation of the Sex Discrimination Act 1984 (Cth) on the functions of Australia's federal wage fixing authorities in the conciliation and arbitration of industrial disputes. These issues will later be discussed in Chapters Ten and Eleven where the legal rights and remedies established under the terms of Australia's discrimination laws are more closely examined.

THE MAINTENANCE AND ACCEPTANCE OF PAST WAGE RELATIVITIES

The institutionalisation of sex segregation and gender bias has been evident, over many years, within the Australian wage fixing system. The awarding of separate basic wage rates and margins for male and female workers, the distinct

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21 Re Cram: Ex Parte Newcastle Wallsend Coal Co Pty Ltd (1987) 163 CLR 140 at 148, 158; Re Ranger Uranium Mines Pty Ltd; Ex Parte Federated Miscellaneous Worker's Union of Australia (1987) 163 CLR 656

division of separate male and female wage classifications, and the non-extension of the minimum wage to women, are all examples of the ways in which the institutionalisation of gender bias can occur in the industrial wage fixing process.

From 1974 - 1986, the implied acceptance by federal wage fixing authorities that past relativities should be a relevant consideration in the determination of wage claims imported, in part, a lack of recognition or understanding of the past, and hidden effects of institutionalised discrimination within the wage fixing process. It was perhaps generally assumed over this period that sufficient and available mechanisms were inbuilt within the Australian industrial wage fixing model to adjust for discrimination in the wage setting process. The effect of discriminatory attitudes and practices leading to the systematic devaluation of women's work was not, it seems, an issue to be resolved within the Australian industrial wage determination process. It should again be emphasised in this context that the objectives of the industrial wage system are primarily directed to the conciliation and arbitration of industrial disputes. This process involves a primary need to maintain industrial harmony within the general framework of existing wage structures to minimise economic flow on and disruptive wage effects. Although the maintenance of fixed wage relativities might be appreciated in the light of these underlying objectives, the subtle

entrenchment of wage relativities is nonetheless problematic where such relativities are partially based on past or hidden discriminatory wage setting practices. This is particularly so having regard to the objects and provisions of the Sex Discrimination Act 1984 (Cth) which relate to the removal of all forms of direct and indirect discrimination in the area of employment.[22]

The implied acceptance of pre-existing award relativities as a relevant factor in the determination of equal pay claims raises direct questions in relation to the adequacy of the procedures applied within the industrial relations system for the removal of systemic discrimination in the wage setting process. The lack of attention given to devising appropriate methods for determining the ways in which discriminatory wage practices might be assessed and remedied raises particular concerns regarding the ways in which the equal pay for work of equal value principle may operate within the Australian wage fixing system.

From 1985-1989 the procedural mechanisms for the negotiation of equal pay award increases within the federal industrial arbitration system remained substantially unchanged. As a result of the 1988 National Wage Case,[23] special cases for wage increases previously referred to anomalies conferences were required to be processed through

22 See Section 3, Sex Discrimination Act 1984 (Cth)

23 (1988) 25 IR 170

the National Wage Case, or through a specially constituted Full Bench of the Industrial Relations Commission. This new requirement extended the wage fixing principles then operative to industrial claims seeking the application of equal pay principles in the form of award wage increases. Apart from this restriction in procedural access, the basic framework for processing award claims connected with the implementation of equal pay principles remained largely static from 1986-1990.

Since 1986 separate changes have, however, more recently taken place within the Australian wage fixing system relevant to equal pay developments and the practical negotiation of equal pay claims. The background to these changes once again involves some understanding of the national wage fixing principles adopted within the Australian centralised wage fixing system. The continuing development of national wage fixing principles within the broader industrial and economic context following on from 1986 forms the subject of the following Chapter. Chapter Six attempts to outline this development with reference to its possible effect on the implementation of equal pay measures.

CHAPTER SIX

NEW DIRECTIONS WITHIN THE AUSTRALIAN WAGE FIXING SYSTEM: 1986-1990

By 1986, a major deterioration in the balance of trade, high interest rates, and rising inflation had led to a recognition by the major industrial parties that further wage restraint was essential if the Australian system of wage fixation was not to be abandoned, or at least substantially weakened. In response to the apparent economic downturn, wage increases in line with movements in the Consumer Price Index were refused by the Conciliation and Arbitration Commission under the terms of the 1986 National Wage Case.[1] National wage case proceedings were adjourned to the following year when it was agreed that a proposal by the ACTU to establish a two-tiered wage mechanism would be examined. This took place in March 1987 when the Commission approved a two-tier wage system providing for award wage increases in two separate stages.[2] A first tier flat wage increase of $10 was granted to all wage and salary earners,[3] and a new wage fixing principle known as the restructuring and efficiency principle was introduced to determine second tier award wage increases.

1 (1986) 15 IR 395

2 National Wage Case 1987 (1987) 17 IR 65 at 99

3 id

The restructuring and efficiency principle was designed to establish more efficient and productive work patterns involving broad changes in work organisation. It aimed at removing inefficient and restrictive industry practices through the development of a more highly skilled, streamlined and flexible workforce. This was to be achieved by a process of award restructuring which included such measures as the reduction in the number of industrial awards, the extension of multiskilling within the labour force and the broadbanding of job classifications.

Second tier wage increases were dependent on the negotiation of revised work practices in keeping with the restructuring and efficiency principle and were subject to a 4% ceiling.[4] In applying the restructuring and efficiency principle in relation to the assessment of work value the requirements of the existing work value principle were to be satisfied. The national wage case decision of March 1987 emphasised that the work value principle would continue to play its established role in situations where employees were affected by significant net additions to work requirements.[5]

The Commission's decision of March 1987 further provided that another first tier increase would be considered in October of that year on application by trade union groups.

4 id

5 ibid at 100

This hearing was delayed until the National Wage Case of February 1988,[6] under which wage and salary earners were granted a flat $6 first tier increase. Following this decision, conferences were held between the major industrial parties to discuss the proposed review of national wage fixing principles. A review of these principles was then formally considered by the Full Bench of the Conciliation and Arbitration Commission in the National Wage Case proceedings of August 1988.[7]

At this hearing before the Conciliation and Arbitration Commission , the problems facing women workers in relation to equal pay under the two-tier wage system formed the subject of detailed submissions by the National Pay Equity Coalition (NPEC). The submissions presented to the August 1988 National Wage Case proceedings by the NPEC will now briefly be outlined.

THE 1988 NATIONAL WAGE CASE PROCEEDINGS - EQUAL PAY ISSUES REVISITED

Intervening in the 1988 National Wage Case, with the support of several women's organisations,[8] the National Pay Equity Coalition presented a series of detailed arguments

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6 (1988) 22 IR 461

7 (1988) 25 IR 170

8 National Pay Equity Coalition, Submission to the 1988 National Wage Case, June 1988, p 1

relating to aspects of pay equity within the federal wage fixing system. These submissions sought to demonstrate that:

> "in overall terms, a gap between male and female earnings persists, and that that gap is not explicable by over-award payments, hours of work, additional loadings (shift, penalty, overtime, commissions, etc). In short that part of the male/female earnings gap resides in award rates of pay."[9]

This gap was stated to derive in part from the non-application of the principle of equal pay for work of equal value. The NPEC noted that further information had previously been sought by the Commission in its previous equal pay determinations in relation to the issue of discrimination in awards.[10] The NPEC went on to demonstrate the difficulties in establishing that the equal pay for work of equal value principle had not been adequately implemented within particular award classifications through the application of the 1972 Equal Pay Case decision.[11] It was contended that much of the information needed to establish such a claim was either unavailable or inaccessible due to its complexity and

9 National Pay Equity Coalition, Submissions to the 1988 National Wage Case, p 2

10 See for example, Private Hospitals' and Doctors'' Award (1986) 300 CAR 190

11 National Wage and Equal Pay Case (1972) 147 CAR 172

volume. The basis of the wage agreements made in relation to consent awards, for example, were not usually recorded. Often, no analysis was possible of the way in which the 1972 equal pay principle had, or had not been applied in such circumstances.

Even in relation to the majority of arbitrated equal pay claims, where no work value inquiries were conducted, insufficient or no information existed regarding the way in which award rates had been determined when implementing the equal pay for work of equal value principle. This problem was compounded, in the NPEC'S view, by the strict restriction against re-opening or reviewing the ways in which the 1972 equal pay principle had been applied in respect of award wage rates.

The NPEC recommended, therefore, a broader approach to the assessment of gender bias to facilitate the implementation of equal pay principles. The primary issue identified by the NPEC was:

> "the assessment of work value in a way that fully recognises the knowledge, skills and experience of the female workforce and the demands of the jobs in which women work."[12]

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12 See National Pay Equity Coalition, Submissions to the 1988 National Wage Case, p 3

The need to comprehend this issue was seen as paramount to the process of award restructuring incorporated within the Commission's national wage fixing principles:

> "If the outstanding issues relating to the assessment of work value are not resolved equitably as part of that restructuring, the need for equal pay proceedings to redress the implicit devaluing of women's work relative to that of men will persist well into the next century."[13]

The NPEC submission went on to recommend that both consent awards and arbitrated wage claims be available for review on application by interested parties to determine whether the 1972 equal pay for work of equal value principle had been appropriately applied. It was further argued that the application of the 1972 equal pay principle should not be constrained by prevailing national wage fixing principles. Award restructuring methods should, it was suggested, allow for a skills audit of existing and proposed award classifications involving skills analysis in a non-discriminatory manner in keeping with the provisions of the Sex Discrimination Act 1984 (Cth) .

A range of other strategies relating to the promotion of pay equity were advanced. These included measures to ensure quarterly Consumer Price Index wage adjustments, the

13 id

extension of supplementary payments, measures for better education and training opportunities for women, the need for greater skills formation for female employees and the encouragement of women into traditional areas of male employment. These combined steps were viewed by the NPEC as critical to the removal of the high levels of occupational segregation in the labour market.

It is not clear, even on a close reading of the Commission's 1988 National Wage Case decision,[14] in what ways the Commission's determination was influenced by the arguments advanced by the NPEC. It is worth noting that no reference to the provisions of the federal Sex Discrimination Act appears in the Commission's reasons for decision. On the other hand, it is significant that the Commission's decision expressly acknowledged the need to address cases where award provisions discriminated against sections of the work force.[15] The outcome of the 1988 National Wage Case will now be described with particular reference to this aspect of the decision.

THE 1988 NATIONAL WAGE CASE - DEVELOPMENT TOWARDS STRUCTURAL EFFICIENCY

The Commission's decision in the 1988 National Wage Case allowed for wage increases in two separate portions,

14 (1988) 25 IR 170

15 ibid, at 179

subject to parties entering into bargaining at the workplace level on restructuring and efficiency principles.[16] The first portion involved the negotiation of a 3% wage increase for wage and salary earners. The second portion involved a further flat increase of $10 which was to be available six months from the date of the initial 3% increase. Building on the restructuring and efficiency principle, a new wage fixing principle was introduced known as the structural and efficiency principle. This principle was designed to encourage sustained improvement in productivity and efficiency at the enterprise level and established a basic set of guidelines to be applied in the negotiation of wage claims within the award restructuring process. The measures to be considered under the structural and efficiency principle included:

> "* establishing skills-related career paths which provide an incentive for workers to continue to participate in skill formation;
> * eliminating impediments to multiskilling and broadening the range of tasks which a worker may be required to perform;
> * creating appropriate relativities between different categories of workers within the award and at enterprise level;

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16 ibid, at 178

* ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;
* including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;
* updating and/or rationalising the list of respondents to awards;
* addressing any cases where award provisions discriminate against sections of the work force"[17]

The Commission once again restated its approach to the alteration of rates on the ground of work value as requiring significant net additions to wage requirements to warrant the creation of a new classification:

> "These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with these principles."[18]

The reinstatement of the traditional methods for determining work value claims once again provided little opportunity for the use of this general wage fixing

17 ibid, at 179

18 id

principle to facilitate the full implementation of the equal pay for work of equal value principle within the industrial wage setting process.

The Commission in addition confirmed the continued operation of the anomalies and inequities principle. Following the Child Care Workers Case in September 1990, the extent to which this principle will continue to operate as the primary wage fixing procedure for the direct application of the equal pay for work of equal value principle is largely in doubt.[19] An analysis of this decision would suggest that the most effective means for processing equal pay award increases presently rests with the negotiation of wage increases through the structural efficiency principle. This is examined further in relation to the Childcare Worker's decision which is considered in the following chapter.

THE DEVELOPMENT OF THE SUPPLEMENTARY PAYMENTS PRINCIPLE

Another important feature of the 1988 National Wage Case was the confirmation of a separate wage fixing principle of indirect but significant relevance to the application of equal pay principles. This was the supplementary payments principle, reintroduced to the Australian wage fixing system under the terms of the 1987 National Wage Case. The

19 See Child Care Workers Case, Decision of the Industrial Relations Commission, September, 1990, S Print J4316

aim of this principle was twofold. First, it sought to assist the poor economic position of low paid workers with little or no access to over award payments. Second, it aimed to provide for more consistent treatment between minimum rates and paid rates awards.[20] A supplementary payment is defined as being:

> "a separate amount in a minimum rates award which is in addition to the minimum rate and which together with the minimum rate becomes the award rate below which no employee may be paid."[21]

A supplementary payment acts as a substitute for overaward payments which may otherwise have been paid to an employee. Supplementary payments are prescribed in minimum rates awards to form part of the award wage rate. The award rate in an award containing supplementary payments is therefore made up of a "base rate" plus a "supplementary payment".

When added together these two rates will represent the minimum amount which an employer is legally required to pay

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20 A paid rates award has no statutory definition under the provisions of the Industrial Relations Act 1988 (Cth). A paid rates award is one in which all of the rates and conditions which are prescribed under the award actually apply as maximum rates. Employers bound by the award are prohibited from paying more than the rates prescribed: National Building Trades Construction Award, per Evatt J, April 1975, Print C7322.

21 (1987) 17 IR 65 p 100

to employees of the classification in question.[22] The amount of a supplementary payment award is determined following a review of the level of actual payments made to employees covered by the particular award under consideration. This has in the past generally been achieved through surveys conducted under the direction of the relevant wage fixing authority.

Supplementary payments can only be granted to workers receiving minimum award rates or earning low overaward payments falling below the appropriate supplementary payment attached to an award. If, for example, an employee was earning $360 per week on a minimum award rate, plus $10 in overaward payment, a supplementary payment award of $15 would only increase the employee's wage to a total amount of $375. This same wage would be paid to an employee not in receipt of overaward payments.

The 1987 and 1988 National Wage Case decisions required that commitments regarding the absorption of overaward payments had to be given by trade unions up to the level of the supplementary payment. This was to ensure that workers already receiving amounts in excess of the minimum rate did not benefit from supplementary payments to the same extent as those workers not in receipt of overaward payments.

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22 For a clear and more detailed explanation of the supplementary payment scheme see, State Wage Case, Industrial Commission of NSW, (1989) 27 IR 360

Another important criterion for determining any wage increments by way of supplementary payments involved:

> "A clear understanding and acceptance by the unions concerned in the award that the introduction or adjustment of supplementary payments may alter relativities of actual rates within the award and with other awards."[23]

Finally, the supplementary payments principle was predominantly subject to the ceiling set for second wage tier increases. This ceiling referred to the total actual wages paid to employees covered by the relevant award including overaward payments. Where this caused extreme financial hardship to an employer, arguments concerning an incapacity to pay were to be considered in determining the availability of supplementary payments.

Because fewer women than men receive overaward wage rates, supplementary payments can be of particular benefit to low paid female workers in certain industries. Since 1988 such benefits have been evident in award wage increases in several areas involving high levels of female employment. In Victoria, for example, certain groups of clerical workers employed in the retail sector, employees in the furnishing trades industry, domiciliary staff employed by

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23 National Wage Case (1988) 25 IR 170 at 180

municipal councils and community service employees have all obtained wage increases resulting, in part, from the award of supplementary payments.[24] In other States women in the textile clothing and footwear industry have also achieved marked award wage increases through the introduction of supplementary payments.[25]

THE 'FEBRUARY REVIEW' 1989

In February 1989, the Conciliation and Arbitration Commission reconvened the national wage case proceedings to consider the progress of award wage reviews and the development of general wage fixing principles arising from its August 1988 decision. In the National Wage Case decision of May 1989,[26] the Commission expressed satisfaction with the operation of the structural efficiency principle and provided further guidelines in respect of its implementation. The Commission endorsed in its decision a joint statement produced by the ACTU and the Confederation of Australian Industry (CAI) dealing with matters contained in a 1987 government survey of federal

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24 Labour Resource Centre. Pay Equity for Women in Australia, National Women's Consultative Council, AGPS, Canberra, 1990, p 51-2; J Doran, Women Workers: The Effect of the Two-Tiered Wages System, ACTU, Melbourne, 1988, p 21-22

25 See, Clothing Trades Award 1982 C No 20258 of 1988, Print H 2282 May, 1988

26 (1989) 30 IR 81

award provisions which differentiated between men and women in the workforce.

The Commission stated that it would encourage the parties to awards to take the joint suggestions of the ACTU and the CAI into account when considering structural efficiency. The Commission's support for this proposal was described as being consistent with Section 93 of the Industrial Relations Act 1988 (Cth) which came into force in March 1989. This Section requires the Industrial Relations Commission (the wage fixing authority which has superseded the Australian Conciliation and Arbitration Commission) to take into account the principles embodied in the Sex Discrimination Act 1984 (Cth).[27]

The Commission's 1989 statement represented the first occasion on which the Sex Discrimination Act 1984 (Cth) had received formal reference within a federal national wage case decision.

THE NATIONAL WAGE CASE DECISION OF AUGUST 1989

In August 1989, the Full Bench of the Industrial Relations Commission granted further wage adjustments subject to the achievement of cost savings through more efficient work practices in keeping with the structural efficiency

27 The legislative effect of Section 93 of the Industrial Relations Act 1988 (Cth) is more fully considered in Chapter Ten

principle. The National Wage Case decision of August 1989[28] provided for the negotiation of wage increases in two stages. A sliding scale of wage rate adjustments was established with minimum increases of two $10 weekly payments for unskilled workers. For skilled tradespersons increases at the top of the wage scale of $15 or 3% of salary rates were to be allowed.

Most significantly for women workers, a process of minimum rate adjustments was also approved for the benefit of low paid workers.

Minimum classification rates were established for a metal industry tradesperson and a building industry tradesperson at $356.30 per week with a supplementary payment of $50.70 per week. Using this rate as a base guide it was determined that new relativities should be set for several key classifications: "Minimum classifications rates and supplementary payments for classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility, and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that

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28 (1989) 31 AILR 286

requirement can be satisfied clear definitions will need to be established."[29]

Over the period of 1987-1990, the flat wage increases introduced through the two-tier wage system, the scheme devised for the phasing in of supplementary payments, and the developing focus on the review of minimum award wage rates have had a combined and positive impact on maintaining the relative position of women's wage rates in Australia. The ways in which these wage fixing procedures have come to influence developments towards the maintenance of pay equity for female workers will now be considered.

1987-1990 CHANGES IN THE NATIONAL WAGE FIXING SYSTEM - IMPLICATIONS FOR THE RELATIVE EARNINGS OF MALE AND FEMALE WORKERS

From 1987-1990 the national wage fixing procedures adopted within the federal conciliation and arbitration system have continued to preserve the overall position of women's wage rates in comparison to those of men. In relation to the total earnings of full time adults, Australian women received by 1990 78% of male total earnings and 83% of the ordinary time earnings paid to men.[30] Where award wage rates for non managerial employees are isolated, a 9% wage

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29 National Wage Case (1989) 31 IR 286

30 Australian Bureau of Statistics, Catalogue 6301.1, Canberra, 1990

gap exists between the wage rates payable to men and women.[31] Although in relation to average total earnings the gender wage gap has marginally widened, other wage indices, including award wage rates and full time adult weekly earnings show certain slight percentage improvements in the relative wage rates of women workers since the introduction of the two-tier wage system.[32] The above wage differences between male and female employees arguably incorporate, however, a persisting component of wage discrimination on the basis of sex.[33]

A key area in which wage differences between men and women have noticeably increased, however, is in the area of overaward payments. In 1987, women were receiving 55.9% of the overaward rates paid to men.[34] By 1988, this figure had declined to 46.9%.[35] It is worth noting when reviewing these national average figures that the ratio of female to male overaward payments varies greatly from industry to industry and from State to State. Female employees in the retail and trade industry, for example, earn only 31.7%,

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31 P Hall, "The Price of Wage Justice, the Costs of Delay", Paper presented at the seminar conducted by the Business and Professional Women's Club of Ryde/Hunters Hill, July 1989, p 5

32 J Doran, op.cit., p 31

33 For a more detailed discussion of this issue, see Chapter One ante

34 Australian Bureau of Statistics, Catalogue 6306.0, Canberra, 1989

35 id

and 29.2%, respectively, of the overaward payments received by male employees.[36] In the Northern Territory and Tasmania, women's total overaward payments amount to 13.5% and 24% respectively, when compared with those of men's.[37] The limited access to overaward payments has been attributed to such factors as direct discrimination, the undervaluing of women's work and the lack of women's industrial bargaining power.[38] Given the current and expanding trend towards enterprise bargaining in conjunction with a more deregulated approach to the wage determination process it would seem that the wide discrepancies between the overaward payments made to men and women are unlikely to be reduced in the immediate future. The possible legal remedies which may be available to address the problem of discrimination in relation to overaward wage payments made outside industrial wage fixing orders are canvassed in Chapter Ten.

WOMEN'S WAGE RATES AND THE IMPACT OF NATIONAL WAGE FIXING PRINCIPLES 1987-1990

Despite the decrease in the level of overaward payments provided to women over the period of 1987-1990, the

36 Labour Resource Centre, op.cit., p 39

37 ibid at p 40

38 Labour Resource Centre, op.cit., p 38; V Pratt, House of Representatives Standing Committee on Legal and Constitutional Affairs, Reference on Equal Opportunity and equal status for Australian women, Official Hansard Report, 6 February, 1990, p 15

Australian wage fixing system has essentially served to protect the wage improvements which have flowed to women since the early 1970's. While the relative wage position of women has not dramatically improved as a result of the wage fixing mechanisms adopted through the 1980's and the early 1990's, it has not regressed. The wage fixing system has, moreover, facilitated a greater participation of women in the Australian labour market in times of ongoing economic restraint.

The flat rate, as distinct from the percentage rate, wage increases provided under the 1987-1990 federal wage fixing principles were considered to lead to greater proportional benefits to workers on lower wages.[39] Since women fall predominantly within this category of workers, benefits have it seems flowed to provide for indirect improvements in female wage rates. The relative wage advantages achieved with the introduction of flat wage increases have, however, been offset by the delays experienced by workers in predominantly female occupations in securing second tier wage increases.[40] This tendency strongly points to the weak industrial bargaining position of women, resulting in part from the low level of women's overall participation in the industrial relations process.

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39 J Doran, op.cit., p (i)

40 C Burton, The Promise and the Price, Allen & Unwin, Sydney, 1991, p 146; See too, Dr M Burgmann cited in S Powell, "Wage Gap Widening", Australian Society, April 1988, p 11

Balancing out these kinds of negative industrial wage effects are the indirect gains for women workers derived from the application of the supplementary payments principle. Although not specifically directed to the implementation of equal pay the supplementary payments principle operates in much the same way as flat wage increases and minimum rates adjustments, to assist the position of low paid female employees within the wage market. The overriding impact of the supplementary payments principle on women's wage levels should not, however, be overstated.

The incidence of supplementary payments is, to begin with, hardly widespread. Of the 5,500 State and federal industrial wage awards in Australia, only 37 provide for supplementary payments.[41] Significantly, supplementary payments are not available in respect of paid rates awards which determine the wage rates for large numbers of women employed in the public sector. It is worth noting that in general, awards applying to the public sector are paid rates awards, as distinct from minimum rates awards which by and large apply to private sector employment.[42]

In relation to private sector employment, access to supplementary payments is largely confined to manufacturing

41 Labour Resource Centre, op.cit., p 45

42 See, State Wage Case, (1989) 27 IR 360

industries, and is in a growing range of circumstances subject to an employer's incapacity to pay. The Industrial Relations Commission has further indicated that the benefits of supplementary payments may not extend to casual workers,[43] and in some cases the full level of supplementary payments may be contingent on the length of service performance by an employee. These latter restrictions raise concerns regarding the disparate impact on women's supplementary wage rates in industries, and small business where predominantly female labour is characterised by high levels of turnover, and casual employment.

In addition, continuing problems have been encountered in relation to the implementation of the supplementary payments principle in the conduct of wage surveys to determine the actual level of total wage payments made to employees. Delays have been experienced in obtaining accurate and comprehensive wage information from employer groups and disagreements have also arisen in relation to the definition of overaward rates relevant to the negotiation of supplementary payment increases.[44]

Strong employer resistance to the supplementary payments principle would on balance suggest that the continued

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43 See Transport Workers Award, Industrial Relations Commission, 26 February 1988, Print H 11699

44 Labour Resource Centre, op.cit., p 54

operation of the supplementary payments mechanism cannot be assured. The 1989 National Wage Case decision[45] has further cast doubt on the feasibility of the supplementary payments principle in its existing form by suggesting that overaward surveys in relation to individual awards will ultimately be abandoned. The efficacy of the supplementary payments principle as a vehicle for addressing differences in male and female wage rates is yet to be fully determined.

Most importantly it needs to be recognised that the application of the supplementary payments principle plays an integral, but subordinate role to the application of the structural efficiency principle: supplementary payments will not be granted in circumstances which would endanger or inhibit necessary changes with respect to award restructuring.[46] It is the structural efficiency principle, more than any other wage fixing mechanism, which in the 1990's is likely to provide the primary means for the removal of discrimination in award rates of pay.

In conclusion, it is important to note that while the national wage fixing procedures allowing for the application of supplementary payments, flat wage increases and minimum award rate adjustments may have led to more

45 (1989) 30 IR 81 at 45

46 Visypack Pty Ltd & the Printing & Kindred Union, Industrial Relations Commission, 22 March 1989, Print H 6636

favourable outcomes for women, as low paid workers, these wage measures were never specifically designed to address the implementation of equal pay principles within the federal Australian wage fixing system. Overwhelmingly the focus of these different wage fixing procedures has been on the fundamental achievement of improved wage outcomes for low paid workers, rather than the realisation of equal treatment between the sexes in the determination of wage rates. At no stage have any of the above wage fixing methods been overtly characterised by Australia's wage fixing authorities as representing the practical means for the application of equal pay measures.

The ways in which the express implementation of equal pay principles has taken shape within the Australian wage fixing system since 1986 forms the subject of the next Chapter of this thesis. Chapter Seven attempts to trace the procedures adopted in the application of equal pay principles within the industrial arbitration process through the presentation of a series of case studies. These case studies will aim to illustrate the methods applied in relation to equal pay award claims through the use of anomalies and inequities procedures. The most recent developments with regard to the negotiation of equal pay award increases through the application of the structural efficiency principle will also be discussed with

reference to the Child Care Workers Case[47] determined by the Industrial Relations Commission in September 1990.

47 September 1990, S Print J 4316

CHAPTER SEVEN

INDUSTRIAL WAGE CLAIMS AND THE APPLICATION OF EQUAL PAY PRINCIPLES

THE ANOMALIES AND INEQUITIES PROCEDURES AND THE LIMITS TO WORK VALUE REVIEWS

From 1986-1990 the express implementation of equal pay measures has remained confined to claims under the anomalies and inequities provisions of the national wage fixing guidelines established under the 1983 National Wage Case.[1] Although certain categories of women workers, such as nurses, secured wage increases under these provisions, the use of the anomalies procedure has been restricted. This is, of course, consistent with the definition of an anomaly provided under the terms of the national wage fixing guidelines prescribed.

A clear division can be detected over the period of 1986-1990 between the application of the anomalies and inequities provision and the work value principles applied within the Australian wage fixing system. During this time access to the equal pay for work of equal value principle was generally restricted to industrial award claims brought under the anomalies and inequities procedure. As outlined in Chapter Five, this procedural limitation largely

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1 (1983) 291 CAR 3

detracted from the broader evaluation of work value issues concerned with gender bias in the setting of wage rates. This restriction was especially relevant to the review of wage rates in predominantly female occupations where the undervaluation of women's work was in issue.

Ideally the review of gender bias should be directly relevant to any investigation or assessment of work value within any particular wage determination process. In the case of Australia, such a development would appear to require major changes in the approach to the investigation and appraisal of work value delineated by the work value principles established within the industrial arbitration process. The restriction of work value claims to circumstances where net additions to skill requirements must always be demonstrated clearly detracts from a broader appraisal of work value concerned with identifying and removing gender bias from wage practices.

The limitations imposed on bringing equal pay cases through the anomalies and inequities provision, the restrictions of the existing work value principle, and the clear reluctance within the federal industrial jurisdiction to engage in work value comparisons between male and female award classifications, have offered minimal encouragement to trade unions seeking to pursue equal pay arguments on behalf of women members.

Following on from the Nurses Case proceedings in 1985, a discernible restraint in relation to the bringing of equal pay claims can be traced within the Australian industrial wage fixing system. This is reflected in the small number of equal pay claims processed within the federal conciliation and arbitration system from 1986 to 1990. The few equal pay claims which have been considered within the federal industrial relations forum over this period have provided little guidance to parties seeking to review discriminatory wage practices in the course of industrial award fixation. Even where equal pay issues have been raised by trade union groups in the negotiation of wage claims, the parameters for determining equal pay increases appear to have inhibited the presentation of any comprehensive analysis of the undervaluation of wage rates on the basis of sex.[2]

These constraints will now be discussed with reference to particular award wage claims brought within the Australian wage fixing system from 1985 to 1990 of special relevance to the implementation of equal pay principles.

These cases have included several industrial wage claims brought by the Professional Officer's Association (the POA) directed to ensuring the recognition of equal pay principles in the determination of wage rates within key areas of women's employment. This series of cases

2 See Chapters Four and Five, ante

highlight, in various ways, the difficulties in relying on the equal pay for work of equal value principle as a means of addressing gender bias in award wage rates. A review of the proceedings instituted by the Australian Miscellaneous Worker's Union (the AMWU) in the Child Care Workers Case finally determined in September 1990 will then follow.

THE THERAPIST'S CASE

The first in the group of industrial wage claims initiated by the POA of relevance to the formal application of equal pay principles, was the Australian Public Service (APS) Therapist's Case.[3] These proceedings sought to improve wage conditions for those therapist professionals employed as physiotherapists, occupational therapists, and speech pathologists within the federal public sector. It was argued that the therapist group should be included under the Science (Australian Government Employment) Award 1985 which provided higher wage rates to predominantly male employees performing science-based work.

The therapist's claim was brought in late 1985, immediately prior to the hearing of the 1986 Nurses Case. By agreement between the parties, the claim was presented without reference to equal pay principles. This was viewed by the union as being critical to avoiding any adjournment of the

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3 Print G1499, Sydney, 23 December 1985

proceedings pending the outcome of the Nurse's test case.[4] It has since been suggested that had the matter been set aside until the finalisation of the Nurses Case:

> "the association's claim would have had no prospect of succeeding, owing to the Commission's rejection of the concept of comparable worth."[5]

Detailed arguments were presented in the case with respect to the educational qualifications of the two groups of science and therapist professionals. Some of the factors raised included the higher entrance standard for therapy courses, the longer duration of therapist's training and the common feature of a mandatory degree in science for both groups. Using other criteria such as work skills, responsibility, complexity of tasks and accountability, the work of the therapist's group was measured against the work of science professional such as dieticians and pharmacists. A Full Bench of the Conciliation and Arbitration Commission agreed to allow the therapist's claim on the basis that the position of the therapist professionals was anomalous and satisfied the various requirements of the anomalies provision under national wage fixing guidelines. The Commission's decision placed a strong emphasis on the similarity of the educational qualifications between the

4 F Rafferty, "Equal Pay - Past Experience, Future Directions: A Practioner's Perspective", Journal of Industrial Relations, Volume 3, December 1989, p 526

5 ibid, p 530

two groups, the negligible cost involved in the wage increases allowed and the long term cost savings to be achieved by attracting therapists to public sector employment. Although the Commmission's reasons for decision also expressed recognition of the comparable work tasks performed by the science and therapist groups, these arguments alone would clearly not have satisfied the requirements of the anomalies and inequities provision in such a way as to justify the award wage increases sought.

THE SOCIAL WORKER'S CASE

The second case brought by the POA as part of the union's strategy to improve the position of its female members, was the Australian Public Service Social Workers Case of 1988.[6] These proceedings sought to adjust the wage rates of social workers in line with the more highly paid and traditionally male award classification of psychological counsellors. The case involved a complex range of argument presented in several arbitral proceedings extending over six months. Part of the Union's argument involved a claim that the 1972 equal pay for work of equal value principle had not been applied and that an inequity existed between the wage rates of social workers and counsellors. At the anomalies conference convened to arbitrate the issues an unwillingness to determine the equal pay aspects of the

6 Social Workers, Professional Officers Association Australian Public Service Award 1985, Decision Anomalies Conference, 10 February, 1981

claim under the anomalies principle led to an investigation of the union's claim under the inequities provision of the national wage fixing principles.[7] This provision requires that wage increases may be allowed in circumstances where the work under review is "truly like with like as to all relevant matters, and there is no good reason for dissimilar rates of pay."[8]

The President of the Commission decided that the work of the social workers and counsellors was "like with like", and went on to recommend a Full Bench hearing to deal with the matter. Prior to this hearing, the Social Worker's Case was resolved by agreement between the parties and ratified by the Conciliation and Arbitration Commission under the terms of the inequities provision of the 1987 national wage fixing guidelines. As in the Therapist's Case,[9] improved wage conditions for a predominantly female group of employees were achieved, yet without any express application of the equal pay for work of equal value principle. It is worth recalling that although the inequities provision may indirectly operate to facilitate greater pay equity for certain groups of women workers, it does not appear to extend to implement the equal pay for work of equal value principle where precise similarity in work tasks is not present.

7 F Rafferty, op.cit., p 53

8 National Wage Case (1987) 17 IR 65 at 92

9 Print G 1499, Sydney, 23 December 1985

THE DENTAL THERAPIST'S CASE

The final case brought by the POA concerned with issues of equal pay for women workers was the Dental Therapist's Case of 1988.[10] This case was brought before the Conciliation and Arbitration Commission in August 1988 for an initial hearing at anomalies conference. A series of lengthy proceedings then followed ultimately concluding in May 1989.

The union's claim directly sought to rely on the equal pay for work of equal value principle as a primary ground to justify the award wage increases under review. It was argued that the 1972 equal pay principle had not been applied in determining wage rates for the exclusively female occupational classification of dental therapist. It was also submitted that an inequity existed between the wage rates of dental therapists and dentists employed within the Commonwealth public sector. The POA here attempted to evaluate the work of dental therapists, in providing primary school dental health care services, against the work of more highly paid dentist classifications elsewhere within the public sector.

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10 Professional Officer's Association, General Conditions of Employment; A.C.T. Health Authority Award 1986, A No 344. 13 July 1989

The report to the anomalies conference prepared by Commissioner Lewin involved a detailed consideration of the wage fixing history of the therapist's group. The Commissioner found that, being a solely female occupation, no equal pay adjustments had been awarded to dental therapists under the terms of the 1969 equal pay ruling. Nor had suitable adjustments been made by the relevant wage fixing authority, the Public Service Board, in accordance with the provisions of the 1972 Equal Pay decision.

In reaching this latter conclusion, consideration was given to the effects of a 1975 wage determination of the Public Service Board which purported to approve a new wage scheme for dental therapists, "comprehending equal pay for work of equal value."[11] The internal submissions relevant to the Board's wage deliberations at the time were not made available in the course of the proceedings and no other clear information was available to show that the equal pay for work of equal value principle had been adopted. Commissioner Lewin determined that all indications pointed to a situation where no positive application of the 1972 equal pay could be demonstrated within any of the consent wage settlements reached.

A range of other special circumstances further suggested that wage increases were justified. Unusual features relating to the acute shortage of dental therapists were

11 ibid at p 4

particularly relevant. It was estimated that without substantial changes to recruitment and retention rates, the operational viability of the dental health services provided would cease over the next five to seven years. The problem of job retention also highlighted issues regarding the poor career structure for dental therapists'. These elements when aggregated with the other special features of the case, placed the salary and career structure of the therapists "in an unusual and possibly unique situation"[12] for the purpose of satisfying the anomalies requirement.

Other special circumstances included in the dental therapist's claim concerned the lack of any "true" market for the purpose of salary fixation. The absence of sufficient market comparators to allow for a market survey system through the history of the therapists group was seen by the Commission as being a significant factor. The regulatory environment applicable to dental therapy training also placed the dental therapists case in an unusual category. This was further reinforced by significant changes occurring in the delivery of school dental services. With the withdrawal of dentists from school dental clinics much of the work involved in providing primary school dental services had passed to the dental therapist's group. These changes had not been reflected in any wage increases outside of standard

12 ibid at p 7

national wage fixing increments. Another special factor in the case was the "budget realisable" savings achieved by the dental service of $89,600 per annum as part of award restructuring and efficiency improvements. By way of contrast the cost of the 4% salary increase for dental therapists had constituted an amount of $25,226 per annum.

The overall circumstances of the claim were found to constitute an anomaly which warranted wage increases in excess of the 4% ceiling set under the 1987 National Wage Case:

> "Together all of the above constitute an anomaly warranting wage fixation properly implementing the 1972 equal pay principle and taking into account the relevant changes to the conduct at the ACT School dental service and work of dental therapists in that service."[13]

The Union's arguments in relation to the inequities provision of the national wage fixing guidelines were discounted. Commissioner Lewin acknowledged that dental therapists performed a wide range of dental clinical tasks involving a particular expertise in child preventative and procedural dentistry. The significantly different qualifications of dentists and the different nature of the

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13 ibid, at p 10

dental procedures undertaken by them formed however, no basis for submissions under the inequities provision.

Following Commissioner Lewin's report, the matter was referred back in August 1989 to the President of the Commission. A round of further anomalies conferences were next convened and a wage settlement was finally agreed between the parties in late 1989. Although wage increases were achieved, the POA's claim for the full implementation of equal pay principles was not finalised as a result of the consent agreement negotiated. The notification of a further industrial dispute in relation to award restructuring was lodged following on from this agreement. This dispute once again partly involved equal pay issues concerned with the removal of elements of gender discrimination in the payment of wage rates.[14]

It was claimed by the Union in relation to the dispute that the wage levels of dental therapists fell below the scale of professional rates afforded to other science professionals employed within the Public Sector.

On 16 August 1990, agreement was reached between the parties that the dental therapists were entitled to receive the same wage earnings as other science professionals. Pay conditions were to remain fixed, however, under the

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14 From discussions with the industrial advocate for the Professional Officers Association, Felicity Rafferty

Professional Officer's Association General Conditions ACT Health Authority Award 1986. This award did not extend to facilitate the classification of professional wage rates. The issue of whether parity would be reached for dental therapists with other professional officers was adjourned to enable a more comprehensive assessment of the qualifications and responsibilities of dental therapists by the employer. It was anticipated that this study will form the basis for further wage negotiation in the course of the award restructuring process.

THE CHILDCARE WORKER'S CASE

The growing influence of award restructuring and the structural efficiency principle in the review and treatment of discrimination in the wage fixing system has become especially apparent since the proceedings arising from the 1988 negotiation of the Childcare Industry (ACT) Award 1985 and the Childcare Industry (NT) Award 1986. These proceedings will now be considered having regard to the approach and principles most recently developed by the Industrial Relations Commission relevant to future equal pay wage claims.

The Child Care Workers Case was originally brought by the Australian Miscellaneous Workers Union under the anomalies and inequities provision of the 1987 national wage fixing principles. The Union's application was first heard before

the President of the Conciliation and Arbitration Commission in August 1988, when it was determined that the broad issues raised by the claim required a preliminary investigation and report. This report was carried out by a single Commissioner, Commissioner Laing, and required a comprehensive study of all matters relating to wages and conditions in the child care industry in the ACT and the Northern Territory. The ACTU moved to support the claims which it maintained were fundamental to the child care industry as a whole. It was acknowledged by the ACTU that child care industry awards generally fell under the jurisdiction of State industrial tribunals, and that no automatic flow on of wage increases to other awards was to be sought.

The enquiry involved some 40 sitting days and extended for almost a year in its investigation. The proceedings involved a total of twenty nine witnesses, over two hundred exhibits, thirteen inspections, and a range of supplementary submissions and materials. Wage increases were sought on numerous grounds. Among these it was claimed that:

- award rates had never been properly determined or subject to proper work value examination
- an inconsistency and dissimilarity existed in relation to other State childcare awards

- significant additions had occurred to the work, skill and responsibility of child care workers
- a revision of training standards for child care workers had taken place
- adjustments to provide proper career structures for child care workers were called for
- high staff turnover and staff shortages in children's services had adversely disrupted industry operations
- award wage rates and entitlements for child care workers had fallen behind industry generally
- child care workers are truly low paid workers who present a strong case for supplementary payments
- child care workers rates are held to artificially low levels due to industry funding arrangements
- considerable cost savings and efficiencies were to be achieved by the restructuring and efficiency principle

The Union sought to demonstrate that there had been no variation of classifications, definitions or changes to the bases of pay rates since 1974. In relation to the ACT award, the materials relevant to the consent award agreement entered provided little assistance in showing how rates and conditions were established.[15] No wage benefit could be identified as resulting from the application of any equal pay decision.

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15 F Rafferty, op.cit., p 9

It was argued that award provisions had historically never been established allowing for proper classification structures, conditions or rates of pay. It was here suggested by the applicant Union that work value exercises had not been based on any clear criteria and that throughout the industry rates had been set on inappropriate bases in relation to skill and responsibility. The Union went on to contend that:

> "rates were originally undervalued because they related both to work which does not require the skill and responsibility of child care workers and because it mainly involves females doing what was seen to be female work."[16]

The Union parties submitted that child care rates in the ACT had been set in relation to areas which were traditionally female work in the domestic, cleaning and hospital fields. It was suggested that:

> "while some of these other employees have received later adjustments in relation to equal pay, child care workers have received no adjustment in relation to this issue since the making of the first award in 1974."[17]

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16 ibid, at p 12

17 ibid, at p 41

Evidence was provided to illustrate how wage levels for child care workers had relatively declined in comparison to other workers. The virtual non existence of overaward payments and the absence of supplementary payments were also noted by the Union. It was demonstrated by example that from 1975-1988 wage rates for private industry cleaners increased more than those of child care helpers and assistants and only marginally less than the qualified child care workers. This form of comparison was rejected by the private employer organisations joined in the proceedings as being inappropriate and irrelevant to the determination of the wage rates in issue.[18] Employer groups further sought to argue that at the time the award wage rates were first established, equal pay considerations had impliedly been taken into account in such a way as to satisfy equal pay principles.

In relation to the arguments concerned with work value, the Union's submissions pointed to several changes leading to significant net additions to skill. These related to such matters as adapting to changing health issues, responsibility in relation to child abuse, the integration of children with disabilities and so on.

Although extensive reference was made in the course of the applicant's case to the issue of work value, little detailed examination was made of the issue of the

18 ibid, at p 39

undervaluation of work performed due to gender bias. No evidence was presented, for example, that the duties being performed by predominantly female child care workers involved the same level of effort, skill and responsibility as certain jobs carried out in predominantly male classifications for higher wage rates. While net additions to effort, skill and responsibility were relevant to the determination of the claim, little precise analysis was presented to show the way in which past and present wage relativities may have been affected by indirect sex discrimination in the setting of wage rates.

The absence of a more detailed appraisal of the issues of gender bias may arguably have been attributed in part to the procedural barriers imposed within the industrial arbitration process when determining equal pay claims. It is important to note that the lodgement of the applicant's case well predated the National Wage Case of August 1989[19] and the developments arising from that case with regard to the structural efficiency principle. Second, it is highly unlikely, on the basis of the 1986 Nurses Case decision, that any submissions relating to work value involving gender comparisons between different award classifications would have been favourably viewed by the Commission. The reluctance to engage in gender comparisons between award classifications has led to this approach being expressly discounted by other Union groups as not worth pursuing in

19 (1989) 30 IR 81

the light of the Nurses' Case.[20] The Commission's clear rejection of the concept of gender wage comparisons appears similarly to have limited the broad assessment of work value issues in the course of the Childcare Workers Case.

It is pertinent to note the absence of argument presented by the Commonwealth on the need for a broader approach to the determination of work value in circumstances where issues of sex discrimination arise. The Commonwealth's submissions in the proceedings were essentially limited to expressions of concern relating to the operational viability of the industry and the need to provide improved career paths and training for childcare workers. As will be detailed in Chapter Eleven, the Commonwealth is obligated to promote the principles contained in Article 11 1.(d) of the Convention on the Elimination of All Forms of Discrimination against Women. This Article incorporates the right to equal treatment in respect of work of equal value as well as equality of treatment in the evaluation of the quality of work. Interestingly, in the Child Care Case, no discussion was provided within the Commonwealth's submissions of the effect of these principles on developments relevant to the industrial wage fixing process. More especially, no discussion was presented

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20 J Biddington, J Clarke, E Hallebone, H Marshall, "Banking, Insurance and Computing - Three Case Studies", in Department of Employment Education and Training Women's Bureau, New Brooms, AGPS, Canberra 1989, p 50

regarding the incidence of indirect discrimination through the undervaluation of women's work in the predominantly female award classifications relating to child care services.

THE CHILDCARE WORKER'S ANOMALIES AND INEQUITIES CLAIM - THE JULY 1990 REPORT

On 11 July 1990 the report of Commissioner Laing in relation to the Child Care Worker's claim was provided to the President of the federal Industrial Relations Commission.[21] This report commenced by setting out the historical background to the establishment of the child care industry, including a description of the previous wage fixing procedures applied. The report moved on to then outline the various submissions presented by the parties and concluded with a review of the significant issues raised.

As a preliminary matter it was noted by Commissioner Laing that during the enquiry, account had been taken of the ongoing national wage fixing decisions up to and including the principles established under the August 1989 National Wage Case. In relation to these decisions, the Commissioner stated that:

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21 Matter A 349 Anomalies and Inequities Claims - Child Care Industry (ACT) Award 1985 and Child Care Industry (NT) Award 1986: Enquiry and Report, July 1989

> "the comprehensive nature of the August 1988, February 1989 review and August 1989 decisions in relation to the Structural Efficiency Principle has largely overtaken all previous National Wage Case decisions relating to this and other industries and the parties now, acknowledge, that all the issues raised in the enquiry proceedings can and should be dealt with under the current structural efficiency principle."[22]

The acceptance by the parties of the major effect of the structural efficiency principle had a noticeable bearing on the work value claim lodged on behalf of the child care workers. On the issue of work value and other changes, the Commissioner's report indicated that:

> "The structural efficiency principle however, now provides a new and perhaps, different approach to the issue which is broader in concept than the work value principle which essentially was the only avenue previously available to the Union."[23]

Commissioner Laing's Report appears to suggest that the degree of actual change to work value may be of lesser significance than previously considered in the determination of industrial wage claims involving work value issues. In the Child Care Workers Case the lowered

22 ibid, at p 2

23 ibid, at p 61

emphasis on the need for clear net additions to work value was reinforced by the absence of sufficient information to determine the basis upon which wage rates had originally been established. The overriding influence of the structural efficiency principle in the negotiation of the claim most significantly pointed to a clear change in direction in the processing of equal pay award wage increases.

The endorsement given by Commissioner Laing in his Report to the eleven work value criteria established under the 1968 Vehicle Industry Case[24] suggested a broadening of the criteria adopted in more recent years to the determination of work value claims involving equal pay issues. In dealing with the question of what constitutes work value, the following criteria were, in Commissioner Laing's view, said to be relevant: qualifications, training period, attributes required for work performance, responsibility, work conditions, quality of work required, versatility and adaptability, skill exercised, additional or acquired knowledge, supervision and the importance of the work to the organisation. The wider approach to the consideration of work value issues might be constructively interpreted as providing a possible base for the negotiation of future wage claims concerned with the removal of gender bias in the determination of award rates and the application of the equal pay for work of equal value principle.

24 (1968) 14 AILR 185

THE DECISION OF THE INDUSTRIAL RELATIONS COMMISSION IN RELATION TO THE CHILD CARE WORKERS CLAIM

Following the presentation of the Report of Commissioner Laing, the child care workers' proceedings were referred to a Full Bench of the Commission for further determination. On 16 September 1990, the Full Bench of the Industrial Relations Commission handed down its decision in the case.[25]

The Commission acknowledged that the two awards under review were inadequate in many respects, most especially with regard to salary rates and structure. It was determined that the low wage levels of the industry's workforce placed the child care workers group within the disadvantaged class of workers qualifying for special attention under the principle established by the 1989 National Wage Case[26] in relation to minimum award rate adjustments. In addition, it was accepted that rates of pay had not been varied to give effect to the 4% adjustment available under the terms of the 1987 National Wage Case.[27] The Commission was in addition satisfied that existing award rates had not been adequately established in the past and that an inequity existed as a result of child care

25 Dec 1001/90 S Print J 4316

26 (1989) 31 AILR 286

27 (1987) 17 IR 65

workers performing similar work for different rates. It was further acknowledged that significant changes had occurred in relation to the skills and responsibilities of child care workers and that an improved career structure was required for workers in the industry.

In determining the actual rate of the pay increase to be allowed in relation to the awards, the Commission had regard to the principles established in the August 1989 National Wage Case[28] relating to the adjustment of wage relativities consistently with rates provided under comparable classifications in other awards.[29] It was held that an appropriate comparison could be drawn between a Child Care Worker Category Level 3, after one year's service, and an Engineering Tradesperson Level 1 employed under the Metal Industry Award.

The innovative approach of the Industrial Relations Commission to the comparative evaluation of award wage adjustments might reasonably be interpreted as bearing a distinct similarity to the comparable worth approach expressly rejected in the 1986 Nurses Case[30] decision. The Commission was, however, quick to dismiss any such interpretation:

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28 (1989) 31 AILR 286

29 (1987) 17 IR 65

30 Private Hospitals' and 'Doctors' Nurses (ACT) Award (1986) 300 CAR 190

"It was not suggested, of course, that these classifications could be 'compared' in the conventional sense, but by reference to the training requirements for each classification, a guide was found to the level of competence which must be attained. Both classes of worker must hold a certificate which is awarded after completion of a course provided by a College of Technical and Further Education."[31]

The content of the Commission's comparative analysis appeared to strictly revolve around the level of training accredited to the respective categories of child care worker and engineering tradesperson selected for the purpose of establishing base rates from which wage relativities for other categories of child care employees were to be fixed.

In relation to the issue of the appropriateness of broader comparisons between different job classifications in terms of skill, responsibility and working conditions, the Commission expressed the following view:

"It is apparent that the decision in the National Wage Case August 1989 did not require that direct

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31 Dec 1001/90 S Print J 4316 at p 5

comparisons of skill, responsibility and work conditions had to be found before relativities could be approved: if this was required, very few categories of worker in awards other than the trades award would qualify".[32]

The narrow approach taken by the Commission in limiting the comparison of child care workers and engineering tradespersons to the criteria of formally accredited training requirements appears to have once again reinforced the general prohibition against broader work value comparisons between different award classifications where the same, or similar work tasks are not involved.

Certain problems are also evident in the actual comparison undertaken by the Commission in respect of the training qualifications accredited to the two groups of child care workers and engineering tradespersons. A basic guide for comparing the two different award classifications was identified in the form of the Register of Australian Tertiary Education published in May 1990 by the Australian Education Council. It was noted by the Commission that both award classifications required work experience to compliment the academic studies undertaken, and that training in a range of skills was to be applied in the exercise of various responsibilities. Evidence established that students in child care studies would be involved in

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32 ibid, at p 8

approximately twice the number of hours as students pursuing the trade certificate course in engineering industries. The academic courses taken by the Child Care Worker Level 3 were in addition rated higher than the levels for which certificate trade courses were ranked. Despite the higher overall accreditation given to the child care workers group, the Commission determined that an appropriate comparison of the two groups warranted wage adjustments equating the Child Care Worker Level 3, after one year's service, with the Engineering Tradesperson Level 1. From this base the classification structure, and salary levels for other child care workers was developed.

The Commission's decision in the case was seen as constituting an historic and major wage determination which was to afford a greater recognition of the skills, training and responsibilities of child care workers in the Australian Capital Territory and the Northern Territory.[33] Significant pay rises were introduced for child care workers in these Territories which included adjustments for the 4% wage increase permitted under the 1987 National Wage Case, the application of minimum rate adjustments and the second 3% wage increase under the terms of the structural efficiency principle. Given that the ACT and NT awards were amongst the lowest pay rates applicable to any child care award in Australia, flow on wage increases to other

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33 Canberra Times, December 18, 1990, p 2

Australian states were not anticipated as a result of the Commission's decision in the 1990 Child Care Workers Case.

The outcome of the Child Care Workers Case clearly signaled a firm shift away from the use of the anomalies and inequities procedures established under Australia's national wage fixing principles as the primary method for the determination of equal pay increases. The case again reinforces the close connection between the application of equal pay principles and the development of national wage fixing principles by the Australian Industrial Relations Commission. The next Chapter of this thesis is directed to the continuing implementation of equal pay for women workers leading into the 1990's. It explores the potential for the award restructuring process and other current wage fixing procedures to assist in the removal of gender discrimination in the wage determination process.

CHAPTER EIGHT

NATIONAL WAGE FIXING PRINCIPLES AND THE APPLICATION OF EQUAL PAY MEASURES - THE 1990'S

INTRODUCTION

The preceding examination of the equal pay claims negotiated through the federal industrial wage fixing system from 1985-1990 serves to highlight the overriding influence of national wage fixing principles on the determination of equal pay claims in Australia. From 1986 to 1990, the terms of the anomalies and inequities principle predominantly shaped the way in which equal pay claims were determined within the Australian industrial relations system. The terms of these basic principles required, for example, the existence of special and extraordinary circumstances prior to the granting of equal pay award increases. Equal pay claims were further limited to situations where the containment of wage flow on effects was assured.

More recently, the national wage fixing procedures resulting from the 1988 and 1989 National Wage Cases[1] have come to affect the way in which wage discrimination claims may be determined within the Australian industrial wage

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1 (1988) 22 IR 461; (1989) 30 IR 81

fixing process. The Child Care Workers Case[2] involving the negotiation of award wage increases through the application of the structural efficiency principle, in particular, illustrates a discernible shift in the approach to be applied to the removal of gender bias within the industrial arbitration system. The Child Care Workers Case[3] might reasonably be interpreted as confirming the operation of new procedures for the effective determination of equal pay claims within the federal industrial jurisdiction.

Certain elements of the 1988 and 1989 national wage principles suggested a potential widening of the possibilities for the review and treatment of discrimination in award provisions.

Of particular relevance to the area of equal pay are the changes brought with award restructuring and the implementation of the structural efficiency principle. In expressly seeking the removal of award provisions which discriminate, the structural efficiency principle represents a special component of the 1989 national wage fixing guidelines. Other wage fixing procedures established by the 1989 National Wage Case[4] may also indirectly have a role in developments towards the removal of wage discrimination. The principles for determining

2 September 1990, S Print J 4316

3 id

4 National Wage Case (1989) 31 AILR 286

minimum wage adjustments, for example, should continue to facilitate the review of many minimum award classifications. It has been suggested that this review may extend to enable irregularities such as the undervaluation of women's work to be corrected.[5] In common with the supplementary payments principle, the process of minimum wage rate adjustments should continue to assist in improving the relative wage position of low paid female employees.

It should be remembered at this point that the achievement of equal pay for women essentially requires the adjustment of wage relativities between predominantly male and female classifications. Significantly, the implementation of the 1988-1990 wage fixing principles rests on an acceptance by all industrial parties that relativities between award rates may alter. On one view, the ongoing shift away from the strict maintenance of wage relativities potentially offers scope for the fixing of award rates, more flexibly in keeping with principles of non-discrimination. The likelihood of broadly achieving this outcome is not, however, assured. Whether the procedures established by Australian wage fixing authorities will operate in such a way as to sustain and improve wage relativities for Australian women workers into the 1990's remains uncertain.

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5 B Kelty, "ACTU Blueprint and Women Workers" in Realising the Potential, Women and Award Restructuring, Department of the Prime Minister and Cabinet, Office of the Status of Women, OSW, Canberra 1990, p 11

Some of the barriers posed with respect to the identification and removal of institutionalised discrimination within established wage setting practices will next be considered with regard to the industrial relations framework of the early 1990's.

AWARD RESTRUCTURING FOR WOMEN - POLICY INITIATIVES FROM 1988-1990

Following the outcome of the 1988 and 1989 National Wage Case decisions, a discernible interest amongst government policy makers, trade union organisations and industry groups began to emerge regarding the capacity of the structural efficiency principle to sustain the labour market position of Australian women.[6] In response to the issues raised, a range of government programs and policies were introduced to assist in the promotion and application

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6 See Women's Bureau, Department of Employment, Education and Training, New Brooms, Restructuring and Training Issues for Women in the Service Sector, AGPS, Canberra, 1989; Women's Bureau, Department of Employment, Education and Training, Clean Sweep, Better Printing Service, Canberra, 1990; Australian Council of Trade Unions, Restructuring Awards Issues for Women Workers, ACTU Melbourne, July 1988; Australian Council of Trade Unions, Restructuring Awards Issues for Women Workers Further Information, South Australian Department of Labour, Women's Adviser's Unit, "Award Restructuring and Women Workers", Discussion Paper, Adelaide, 1989; Department of Industrial Relations and Employment, Women's Directorate of N.S.W., Dangerous Opportunities: Industry Restructuring and Equal Employment Opportunity, Sydney, April 1990; M Beaumont, "Award Restructuring and Nursing", Labour Resources No 6, November 1989, p 6; Women's Employment Branch, Department of Labour, "Women and Award Restructuring", Discussion Paper, Melbourne, 1989

of equal employment opportunity measures within the award restructuring process.

At a federal level, the Australian Women's Employment Strategy was devised in 1988 in consultation with Commonwealth and State Governments to endorse eight nationally agreed goals to improve women's working conditions.[7] These goals included increasing women's access and participation in employment, education and training, reducing gender segregation in employment, developing appropriate awards and conditions for especially disadvantaged women and the promotion of pay equity for women. Within these broad goals the position and movement of women within the award restructuring process was specifically identified as one of the major factors relevant to the achievement of greater wage justice for women.[8]

Consultative mechanisms between government, employers and unions were consequently established as a means of reviewing the award restructuring process and its effects on women's labour market position. Such government policy initiatives included the preparation of Guidelines To Assist Industry Representatives in Monitoring The Position

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7 Department of Employment Education and Training, Women's Bureau, Australian Women's Employment Strategy, AGPS, Canberra, 1988

8 ibid, p 5

of Women In The Process of Award Restructuring,[9] in which a series of recommendations were put. These recommendations advocated such measures as the conduct of wage surveys to ascertain non-award remuneration for women, the examination of wage structures for broad gender bias, the carrying out of skills analysis directed to take account of discrimination issues, the review of minimum rates adjustments with regard to its likely impact on gender wage differentials and greater planning to provide equitable access to training and education programs.

Other policy strategies included an undertaking to incorporate equal opportunity measures within the Australian Government's Workplace Reform Program,[10] part of which was designed to improve workplace skills, and the recognition of those skills through the realisation of the structural efficiency principle. The monitoring of the effects of award restructuring for women were simultaneously included as part of the Australian Workplace Industrial Relations Survey which was anticipated to gather information on the effectiveness of equal employment opportunity programs. These programs were devised to

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9 National Board of Employment, Education and Training, The Employment and Skills Formation Council, AGPS, Canberra, 1989

10 Department of the Prime Minister and Cabinet, Office of the Status of Women, Mid-Term Implementation Report, AGPS, Canberra, 1990 p 25

complement national procedures for the setting of national standards and accreditation for training.[11]

A series of seminars and workshops relevant to award restructuring and equal employment opportunities were, in addition, sponsored by various government agencies with a view to assisting in the development of suitable training strategies, skills audits and non-discriminatory methods of job evaluation.[12] To ensure the dissemination of information relevant to the changes taking effect with award restructuring, federal financial grants were provided under the Work Change Assistance Scheme.[13] Of most relevance to the issue of discrimination in the payment and determination of wage rates, an Equal Pay Unit was

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11 L Bannerman, "Skills Formation and Industry Training", in Realising the Potential, op.cit., p 35

12 ibid, p 1; New Brooms, op.cit.; Women's Directorate N.S.W. Department of Industrial Relations and Employment, Breaking Barriers Building Careers, A Conference on Women's Employment and Industry Restructuring, Masonic Centre, 1989; Australian Federation of Business and Professional Women Inc., "Pay Equity: The Gender Gap - Justice Delayed is Justice Denied", Proceedings of Seminar Conducted by the Business Women's Club of Ryde/Hunters Hill and Macquarie University, July 1989

13 It is interesting to note, however, in relation to this scheme that by June 1990 only a quarter of the $3.2 million allocated to industry specific grants was reported as being transferred to industries with a high female participation rate: P Clark, "Equal Pay, A Hollow Victory", Sydney Morning Herald, 16 October 1990, p 19

established within the Commonwealth Department of Industrial Relations in late 1990.[14]

Parallel to government policy initiatives, activity was generated within certain trade union organisations concerned with the impact of award restructuring on women in the workplace. The 1989 ACTU Congress resolved that a range of approaches was required to maximise the benefits to women in the restructuring of awards. These approaches included the pursuit of genuine work reorganisation to break down gender segmentation, the proper recognition of skills used by women, the development of gender bias free skills assessment procedures and the design of new training arrangements for women.[15]

In recognition of the changing environment brought with the implementation of the structural efficiency principle employer groups likewise began to focus on the potential of the award restructuring process to deliver equity and efficiency in the workplace.[16] Signs of employer participation became evident in a number of jointly organised research surveys, and seminar programs involving tri-partite consultation with government and trade industry groups. A good example of this consultative interaction is

14 Department of Prime Minister and Cabinet, Office of the Status of Women, Women Budget Statement, Canberra, 1990 pp 31, 157, 164

15 Clean Sweep, op.cit., kp 15

16 See New Brooms, op.cit.

provided by the joint government industry research surveys carried out in respect of service sector employment. This project will now be briefly described to illustrate the kind of issues surrounding the joint industry studies undertaken.

INDUSTRY CONSULTATION IN THE SERVICE SECTION

The service sector employs the large majority of Australian women in such areas as financial services, retail trade, hospitality, community services and clerical work. Over 55% of Australian female employees in the paid workforce fall, for example, within the two occupational groups of clerical and sales work (78.4% of clerical workers in Australia are women).[17] Because of its high percentage of female employees the service sector represents a key area for review within the award restructuring process. As such, it is logically well placed to form the basis for research and consultation between industry groups concerned with the effects of award restructuring for women. This was achieved in 1989 through a collaborative set of case studies funded by the Women's Research and Employment Initiatives Program.

These studies suggested that a close relationship existed between the services provided by women in the service

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17 Australian Bureau of Statistics, Catalogue No 6203.0, Canberra, November 1989

industry and women's domestic skills.[18] This, it is argued, has led to a situation where many industry skills within the service sector have been traditionally regarded as coming naturally to workers or as involving minimal training. These industry skills have, consequently come to be perceived as appropriately receiving low levels of remuneration.[19] Another feature noted by the studies presented was the high level of gender segregation within the service industry. This feature, it was suggested, reinforced patterns of employment discrimination, resulting in fewer training and career opportunities, as well as lower wage levels for women. Word processing and data entry in the computer service industry are, for example, almost exclusively carried out by female workers with few formally certified skills. Less skilled manual work in the field of computer operating, a largely male area of employment, involves, by way of contrast, greater formal skills recognition and higher wage rates.[20] Technical skills associated with the handling and servicing of machines, are , by way of further example, valued more highly than the technical skills and dexterity involving in performing keyboard and typing tasks. Similar kinds of wage discrepancies were noted in the retail trade industry where men tend to work in the transport and wholesaling

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18 ibid at pp 276, 138

19 id

20 ibid, p 20 ff

functions and women in selling and clerical roles.[21] The failure to recognise the skills and experience of women has been viewed as one of the significant factors contributing to the low wages paid to women and high industry attrition rates.[22] It has been suggested that this situation results partly from the lack of any systematic procedure for the review of work value and partly as a consequence of service related tasks being predominantly carried out by women.[23]

Another feature of the studies was the identification of a growing tendency towards a 'contingent' workforce involved in casual and part-time employment.[24] Given that this workforce predominantly involves women workers with little access to training opportunities, or career paths, unresolved issues were seen to arise in relation to the possible negative effects of industry restructuring for women.

The discussion within industry forums of the type of issues outlined above has arguably assisted in promoting a greater awareness of the need for workplace reform and the removal of discriminatory employment practices. The broader policy initiatives adopted from 1988 to 1990 ideally should facilitate a clearer understanding of equal employment

21 ibid, p 85 ff

22 ibid, p 139 ff

23 id

24 ibid, p 24 ff

opportunity issues in the workplace and a wider recognition of women's traditionally undervalued skills. Whether these policy initiatives will effectively result in improving the wage conditions for Australian women workers has yet, however, to be fully determined. In particular, the effect of the award restructuring process on the relative wage levels between men and women workers is especially unclear. The difficulties associated with realising any further improvements to women's wage levels within the operation of the existing national wage fixing principles will now be discussed.

CHALLENGES FOR WORKPLACE REFORM - NATIONAL WAGE FIXING PRINCIPLES AND THE INTEGRATION OF EQUAL OPPORTUNITY IN EMPLOYMENT

The main legislative and policy emphasis of the late 1980's and early 1990's directed towards improving women's relative wage position in the Australian labour market appears to rest primarily with the integration of the principles of equal employment opportunity within the award restructuring process. It has been assumed that measures included in this process, such as multiskilling, job redesign, improved training, enhanced educational opportunities and the creation of broader career paths will assist to achieve long term improvements to women's employment conditions. Such developments are simultaneously viewed as providing the means of reducing

the high level of occupational segregation between the sexes, and the removal of certain kinds of employment barriers from the workplace. The removal of wage discrimination is seen to flow as a necessary consequence of these combined measures.

The extent to which the above benefits have been conferred on women workers through the process at award restructuring to date is, however, extremely difficult to assess. Up until late 1990, the slow pace of enterprise negotiations appeared to be affecting restructuring measures industry wide.[25] This delay has been attributed to the complexity and difficulty of the processes in reviewing skills, work practices, training needs and facilities.[26] As a result, little information has been collated overall regarding the effects of the skills audits and work redesigns being undertaken in the course of award restructuring.[27] While certain advances have been apparent in the metal trades, building, warehousing, chemicals, transport and timber

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25 M Rimmer, and C Verevis, "Progress of Award Restructuring: Case Studies", Industrial Relations Research Centre Monograph, Monash University and the University of New South Wales, September 1990, p 100

26 id

27 A Byrne, "Award Restructure: The Need for Work Design and Skill Audits," in Dangerous Opportunities: Industry Restructuring and Equal Employment Opportunities, Women's Directorate, NSW Department of Industrial Relations and Employment, April, 1990, p 19

industries,[28] negligible progress has been reported in connection with restructuring within predominantly female industries outside the area of clothing and textile trades. The small amount of current research which touches on the effects of award restructuring on women workers, moreover, points to a continuing trend towards the institutionalisation of women's disadvantaged labour market position.[29]

In respect of the more specific problems of discrimination in the wage determination process, it would appear unlikely for a variety of reasons that the promotion of equal employment opportunity strategies in the course of award restructuring would, alone, be sufficient to reduce the component of the male/female wage gap arising from indirect wage discrimination. The difficulties attached to the practical application of equal pay principles in the course of implementing the various workplace reforms taking place within the industrial relations system will now be considered.

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28 See P Hall, "Award Restructuring and Equal Employment Opportunities," in Dangerous Opportunities, op.cit., p 4

29 C Vellekoop Baldock, "Award Restructuring for Women: Tool of Change or Stagnation?", Australian Feminist Studies, No 12, Summer 1990, p 49; D Loxton and P Harris, "Job Evaluation and Broadbanding in the Western Australian Public Service", Discrimination in Government Policies and Practices: Section 82(b) Report No 4, Equal Opportunity Commission, Perth, 1989, p 155

THE REMOVAL OF DISCRIMINATORY WAGE PRACTICES - A MATTER FOR CONSENSUS?

The program of workplace reform designed to facilitate the inclusion of equal employment opportunity principles within the award restructuring process relies fundamentally on co-operative agreement being reached between the major industry parties on the need and value of ensuring non-discriminatory treatment in the wage determination process. Although much of the groundwork has been laid in an effort to persuade industry groups that mutual benefits may be derived from the restructuring of awards consistently with the interests and needs of women, there is of course no guarantee that adequate industry support will be forthcoming. Employer organisations concerned essentially with the delivery of maximised business profits will predictably be seeking to maintain low level wage costs. The traditional reluctance of certain sections of the trade union organisational base to support fully the concept of higher wage increases for women might also reasonably be expected to play a role in the outcome of wage bargaining negotiations concerned with equal pay adjustments.[30]

Realistically, it should also be acknowledged that the majority of wage negotiations take place in an industrial

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30 See M Thornton, "Discrimination Law - Industrial Law: Are They Compatible?" (1987) 59 Australian Quarterly 162

wage bargaining process still characterised by an ignorance of equal employment opportunity principles, an inadequate appreciation of the systematic barriers facing women and in some cases an overt antipathy towards the issue of equal pay.[31]

PROCEDURES FOR TRAINING ACCREDITATION AND NON-DISCRIMINATORY SKILLS EVALUATION

Serious concerns have been expressed as to whether the challenge to create methods for the proper recognition of women's work skills across occupational levels will be effectively met by the central institutional processes of the industrial relations system.[32] Questions continue to surface relating to the ability of the legal and industrial processes to respond to the need to evaluate more fully women's skills and contribution in the area of employment. Similarly concerns have been raised regarding the systematic training and accreditation arrangements being

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31 E Callendar, "Overview, Work Organisation, Skills Analysis", Realising the Potential, op.cit., p 76

32 C Burton, "Equal Opportunity - Equal Pay", Paper Presented to the Conference: Anti Discrimination, Equal Opportunity, Privacy Laws and Employment Practice: The Second Decade, Sydney 26-27 April, 1990; V Pratt, Affirmative Action Agency, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Official Hansard Report, 6 February 1990, p 15; J Scutt, "Equal Pay - The Long Haul", Paper Presented to the Seminar conducted by Australian Federation of Business & Professional Women Inc., July 1989; V Pratt & E Davis (Eds) Making the Link: Affirmative Action and Industrial Relations, AGPS, Canberra, 19990

introduced with industry restructuring.[33] Many of the accreditation reforms have, for example, been structured on methods derived from accreditation mechanisms developed for the metal trades industry. The issue here arises as to whether the inbuilt assumptions, values and methodologies incorporated within such industry based mechanisms may in fact operate to disadvantage women in the course of restructuring. Although it is arguable that any process involving a more systematic development and recognition of skills generally should lead to greater benefits for women workers, the extent of these benefits will largely depend on whether training structures, skills audits and job reclassifications are adequately designed to take account of the special differences relevant to predominantly female occupations.[34]

The unpredictable nature of the wage outcomes to be achieved by women workers as a result of award restructuring highlights a basic concern that the rigidity of award structures could simply be replaced in the course of restructuring by another set of structures in which gender inequality is transferred:

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33 Dangerous Opportunities, op.cit., p 14; B Pocock, Demanding Skill, Women and technical education in Australia, Allen & Unwin, Sydney, p xiv

34 Dangerous Opportunities, op.cit., p 5; P Hall "Award Restructuring and Equal Employment Opportunities", Discussion Paper, Industry Restructuring Workshop, Department of Industrial Relations and Employment, Sydney 1989, p 1 ff

"For women the restructuring process will either reinforce the existing division of labour by sex or it will mean the revaluation of women's traditionally undervalued skills."35

There is here an essential need to ensure that the strategies which underpin wage practices are critically evaluated in a context which appreciates that certain job evaluation criteria may involve issues of gender bias. As research studies have consistently shown skills audits and work value assessments are not necessarily gender neutral in their application.[36] In circumstances where new award wage structures are meant to remove gender discrimination from their provisions, a lack of trained expertise in dealing with issues of gender bias in the process of wage determination can only be viewed as problematic. There remains the ever present and underlying risk that unless comprehensive skills identification exercises are carried out in a non-discriminatory manner, prior to, or in the course of, award restructuring, existing inequities within award provisions might only be entrenched.

This risk could be said to apply equally to the process of minimum wage adjustments. It will be recalled that the procedures for the establishment of these rates were set

35 National Board of Employment Education and Training, op.cit., p vii

36 C Burton, "Gender Bias in Job Evaluation", Monograph No 3, Affirmative Action Agency,, Sydney 1988

down by the Industrial Relations Commission, in the August 1989 National Wage Case.[37] The Commission determined in these proceedings the minimum award rate and supplementary payment payable to a metal industry and building industry tradesperson. Having set this minimum classification rates, the Commission went on to state:

> "Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards."[38]

This aspect of the Commission's decision is difficult to interpret, implying as it does the ultimate reintroduction of comparative wage justice principles. The manner in which relativities will be established through the setting of minimum wage adjustments nonetheless points to a critical role for the assessment of work, skills and responsibilities on gender neutral grounds. The significance of this process is reinforced by the

37 (1989) 31 AILR 286

38 ibid at 289

Commission's future proposal that once the minimum rates exercise had been completed across awards:

> "minimum classification rates will not alter their relative position one to another unless warranted on work value grounds."[39]

The Commission's decision to restrict future arguments relevant to the alteration of wage relativities to cases involving changes to work value, once again raises the problem of the limits to existing work value principles where the broader determination of equal pay adjustments are in issue.[40] While these problems will conceivably be addressed through the development and application of the structural efficiency principle, such developments have yet to unfold clearly .

INDUSTRIAL WAGE FIXING PROCEDURES AND PROCESSES - NO SEX DISCRIMINATION HERE?

Along with the emphasis placed on industry agreement, the policy approach to removing discrimination within the award restructuring process relies heavily on the capacity of industrial wage fixing authorities to appreciate the operation of anti-discrimination principles and to devise appropriate methods for their implementation. Industrial

39 ibid at 290

40 See, Chapter Five, ante

wage fixing bodies are simultaneously called upon to effectively adjudicate between the numerous competing interests involved in the determination of industrial wage disputes.

The degree of significance to be attached to the implementation of equal pay principles in the determination of an award wage order or other wage determination is a matter essentially for the discretion of the relevant wage fixing tribunal. This offers considerable advantages in special circumstances where the flexibility of the industrial wage fixing process may extend to adjust for wage levels to redress elements of wage discrimination. In other instances, however, the prevailing constraints imposed by national wage fixing principles might be construed to operate in such a way as to diminish the full implementation of equal pay principles within specific awards. The lack of any consistently identifiable procedures to enable the determination of equal pay award wage increases, continues to operate as an underlying disincentive to the lodgement of industrial disputes concerned with the removal of discrimination in the wage fixing process. This general lack of uncertainty is exacerbated by the absence of review procedures within the Australian industrial arbitration system concerning the

identification and treatment of direct and indirect discrimination in the wage discrimination process.[41]

WOMEN AND THE INDUSTRIAL WAGE FIXING PROCESS - A CASE FOR GREATER PARTICIPATION?

The overall extent to which the relative wage conditions of Australian women may improve through such means as award restructuring, the process of minimum rate adjustments and the application of the supplementary payments principle is clearly difficult to predict. It can safely be assumed that wage improvements for women workers will be largely conditional upon the level of women's active involvement and participation in the industrial wage negotiation process. The low representation of women within this process is not suggestive, however, of significant change through collective bargaining means. As of 1988, only 44% of all female employees were members of trade union organisations with women comprising 35% of all trade union members.[42] Of all trade union officials, 11% were women.[43]

It is interesting to note that as of mid 1991 the proportions of women and men within the Australian workforce covered by industrial wage awards were fixed at

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41 See, Chapter Five, ante; Chapter Ten, post

42 Australian Bureau of Statistics, Catalogue 6323.10, Canberra, 1988

43 Australian Women's Employment Strategy, op.cit., p 50

83.5% and 77.3%, respectively.[44] It yet remains to be seen as to whether this shift will be represented in a higher level of women's participation in trade union organisations.

The lack of women participants in the industrial decision making structure is further evident through the senior levels of industry and government. Although statistical information concerning employer organisations is unavailable, it is generally recognised that few women occupy senior, or middle management positions in the area of wage decision-making. Within the Australian Public Service, women formed, in 1990, a low 10.9% of the key decision making unit, the Senior Executive Service.[45] In relation to the sitting members of the Industrial Relations Commission as of July 1990, three Deputy Presidents, and two members of the 46 member Industrial Relations Commissioners were women.[46]

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44 K Harbutt, The Australian, 29-30 June 1991, "Coverage by awards drops 5pc", p 2

45 Office of the Status of Women, Department of the Prime Minister and Cabinet, National Agenda for Women, Mid Term Implementation Report, AGPS, August 1990, p 11

46 ibid, p 27

TOWARDS A GREATER RECOGNITION OF EQUAL PAY PRINCIPLES

It might be suggested that until a greater emphasis is placed within the industrial wage fixing system on the explicit achievement of equal pay, little improvement to wage disparities between Australian men and women will be likely. For this kind of emphasis to develop, a heightened awareness is clearly needed of the ways in which discrimination may indirectly operate to effect wage conditions established within the industrial wage fixing process. One possible means of developing a broader understanding of this issue may lie within the terms of Section 93 of the Industrial Relations Commission Act 1988 (Cth). This provision requires the Industrial Relations Commission to have regard to the principles embodied in Australia's federal sex discrimination legislation in the performance of its wage fixing functions. It is worth noting that the removal of all forms of employment discrimination is one of the primary matters covered under the terms of the federal Sex Discrimination Act 1984 (Cth). The implementation of equal pay principles is similarly an area included under the Articles contained in the United Nations Convention on the Elimination of All Forms of

Discrimination Against Women. This Convention is a schedule to the Sex Discrimination Act 1984 (Cth).[47]

The extent to which the provisions of Australia's federal discrimination laws may influence the removal of discrimination in the payment and determination of wage rates raises a number of complex legal issues. These issues involve a detailed analysis of the ways in which discrimination legislation may affect the regulation of wage rates. This topic forms the basis of further discussion in the following two Chapters. Chapter Nine begins with examining the role of Australia's sex discrimination legislation in providing adequate methods for the implementation of equal pay principles and the removal of discriminatory wage setting practices.

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47 A more detailed study of Australia's international treaty obligations in the area of equal pay is set out in Chapter 11

CHAPTER NINE

DISCRIMINATION LAWS AND THE REGULATION OF WAGE RATES

DISCRIMINATION LEGISLATION - AN OVERVIEW

From 1975-1990, the gradual introduction of State and Federal discrimination legislation has led to the development of an extensive statutory framework designed to remove and prohibit discrimination on the basis of sex. Australia's first sex discrimination laws were passed in 1975 with the enactment of the South Australian Sex Discrimination Act.[1] In 1977, similar legislation was introduced in New South Wales with the Anti-Discrimination Act 1977 (NSW) and in Victoria with the Equal Opportunity 1977 (Vic).[2] This legislation was followed in 1984 with the enactment of the federal Sex Discrimination Act 1984 (Cth) and the Western Australian Equal Opportunity Act 1984 (WA). Since the commencement of the federal Sex Discrimination Act in August 1984, limited legal rights to equal treatment irrespective of sex have been made available in all Australian States and Territories in relation to such areas as employment, the provision of goods and services, education, accommodation and the administration of

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1 This legislation has since been superseded by the Equal Opportunity Act 1984 ((SA)

2 This legislation has since been superseded by the Equal Opportunity Act 1984 (Vic)

Commonwealth laws and programs.[3] The Sex Discrimination Act 1984 (Cth) remains, in 1991, the only source of legal protection for persons affected by sex discrimination within the States of Queensland and Tasmania, the Australian Capital Territory and the Northern Territory.

Discrimination laws providing legal remedies in respect of unequal treatment on the basis of sex are complemented by affirmative action laws directed to the promotion of equal opportunity in employment. Such legislative measures include the Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth) and the Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (Cth).[4] These laws are primarily designed to implement equal employment opportunity at the organisational level with a view to removing systemic discrimination within employment practices.[5] Affirmative action requirements under federal law are aimed at identifying

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3 Although the nature of the legal rights conferred by federal discrimination legislation has not formed the subject of detailed judicial consideration, there is legal authority with respect to State law which suggests that only procedural rights to lodge a formal complaint of discrimination are provided under discrimination legislation: R v Sex Discrimination Board; ex parte Gadsby (1984) EOC 92-029

4 See too Section 22B, Public Service Act 1922 (Cth), Anti-Discrimination Act 1977 (NSW), Part IXA; Equal Opportunity Act 1984 (WA), Part IX; Section 15A Public Service Act 1974 (Vic)

5 See C. Ronalds, Affirmative Action and the Sex Discrimination Act: A Handbook on Legal Rights for Women, Pluto Press, Sydney, 1987; C. Ronalds, "Principles of Affirmative Action and Anti-Discrimination Legislation", Monograph No 1, Affirmative Action Agency, 1988

existing structural barriers which inhibit women's equal participation in the workforce by providing measures to be applied in employment situations involving more than one hundred employees. These measures concentrate on the review of personnel policy and management practices, and include such steps as the issue of policy statements, employee consultation, statistical analysis, the setting of organisational objectives and the preparation of forward estimates to reduce the structural impediments to women's participation in the employment process.

EQUAL PAY MEASURES - THE LEGISLATIVE FOCUS

In terms of the legislative response to the removal of discrimination within the wage determination process, a major focus has been given to the provisions of the Affirmative Action (Equal Opportunity For Women) Act 1986 (Cth). As outlined above, this Act is aimed at improving women's access to jobs, promotion and training opportunities with a view to eliminating discriminatory work patterns through the promotion of equal opportunity.

The Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth) is administered by the federal Affirmative Action Agency and requires private sector employers and higher educational institutions to report annually on the development of affirmative action programs. The Act does not extend, however, to cover the 54% of employees in the private sector

who work in enterprises with fewer than 100 employees.[6] The Act also excludes from its coverage casual and contract employees including a large percentage of the female workforce in the hospitality and retail trade sector.

The scheme of Australia's affirmative action legislation is facilitative only in that it seeks to encourage a recognition amongst employers of the need for active measures to ensure equality of treatment in employment, as distinct from legally requiring the application of such measures.[7] The role of the Affirmative Action Agency is primarily concerned with assisting employers to introduce employment standards consistent with the principles of anti-discrimination laws.

In the context of pay equity, it is important to recognise that the Affirmative Action Act does not operate to confer legal rights in respect of equal pay for women, nor is it designed to require compliance by employers with regard the implementation of equal pay principles. The only sanction for failure to comply with federal affirmation action laws is that an employer may be named in Federal Parliament in a

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6 C Burton, "Equal Opportunity-Equal Pay", Paper presented to the Conference: Anti-Discrimination, Equal Opportunity, Privacy Laws and Employment Practice: The Second Decade, Sydney April 1990, p 13

7 See V Pratt, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Official Hansard Report, 6 February, 1990, pp 6-17

report submitted by the Director of Affirmative Action.[8] Legislative prohibitions in respect of sex discrimination in employment are contained under the terms of the Sex Discrimination Act 1984 (Cth) which aims to provide legal remedies to persons affected by discrimination in the terms and conditions of employment. The limited coverage of the Sex Discrimination Act in relation to discriminatory wage practices forms the topic of detailed examination in Chapter Ten of this thesis.

Although affirmative action policies and programs have an essential role to play in the area of equal pay for women through the development of change in the structural pattern of women's employment,[9] it should be emphasized that this thesis is more directly concerned with the analysis of legal rights and remedies in relation to alleged discrimination in the wage determination process.

THE OPERATION AND IMPACT OF SEX DISCRIMINATION LEGISLATION

Under the terms of State and federal discrimination legislation, legal remedies are available in relation to both individual and representative complaints of sex

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8 See Section 19, Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)

9 See C Burton, The Promise and The Price: The Struggle for equal opportunity in women's employment, Allen & Unwin, Sydney, 1991, pp 37-76

discrimination.[10] Complaints of discrimination in employment may be dealt with by either State or federal anti-discrimination bodies[11] whose functions include the conciliation and determination of claims of alleged sex discrimination. Upon receipt of complaints of sex discrimination, conciliation procedures are initially employed by anti-discrimination agencies in an effort to resolve disputes by way of negotiation and mutually agreed settlement between the parties. Where this is not possible, State and federal anti-discrimination tribunals are empowered to determine alleged claims of sex discrimination by way of public enquiry. This may involve the making of various determinations of a quasi-judicial nature, including the payment of damages and the making of orders prohibiting the continuance of discriminatory acts and practices.[12]

The exercise of these powers has lead to the formal adjudication of many claims of sex discrimination in relation to a wide category of public and private sector activity. The

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10 Representative complaints are not available, however, under the Equal Opportunity Act 1984 (Vic)

11 Under instruments of delegation authorised by the federal Human Rights and Equal Opportunity Commission co-operative agreements have been entered between State and Federal Governments to enable State anti-discrimination agencies to administer complaints of sex discrimination falling within the jurisdiction of the federal Sex Discrimination Act 1984 (Cth)

12 See Sex Discrimination Act 1984 (Cth), Section 81; Equal Opportunity Act 1984 (WA), Section 127; Equal Opportunity Act 1984 (SA), Section 96; Equal Opportunity Act (Vic) 1984, Section 43; Anti-Discrimination Act 1977 (NSW), Section 113

pursuit of legal rights under the statutory appeal provisions and enforcement procedures established by State and federal discrimination legislation has in addition led to the judicial determination of numerous claims of sex discrimination by State Supreme Courts, the Australian Federal Court and the High Court of Australia. The effect of sex discrimination laws has, over the past 15 years, been highlighted by several important proceedings where declarations have been granted prohibiting discriminatory conduct and in which substantial monetary damages have been awarded as a result of unlawful sex discrimination.[13] The outcome of these decisions has clearly been instrumental in promoting a greater awareness and understanding of sex discrimination issues within the community at large.[14] A broader recognition of the general principle of equal treatment, irrespective of sex has also been facilitated by the performance of the wide statutory functions of anti-discrimination agencies. These functions

13 See Ansett Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237; Allders International Pty Limited v Anstee (1986) EOC 92-157; Squires v Qantas Airways Limited (1985) EOC 92-135; Thompson & Ors v Qantas Airways Limited (1989) EOC 92-251; Hall & Ors v A & A Sheiban Pty Ltd & Ors (1989) 85 ALR 503; Aldridge v Booth (1988) 80 ALR 1; Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165. See too generally, Equal Opportunity Cases, Australian and New Zealand Equal Opportunity Law and Practice, CCH Australia Limited

14 C Ronalds 1987, op.cit., p 19; C. O'Donnell and P Hall, Getting Equal: Labour Market Regulation and Women's Work, Alen & Unwin, Sydney, 1988, p 92; Kramar R "Affirmative Action: A Challenge to Australian Employers and Trade Unions", Journal of Industrial Relations, Volume 2, June, 1987, p 176. For a useful critique of the deficiencies of Australia's sex discrimination legislation see, however, M Thornton, "Sex Discrimination Legislation in Australia", The Australian Quarterly, Summer, 1982 p 394-401

include the development of educational materials, the conduct of research programs, community consultation and the promotion of the principles of equality incorporated within the terms of discrimination legislation.

A REVIEW OF SEX DISCRIMINATION IN THE AREA OF EMPLOYMENT

The effect of Australia's sex discrimination legislation has been most pronounced in the area of employment. It is in relation to discrimination in employment that most complaints are brought under sex discrimination laws.[15] The development of case law with respect to sex discrimination matters has similarly been most intensive in the employment field.[16]

The steady increase in the participation of women in the Australian labour force[17] has arguably reinforced the need for a sustained focus on ensuring compliance with the requirements

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15 77.9% of all sex discrimination complaints brought under the federal Sex Discrimination Act over the period of 1988-1989 were in relation to alleged sex discrimination in employment: See, Human Rights Australia, Annual Report 1988-89, p 26. A similar pattern has emerged in relation to complaints of sex discrimination handled by State anti-discrimination agencies.

16 As of February 1989, of the 85 reported decisions arising under State and federal sex discrimination legislation, complaints of discrimination in employment constituted 64% of all cases

17 Participation in women's employment has nearly doubled from 1.6 million in 1968 to 3 million in 1988. Between 1983-88 women's labour force participation rose by 5.3% to approximately 50.1%. By June 1990 the participation rate had further increased to 52%: Office of the Status of Women Department of the Prime Minister and Cabinet, National Agenda For Women, AGPS, Canberra, 1990, p 21

of discrimination legislation and the principles of equal opportunity in employment. In response to these labour market changes, major policy and legislative reviews have been initiated with a view to ensuring the removal of discriminatory practices and the development of equal opportunity within the various areas of government, industry and trade union activity. Such policy initiatives are to be found in the review of discriminatory legislation and industrial award restrictions,[18] changes to discriminatory practices affecting superannuation benefits[19] and the ongoing development of broad employment strategies designed to

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18 Anti-Discrimination Board N.S.W. "Discrimination in Legislation", Report of the Anti-Discrimination Board in Accordance with Section 121 of the Anti-Discrimination Act 1977, 1977, Part I, Volumes 1 & 2, 1978; L Phillips; "Casual and Part-Time Work, A Survey of the Provisions Contained in New South Wales Awards, Women's Co-Ordination Unit, NSW Premier's Department, 1982; J O'Dea, D Byrt and Baumanis, Review of Discrimination Provisions in South Australian Awards and Agreements, South Australia Department of Labour, 1987; D Loxton, "Discrimination in By-Laws", A Review of the By-Laws of Municipalities in Western Australia, Report No. 1, Equal Opportunity Commission, Perth, 1988; Department of Employment, Education and Training, Women's Bureau & Office of The Status of Women, Survey of Sex Differentiating Provisions in Federal Awards, Canberra, 1987; Q Bryce, "Address to Worksafe Australia National Occupational Health and Safety Commission", Paper presented to the Lead Forum, August 1990.

19 Human Rights Commission, "Superannuation and Insurance and the Sex Discrimination Act 1984", Report No. 19, Part I, AGPS, Canberra, 1986; Q Bryce, "Fifth Anniversary of the Sex Discrimination Act 1984", Occasional Papers from the Sex Discrimination Commissioner, No 2, HREOC, Sydney, 1989, p 8; Department of Prime Minister and Cabinet, National Agenda For Women, Mid-Term Implementation Report, AGPS, Canberra, August 1990, p 45

encourage the non-discriminatory treatment of women in the labour market.[20]

A close examination of the kinds of changes occurring within this policy and legislative review process reveals a strong interrelationship between unlawful sex discrimination in the terms and conditions of employment and various issues central to the field of industrial relations. This interrelationship has on occasions also been the subject of a series of legal proceedings where the effect of discrimination laws on the powers of industrial wage tribunals has been in issue.[21] Legal arguments have consistently been raised in many of these proceedings regarding the effect of discrimination legislation

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20 See, for example, Department of Prime Minister and Cabinet, Office of the Status of Women, "National Economic Summit Conference", Information Paper on the Economy, AGPS, Canberra, 1963; J Doran, "The Two-Tiered Wage System: Implications For Women, Action Program for Women Workers, ACTU Melbourne, 1986; J Doran, "Restructuring Award Issues for Women Workers", Action Program for Women Workers, ACTU Melbourne, 1988; Department of Prime Minister and Cabinet 1990, op.cit.; Department of Employment and Training, Women's Bureau, New Brooms: Restructuring and Training Issues for Women In The Service Section, AGPS, Canberra, 1990

21 Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237; Landsdowne v City of Oakleigh (1988) EOC 92-225; Allders International Pty Ltd v Anstee (1986) EOC 92-157; Stoker v Kellogg (Aust) Pty Ltd (1984) EOC 92-021; Caridi v Steiger Australia Pty Ltd EOC 92-156; R V Sex Discrimination Board Ex Parte Cope (1984) EOC 92-007; Napier v The Public Service Board of NSW (1984) EOC 92-014; Squires v Qantas Airways Limited (1985) EOC 92-135; Thompson & Ors v Qantas Airways Limited (1989) EOC, 92-251

on the operation of industrial award provisions.[22] The decisions arising from these cases have, on the whole, upheld the provisions of discrimination legislation. A steady emphasis has been placed in these decisions on the capacity of the courts to interpret the terms of discrimination legislation as operating consistently within the framework of industrial law. Even where jurisdictional overlap with industrial legislation has been in dispute, discrimination laws have maintained an important influence on the treatment of various forms of discrimination in employment.

Significantly, however, this influence has not carried over to the review or treatment of claims of sex discrimination in relation to the payment of wages, or the determination of wage conditions in the course of employment. Very few reported decisions exist in the area of discrimination law with respect to issues connected in any way to the problem of wage discrimination. Even where such proceedings have arisen,

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22 For an examination of the legal interrelationship between industrial award provisions and Australia's discrimination legislation, see G McCarry, "Landmines among the Landmarks: Constitutional Aspects of Anti-Discrimination Legislation", (1989) Australian Law Journal, Vol 63, 327; M Thornton, "Discrimination Law/Industrial Law: are they compatible?", The Australian Quarterly, Winter 1987, 162

successful outcomes for complaints have rarely been achieved.[23]

The limited effect of discrimination laws in the area of equal pay would appear to flow as a result of two distinct, but separate causes. First, as discussed in Chapter One, there is the difficulty in identifying discrimination from the complex mix of factors which lead to the inequality between men and women's earnings.[24] Second, is the limited application of Australia's sex discrimination laws with regard to the application of equal pay principles. This second issue will now be discussed through the presentation of a detailed review of discrimination legislation in so far as it may affect the removal of discrimination within the Australian wage fixing process.

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23 See for example, Koh v Mitsubishi Australia Pty Ltd (1985 EOC 92-134; Napier v Public Service Board of NSW (1984) EOC 92-014; cf Thompson & Ors v Qantas Airways Limited (1989) EOC 92-251

24 See M Rubenstein, Equal Pay For Work of Equal Value, Macmillan, London, 1984 pp 13-41; P Weiler, "The Wages of Sex: The Uses and Limits of Comparable Worth", [1986] Harvard Law Review, Vol 9 1728, at pp 1779-1794

SEX DISCRIMINATION LEGISLATION AND THE DETERMINATION OF COMPLAINTS OF WAGE DISCRIMINATION

Sex discrimination in employment is prohibited by a variety of federal and State discrimination laws.[25] Under these laws it is unlawful for employers in all Australian States and Territories to discriminate on the ground of sex in either the terms or conditions upon which employment is offered, or in the terms or conditions provided in the course of employment.[26]

The legal mechanisms prohibiting unlawful discrimination in employment are essentially similar under federal and State law. Although reference is made in the following analysis to certain legislative provisions under State law, for the reasons outlined in Chapter One of this thesis, a primary focus remains throughout on the operation of the federal Sex Discrimination Act 1984 (Cth).

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25 Sex Discrimination Act 1984 (Cth); Anti-Discrimination Act 1977 (NSW) Section 25; Equal Opportunity Act 1984 (Vic) Section 21; Equal Opportunity Act 1984 (SA) Section 30; Equal Opportunity Act 1984 (WA) Section 11

26 It should be noted that very little legislative protection against discrimination in employment exists however in the States of Queensland and Tasmania with respect to State government employment. Only very limited protections may lie under the Human Rights and Equal Opportunity Act 1986 (Cth) in this area

Section 14 of this Act provides that :

Section 14

(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status or pregnancy -

(a) in the arrangements made for the purpose of determining who should be offered employment;
(b) in determining who should be offered employment; or
(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, or pregnancy -

(a) in the terms and conditions of employment that the employer afford the employee;
(b) by denying and employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
(c) by dismissing the employee; or
(d) by subjecting the employee to any other detriment.

The wide terms of Section 14 are consistent with the broad objects of the Sex Discrimination Act 1984 (Cth) as set out in Section 3 of the Act. These objects are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women;

(b) to eliminate, so far as possible discrimination against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs.

(c) to eliminate so far as is possible, discrimination involving sexual harassment in the workplace and in educational institutions, and

(d) to promote recognition and acceptance within the community of the principles of the equality of men and women.[27]

The provision of Section 14 pertain to several of these objects, and most particularly to the implementation of Article 11 of the United Nations Convention Against the Elimination of All Forms of Discrimination against Women (the

27 Section 3, Sex Discrimination Act 1984 (Cth)

UN Convention).[28] This Convention is a schedule to the Sex Discrimination Act 1984 (Cth) and forms an important reference for interpreting the Act's provisions.[29] The inclusion of the United Nations Convention as a schedule to the Act, when viewed with the broad terms of Section 14, lends support to the argument that the treaty provisions of Article 11 have been incorporated within Australian domestic law. The constitutional validity of Section 14 would indeed appear to depend upon the legislative implementation of Article 11 so as to constitute a valid law with respect to external affairs within the meaning of Section 51(xxix) of the Australian Constitution.[30]

Article 11 of the United Nations Convention is the main provision relating to equal treatment in employment, including the payment and determination of wage rates. It covers by virtue of Article 11 1. (d):

> "the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as

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28 For a more detailed analysis of the provisions of the UN Convention, see Chapter 11

29 Koowarta v Bjelke-Peterson (1982) 56 ALR 625; Gerhardy v Brown 57 ALR 472; See too Q Bryce, "The United Nations in Public Profile", 1988 Evatt Memorial Lecture, Occasional Papers from the Sex Discrimination Commissioner, Number 1, 1988 p 24

30 The external affairs power under Section 51 (xxix) of the Australian Constitution only authorises laws which give effect to a treaty obligation: Koowarta v Bjelke-Peterson (1982) 56 ALR 625; Commonwealth of Australia v Tasmania (1983) CLR 1

well as equality of treatment in the evaluation of the quality of work."

The express provisions of Section 14 and Article 11 suggest that the payment of wages should be interpreted as a term or condition of employment for the purpose of the Sex Discrimination Act 1984 (Cth). This Section may possibly extend in appropriate circumstances to prohibit sex discrimination in the determination of wage rates. This was, significantly, the interpretation expressed in relation to the Sex Discrimination Act 1984 (Cth) by the ILO Committee of Experts on the Application of Conventions and Recommendations in its 1986 General Survey of the Reports on the Equal Remuneration Convention ILO Convention 100.[31] Although this interpretation of Section 14 can clearly be substantiated in respect of certain cases of wage discrimination, the limited coverage of the Section in respect of the wage conditions of the majority of Australian workers needs to be appreciated. The limits to Section 14 with regard to the problems of wage discrimination will now be discussed.

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31 See, International Labour Conference, Equal Remuneration, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ILO, Geneva, 1986 p 81

STATUTORY EXEMPTIONS IN RESPECT OF COMPLAINTS OF WAGE DISCRIMINATION

Although the terms of the Sex Discrimination Act 1984 (Cth) appear to allow for the review of wage rates as a term or condition of employment, the operation of the Act with respect to claims of sex discrimination in the payment of wage rates is very largely restricted. This is due to a statutory exemption provided under Section 40 of the Act which prohibits the review of wage rates subject to existing orders or awards of industrial wage fixing authorities. Employers acting in direct compliance with orders or awards of industrial tribunals are accordingly protected, by virtue of Section 40, from complaints of alleged sex discrimination arising in respect of wage conditions. Similar statutory exemptions to those provided under federal law exist in NSW and Victoria.[32]

The purpose of the exemption provided under Section 40 is basically twofold. First, it operates to preserve the authority of industrial wage tribunals to determine and regulate the making of award wage rates. Second, it protects employers from experiencing a dual liability in respect of discriminatory wage conditions, where such conditions may form the subject of a binding industrial award wage determination.

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32 See Section 54, Anti-Discrimination Act 1977 (NSW); Section 39, Equal Opportunity Act 1984 (Vic)

It is important to recognise, when examining the scope of Section 40, that the acts and practices of industrial tribunals in the exercise of their wage-fixing functions are not specifically excluded from the provisions of the Sex Discrimination Act 1984 (Cth). The exemption provided under Section 40 operates, rather to prohibit the lodgement of complaints of sex discrimination in employment against employers acting in compliance with industrial award orders.

It is also worth noting that the general statutory protection provided to employers acting in accordance with industrial wage determinations is not contained under State legislation in either South Australia or Western Australia. Claims of sex discrimination in the payment of wage rates may in these States be determined under the provisions of the Equal Opportunity Act 1984 (WA) and the Equal Opportunity Act 1984 (SA), whether or not an industrial award attaches to the employment contract.[33]

One case study in South Australia, by way of example,[34] involved a sex discrimination claim brought by a female accounting officer who alleged she had been classified within a lower grade than a male comparator. The negotiation of her

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33 The Equal Opportunity (Statutory Exceptions) Regulations 1987 (WA) ceased operation in relation to industrial orders and awards in the State of Western Australia as of 8 November 1988

34 South Australian Office of the Commissioner for Equal Opportunity, "Take Five", Equal Opportunity, Vol.1 No 5, December 1988

complaint through the conciliation procedures under the South Australian Equal Opportunity Commission Act 1984 led to her promotion and the payment of back pay for the period since the male comparator had commenced employment.

Another case in Western Australian[35] involved the negotiation of monetary compensation to a complainant alleging sex discrimination in the payment of wages during her employment in a horticultural nursery. In this particular case the employer had not complied with amendments to the Western Australian Horticultural Nursery Industry Award.

While the above examples provide interesting illustrations of the ways in which wage discrimination claims may be negotiated through the use of discrimination legislation, the successful pursuit of such claims is, however, isolated and usually dependent upon individual fact circumstances.

Overall the statutory protection afforded to employers acting under the authority of wage fixing tribunals significantly restricts the extent to which the principles and procedures under discrimination law can apply to the determination of claims of wage discrimination in the course of employment. In a labour market where over 90% of wage rates are

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35 Western Australian Office of the Commissioner for Equal Opportunity, Opportunity, Vol.3 No 6, April 1989

determinedunder either State or federal industrial award,[36] the right to seek legal remedies in relation to alleged sex discrimination in the wage setting process is strictly limited. As mentioned previously, very few cases have been determined under Australia's discrimination laws with respect to the issue of discrimination in the payment or assessment of wage rates.

The reported decisions which can be identified relate exclusively to the operation of State discrimination legislation and will now be briefly discussed.

CLAIMS DETERMINED UNDER SEX DISCRIMINATION LEGISLATION RELATING TO ISSUES OF WAGE DISCRIMINATION

NAPIER & ORS V THE NSW PUBLIC SERVICE BOARD

The earliest reported Australian decision directly related to the issue of discrimination in the payment of wage involved the claim of Napier & Ors v Public Service Board of N.S.W.[37] The claim involved a complaint of direct discrimination on the basis of sex under the provisions of the NSW Anti-Discrimination Act 1977. The complaint was brought by a male school cleaner seeking equal rates to women school cleaners employed under the terms and conditions of a Public Service Board wage Agreement. The complainant's wage conditions were

36 Department of Employment, Education and Training, Women's Bureau, "Pay Equity: A Survey of 7 OECD Countries", AGPS Canberra 1987, Information Paper No 5, p 29

37 (1984) EOC 92-014

covered by a separate Crown Award. It was argued that the complainant was entitled to the same higher hourly rate of pay as female cleaners similarly employed, but paid pursuant to the Public Service Board Agreement.

A preliminary objection to jurisdiction was raised by the employer who alleged that its conduct was protected from the operation of the Act by virtue of the provisions exempting acts carried out in accordance with orders and awards of tribunals having the power to fix minimum wage conditions.[38] These provisions are similar to, but arguably more extensive than, the terms of Section 40 of the Sex Discrimination Act 1984 (Cth). The employers preliminary objection to jurisdiction was dismissed by the NSW Equal Opportunity Tribunal on the basis that the Public Service Board Agreement in question did not fall within the exemption provisions of Section 54 of the Act. The matter was taken on Appeal to the NSW Supreme Court[39] where the Tribunal's decision was quashed.

The Court held that in making wage payments under the Crown Award the employer was engaged in an act which was done in compliance with that award. The suggestion that there was nothing to prohibit the employer from making over award payments to avoid discriminatory wage practices was rejected by the Court. Under the terms of the Crown Award nothing less

38 See Section 54(b) and (e), Anti-Discrimination Act 1977 (NSW)

39 Public Service Board of NSW v Napier & Ors (1984) EOC 92-116

than the stipulated amount was to be paid, and accordingly the complainant's claim was dismissed.

The case in summary reinforces the strength of the exemption provisions in respect of award wage payments. It provides in its result little guidance in relation to the lodgement of claims of discrimination in respect of either non award, or overaward wage payments made outside the ambit of industrial wage orders.

KOH V MITSUBISHI MOTORS PTY LTD

The second reported decision broadly relevant to the issue of wage discrimination involved a complaint of direct sex discrimination in employment under the South Australian Sex Discrimination Act 1975.[40] The complaint was lodged by a purchasing economist who claimed that her employer had treated her less favourably than it would have treated a man by denying her access to opportunities for promotion and subjecting her to other detriments in the course of employment. The complainant alleged that her position had been undergraded by the employers job evaluation system and that as a result she had been denied benefits including a higher wage entitlement.

The South Australian Sex Discrimination Board found as a matter of fact that sex had not been a factor which had been taken into account in evaluating her grading within the

40 Koh v Mitsubishi Motors Pty Ltd (1985) EOC 92-122

company structure. It was determined that the complainant had not been subjected to any detriment within the terms of the Act. The decision of the Board was taken on Appeal to the Industrial Court of South Australia which confirmed the Board's ruling that insufficient evidence was available to demonstrate that the complainant was treated differently on the basis of her sex.[41]

The case basically highlights the need for clearly identifiable evidence to discharge the burden of proof which must be established on the balance of probabilities for a complaint of sex discrimination to succeed. More particularly, it demonstrates the need for expert evidence in the situation where proof of gender bias in relation to job evaluation systems is in issue. The consequential cost of presenting such evidence may, as this case further illustrates, pose obvious difficulties for prospective complainants of this type.

THOMPSON & ORS V QANTAS AIRWAYS LTD

The most recent decision touching on the topic of pay equity is that of Thompson & Ors v Qantas Airways Ltd (1989),[42] a case determined under the NSW Anti-Discrimination Act 1977. In common with Koh v Mitsubishi the primary focus of this complaint related to the lack of promotional opportunities in employment. The case involved seven women complainants,

41 Koh v Mitsubishi Motors (1985) EOC 92-134

42 (1989) EOC 92-251

formerly employed as Flight Hostesses with Qantas Airways during a period where Flight Hostesses could only be promoted to the position of Senior Flight Hostess. Male Flight Stewards, in comparison, could be promoted to the positions of Senior Flight Steward, Chief Flight Steward and Flight Service Director.

The complainants argued that, had promotional opportunities been available similar to those of male cabin crew, their employment with the respondent would have been substantially longer. Evidence was provided that each complainant had desired an extended career, but that the denial of promotional opportunity with its lack of recognition of individual skill and experience had promoted earlier retirement. The employer sought to argue that the terms of employment of the two groups of Flight Hostesses and Flight Steward had been covered respectively by the Flight Hostess Award and the Flight Steward Award. In complying with these award provisions, it was claimed that the employer was exempted from the operation of the Anti-Discrimination Act 1987 (NSW).[43] The awards, it was suggested, constituted a code for these employees which jointly "covered the field" in respect of employment conditions.

The NSW Equal Opportunity Tribunal rejected the employer's arguments and held that the terms and conditions afforded the complainants constituted less favourable treatment on the

43 See Section 54, Anti-Discrimination Act 1977 (NSW)

grounds of sex within the meaning of the NSW Anti-Discrimination Act 1977. It was determined that nothing was contained in either award which made it necessary to withhold promotional opportunities. By way of compensation each complainant was awarded the maximum amount payable under the Act of $40,000 for loss and damages suffered by reason of the employer's work practices.

It is important to note that the decision in Thompson v Qantas is not directly concerned with the issue of sex discrimination in the actual payment of wage rates. The responsibilities of female flight hostesses were not precisely comparable to those carried out by male flight stewards ranked with greater seniority and it would be wrong to characterise the case as a complaint of wage discrimination in the strict sense. The position available upon promotion for male employees were, however, paid at salary rates higher than the positions available for female employees, and due to its broader implications for pay equity, an outline of the case has been included for the purpose of present discussion. The case moreover, serves to illustrate the subtle difference and potential overlap with employment discrimination concerned with the denial of promotional opportunities and discrimination in the payment of wage rates.

The case is also pertinent having regard to its findings in relation to the operation of industrial award provisions. The rejection of the argument that the awards in question "covered

the field" so as to require the employer to limit promotional opportunities (and consequential wage benefits) restates an important line of legal authority which suggests that industrial award orders may effectively co-exist with discrimination laws in the area of employment.[44]

As the above cases determined under State discrimination legislation amply illustrate, major barriers arise in relation to the lodgement of successful claims concerning discrimination in, or connected with, the field of wage determination. The following Chapter of this thesis is directed to more specifically analysing the ways in which such limitations extend to the legal provisions contained in federal discrimination law. It also seeks to examine the potential use of the federal Sex Discrimination Act 1984 (Cth) in respect of the further development of equal pay principles within the Australian wage determination process.

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44 See Squires v Qantas Airways Ltd (1985) EOC 92-135; Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237; Metal Trades Industry Association of Australia v Amalgamated Metal Worker and Shipwrights Union (1983) 152 CLR 632

CHAPTER TEN

THE LIMITS AND POTENTIAL OF AUSTRALIA'S DISCRIMINATION LEGISLATION IN THE REMOVAL OF SEX DISCRIMINATION IN THE DETERMINATION OF WAGE RATES

INTRODUCTION

The preceding Chapter served to outline the broad framework of Australia's discrimination legislation and the major statutory restrictions to the use of this legislation as a means of remedying discriminatory wage practices. This Chapter examines more closely the legal provisions contained under the Sex Discrimination Act 1984 (Cth) with a view to analysing the limits and potential of Australia's federal discrimination law with regard to the removal of wage discrimination and the implementation of equal pay principles.

Three areas are basically identified within the existing legislative framework which suggest a possible role for the use of federal discrimination law in resolving issues of wage discrimination. The first concerns situations of alleged wage discrimination where no industrial award provisions apply to the employment contract. The second relates to overaward wage payments made outside the terms of an industrial award. The third relates to the influence of the Sex Discrimination Act 1984 (Cth) on the determination of award wage rates and the development of national wage fixing principles by federal industrial wage fixing authorities. These three areas will now be separately considered, commencing with a discussion of

the use of discrimination legislation in the area of non-award and overaward payments.

COMPLAINTS OF SEX DISCRIMINATION IN THE AREA OF NON AWARD WAGE PAYMENTS

In circumstances where no award provisions operate with respect to the employment contract, it may be open for either an individual, or representative complainant to bring a complaint of unlawful sex discrimination within Section 14 of the Sex Discrimination Act 1984 (Cth).[1] Similarly in relation to overaward payments unconnected to an existing order or award of an industrial wage fixing authority, there would appear to be no legal barrier prohibiting the lodgement of a claim under the Act in circumstances involving discriminatory treatment on the basis of sex. The statutory provisions protecting employers acting in accordance with the determinations of industrial wage fixing bodies would not in such cases apply to preclude an investigation of a complaint of alleged discrimination in employment.

Where a complaint of unlawful discrimination is received under the Act, it is referred by the Human Rights and Equal Opportunity Commission to the federal Sex Discrimination Commissioner for inquiry.[2] Conciliation procedures are then usually employed to assist the parties to reach a mutual

1 See Section 50, Sex Discrimination Act 1984 (Cth), Section 52

2 Section 52(1), Sex Discrimination Act 1984 (Cth)

settlement of the complaint.[3] Where no agreement can be reached between the parties, the matter may then be referred to the Human Rights and Equal Opportunity Commission for formal hearing under Part III of the Sex Discrimination Act 1984 (Cth).[4]

In establishing a complaint of unlawful discrimination the onus of proof is on a complainant[5] within the terms of Section 14 of the Act and within the definition of discrimination provided under Section 5. An examination of the definitions of direct and indirect discrimination now follows with reference to complaints of alleged sex discrimination in the payment and determination of wage rates.

DIRECT DISCRIMINATION IN THE PAYMENT OF WAGE RATES

Section 5 of the Sex Discrimination Act 1984 (Cth) defines direct discrimination in the following way:

> **Section 5**
>
> (1) For the purposes of this Act, a person (in this sub-section referred to as the "discriminator")

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3 Human Rights Australia, Annual Report, 1987-88, p 24

4 Section 52(5), Sex Discrimination Act 1984 (Cth)

5 O'Callaghan v Loder (1984) EOC 92-023; Australian Iron & Steel v Najdovska & Ors (1988) 12 NSWLR 587; Aldridge v Booth (1988) 80 ALR 1; Hall & Ors v A & A Sheiban Pty Ltd & Ors (1989) 85 ALR 503

discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of the sex of the aggrieved person, if by reason of -

(a) the sex of the aggrieved person;
(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

The terms of Sub-section 5 (1) would appear to be limited to claims of direct wage discrimination in circumstances where a female employee is performing the same, or substantially similar work to that of a male employee at a lesser wage rate. If, for example, overaward payments were denied to female employees in materially the same circumstances as male employees in the same establishment, a claim of direct discrimination may arise under Section 5 of the Act.

The definition of direct discrimination may not, however, extend to less obvious cases of discrimination, where, for example, the undervaluation of work predominantly performed by

women is in issue. Even if it could be shown that the effort, skill and responsibility of female workers was the same as that of male comparators working within a different job classification, it is unlikely that this kind of situation would fall within the terms of Sub-Section 5(1). The different tasks being performed by the male comparators in such circumstances would almost certainly constitute materially different circumstances in such a way as to preclude the operation of Sub-Section 5(1).[6]

Although a liberal interpretation of Sub-Section 5(1) might extend to support an argument that no material difference could be said to exist where, despite the performance of dissimilar tasks levels of skill, effort and responsibility are the same, there is no existing judicial authority to suggest that such an interpretation would be adopted.[7] Certainly, the Act's provisions have not been tested on this point. The question of whether such complaints of sex discrimination might alternatively fall within the legislative provisions relating to indirect discrimination in employment will now be discussed.

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6 See M Thornton, "Sex Discrimination Legislation in Australia", Australian Quarterly, Summer, 1982 p 396

7 For a narrow interpretation of the meaning of "material difference" with reference to statutory provisions under State discrimination legislation comparable to Section 5, see, Koh v Mitsubishi Motors Australia, (1985) EOC 92-122; Director-General of Education & Anor (1984) EOC 92-015. See too with reference to the definition of "material difference" under UK legislation, Rainey v Greater Glasgow Health Board, [1986] 3 W.L.R. 1017; 1 All E. R 65

INDIRECT DISCRIMINATION IN THE PAYMENT OF WAGE RATES

Indirect sex discrimination is defined under Sub-Section 5(2) of the Act which provides that:

> Section 5
>
> (2) For the purpose of this Act, a person (in this sub-section referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person) on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition -
>
> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
> (b) which is not reasonable having regard to the circumstances of the case, and
> (c) with which the aggrieved person does not or is not able to comply.

Applying the terms of this Sub-Section to the fact circumstances of a claim of indirect discrimination in the payment of wage rates, a possible construction arises in

relation to the Act's application. Where, for example, it is shown that:

(a) an employer has imposed a requirement or condition that in performance of Y duties an employee will receive $X, or that an employee must work in a particular job classification before being entitled to a particular wage rate, and,

(b) a substantially higher proportion of men than women either perform Y duties, or fall within the particular job classification in question, and,

(c) the requirement is unreasonable in the circumstances, and,

(d) the employee does not, or cannot comply with the condition imposed because the employee does not perform Y duties, or fall within the particular job classification under review,

a claim for unlawful wage discrimination might, hypothetically, arise.

It is interesting to note the observations expressed with regard to Sub-Section 5(2) by the ILO Committee of Experts on

the Application of Conventions and Recommendations in its examination of the legislative provisions contained under the Sex Discrimination Act 1984 (Cth). In the Committee's assessment:

> "The qualitative criterion of sub-section 2(a) should facilitate the review, inter alia, of job descriptions and classifications in the light also of sub-section 2(b) to ensure equal treatment of women and men in employment and in remuneration."[8]

Reference to the use of discrimination legislation as a possible avenue for the review of job classifications has also been noted by local commentators who perceive a key role for the use of job evaluation procedures as a means of identifying gender bias in the determination of wage rates.[9] Through such procedures it is envisaged that the wage value affixed to work predominantly carried out by women might in certain

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8 International Labour Conference, Equal Remuneration, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ILO, Geneva, 1986, p 45

9 C Burton, R Hag, G Thompson, Womens Worth, Pay Equity and Job Evaluation in Australia, AGPS Canberra, 1987 p 27 ff; C Burton, "Gender Bias in Job Evaluation", Monograph No 3 Affirmative Action Agency 1988 p 16; B Pocock, Demanding Skill, Women and Technical Education in Australia, Allen and Unwin Australia, 1990 Sydney, p 15 ff; C Burton, The Promise and The Price, Allen and Unwin, Sydney, 1991, p 105 ff

circumstances be reviewed through the application of discrimination laws.[10]

Although it might reasonably be inferred from an analysis of the broad legislative intention of the Sex Discrimination Act 1984 (Cth)[11] that such a review process would be facilitated under the Act, the likelihood of bringing a successful complaint of indirect wage discrimination under the definition provided by Section 5 would, in practice, seem highly remote. Apart from the fact that cases involving non award wage payments will seldom arise, very real difficulties attach to establishing a claim of indirect discrimination under Australia's sex discrimination laws. The complex problems associated with satisfying the basic requirements of the statutory definition of indirect discrimination will now be separately considered.

ESTABLISHING INDIRECT DISCRIMINATION - A DEFINITIONAL DILEMMA

Very little legal authority has developed in Australia on the interpretation of the legislative definition of indirect discrimination provided under Australia's sex discrimination laws. This is particularly so in relation to Australia's federal law, where the judicial consideration of the terms of

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10 Dr K MacDermott, Department of Employment Education and Training, "Pay Equity A Survey of 7 OECD Countries", Information Paper No 5, AGPS, Canberra, 1987, p 14

11 See Senator S Ryan, Second Reading Speech, Hansard 2 June 1983, pp 1185-1186

Sub-Section 5(2) of the Sex Discrimination Act 1984 (Cth) has been limited to two cases.[12] Both of these cases involved unsuccessful claims relating to indirect discrimination in employment. Most significantly, no reported decisions have arisen under either State, or federal law where the definition of indirect discrimination has been analysed, or sought to be applied with reference to issues of discrimination in the setting or payment of wage rates.

Of the case law which has developed, considerable uncertainty exists regarding the methods to be applied in satisfying the definitional requirements of indirect discrimination provided by Australia's sex discrimination laws. As Tahmindjis notes,[13] the lack of any precise or uniform formulation of judicial opinion with reference to the definition of indirect discrimination has resulted in an insufficiently clear indication of the parameters of unlawful discrimination within the Australian legal system.[14] This may, in part be attributed to the complexity of the statutory definition itself, which has been described succinctly by the Full Court of the Federal Court as involving "an unfortunate lack of

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12 Styles v The Secretary of the Department of Foreign Affairs and Trade & Anor (1989) 88 ALR 621; Australian Public Service Association v Australian Trade Commission (1988) EOC 92-228

13 P Tahmindjis, "Indirect Discrimination in Australia: the High Court Decision in A.I.S. v Banovic", Australian and New Zealand Equal Opportunity Law and Practice, CCH, 1990, EOC 90-126

14 See too R Hunter, "Indirect Sex Discrimination", Legal Services Bulletin, Vol 14, No 1, February 1989, p 17

clarity."[15] The difficult nature of the definition is perhaps self evident from the cumbersome construction devised above with reference to a hypothetical claim of discrimination in respect of wage conditions. The separate requirements of the definition of indirect discrimination will now be analysed with reference to this hypothetical construction to demonstrate the barriers associated with the use of the legislative provisions of indirect discrimination as a means of providing legal remedies with respect to discriminatory wage practices.

THE EXISTENCE OF A REQUIREMENT OR CONDITION

The first component of the definition of indirect discrimination involves the existence of a requirement or condition. Australian legal authority, though in this area difficult to interpret precisely, appears to suggest that this factor should be construed broadly.[16] This approach is consistent with a number of English decisions concerned with the interpretation of similar legislative provisions under the

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15 Styles v The Secretary of the Department of Foreign Affairs and Trade & Anor, (1989) 88 ALR 621 per Bowen CJ and Gummow J at p 624

16 Australian Iron and Steel Pty Ltd v Banovic 168 CLR 165; Styles v The Secretary of the Department of Foreign Affairs and Trade & Anor, (1989) 88 ALR 621

Sex Discrimination Act 1975 (U.K.).[17] These decisions basically confirm that a requirement refers to some term which must be satisfied to obtain some benefit. Similarly, the position in Australia appears to relate to any stipulation which must be fulfilled and which leads to some kind of practical outcome.[18] Returning then to the hypothetical construction posed in relation to a complaint of wage discrimination, it is arguable on the basis of the broad interpretation applied to determining the existence of a requirement or condition, that the first component of the definition of indirect discrimination could be met. A requirement or condition must on one view, however, relate to a sex based criterion.[19] Here it might be alternatively argued that an employer is not imposing an identifiable requirement or condition by which an aggrieved party is compelled to engage in the performance of lower paid duties. On this construction no requirement or condition might be said to apply within the intended ambit of Sub-Section 5(2).

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17 Clarke & Anor v Eley (IMI Kynock Ltd) (1983) I.C.R. 165; Steel v Union of Post Office Workers [1978] 1 W.L.R. 64; Watches of Switzerland v Savell [1983] I.R.L.R. 141; Home Office v Holmes [1984] I.C.R. 678

18 Styles v The Secretary of the Department of Foreign Affairs and Trade & Anor (1989) 88 ALR 621 at 628-630; Australian Iron and Steel Pty Ltd v Banovic 168 CLR 165 at 195-197

19 See, Australian Iron and Steel Pty Ltd v Banovic 168 CLR 165, per Brennan J at 168

IDENTIFYING A SUBSTANTIALLY HIGHER PROPORTION OF PERSONS OF THE OPPOSITE SEX TO THE AGGRIEVED PARTY ABLE TO COMPLY WITH THE REQUIREMENT OR CONDITION

The second component of the definition of indirect discrimination involves establishing that a substantially higher proportion of persons of the opposite sex to the complainant comply, or are able to comply with the requirement or condition. The diversity of judicial opinion on the approach to be adopted with respect to this particular requirement raises considerable uncertainty regarding the acceptability of the formulation suggested above to substantiate a claim of indirect wage discrimination. It should be recalled that a complaint under discrimination legislation in respect of discriminatory wage conditions must involve circumstances where an individual employer provides differential wage conditions with respect to employees within the same organisation or establishment. Difficult issues emerge in this context with respect to the operation of Sub-Paragraph 5(1)(a) of the Sex Discrimination Act 1984 (Cth). As indicated by the High Court of Australia in Australian Iron and Steel Pty Ltd v Banovic, this sub-paragraph requires:

"an exercise which will ascertain whether sex is significant to compliance with the condition or requirement in question."[20]

Within the course of this exercise a major issue arises in identifying the group or "base pool" with respect to which the comparison referred to in Sub-Paragraph 5(2)(a) must relate.[21]

The application of Sub-Paragraph 5(2)(a) to a situation of alleged wage discrimination would arguably involve the identification of distinct "base pools" from the class of employees affected by the wage conditions fixed within the same establishment. This would require the existence of clearly defined male and female occupation groups within the establishment in question. If by way of practical illustration a comparison was to be drawn between a computer technician and a clerical worker engaged in computer word processing tasks, clear difficulties might arise in categorising numerically significant "base pools" for the purpose of comparison. Even if appropriately identifiable groups could be established, and statistical evidence presented regarding the different levels of male and female participation in these respective occupations, the question remains as to what may constitute a substantially higher proportion of men than women for the purposes of Sub-Paragraph

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20 (1989) 168 CLR 165 per Deane J. and Gaudron J. at 178

21 See Tahmindjis, op.cit., para 90-129; Hunter op.cit., p 19

5(2)(a). Arguably these kinds of problems may be reduced where clearly defined gender divisions occur within occupational groups forming part of an organisation in which significant numbers of workers are employed.

Ultimately, however, the resulting base groups derived for the purposes of comparison may be held merely to reflect the fact that sexual imbalance exists in the workforce. As Dawson J states in Australian Iron and Steel Pty Ltd v Banovic with reference to the legislative provisions contained under Sub-Section 24(3) of the Anti-Discrimination Act 1977 (NSW):[22]

> "The sub-section was not intended to embrace requirements which are truly non-discriminatory and it must, therefore, require something more than a direct comparison between the number of men who comply and the number of women who comply with a requirement imposed by an employer."[23]

His Honour proceeds to emphasise that:

> "Moreover, a comparison upon a proper basis between the two proportions has the effect that inequality of the sexes in the workforce will not of itself determine whether the compliance rate by one sex is substantially

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22 These provisions are substantially the same as those provided under Section 5(2) of the Sex Discrimination Act 1984 (Cth)

23 (1989) 168 CLR at 186

higher than that of the other, and will not therefore, pre-empt the question whether a requirement which has been imposed upon a workforce is discriminatory."[24]

This question presumably involves the determination of the issue of reasonableness as required by the next limb of the definition of indirect discrimination.

Before dealing with this aspect of the definition, it must be acknowledged that an underlying flaw may be perceived in the presentation of the kinds of gender comparisons suggested in relation to the hypothetical model of wage discrimination constructed for analysis. Given the circumscribed nature of the interpretation afforded to the definition of indirect discrimination within the Australian judicial system, it may simply be the case that the natural meaning of Sub-Section 5(2) would be interpreted in such a way as to preclude the application of the Section to cases involving the comparison of work value between the sexes. The application of Sub-Section 5(2) to complaints of alleged indirect discrimination in the determination of wage rates may be held, in short, to be unworkable and outside the legislative intention of the Act's provisions.

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24 ibid at 187

ESTABLISHING UNREASONABLENESS IN THE CIRCUMSTANCES

The third requirement to be met in establishing a complaint of indirect discrimination is that the requirement or condition must be shown to be unreasonable in the circumstances.[25] Assuming for the purposes of discussion that the preceding elements of the definition could be satisfied, real problems arise in relation to claims of discrimination in the payment of wages where issues of reasonableness strongly interrelate with arguments concerned with the operation of economic factors and labour market forces. Although mere business convenience may not be sufficient to establish that a requirement or condition is reasonable in the circumstances,[26] economic factors, the maintenance of a stable workforce or the impact of industrial disputation,[27] may be relevant to determining whether the provisions of Sub-Section 5(2) will be satisfied in any particular case. It is worth noting when considering the possibility of equal pay claims under Australia's discrimination legislation that the extent to which legitimate commercial necessity may operate to establish

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25 Sub-Paragraph 5(2)(b), Sex Discrimination Act 1984 (Cth)

26 The Secretary of the Department of Foreign Affairs and Trade v Styles & Anor (1988) 84 ALR per Wilcox J at p 429

27 Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165 per Deane J and Gaudron J at 181

that a requirement or condition is reasonable in any given fact situation is decidedly unclear.[28]

In circumstances where financial restraint, economic recession, industrial uncertainty and sustained levels of unemployment predominate, the difficulties of establishing successful claims of indirect wage discrimination would appear to be pronounced.

NON-COMPLIANCE WITH THE REQUIREMENT OR CONDITION

The final factor to be established in satisfying the definition of indirect discrimination is that the complainant does not, or is not able to comply with the requirement or condition sought to be challenged. This factor would appear to relate to an inability to comply in practice, rather than a physical incapacity to comply.[29] Where a female complainant does not actually perform the tasks carried out by the occupational group sought to be compared this fact alone would not appear to provide a sufficient basis to defeat the claim by virtue of the requirements of Sub-Section 5(2) of the Sex Discrimination Act 1984 (Cth).

28 As to the ways in which economic reasons, or other reasons such as administrative efficiency may be held to justify a particular requirement or condition as being non-discriminatory under UK law, see, Ojutiku v Manpower Services [1982] I.C.R. 661; Rainey v Greater Glasgow of Water [1986] 3 W.L.R. 47; Benveniste v University of Southampton [1989] IRLR 122

29 The Australian Public Service Association v The Australian Trade Commission (1988) EOC 92-228; Mandla v Dowell Lee [1983] 2 A.C. 548

PROCEDURAL BARRIERS TO THE REVIEW OF COMPLAINTS OF DISCRIMINATION IN RELATION TO NON AWARD AND OVER AWARD PAYMENTS

The above analysis with reference to the statutory definitions of discrimination clearly indicates that a range of restrictions attach to the use of discrimination laws as a means of reviewing alleged discrimination in the determination of wage rates. The establishment of claims of unlawful sex discrimination in relation to non-award and overaward wage payments presents, in summary, a formidable task for prospective complainants seeking legal remedies in relation to discriminatory wage practices. The difficulties of applying the legal definition of discrimination, and discharging the legal standards of proof required under this statutory definition, would in the vast majority of cases severely inhibit the use of legal remedies to address alleged discrimination in the payment of wage rates.

The limited application of discrimination legislation, and the difficulties of establishing claims of wage discrimination within the definitions prescribed suggest a minimal potential for the complaints based scheme established under the terms of Australia's sex discrimination legislation in the resolution of equal pay issues.

The lack of any effective regulatory mechanisms to offset discrimination in relation to wage payments made outside the centralised wage fixing system presents particular problems where the issue of overaward payments is concerned. This is due to the fact that a large and growing number of workers within the labour force are regularly affected by the payment of overaward wage rates. Inequitable access to overaward payments has also been identified as being a major contributing factor to the wage differences between male and female employers.[30] Disparities in the payment of overaward rates to men and women workers remain pronounced, and indeed show signs of becoming more entrenched. This risk seems particularly high, given the continuing trends within the industrial wage area towards decentralised enterprise wage bargaining. Since 1983, average overaward payments provided to full time adult non managerial employees across all industries reveal the following pattern:[31]

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30 National Women's Consultative Council and the Labour Research Centre, Pay Equity For Women in Australia, AGPS, Canberra 1990, p 38

31 Australian Bureau of Statistics, Catalogue 6306.0, 1988. It should be noted that the numbers used in sampling the incidence of overaward payments raises certain queries in relation to the statistical significance of the above figures. These figures do not in addition extend to incorporate overaward payments made to junior employees or managerial employees

	Male Earnings	Female Earnings	Percentage Male/Female Earnings
1983	$11.80	$5.20	44.07%
1984	No survey conducted		
1985	$13.80	$7.30	52.90%
1986	$10.90	$5.50	50.46%
1987	$10.20	$5.70	55.88%
1988	$9.60	$4.50	46.88%

The gender wage imbalance in the area of overaward payments has generally been described as:

> "the result of a number of factors ranging from blatant discrimination and the undervaluing of women's skills to occupational and industry segregation and a lack of bargaining power."[32]

While this may be the case, much clearer evidence is required to establish the extent to which differences in overaward rates paid to male and female employees may be attributed to direct or indirect discrimination in the workplace.

The area of overaward payments has long been identified as a possible area in which representative trade union complaints might be brought under the Sex Discrimination Act 1984 (Cth) to remedy wage discrimination within the industrial wage

32 National Women's Consultative Council and the Labour Resource Centre, op.cit., p 38

negotiation process.[33] The collection of data and evidence linking overaward wage differentials to unfavourable treatment on the basis of sex is yet, however, to be systematically or comprehensively undertaken. It is perhaps not surprising having regard to the difficulties, and costs associated with this task that no complaints in respect of discriminatory overaward payments have so far been dealt with under the Sex Discrimination Act 1984 (Cth). The uncertainty of successfully establishing a representative complaint of this nature within the legal definitions provided under the Act has in all likelihood also inhibited the lodgement of formal complaints under Australia's federal discrimination legislation.

Although the use of discrimination legislation as a means of identifying and treating discrimination in relation to non-award and overaward payments cannot be wholly excluded, broader measures than the complaint based model established under existing discrimination laws will need to be developed if the issue of discrimination in relation to wage payments made outside the terms of industrial award wage orders is in any way to be practically addressed.

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33 J Acton, Working Women's Charter, Implementation Manual No 2, Equal Pay, ACTU, Melbourne, 1985, p 32; see too, International Labour Conference, Equal Remuneration, General Survey by the Committee of Experts, on the Application of Conventions and Recommendations, International Labour Office, Geneva, 1986, p 183; P O'Neil, Sex Discrimination Commissioner, Address to Women in Trade Unions Network, Adelaide, February 1986

The need to develop wider strategies to ensure the recognition of the principles contained within Australia's discrimination laws in the field of wage determination is of course by no means limited to the peripheral area of non-award and overaward payments. It is important to recall that the payment of women's wages is predominantly governed by the centralised wage fixing system developed within the framework of industrial law. The extent to which this wage fixing system may be influenced by discrimination legislation will now be examined beginning with an analysis of the Sex Discrimination Act 1984 (Cth) in so far as it relates to the making of awards and determinations of Australia's federal wage fixing authorities.

THE EFFECT OF THE SEX DISCRIMINATION ACT 1984 (CTH) ON THE FUNCTIONS OF FEDERAL INDUSTRIAL WAGE TRIBUNALS

The ways in which discrimination legislation might be said to influence the determinations of industrial wage tribunals in the exercise of federal power are extremely difficult to identify. Complex issues emerge as to how discrimination law principles can, or should operate within the context of the Australian federal industrial wage fixing system.[34]

It is essential to appreciate, nonetheless, that the degree to which the Sex Discrimination Act 1984 (Cth) may assist further

34 See L Bennett, "Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission", Journal of Industrial Relations, Vol 30, 1988, pp 534-537

development towards the removal of wage discrimination will largely depend on the Act's capacity to influence outcomes within the Australian industrial relations system.

In examining the legislative provisions contained under federal discrimination law of relevance to the area of equal pay it is instructive to reflect initially on the intention of the legislative scheme introduced in 1984 with the enactment of the federal Sex Discrimination Act.

To begin with, the Second Reading Speech to the Sex Discrimination Bill 1983 placed a strong emphasis on the need to address the high incidence of discrimination on the basis of sex in the area of employment. The differences in male/female earnings were cited in this context as one area of structural inequality which required adjustment to ensure the removal of unfavourable treatment on the basis of sex within the Australian labour market. It was noted that:

> "The Bill makes unlawful discrimination against applicants for jobs and employees generally and discrimination against persons who are Commonwealth agents and contract workers. The Bill will extend as far as is constitutionally possible and in this regard will provide protection not only to the Commonwealth's

own employees but to employees of other institutions such as trading and financial corporations."[35]

The Second Reading Speech goes on to state that:

> "It will also be unlawful for a person who performs functions or exercises power under Commonwealth law or for the purposes of a Commonwealth program to discriminate on the ground of sex, marital status or pregnancy in carrying out such functions."[36]

The Bill's broad intention to remove discrimination in employment finds its legislative expression in Section 14 of the Sex Discrimination Act 1984 (Cth). As earlier outlined in Chapter Nine, the provisions of Section 14 include remuneration as "a term or condition of employment".

Although Section 40 of the Sex Discrimination Act 1984 (Cth) prevents the lodgement of claims of sex discrimination against employers acting in accordance with industrial wage orders, this exemption could not reasonably be interpreted as providing new opportunities for discrimination under cover of industrial awards. This would appear to be especially so having regard to the terms of Section 26 of the Act which prohibits persons acting under Commonwealth law from engaging

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35 Senator Ryan, Second Reading Speech, Hansard 2 June 1983, pp 1185-1186

36 ibid, at p 1186

in discriminatory acts and practices in the performance of their statutory responsibilities.

The legislative scheme of the Sex Discrimination Act 1984 (Cth) suggests that the orders and determinations made by industrial wage fixing authorities should not be made inconsistently with the Act's provisions. This interpretation accords with the general legal principle that awards of federal industrial tribunals cannot be made inconsistently with laws of the Commonwealth.[37] It is an interpretation which is also reinforced by the provisions of Section 109 of the Sex Discrimination Act 1984 (Cth), and Section 86 of the Industrial Relations (Consequential Provisions) Act 1988.[38] These two latter provisions will now be briefly discussed.

INDUSTRIAL WAGE DETERMINATION AND AWARDS TO BE MADE CONSISTENTLY WITH THE SEX DISCRIMINATION ACT 1984 (CTH)

Up until 1989, Section 109 of the Sex Discrimination Act 1984 (Cth) provided that the Act was a prescribed Act for the

37 Federated Seamen's Union of Australia v Commonwealth Steamship Owners Association (1922) 30 CLR 44; William & Anor v Commonwealth Banking Corporation Conciliation and Arbitration Commission, C No 989 of 1960; Termination Change and Redundancy Case (1984) 8 IR 34; Rockhampton City Council Municipal Officer's (Queensland Consolidated Award) Case (1978) 203 CAR 584

38 For a detailed discussion on the constitutional aspects of anti-discrimination laws, and the effect of inconsistencies arising between federal discrimination laws and industrial award clauses, see G McCarry, "Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws", The Australian Law Journal, Volume 63, May 1989, p 340ff

purposes of Section 41A of the Conciliation and Arbitration Commission Act 1904 (Cth). Section 41A provided the former Conciliation and Arbitration Commission with powers to override certain laws affecting employment conditions within the Commonwealth Public Service. The Section, in effect authorised the Commission to make awards which were not in accord with a law of the Commonwealth where in the Commission's view it was proper to do so. This authorisation did not, however, extend to Acts prescribed under Section 41A of the Conciliation and Arbitration Commission Act 1904 (Cth). The inclusion of the Sex Discrimination Act 1984 (Cth) as a prescribed Act for the purpose of sub-section 41A of the Conciliation and Arbitration Commission Act 1904 (Cth) arguably reflected the legislature's intention that all new industrial orders, or awards made following the commencement of the federal Sex Discrimination Act would be made consistently with the Act's provisions. Such an interpretation would also necessarily follow having regard to Australia's international treaty obligations arising under the Convention on the Elimination of All Forms of Discrimination Against Women.[39] This indeed was the view adopted by the

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39 See Articles 2, 11 and 15 of this Convention. See too, ILO Convention 100 (Equal Remuneration), Articles 1, 2 and 3, and ILO Convention 111 (Discrimination in Employment and Occupation), Articles 2 and 3. For a more detailed discussion of the rights and obligations established under the international treaty agreements ratified by the Australian Government with reference to the area of equal pay, see Chapter Eleven

former Human Rights Commission[40] in its submissions to the then former Attorney-General, the Honourable Lionel Bowen, in relation to the proceedings before the Conciliation and Arbitration Commission in the 1985 Nurses Case proceedings.[41]

In 1989, Section 109 of the Sex Discrimination Act 1984 (Cth) was amended by Section 86 of the Industrial Relations (Consequential Provisions) Act 1988 (Cth). This statutory amendment ensures that the Sex Discrimination Act is now a prescribed act for the purposes of Section 121 of the Industrial Relations Act 1988 (Cth). This latter Section substantially replaces the former Section 41A of the Conciliation and Arbitration Act 1904 (Cth).

Overall, the provisions contained within the Sex Discrimination Act 1984 (Cth) and the Industrial Relations Act 1988 (Cth) suggest, at least in theory, that Australia's discrimination laws are basically intended to be of relevance to the processes of industrial wage fixation. Difficult legal and procedural issues arise, however, in attempting to precisely identify the availability of mechanisms for the review of alleged discrimination within the wage setting practices authorised by Australia's federal industrial wage tribunals. This general uncertainty involves, in part, the interpretation of two statutory provisions which suggest

40 Information provided in the course of discussions with members of the former Human Rights Commission

41 See, Private Hospitals' and Doctors' Nurses (A.C.T.) Award (1986) 300 CAR 190

certain limited possibilities for the review of alleged discrimination arising in the exercise of federal legislative power by Australia's national industrial wage fixing authorities. The first of these provisions is contained in Section 26 of the Sex Discrimination Act 1984 (Cth). The second relates to Section 93 of the Industrial Relations Act 1988 (Cth). These two legislative provisions will now be discussed for the purpose of analysing the legal rights and remedies available to persons affected by alleged sex discrimination within the Australian wage fixing system.

SECTION 26 OF THE SEX DISCRIMINATION ACT 1984 (CTH)

On the face of the Sex Discrimination Act 1984 (Cth), a possible avenue for review of alleged discrimination within the federal wage fixing process lies under the terms of Section 26 of the Act. This Section relates to persons performing functions, or exercising powers under federal law. It provides that:

> **Section 26**
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> (1) It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program to discriminate against

another person, on the ground of the other person's sex, marital status or pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

(2) This section binds the Crown in right of a State.

Under Part III of the Sex Discrimination Act 1984 (Cth), the Human Rights and Equal Opportunity Commission is empowered to inquire into any alleged infringements of Section 26 on receipt of either an individual or representative complaint.[42] Where a complaint is received, it is referred by the Commission to the federal Sex Discrimination Commissioner, who is required under Section 52 of the Act to investigate the complaint, and to attempt to resolve it through the process of conciliation.[43]

Prior to the introduction of the Industrial Relations Act 1988 (Cth), the issue arose as to whether the terms of Section 26 could apply to persons exercising federal powers in the making of industrial awards, or other wage determinations.[44] At the time of the Act's introduction, Section 60 of the Conciliation

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42 Section 48(1)(a), Sex Discrimination Act 1984 (Cth)

43 Section 52(1), Sex Discrimination Act 1984 (Cth)

44 See, for example, the submissions presented to the Conciliation and Arbitration Commission on the operation of Section 26 by the National Council of Women of Australia in the 1985 Nurses Case, Transcript of Proceedings C No 2219 of 1985, C No 2271 of 1985, 26 November 1985, p 142

and Arbitration Commission Act 1904 (Cth) provided that awards made by the former Conciliation and Arbitration Commission were binding and conclusive. The later enactment of the Sex Discrimination Act 1984 (Cth) made no provision, however, to exempt the acts and practices of federal wage fixing bodies from the Act's operation.

On one interpretation, Section 26 of the Act might have applied to require the investigation of complaints of alleged discrimination by the Human Rights and Equal Opportunity Commission in circumstances where the acts complained of were carried out pursuant to federal legislative power. The likelihood of any such complaint succeeding would, on an alternative view, appear remote.

First, it could be argued that the natural construction of Section 26 did not apply to the exercise of legislative powers[45] or, in the case of industrial wage orders, the quasi-legislative powers of federal industrial wage fixing tribunals. Second, while federal industrial tribunals may be entitled to have regard to the fact that Australia has assumed obligations under international Conventions,[46] they will not be legally bound to comply with the terms of any relevant Convention unless a clear legal obligation exists under

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45 See, Gerhardy v Brown (1984) 57 ALR 472 at 478 and 488

46 Termination, Change and Redundancy Case (1984) 8 IR 34 at 45; Rockhampton City Council Municipal Officers (Queensland) Consolidated Awards Case (1978) 203 CAR 584

Australian municipal law.[47] The effect of Section 26 and Section 40 of the Sex Discrimination Act 1984 (Cth) are especially ambiguous in this regard.

In any event, the introduction of the federal Industrial Relations Act in 1988 might be viewed as finally removing any doubt as to the appropriate forum for the review of alleged discrimination in the making of industrial orders.[48] Part III of the Industrial Relations Act 1988 (Cth) provides a comprehensive scheme for the review of industrial wage determinations which would it seems override the terms of Section 26 of the Sex Discrimination Act 1984 (Cth). Although the issue is yet to be legally tested, the terms of Section 26 would, on balance, appear to exclude the acts and practices of persons exercising authority under the Industrial Relations Act 1988 (Cth).

SECTION 93 OF THE INDUSTRIAL RELATIONS ACT 1988 (CTH)

In contrast to the uncertainty presented by the provisions of Section 26 of the Sex Discrimination Act 1984 (Cth), the recognition of anti-discrimination principles within the

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47 Bradley v Commonwealth & Anor (1973) 128 CLR 557; Koowarta v Bjelke-Peterson & Ors (1982) 153 CLR 168; Kioa v West (1985) 159 CLR 550

48 It should be noted here, however, that the Industrial Relations Act 1988 (Cth) might not be interpreted to operated in such a way as to wind back the implementation of international treaty obligations initially established by the prior introduction of the federal Sex Discrimination Act in 1984

federal wage fixing process is expressly required under the terms of Section 93 of the Industrial Relations Act 1988 (Cth). Section 93 unequivocally states that the federal Industrial Relations Commission:

> "shall take account of the principles embodied in the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984 relating to discrimination in employment."

Where it could be demonstrated that the Industrial Relations Commission had failed to take into account the principles of the Sex Discrimination Act 1984 (Cth), a breach of the Commission's statutory duty could be said to arise. It might simultaneously be argued in such circumstances that the Commission has no jurisdiction to make an industrial wage determination in terms that are inconsistent with the federal Sex Discrimination Act 1984 (Cth).[49] This latter argument may encounter difficulty, however, on the basis that the combined provisions of the Sex Discrimination Act 1984 (Cth), and the Industrial Relations Act 1988 (Cth) arguably express an intention that matters of industrial wage fixation shall be

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49 Federated Seamen's Union of Australia v Commonwealth Steamship Owners' Association (1922) 30 CLR 144; see too McCarry, op.cit., p 339

exclusively determined within, and subject to the legislative framework established under Australian industrial law.[50]

Assuming, for the purpose of discussion that the circumstances relating to the determination of an award wage order were to indicate that no account of the principles of the federal Sex Discrimination Act was taken, it may be possible for the appeal provisions under Part III of the Industrial Relations Act 1988 (Cth) to take effect. These provisions allow for an initial review of industrial wage determinations made by a single member of the Commission, before the Full Bench of the Industrial Relations Commission.[51] Section 45 of the Act provides that an appeal lies to a Full Bench of the Commission against a decision of a member by way of a finding in relation to an industrial dispute, or against an award or order made by a member of the Commission, other than a consent award.[52]

Leave of the Full Bench must first be obtained in respect of any appeal application, and will only be available, if in the view of the Full Bench, the matter is of such importance that

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50 See Re Professional Engineers Awards (1961) 97 CAR 3 at 27; a more detailed consideration of the possible legal remedies available to review the powers of the Industrial Relations Commission to make orders and other wage determinations inconsistently with the terms of the Sex Discrimination Act 1984 (Cth) is discussed later in this Chapter

51 Section 45(1), Industrial Relations Act 1988 (Cth)

52 Section 45(1)(b), Industrial Relations Act 1988 (Cth)

it should be granted in the public interest.[53] An appeal in relation to an order or award, other than a consent award, may only be instituted by an organisation or person bound by the award or order.[54] Appeals with respect to a finding in relation to an industrial dispute or presumably a consent award may, however, be instituted by an organisation or person aggrieved by the decision concerned.[55]

It is also worth nothing that the Commission is empowered to refer any questions of legal interpretation in relation to the federal Sex Discrimination Act in matters before it for the opinion of the Federal Court.[56]

Limited review procedures exist to enable the interpretation of awards by the Industrial Division of the Federal Court.[57] In the event of disputed findings arising in relation to an industrial dispute a further avenue for review may lie under Section 57 of the Industrial Relations Act 1988 (Cth) to the High Court of Australia.

As mentioned earlier, another possible review procedure may be available to challenge the jurisdiction of the Industrial Relations Commission to make industrial wage determinations

53 Section 45(2), Industrial Relations Act 1988 (Cth)

54 Section 46, Industrial Relations Act 1988 (Cth)

55 Section 45(3)(d), Industrial Relations Act 1988 (Cth)

56 Section 45(3)(a), Industrial Relations Act 1988 (Cth)

57 Section 50, Industrial Relations Act 1988 (Cth)

inconsistently with the terms of the federal Sex Discrimination Act. This procedure, known as an application for prerogative writ, relates to the authority of the Australian High Court to review determinations of the federal Industrial Relations Commission in the exercise of the Court's original jurisdiction under Section 75(v) of the Australian Constitution. In this regard, it is important to note that members of the Industrial Relations Commission are officers of the Commonwealth for the purposes of Section 75(v) of the Australian Constitution.[58] Detracting from the use of the prerogative writ as a means of immediate review before the High Court, however, are the provisions of Section 151 of the Industrial Relations Act 1988 (Cth) . This Section provides that awards made by the Commission are final and conclusive, and shall not be subject to challenge through the application of the prerogative writs of mandamus, prohibition, or injunction. While the High Court has been generally reluctant to place full reliance on such privative clauses purporting to oust its original jurisdiction,[59] there is also a clear

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58 The King v Galvin & Anor; Ex Parte Metal Trades Employer's Association & Ors (1949) 77 CLR 432; R v Commonwealth Court of Conciliation and Arbitration; Ex Parte Brisbane Tramways (1914) 18 CLR 54; Australian Coal and Shale Employees Federation v Aberfield Collieries (1942) 66 CLR 161; R v The Conciliation and Arbitration Commission; Ex parte The Angliss Group (1969) 122 CLR 553

59 R V Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598 at 615. See too, Australian Labour Law Reporter CCH Australia Limited, para 43-410 tt

judicial reluctance to interfere with a specialist industrial tribunal acting within, and with reference to its powers.[60]

In summary, therefore, it appears that access to legal procedures and remedies may theoretically be available in cases where it could be demonstrated that no account of the principles embodied in the Sex Discrimination Act 1984 (Cth) had been taken into account within the industrial award making process. Legal remedies might alternatively be available in cases where an industrial wage determination is made inconsistently with the terms of the federal Sex Discrimination Act. In practice, however, these legal review mechanisms would appear unlikely to facilitate the identification and treatment of discrimination within the federal industrial wage determination process. The barriers posed to the review of discriminatory wage practices through the use of existing legal procedures within the area of industrial wage negotiation will now be briefly outlined.

PROCEDURAL BARRIERS TO THE REVIEW OF DISCRIMINATORY TREATMENT WITHIN THE FEDERAL INDUSTRIAL WAGE FIXING SYSTEM

In considering the potential use of legal procedures for the review of discrimination in the wage setting process several difficulties can be seen to exist. The first of these relates to the problems of proof in establishing the presence of sex

60 See R v Dunphy; Ex Parte Maynes 1978 AILR 284; R v The Commonwealth Conciliation and Arbitration Commission; Ex Parte The Angliss Group (1969) CLR 546 at 563

discrimination in the wage setting process. This difficulty is especially apparent when dealing with the issue of indirect discrimination. It should be recognised in this context that any differences in the payment of wage rates for women resulting from discrimination in the wage setting process are likely to represent only one component of the wage gap between male and female workers.[61] Identifying discrimination from the complex mix of factors which comprise the differences in male and female earnings presents a formidable evidentiary task. The costs involved in the presentation and gathering of evidence of gender bias through such methods as job evaluation analysis, are frequently high, and unlikely to be incurred in relation to a distinctly uncertain legal remedy and outcome.

Second, it should be appreciated that even if discrimination in the determination of wage rates could be established within the prescribed definitions provided under the Sex Discrimination Act 1984 (Cth), the fact that the Act's principles had been taken into account may sufficiently discharge any statutory obligation under Section 93 of the Industrial Relations Act 1988 (Cth). Proving a failure to take into account the principles embodied in the Sex Discrimination Act (Cth) 1984 in the making of an industrial order, award or finding will often be difficult to legally establish. This is particularly so given the terms of Section

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61 See M Rubenstein, Equal Pay For Work of Equal Value, Macmillan, London, 1984 pp 13-41; P Weiler, "The Wages of Sex: The Uses and Limits of Comparable Worth", [1986] Harvard Law Review, Vol. 99, 1728 at pp 1779-1794

90 of the Industrial Relations Act 1988 (Cth) which requires the Commission to have regard to the likely effects on the national economy of any awards or orders with special reference to the level of employment and inflation.

In relation to the available review processes under consideration, there is in addition the legal problem of standing. This refers to the fact that claims for review of an industrial award can generally only be brought by an organisation or person bound by the award or order.[62] Although powers exist to enable interested organisations, persons or other bodies to be heard in proceedings arising under the Industrial Relations Act 1988 (Cth),[63] or in relation to an application for prerogative writ,[64] a "real or substantial" interest in the outcome of the decision would need to be established.[65] Any such application for review would almost certainly require strong trade union involvement and support. The lower participation of women relative to men within trade union organisations, and key union decision making structures[66] would not suggest, however, that access to the level of resources required to effectively pursue industrial claims seeking the removal of wage discrimination

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62 See Section 45, Industrial Relations Act 1988 (Cth)

63 See Section 46, Industrial Relations Act 1988 (Cth)

64 R v Watson; Ex Parte AWU (1983) 128 CLR 77

65 See CCH, Australian Labour Law Reporter, para 43-280

66 Australian Bureau of Statistics, Catalogue 6325.0, 1988; National

is likely to be immediately forthcoming. Although it would appear that a greater commitment on the part of the trade union movement to supporting such actions will be critical to influencing higher levels of trade union membership amongst the increasing number of women participants in the Australian labour market, there is little indication of any concentrated trade union involvement of this kind. While it might be argued that the approach of the trade union movement throughout the 1980's to secure higher minimum wage levels for low paid workers indirectly facilitates the achievement of positive wage outcomes for women workers, wage policies of this nature would appear to result in little more than the maintenance of relative male and female wage differentials. Given the legal and institutional framework within which the review of indirect sex discrimination in the setting of wage rates must take place, it would seem unlikely that the barriers to the review of wage discrimination will diminish until such time as a more pro-active role is taken by trade union organisations to ensure the proper implementation of equal pay principles.[67]

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67 For a discussion of the importance of trade union involvement in the removal of discrimination, see International Labour Office, "Trade Unions and Women's Employment", Women at Work, Number One, ILO Geneva, 1988; as to the practical difficulties of securing trade union support in the implementation of anti-discrimination principles, see M Thornton, "The NSW Labor Council and discrimination in employment", The Australian Quarterly, Spring 1988, 238

TOWARDS THE PROMOTION OF THE PRINCIPLES OF EQUAL REMUNERATION EMBODIED WITHIN THE SEX DISCRIMINATION ACT

This Chapter has attempted to analyse the possible ways in which federal discrimination law may operate to influence the removal of direct and indirect discrimination in the wage fixing process. The substantial limitations to the existing legislative scheme have been demonstrated with direct reference to the review of indirect discrimination in the determination of wage rates. The absence of suitable and accessible procedures to review alleged sex discrimination in the industrial decision making process has also been described. The preceding analysis clearly suggests that the impact of the federal Sex Discrimination Act in relation to the implementation of equal pay principles within the Australian wage fixing system has been extremely limited. Despite the Act's broad framework under which access to legal rights and remedies is available, no use has to date been made to the Act's provisions prohibiting discrimination in the area of equal pay. The Act's greatest potential in this area rests, it seems, with the promotion of change at a policy level.

A recent example of the way in which the federal Sex Discrimination Act has been able to develop its capacity to influence policy within the industrial relations field can be found in the Parental Leave Test Case determined in July,

1990.[68] These proceedings represent an important precedent in which the federal Sex Discrimination Commissioner, Quentin Bryce AO was granted leave to intervene in proceedings before the Australian Industrial Relations Commission to present submissions on the operation and interpretation of the Sex Discrimination Act 1984 (Cth). The Commissioner's intervention on behalf of the Human Rights and Equal Opportunity Commission provides a significant model which might arguably also extend, in appropriate cases, to enable the presentation of substantive submissions on the ways in which the provisions contained within the Sex Discrimination Act 1984 (Cth) may be applied to ensure a more comprehensive implementation of equal pay principles within the national wage fixing system.[69]

Historically, in the area of equal pay, the Australian conciliation and arbitration system has relied extensively on the presentation of this kind of argument by various trade

68 See Federated Miscellaneous Workers Union of Australia and Angus Nugent and Sons Pty Ltd & Ors C No 23285 of 1988, Print M J3596 Dec 773/90

69 The concept of strengthening and formalising procedures through which more detailed assessments of the impact of wage determinations on women may be received in the course of industrial wage hearings is by no means a new concept. See submissions presented by E Ryan on behalf of the Women's Electoral Lobby, in Australia Conciliation and Arbitration Commission, Inquiry into Wage Fixation, Vol II, AGPS, Canberra, 1978 p 175; Women's Electoral Lobby Submission to the 1983 National Wage Case, Sydney p 59; See too M Thornton, "Pay Equity: An Australian Perspective", Paper Prepared for the International Labour Organisation, May 1989, p 32; the establishment of such procedures might arguably provide a critical means of ensuring the non-discriminatory assessment of work value within the Australian wage determination process

union organisations, government representatives, and community interest groups. In relation to the major equal pay cases determined in 1969[70] and 1972[71] it is interesting to recall the influence of the submissions presented in these proceedings relating to the recognition of Australia's international legal obligations regarding the development and application of equal pay principles.

Over more recent years the importance attached to the presentation of arguments concerned with the implementation of Australia's international treaty obligations in the area of equal pay appears to have substantially diminished. This situation would appear to be largely inconsistent with the need to promote developments towards a greater recognition and acceptance of equal pay principles. The following Chapter is aimed at examining the legal obligations arising under the various international treaty agreements ratified by the Australian Government relevant to the area of equal pay. It seeks to explore the ways in which these international instruments may continue to operate in conjunction with the provisions of the Sex Discrimination Act 1984 (Cth), as a vehicle for the promotion of greater pay equity within the Australian industrial wage determination system.

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70 Equal Pay Cases (1969) 127 CAR 1142

71 National Wage and Equal Pay Cases (1972) 147 CAR 172

CHAPTER ELEVEN

INTERNATIONAL TREATY OBLIGATIONS AND THE IMPLEMENTATION OF EQUAL PAY PRINCIPLES

Several international treaty obligations relevant to the application of equal pay principles have played an important part in the development of Australian industrial and discrimination law. Since 1973, the Australian Government has ratified three international treaty instruments under which the implementation of measures is required to ensure equal treatment in the determination of remuneration between men and women workers. These international instruments include:

- The Convention on the Elimination of All Forms of Discrimination against Women, 1979

- The Equal Remuneration Convention (ILO 100), 1951, and

- The Discrimination (Employment and Occupation) Convention (ILO 111), 1958

In this Chapter, the different obligations arising under Australia's international treaty commitments will be outlined and discussed, together with the implications

arising from these obligations for further action in the area of pay equity. Because of the specific focus of the Convention on the Elimination of All Forms of Discrimination against Women, and the Equal Remuneration Convention (ILO 100), particular attention is paid to these two international instruments as a means of promoting the achievement towards greater pay equality between the sexes.[1]

In considering the Convention on the Elimination of All Forms of Discrimination against Women, the review and reporting procedures of the Committee on the Elimination of Discrimination against Women are described to illustrate the ways in which the recommendations of this United Nation's Committee may serve to influence progress towards the removal of discriminatory wage practices. Australia's response to the reporting requirements established under the United Nations Convention is also analysed, and a short evaluation is presented of Australia's general performance with respect to its obligations under the United Nations Convention relevant to the area of equal pay. Reference is made in the course of this evaluation to guidelines prepared by the Commonwealth Secretariat regarding the implementation of

1 In relation to the scope and requirements of the more general provisions of the Discrimination (Employment and Occupation) Convention (ILO 111) and Recommendation (No 90) see, International Labour Conference, Equality in Employment and Occupation, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Office, Geneva, 1988

the equal pay provisions set out in Article 11 of the United Nation's Convention.

Attention is also focused on the treaty obligations arising under The Equal Remuneration Convention ILO 100 and ILO Recommendation (No 90). A brief evaluation of Australia's compliance with these international instruments is presented with special reference to the 1985 General Survey conducted by the ILO Committee of Experts on the Application of Conventions and Recommendations.

Finally, a range of conclusions are drawn regarding the implications for the further development of equal pay principles within the context of the Australian industrial wage determination process.

THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The most legally significant international treaty to which Australia is a party and which directly concerns the application of equal pay principles is the Convention On the Elimination Of All Forms Of Discrimination against Women (the UN Convention). The UN Convention was adopted by the United Nations General Assembly in 1979 and came

into force as a United Nations treaty in late 1981.[2] The treaty represents the most comprehensive international legal instrument concerned with the role and status of women, and requires State parties, on ratification, to enter into a legally binding commitment to ensure the elimination of all forms of direct and indirect discrimination against women.

In 1983, the UN Convention was ratified by the Australian Government and partially incorporated within Australian domestic law the following year with the introduction of the Sex Discrimination Act 1984 (Cth). Of the various international treaties concerned with equal pay issues, it is the UN Convention which has played a unique role in the introduction and development of discrimination legislation within Australia's domestic legal system. The UN Convention provides an important constitutional foundation for the enactment of the Sex Discrimination Act 1984 (Cth) by virtue of the Act's reliance on the external affairs power under Section 51 (xxix) of the Australian Constitution. The constitutional validity of Australia's legislative prohibitions against discrimination in the terms and conditions of employment

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2 A.C. Byrnes, Report on the Seventh Session of the Committee on the Elimination of Discrimination Against Women, and the Fourth Meeting of State Parties To The Convention, Interntional Woment's Rights Action Watch, Columbia University, New York, 1988, p1

appears to depend in part on the provisions of Article 11 of the UN Convention.

In addition to providing a clear constitutional foundation to the legislative framework of Australia's federal discrimination laws, the UN Convention continues to play a significant policy role in the development of women's rights within Australia.[3] A broad outline of the provisions contained under the UN Convention will now be briefly presented.

The UN Convention[4] is divided into a preamble and six parts. Part 1 defines discrimination and lists areas in which State Parties agree to adopt policies and measures to remove discrimination. Article 1 provides the definition of discrimination which is expressed to involve any distinction, exclusion, or restriction made on the basis of sex. The definition concentrates on the promotion of women's rights and the recognition of

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3 Elizabeth Evatt J, "International Machinery On Human Rights", Paper presented to the International Forum - "Future Directions by Women in Public Sector Administration" IASA Annual Conference, Brisbane, 4-12 July, 1988, p 25-33

4 See Appendix 1

women's status within all areas of economic, political and social activity.[5]

Article 2 sets out the policy and legislative measures to be implemented by State parties to facilitate the removal of discrimination. Effective legal protection against discrimination through the establishment of competent tribunals and other public institutions is included amongst these measures. State parties are further obliged to ensure that public authorities and institutions refrain from engaging in any act or practice of discrimination. Such obligations arguably extend in the Australian context to the operation of Australia's State and federal wage fixing authorities in the determination of prescribed award wage rates.

Of particular relevance to the area of equal pay are the provisions contained in Part II of the UN Convention. It is here that Article 11 1.(d) requires:

> 1. State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

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5 Commonwealth Secretariat, The Convention on the Elimination of All Forms of Discrimination Against Women: The Reporting Process - A Manual for Commonwealth Jurisdiction, Commonwealth Secretariat, London 1988, p 4

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.[6]

THE REVIEW AND REPORTING FUNCTIONS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

Part V of the UN Convention provides for the establishment of the Committee on the Elimination of Discrimination against Women (CEDAW) which acts as the basic supervisory mechanism responsible for the monitoring of the Convention's implementation. CEDAW compromises twenty three independent experts nominated, and elected by State parties, and who serve in a private capacity, rather than as government representatives. The monitoring process involves the examination of reports submitted by State parties to the Committee and the reporting of the Committee's activities to the General

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6 It would appear that the terms of Section 14 of the Sex Discrimination Act 1984 (Cth) operate to incorporate the provisions of Article 11 within Australia's domestic law. See Chapter Nine for a more detailed discussion of the provisions of Section 14 of the federal Sex Discrimination Act

Assembly of the United Nations through the Economic and Social Council.[7]

State parties are required to submit their reports on the measures adopted to give effect to the Convention's provisions within one year after becoming a party to the Convention and every four years thereafter.[8] In addition to analysing the reports submitted by State parties, CEDAW members question government representatives who appear before the Committee prior to the preparation of its reports. The Committee issues a report of its activities on an annual basis. The Committee's reporting requirements provide an ongoing means for the review and evaluation by both government and non-government agencies of the Convention's progress. As will shortly be demonstrated these review and reporting processes have over recent years served a valuable role in analysing equal pay developments in Australia within a non partisan political context. As stressed in the guidelines issued by the Commonwealth Secretariat with reference to the Convention's implementation:

> "Governments, women's national machineries and non-governmental organisations have an important role in collecting information and presenting it so that it reflects the true situation within the country

7 See Article 21 of the UN Convention

8 Article 18 of the UN Convention

concerned. In addition, Government Department's women's national machineries and non-governmental organisations can all use the reports to monitor the progress achieved to date, evaluate the obstacles which still remain and develop strategies to overcome them."[9]

Under the terms of Article 21 of the UN Convention, the Committee's functions extend to making general recommendations based on its examination of reports and other information received from State parties.

Although CEDAW has no judicial power to pronounce a State party in violation of the UN Convention, or to enforce any form of remedy, it may offer suggestions to individual State parties and exert pressure through the public review of State parties' reports.[10] As Byrnes suggests:

"A positive appraisal in an international forum of a country's commitment and efforts can give impetus to further progress. An adverse assessment can embarrass a government at home and abroad, ideally

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9 Commonwealth Secretariat, op.cit. p4

10 A.C. Byrnes, "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women", The Yale Journal of International Law, Volume 14, Number 1, Winter 1989, p 6

providing it with some incentive to do more in the future."[11]

The Committee's recommendations further provide constructive guidance to State parties seeking to meet their obligations under the Convention. This process is consistent with the Committee's role of promoting principles of non-discrimination within the broad areas referred to under the Convention's provisions.

In considering the implementation of equal pay principles, it is significant to note the recommendations presented by CEDAW at its Eighth Session meeting in February 1989. These recommendations were included in the Committee's April 1989 Report to the General Assembly of the United Nations[12] where it was expressed that the Committee:

> "Recommends to the State parties to the Convention on the Elimination of All Forms of Discrimination against Women that:
>
> 1. In order to fully implement the Convention of All Forms of Discrimination against Women, those

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11 id

12 United Nations, General Assembly, Report of the Committee on the Elimination of All Forms of Discrimination against Women, A/44/38, 14 April 1989

State parties that have not yet ratified ILO Convention 100 should be encouraged to do so;

2. They should consider the study, development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate, and they should include the results achieved in their reports to the Committee on the Elimination of Discrimination against Women;

3. They should support, as far as practicable, the creation of implementation machinery and encourage the efforts of the parties to collective agreements, where they apply, to ensure the application of the principle of equal remuneration for work of equal value."[13]

It is conceivable that the above recommendations might operate in such a way as to encourage further policy development within Australia as a means of working towards greater progress in the area of equal pay. The recommendations suggested might even practically form the basis of submissions to Australia's federal wage fixing

13 ibid, p 82

authorities in the course of industrial wage case proceedings.

AUSTRALIA'S PARTICIPATION IN THE REPORTING PROCESSES ESTABLISHED BY CEDAW

In 1986, Australia's initial report to CEDAW was submitted in accordance with the requirements of Article 18 of the UN Convention.[14] Australia's report, was considered by CEDAW at its 7th Session commencing in February 1988 together with a supplementary report describing further initiatives undertaken since 1986.[15] The report covered a wide range of topics, including a statement regarding Australia's compliance with Article 11. Although considerable progress was recorded in relation to the wage differentials between men and women workers over the previous decade, it was acknowledged that women in the paid workforce were not yet accorded full equality of opportunity and treatment with their male counterparts.[16] It was noted that as of 1987, women's average earnings were only 65% of men's, and in

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14 See, Department of the Prime Minister and Cabinet, Office of the Status of Women, Convention on the Elimination of All Forms of Discrimination against Women - Report of Australia, AGPS, Canberra 1986

15 See CEDAW, Consideration of Reports Submitted by State Parties Under Article 18 of the Convention, Initial Reports of State Parties - Australia, CEDAW/c/5/Add.40/Amend.1, United Nations January, 1988

16 ibid, p 78

the case of full time employees a 21% wage gap was evident. This situation was nonetheless stated as being considerably more favourable than that applicable to nine other comparable industrialised nations.

The overall assessment of Australia's report by CEDAW was extremely positive[17] and the thoroughness and frankness of the submissions forwarded were viewed as clear evidence of Australia's commitment to realise equality between men and women. In relation to pay equity it was, however, noted that much remained to be done.[18]

In keeping with the Committee's practice a series of questions were directed to Australia's representative regarding the implementation of certain provisions of the UN Convention. Among the matters raised, clarification was sought on the Australian Government's position on the principle of equal pay for work of equal value.[19] In response to this query, the Committee was referred to the

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17 A.C. Byrnes, International Legal Notes, "Australia and the Convention on Discrimination Against Women", The Australian Law Journal, Volume 62, June 1988, 478; United Nations, Economic and Social Council, Report of the Committee on the Elimination of Discrimination against Women on its Seventh Session, A/43/38, May 1988

18 United Nations, Economic and Social Council, op.cit., p 65

19 CEDAW, Summary Record of the 114th Meeting, CEDAW/C/114/February 1988, p 13

1986 Nurses Case decision[20] and to the fact that wage increases for the nursing profession had been achieved, despite the rejection of the concept of comparable worth by Australia's leading wage fixing authority. The response provided, however, little analysis of the limitations placed on the processing of claims for equal pay for work of equal value, or of the obstacles to the full achievement of this principle within the context of the Australian industrial wage fixing system.[21]

THE OPERATION OF THE UNITED NATIONS CONVENTION AS A TOOL FOR THE EVALUATION OF PAY EQUITY MEASURES

An important feature of the UN Convention is its capacity to provide a model to evaluate and measure progress in relation to the development of the principles of equal treatment irrespective of sex.

In evaluating the implementation of Australia's obligations concerning the requirements set out under Article 11.1.(d) of the UN Convention with reference to equal pay, useful reference can be made to the guidelines issued by the Commonwealth Secretariat relevant to the reporting process administered by CEDAW. In relation to the application of the principle of equal remuneration

20 Private Hospitals' and Doctors' Nurses (A.C.T.) Award (1986) 300 CAR 190

21 See CEDAW, Summary Record of the 118th Meeting, CEDAW/C/SR.118, March 1988, p 16

for work of equal value these guidelines contain a range of questions for the purpose of determining the effectiveness of the implementation procedures adopted by State parties to the Convention. Particular questions suggested by the Commonwealth Secretariat include:

"1. Does the country have legal provisions guaranteeing the right to equal pay for work of equal value? If so, how effective is their implementation? What obstacles impede their implementation?

2. If such provisions exist, how is quality of work evaluated? Does this evaluation lead to equality of treatment? If not, why not?

3. Are women and men afforded equal benefits as ancillary to work of equal value? If not, why not?"[22]

With respect to the implementation process the following objectives are listed:

"1. Ensure that all members of the labour force, domestic workers and agricultural workers are covered by anti-discrimination legislation.

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22 Commonwealth Secretariat, op.cit. p 40-41

2. If necessary, introduce legislative provisions to guarantee equal remuneration for work of equal value.

3. Where such legislation is in place, monitor its effectiveness.

4. Review the differential treatment with respect to pay, non-wage benefits and evaluation schemes for women workers, including those involved in part-time work.

5. Evaluate the effectiveness of current enforcement systems as to whether they are complaint-based. Examine who can bring the complaint; whether the procedure is free and well-publicised; and whether complaints can be taken on a representative or group basis."[23]

TOWARDS IMPROVED MEASURES TO ENSURE THE IMPLEMENTATION OF EQUAL PAY PRINCIPLES

Applying the above tests and standards posed by the above guidelines prepared by the Commonwealth Secretariat, a number of clear issues arise in relation to the implementation and extent of the procedures adopted by Australia in the area of equal pay. First, there is the

23 id

apparent weakness in the impact, and coverage of Australia's discrimination laws with respect to workers and their wage conditions within the industrial wage fixing process.[24] Obvious questions relating to the availability and accessibility of procedures to facilitate the review of complaints of alleged wage discrimination here arise. In particular, the effectiveness of current enforcement mechanisms to remedy discrimination in the payment of wage benefits, including non-award and overaward payments, might reasonably be identified as an area requiring further review. The inadequacy of the existing measures to monitor the evaluation of women's work in a manner consistent with the equal pay for equal work principle presents another key area for potential reform.

In relation to this latter issue, the 1989 recommendations of CEDAW concerning the application of gender-neutral criteria in the evaluation of work value become especially relevant. The realisation of the objectives suggested by these recommendations clearly remain to be achieved within the Australian wage determination process. Such further action might, however, optimistically be expected to fall within the

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24 For a detailed discussion of the limitations of Australia's anti-discrimination legislation in the area of equal pay, see Chapter Ten, ante

functions of the specialised Equal Pay Unit[25] established within the federal Government Department of Industrial Relations in late 1990. The protection of Australia's exemplary international reputation in relation to the removal of sex discrimination would appear, in the area of pay equity, to rely on a sustained commitment to the gender-neutral evaluation work value in accordance with the most recent CEDAW recommendations.

THE ILO EQUAL REMUNERATION CONVENTION (NO 100) AND RECOMMENDATION NO 90, 1951

Two other international instruments binding upon Australia involve a direct and specific focus on the achievement of greater pay equity. These are the International Labour Organisation's Equal Remuneration Convention (ILO 100)[26] and its associated Recommendation (No 90).[27] Both ILO 100 and Recommendation (No 90) were first adopted by the International Labour Organisation (the ILO) in 1951, in keeping with the ILO's founding objectives as contained within the original text of the

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25 See P. Morris MHR, Minister for Industrial Relations, Media Release, 2 March 1990

26 Appendix 2

27 Appendix 3

ILO Constitution.[28] The Convention has historically been an important influence on the acceptance and implementation of equal pay principles within the Australian wage fixing system.[29]

In 1974, ILO 100 was ratified by the Australian Government. It has yet, however, to be incorporated within Australia's domestic law through the enactment of national legislation. Australia's obligations under ILO 100 do not accordingly give rise to private rights enforceable within the Australian legal system.[30]

The terms of ILO 100 are accompanied by Recommendation (No 90). In common with other ILO Recommendations, Recommendation (No 90) is not open to ratification. It

28 International Labour Conference, Equal Remuneration, General Survey by the Committee of Experts on the Application of Conventions and Recommendation, International Labour Office, Geneva, 1986, p 2

29 M. Gaudron and M. Bosworth, "Equal Pay?" in In Pursuit of Justice, Ed J Mackinolty and H Radi, Hale and Iremonger, 1976, p 163; see too the discussion of the 1968 and 1972 Equal Pay decisions in Chapter Three ante in which the relevance of the equal pay principles developed under international law is considered with reference to the determinations reached by the Conciliation and Arbitration Commission

30 See Simsek v McPhee & Anor (1982) 56 ALJR 277; Bradley v Commonwealth & Anor (1973) 128 CLR 557; Koawarta v Bjelke-Peterson & Ors (1982) 56 ALJR 625 at p 648; Kiao v West (1985) 159 CLR 550; for a description of the limited effects of international human rights standards in circumstances where such standards have not been incorporated within the terms of local municipal law, see H. Burmester, "Impact of Treaties", Australian Law News, Vol 32, July, 1989, p 30

serves nonetheless to embody detailed standards for the consideration of State parties, with a view to promoting the application of the principle of equal remuneration by national legislation, or otherwise.

By virtue of the terms of the ILO Constitution, several obligations exist in respect of ILO 100 and its attached Recommendation (No 90).[31] These obligations require the Australian Government:

> "(a) to bring the Convention or Recommendation before the federal authority or authorities within whose competence the matter lies, for the enactment of legislation or other action;
>
> (b) to inform the ILO of the measures taken to bring the Convention or Recommendation before such authority or authorities and of the action taken by the authority or authorities;
>
> (c) in the case of a Convention which the competent federal authority has consented to ratify, to communicate the formal ratification of the

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31 Department of Industrial Relations, Review of Australian Law and Practice in Relation To Conventions Adopted By The International Labour Conference, AGPS, Canberra, 1985, p 4

Convention to the ILO and to take any necessary action to give effect to the Convention."[32]

In examining the necessary action to be taken with respect to ILO 100 and Recommendation (No 90) a clear understanding is needed of the provisions set out under both these international instruments. These provisions will now be outlined as a means of identifying Australia's international legal obligations in the area of equal pay. The following discussion might also serve to demonstrate the kinds of arguments which may require presentation, and further development in proceedings before Australia's industrial wage fixing authorities relevant to the negotiation of equal pay award wage increases.

THE PROVISIONS OF ILO 100 AND RECOMMENDATION 90

ILO 100 and Recommendation (No 90) set out a range of measures to provide for, ensure, encourage and facilitate the application of the principle of equal remuneration for men and women for work of equal value.

To begin with, remuneration is very broadly defined in Article 1 of the Convention to include basic salaries and minimum wages, as well as "any additional emoluments whatsoever payable directly or indirectly, whether in

32 ibid, p 5

cash, or in kind." In the Australian context it is worth noting that this definition would clearly extend to cover overaward payments provided in the course of employment.

State parties are required under Article 2 of the Convention to apply the principle of equal remuneration by "means appropriate to the methods in operation for determining rates of remuneration." Any such application may take place by means of national laws, legally established machinery for wage determination, collective agreements, or a combination of these means.[33] As a ratifying country, Australia is also required to allow for measures to promote the objective appraisal of jobs on the basis of the work to be performed in circumstances where such action will operate to give effect to the Convention's provisions. In the course of this process, State parties are required to co-operate with employers' and workers' organisations involved in the wage negotiation process.[34]

The terms of Recommendation (No 90) are more precise than those contained under ILO 100, and provide specific guidance on the form of appropriate action to be undertaken with reference to the ILO Convention. Where wage rates are subject to statutory regulation, it is recommended that State parties should ensure the

33 ILO 100, Article 2 sub paragraph 2

34 ILO 100, Article 4

application of equal pay for work of equal value after consultation with employer and employee groups, with particular regard to:

"(a) the establishment of minimum or other wage rates in industries and services where such rates are determined under public authority;

(b) industries and undertakings operated under public ownership or control; and

(c) where appropriate, work executed under the terms of public contacts."[35]

ILO Recommendation (No 90) calls for the enactment of laws allowing for the general application of equal pay for work of equal value where appropriate in the light of methods in operation for the determination of wage rates.[36] It is further recommended that State parties establish or encourage the use of objective job appraisal methods of work to be performed, whether by job analysis or other procedures.[37]

Other broad measures are referred to within Recommendation (No 90) such as the need to ensure that

35 ILO Recommendation (No 90), Paragraph 2

36 ILO Recommendation (No 90), Paragraph 3

37 ILO Recommendation (No 90), Paragraph 5

employers and workers are fully informed as to any legal requirements to be met with regard to the application of the equal pay for work of equal value principle. Reference is also made to the need for equal facilities for vocational training and placement. Recommendation (No 90) concludes by calling for every effort to be made to promote public understanding of the grounds on which it is considered that equal pay for work of equal value should be implemented.

THE 1985 GENERAL SURVEY BY THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS

In accordance with the established practice of the ILO,[38] State parties were requested in 1985 to report on the position of their law and practice with regard to the application of ILO 100 and Recommendation (No 90). This reporting requirement led in 1986 to the issue of a major report by the ILO's Committee of Experts on the Application of Conventions and Recommendations.[39] The 1986 Report serves to clarify the obligations of State parties to the Convention, and establishes useful guidelines for those parties concerned with effective compliance under international law. It contains several comments and recommendations of directly applicable to current developments within the Australian wage fixing

38 See Article 19 of the ILO Constitution

39 International Labour Conference, op.cit.

system. Some of the specific topics covered which are of relevance to the contemporary debate surrounding equal pay issues in Australia will now be briefly discussed.

JOB EVALUATION AND THE ASSESSMENT OF EQUAL PAY FOR WORK OF EQUAL VALUE

It may be recalled that under ILO 100, equal remuneration is to be established for "work of equal value". In choosing the "value" of the work as the point of comparison between male and female workers, it is important to appreciate that the ILO standards go beyond a reference to "the same", or "similar" work:

> "The reference to "work of equal value" inevitably broadens the field of comparison since jobs of a different nature have to be compared in terms of equal value. To compare the value of different jobs, it is important that there exists methods and procedures of easy use and ready assess, capable of ensuring that the criterion of sex is not directly or indirectly taken into account in the comparison."[40]

It is also important to recognise at this point that the Convention does not unconditionally require measures to be introduced for the objective assessment of jobs. Nor

40 ibid, p 190

is any positive indication provided as to how work value is to be determined. Despite this situation, it is the Committee of Experts' view that :

> "it follows from Article 3, paragraph 3 that some form of objective appraisal of jobs on the basis of the work to be performed is the only method set forth in the Convention for differentiating wages in conformity with the principle of equality."[41]

A further requirement of the standards established under ILO 100 is that the reach of the comparison between jobs performed by men and women must be as wide as the wage policies and structures in place permit. The comparison must also take into account the degree to which wages fixed may be based on factors unrelated to sex. In any such assessment the Convention is intended to cover:

> "not only open discrimination against either sex, but also cases where apparently objective criteria such as performance or job difficulty are explicitly

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41 ibid, p 11

or implicitly defined or applied with reference to the worker's sex."[42]

In short, the Convention envisages the elimination of all forms of direct and indirect sex discrimination in the wage-fixing process.

When using job evaluation methods in the course of this process, the Committee has noted the particular difficulties which may be experienced in areas where men and women are segregated into different occupations, industries and jobs. It is suggested in these circumstances that:

> "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."

The above comments are particularly appropriate to Australia where levels of occupational segregation by gender are pronounced[43] and where no clearly identifiable procedures exist for the systematic application of non-

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42 ibid, p 12

43 For a discussion on the incidence of occupational segregation in the Australian workforce and its effect on the relative wage levels of male and female workers, see Chapter One, ante

discriminatory evaluation criteria within the wage determination process.

The Committee's survey highlights the increasing importance of job evaluation as a means of giving effect to the terms of ILO 100:

> "Because men and women tend to perform different jobs, a technique to measure the relative value of jobs with varying content is critical to eliminating discrimination in the remuneration of men and women."[44]

Reference is made to a number of countries where the use of formal evaluation plans has been instituted to systematically examine and compare those jobs in which women predominate with jobs in which men predominate.[45] Such procedures provide a recognised basis to identify and correct wage discrimination in the determination of pay rates. A noticeable absence within the Committee's discussion of these developments is any reference to the adoption of similar measures in Australia. The use of job evaluation methods and procedures as a means of identifying indirect sex discrimination in the determination of wage rates remains, it seems, to be appropriately accepted by Australian industrial wage

44 International Labour Conference, op.cit., p 106

45 ibid, p 109 ff

fixing authorities as a legitimate tool to be systematically applied to ensure the removal of discriminatory wage practices.

THE SCOPE OF THE STATE'S OBLIGATIONS UNDER ILO 100 TO ENSURE THE APPLICATION OF THE PRINCIPLE OF EQUAL REMUNERATION

A ratifying State's obligation under ILO 100 to ensure the implementation of equal pay for work of equal value is limited to those areas where such action is consistent with the methods in operation for determining wage rates. This obligation will arise, in the Committee's view, where the State party is the employer, where the State party is in a position to intervene in the wage-fixing process, or where legislation bearing on equal treatment exists which is relevant to the setting of wage conditions.[46] In the case of Australia, all three of these situations could be identified as relevant. Although there is no general obligation to enact legislation under the Convention, the Committee points out that:

> "legislative action by the State for the protection of equality may extend the government's competence to intervene in the field of wages and, hence, widen the scope for ensuring the application of the

46 ibid p 13

principle under Article 2 paragraph 1 of the Convention."[47]

In the case of Australia, the enactment of the federal Sex Discrimination Act 1984 (Cth) might arguably be interpreted as placing Australia within the above mentioned category. Assuming that Australia's recent federal discrimination and industrial legislation is intended to widen the scope for the application of the equal remuneration principle, some form of legislative amendment to national laws would appear necessary to enable these statutory provisions to effectively assist in removing indirect sex discrimination in the wages field.

EQUAL PAY PRINCIPLES NOT CONTINGENT ON ECONOMIC FACTORS

When considering the scope of ILO 100, it is especially significant to note the Committee's firm view that governments must not seek to avoid their obligations under the Convention on the pretext that they are precluded from interfering in the wage fixing process by virtue of economic factors.[48] No compromise may be proposed, for example, that the implementation of the equal remuneration principle may only be pursued subject to suitable financial and economic conditions. Such an

47 ibid, p 14

48 ibid, p 15

approach is unacceptable, in the Committee's assessment, having regard to the call for positive action required under the Convention's provisions through which the unqualified right to equal treatment irrespective of sex is guaranteed.[49]

Australia's appreciation of this position is hardly well reflected when considering the outcome and effect of the 1986 Nurses Case Decision.[50] As outlined earlier in Chapter Seven, this decision has throughout the 1980's had an overriding influence on the application of equal pay principles within the Australian industrial wage fixing system. Most notably it has operated over a sustained period to establish the preconditions for bringing equal pay claims in accordance with the anomalies and inequities provisions contained within national wage fixing guidelines. The restriction of equal pay awards to situation where no economic flow on effects may result is plainly difficult to justify given the positive requirement to implement the right to equal remuneration, irrespective of prevailing economic circumstances.

The slowly emerging shift away from the strict adherence to the requirements laid down in the 1986 Nurses Case

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49 id

50 Private Hospitals' and Doctors' Nurses (A.C.T.) Award (1986) 300 CAR 190

decision[51] brought most recently with the development of the structural efficiency principle might constructively be viewed as providing a greater potential scope for Australia's future compliance with its international treaty obligations in relation to equal pay issues. As to whether future developments within the Australian wage fixing system will effectively operate to ensure the positive application of equal pay principles in the newly emerging context of enterprise bargaining is, however, yet to be determined.

DISCRIMINATION IN INDUSTRIAL AWARDS AND COLLECTIVE WAGE AGREEMENTS

The elimination of discrimination in collective agreements is another area identified by the ILO Committee of Experts as requiring further action by State parties to ILO 100. The removal of discriminatory wage practices within industrial wage agreements is cited by the Committee as one of the most effective and practical ways of ensuring the achievement of the Convention's obligations.[52] The need to focus on the terms and conditions established under collective wage agreements is particularly pertinent in the case of Australia where

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51 See for example, the decision of the Industrial Relations Commission in Child Care Industry (ACT) Award 1985 and Child Care Industry (NT) Award 1986, Dec 1001/90 S Print J4316

52 International Labour Conference, op.cit., p 193

industrial award provisions frequently based on such agreements substantially determine the terms of remuneration applicable to the large majority of the Australian labour force. Given that consent award agreements between employer and employee groups continue to require the approval of State and federal industrial wage fixing authorities, the removal of discrimination in award wage conditions remains inextricably linked to the industrial award determination procedures established within the framework of industrial law. Although the problem of direct discrimination in respect of wages paid pursuant to industrial awards agreements has been substantially addressed over the past two decades through the operation of this regulatory framework, outstanding issues remain concerning indirect discrimination in the wage determination process. As the ILO Committee's Report confirms, less evident forms of indirect discrimination persist with regard to such matters as the choice of methods for determining remuneration, the criteria for the classification of jobs and the evaluation of the work value to be attached to specific occupations within the labour market.[53]

The Committee noted with particular reference to Australia that overaward and bonus payments made to women employees outside the centralised wage regulation process were consistently less than those made to male employees.

53 ibid, p 179

As at the time of the 1985 survey, the ACTU was reported to be engaged in the collection of data relating to these overaward wage differences. Reference was also made to the consultation taking place between the ACTU and the former federal Human Rights Commission in connection with the possible use of the Sex Discrimination Act 1984 (Cth) as a means of remedying problems of wage discrimination arising from overaward payments. As of 1991 this process of consultation is continuing. The provisions of the Sex Discrimination Act 1984 (Cth) remain to be tested in relation to both direct and indirect discrimination in the payment of overaward rates.[54]

TOWARDS GREATER EMPLOYER/EMPLOYEE AWARENESS AND CONSULTATION

In reviewing the legal developments relevant to the application of the principle of equal pay for work of equal value within the various countries surveyed in 1985, the following observations of the ILO Committee of

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54 The need to address the issue of overaward payment has been acknowledged as a key issue since the early introduction of the Sex Discrimination Act 1984 (Cth). See, P O'Neil, Commonwealth Sex Discrimination Commissioner, Address to Women in Trade Unions Network, Adelaide, February 1986 p 4; Some four years later, it is now likely that a national inquiry into overaward payments will be undertaken by the Human Rights and Equal Opportunity Commission, see Human Rights and Equal Opportunity Commission, Overaward Payments and the Sex Discrimination Act: Information Paper, 1991

Experts strike a distinct and familiar chord with respect to the Australian experience:

> "quite often, a relative scarcity of national standards for the general application of the principle corresponds to a situation where for years its implementation in practice is not considered to call for further action; once such action gets under way, however, and the further tools for implementing the principle are developed, the more the existence of problems in practice may be brought to the surface, thus initiating true progress."[55]

These comments are no less applicable in Australia where the social and political impetus for legislative reform, or alternative measures to promote the implementation of equal pay principles appears to have largely subsided during the 1980's. While this situation might pragmatically indicate to some that no further measures are presently needed to facilitate greater pay equity for women, it would nonetheless be ill-judged to suggest that the equal pay debate in Australia has been finally

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55 ibid, p 24

concluded.[56] As this Chapter has attempted to demonstrate the implementation of equal pay principles in conformity with international treaty law obligations has yet to be comprehensively achieved. A greater recognition of the need to comply with the standards and principles of equal treatment contained within international treaty agreement will it seems be required; however, before any effective progress in relation to the application of equal pay principles is likely to occur.[57]

Given the tri-partite nature of the Australian wage fixing system such compliance will necessarily demand a greater appreciation on the part of employers, employees, trade union organisations and wage fixing authorities alike of the need to ensure equal treatment irrespective of sex in the determination of wage rates. This development will in turn depend on an enhanced awareness of the productivity and efficiency benefits which will

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56 It is interesting to note here the large number of submissions received by the House of Representatives Standing Committee on Legal and Constitutional Affairs relating to the Committee's reference on Equal Opportunity and Equal Status for Australian Women, directly related to issues affecting pay equity. See Standing Committee on Legal and Constitutional Affairs, Submissions Authorised for Publication, Volumes 1-13, AGPS, Canberra, 1989-1991

57 This is an issue which will no doubt form part of the review relevant to the preparation of the second Australian report for CEDAW during the course of 1991. See, "OSW's International Role", OSWOMEN, June 1991, Number 9, Office of the Status of Women, Canberra, 1991, p 2

ultimately flow from the implementation of this fundamental right.

As outlined earlier in this Chapter, the obligations arising under the international Conventions ratified by the Australian Government in relation to the right to equal remuneration have no legally binding effect on private individuals until such time as domestic legislation is enacted to require compliance with the standards and provisions established under treaty agreement. Although it would appear that the provisions of Section 14 of the Sex Discrimination Act 1984 (Cth) have attempted to implement the equal pay provisions of Article 11 of the UN Convention within Australian municipal law, it is clear that the operation of the other treaty instruments referred to in this Chapter have no legally binding effect within Australia's present legal system. The standards and objectives established under the terms of these international treaty agreements should ideally continue to play a constructive and positive role at a policy level in ensuring the removal of discriminatory treatment in the determination of wage

rates within the Australian wage fixing process.[58] In the event that this is not possible further attention may need to be given to the introduction of clearer national legislation under which the right to equal pay for work of equal value is assured.

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58 For a detailed discussion of the ways in which the principles established under international treaty agreements may lead through the process of gradual policy development to the introduction of practical measures to implement the principle of equal pay for work of equal value see E C Landau, The Rights of Working Women in the European Community, Commission of the European Communities, Brussels, 1985 pp 15-20

CHAPTER TWELVE

THE INTERRELATIONSHIP OF INDUSTRIAL LAW AND DISCRIMINATION LAW IN THE DETERMINATION OF WOMENS WAGES

CONCLUSIONS

This thesis has been directed to examining the processes by which women's wage rates have been regulated within the Australian wage fixing system, and the ways in which discrimination laws may influence this system through the review of unfavourable treatment on the basis of sex. Two separate areas of legal study have been undertaken. The first of these relates to the area of industrial law which predominantly controls the wage levels fixed for the majority of Australian women workers. Second, is the area of discrimination law under which a range of legal provisions have been introduced to remedy sex discrimination in the terms and conditions of employment. A significant feature to emerge is the lack of any obvious or developed connection between the two legal areas in relation to the practical implementation of equal pay principles.

The resolution of sex discrimination issues within the Australian wage fixing process has traditionally been the preserve of the industrial law jurisdiction. The length of this tradition has been an important factor contributing to the largely exclusive development of industrial law with regard to the regulation of female wage rates. The limited interrelationship between the two areas of industrial law and discrimination law has been further reinforced by the existing statutory framework provided under Australia's discrimination laws. These laws operate to preserve the authority of Australia's industrial wage tribunals to regulate all aspects of award wage conditions. The removal of discrimination from federal industrial award wage provisions accordingly depends to a substantial degree on the exercise of the statutory powers of the Australian Industrial Relations Commission under the Industrial Relations Act 1988 (Cth).

The Industrial Relations Act significantly provides that the Industrial Relations Commission must take account of the principles embodied within the Sex Discrimination Act 1984 (Cth) in the performance of its functions. The provisions of the Industrial Relations Act do not, however, explicitly require the Commission to ensure the implementation of equal pay principles or the removal of discriminatory wage practices. While equal pay award wage claims may continue to be brought under the terms

of the 1972 Equal Pay Case [1], the establishment of equal pay claims remains contingent on the collective bargaining strength of trade union organisations in areas affecting women's employment. The initiation of such claims also relies substantially on the willingness of trade union organisations to protect and promote the special interests of women trade union members.

The key role of Australia's industrial arbitration system in ensuring the removal of discrimination from award wage provisions strongly suggests that any new measures for the progressive application of equal pay principles must primarily focus on legal and institutional reform within the industrial wage fixing process. In examining the kinds of changes necessary to effect this reform several critical issues can be identified. The first of these relates to the need to develop suitable wage fixing methods which directly address the implementation of the principle of equal pay for work of equal value, irrespective of sex.

The implementation of equal pay principles through the pursuit of equal pay award wage claims has been very largely influenced by the operation of prevailing national wage fixing principles. The changing impact of

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[1] National Wage Case and Equal Pay Cases (1972) 147 CAR 172

these principles has meant that no clearly identifiable procedures have been consistently applied to facilitate the identification and review of alleged sex discrimination within the Australian wage fixing system. More effective procedures are required which allow for the adjustment of relative wage levels on a gender neutral basis having regard to the effort, skills and responsibility attached to work performed within specific job classifications. This must involve a change in the traditional emphasis placed on the need to establish "net additions" to work value as a fundamental prerequisite to the determination of work value award wage increases.

The practical and conceptual difficulties of devising suitable principles for the assessment of work value within wage structures has formed the subject of longstanding and widespread interest. Outstanding issues persist with regard to the need to develop gender neutral criteria in the conduct of comparative work value assessments between job classifications. These issues are highlighted in cases where dissimilar work content exists, but where similar work value is claimed. The positive identification and treatment of gender bias in such cases arguably requires a more flexible use of comparative work value assessments and a greater focus on the need for gender-neutral job evaluation procedures.

The 1990 decision of the Australian Industrial Relations Commission in the Childcare Worker's Case [2] indicates a recent shift in approach to the comparative assessment of differing job classifications involving dissimilar work content. Whether this precedent will eventually lead to the broader application of non-discriminatory job evaluation methods in the review of work value between predominantly male and female occupations remains to be seen. More systematic, objective and strategically directed procedures for the identification and assessment of discriminatory wage setting practices will be necessary, however, before any major improvement to the wage position of Australian women workers is likely to occur. These measures will be central to ensuring Australia's continuing compliance with its international treaty obligations relevant to equal remuneration for women workers and the removal of sex discrimination in all its forms.

On a more immediate and practical level, non-discriminatory wage fixing methods will need to be devised through the ongoing development of the structural efficiency principle and the introduction of enterprise wage bargaining. The manner in which discrimination law principles will be taken into account

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[2] Child Care Worker's Case, Industrial Relations Commission, September 1990, S Print J4316

by the Australian Industrial Relations Commission in the context of these national wage fixing developments is at this stage unclear. The establishment of effective methods for the review of sex discrimination in the course of productivity based enterprise wage bargaining clearly represents a major challenge for the Australian wage fixing system of the 1990's.

More particularly close scrutiny will be necessary of the exercise of federal statutory powers involving the ratification of enterprise wage bargaining agreements under Sections 112 and 115 of the Industrial Relations Act 1988 (Cth). Given the relatively weak collective bargaining strength of women workers a careful analysis of enterprise bargaining developments will, over time, be vital to ensuring that the relative wage position of Australian women workers does not regress. A stronger commitment by trade union organisations to ensuring the implementation of equal pay principles will be equally critical to the maintenance and improvement of existing male/female wage relativities. This latter development will in turn be relevant to sustaining current levels of trade union membership amongst women within the paid labour market.

In developing appropriate wage fixing methods to deal more effectively with the incidence of wage discrimination, a primary issue emerges in assessing the

role which prevailing market forces should play in determining work value. It is hardly feasible, for example to envisage the design of work value assessments in which the influence of market forces is entirely excluded. Similarly, it would appear over simplistic to allow free market forces to wholly determine wage levels in circumstances where discrimination in the payment of wage rates is in issue. While obvious conceptual complexities arise in maintaining a balance between these alternative perspectives, it is important that the difficulties posed should not restrict the creation of viable measures for the treatment of sex discrimination in the determination of wage rates. This is especially so having regard to the Australian experience in the industrial wage area where a familiarity has developed over many years with the assessment of work value across award classifications and the flexible adjustment of appropriate award wage relativities.

The extent to which market forces should be permitted to determine work value is integrally connected to the fundamental issue of whether the right to equal treatment irrespective of sex should remain subordinate to economic considerations. In considering this issue it is important to appreciate that neither the methodological approach of orthodox economic analysis, nor the assumptions upon which it is based are immutably

value free or gender neutral in effect. [3] Legal principle would moreover suggest that the perceived economic effects of equal pay award wage adjustments should not form the basis for denying the substantive right to equal treatment irrespective of sex in the terms and conditions of employment. The restricted application of equal pay principles within the Australian wage fixing system throughout the 1980's to cases involving no economic flow on effects arguably reflects an inadequate recognition of this basic legal right.

The limited recognition of the right to equal treatment irrespective of sex within the industrial wage fixing system highlights the need to develop a broader awareness of the principles embodied within Australia's sex discrimination laws. This process must necessarily involve an increased understanding of the subleties and pervasiveness of gender bias in the determination of wage conditions. Such attitudinal change would arguably be enhanced by a wider appreciation of the cost, efficiency and human resource benefits to be obtained from the removal of discriminatory wage practices. The negative cost effects resulting from discrimination in the wage determination process should, for example, be

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[3] M Waring, Counting for Nothing, What Men Value and What Women are Worth, Allen & Unwin Port Nicholsen Press, 1990, p 14 ff

taken into account in the productivity and cost assessments undertaken within the industrial wage negotiation process.

A particular emphasis has been placed in this thesis on examining the operation of Australia's sex discrimination legislation and its effect on gender wage discrimination within the Australian labour market. As outlined in Chapters Nine and Ten the direct application of this legislation is effectively restricted to the area of overaward and non award wage payments as a result of exemptions provided to employers acting in accordance with industrial wage orders. Even in relation to overaward and non award wage payments, however, it has yet to be demonstrated whether the statutory provisions contained under Australia's sex discrimination laws legally extend to accommodate the review of alleged discrimination in the determination of wage conditions. Considerable uncertainty remains regarding the capacity of Australia's sex discrimination laws to legally remedy such issues as the undervaluation of work predominantly performed by women. The uncertainty of achieving any satisfactory outcome through the use of existing legal procedures has provided little incentive for individuals or trade union groups seeking the review of alleged sex discrimination in the payment of wage rates. In contrast to other major industrialised countries, no identifiable legal

jurisprudence relating to the identification and treatment of wage discrimination has yet emerged in Australia.

The lack of legal authority in relation to the issue of wage discrimination might be attributed to several factors. The first and most important of these factors relates to the unique Australian approach to the implementation of equal pay principles through the operation of the quasi-legislative orders of industrial wage tribunals. This approach has characteristically involved the use of flexible and non-legalistic procedures for the removal of discrimination from award wage provisions. Legal solutions have as a result rarely been sought or applied in securing wage outcomes in accordance with equal pay principles.

It is important to recall at this point that the industrial conciliation and arbitration process has historically secured wide wage reforms for Australian women workers through the use of collective wage bargaining means within a centralised wage fixing system. The success of the conciliation and arbitration process in achieving improved wage benefits for women workers has arguably promoted the use of non legal remedies as the preferred means for ensuring the application of equal pay principles. The achievements towards greater pay equity for Australian women have

consequently been largely determined by the application of industrial wage procedures as distinct from the pursuit of statutory legal rights and the development of legal precedent.

The success of the Australian conciliation and arbitration system in delivering pay equity for women becomes especially apparent when comparing the size of the gender wage gap in Australia with other comparable industrialised countries. It is interesting to note, for example, that the wage gap between men and women workers within the paid labour market is significantly lower in Australia than the United States, Japan, Great Britain, Canada and New Zealand. [4] This is despite the existence of various legislative schemes in several of these overseas jurisdictions under which legal mechanisms have been introduced to specifically deal with issues of sex discrimination in the determination of wage rates. Such legislative schemes have traditionally involved the use of formal complaint based models with a narrow emphasis on individual legal rights and remedies. It is possible that the perceived inadequacies of these models have also partially detracted from the development of legal case law and

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[4] K MacDermott, Pay Equity, A Survey of Seven OECD Countries, Information Paper No. 5, Department of Employment, Education and Training, Women's Bureau AGPS, Canberra, 1987, p 67)

authority within Australia concerned with the phenomenon of wage discrimination. This perception may have wrongly led to the assumption that legal principle has no useful role to play in implementing the right to non-discriminatory treatment in the payment of wage rates. It is equally possible however, that the lack of legal development in relation to the topic of wage discrimination can be attributed to the restricted operation of the existing statutory provisions contained under Australia's sex discrimination legislation. Even where this legislation might arguably be applied in the case of overaward and non award wage payments, the use of the legal process appears to have been largely inhibited by the difficulties attached to characterising and establishing complaints of wage discrimination within the legislative definitions and provisions under Australia's sex discrimination laws.

The adequacy of existing statutory protections against sex discrimination in the payment of overaward wage rates raises particularly contentious issues in the context of recent developments towards a more decentralised wage fixing system. It is worth noting that increasing levels of male and female earnings are comprised of overaward wage payments made outside the centralised industrial wage fixing process. An immensely difficult task lies ahead in monitoring the level of overaward payments made to men and women within

a progressively deregulated wage market. The gathering of sufficiently accurate and comprehensive data on these gender wage differences will, nonetheless, be fundamental to determining the incidence and extent of sex discrimination within the Australian wage fixing system. Whether any legal rights and remedies exist to protect women against discrimination in the payment of overaward wage rates made outside the industrial wage fixing system is yet to be legally determined.

In conclusion, it is important to recall that the wage gap between men and women workers in Australia has failed to significantly improve over a period of almost fifteen years. Full time women workers in Australia continue to receive only 84.5% of the average weekly ordinary time earnings of men while women's average weekly wages fall to a level of 66.5% of male earnings. [5] It is extremely probable that these wage differences reflect a residual level of sex discrimination in the payment of wage rates. It is also highly likely that sex discrimination in the payment of wage rates will remain a continuing feature of the Australian wage fixing system leading into the 1990's. The growing participation of women workers within the Australian labour market would suggest that a greater

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[5] ABS Catalogue 6301.0, May 1991

understanding will gradually be demanded of the complex issues surrounding the incidence of sex discrimination in the payment of wage rates. A wider knowledge of the principles contained within Australia's sex discrimination legislation should ultimately assist in establishing a clearer relationship between discrimination law and industrial law in relation to the regulation of women's wages.

The resolution of such key issues as the undervaluation of women's work will ultimately depend, however, on the impetus of institutional and legal reform in response to community and legislative demands. This will primarily be a matter for Australian women and the combined influence of women's interest groups in securing social, institutional and political change relevant to the removal of sex discrimination in all its forms.

SCHEDULE

Section 4

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialised agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialised agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realisation of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

SCHEDULE—continued

Have agreed on the following:

PART 1

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

SCHEDULE—continued

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organisations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaption of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely;

(g) The same opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

SCHEDULE—continued

Article 11

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

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

SCHEDULE—continued

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to chose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

SCHEDULE—continued

PART V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilisation as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3, and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned; and

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

SCHEDULE—continued

Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with Article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialised agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialised agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

SCHEDULE—continued

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organisation of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed the present Convention.

APPENDIX 2

TEXT OF THE SUBSTANTIVE PROVISIONS OF THE EQUAL REMUNERATION CONVENTION, 1951 (No. 100) AND RECOMMENDATION, 1951 (No. 90)

Convention No. 100

Article 1

For the purpose of this Convention -

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

(b) the term "equal remuneration for men and women workers for work of equal value" refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. The principle may be applied by means of -

(a) national laws or regulations;

(b) legally established or recognised machinery for wage determination;

(c) collective agreements between employers and workers; or

(d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.

3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Article 4

Each Member shall co-operate as appropriate with the employers' and workers' organisations concerned for the purpose of giving effect to the provisions of this Convention.

APPENDIX 3

Recommendation No. 90

1. Appropriate action should be taken, after consultation with the workers' organisations concerned or, where such organisations do not exist, with the workers concerned -

(a) to ensure the application of the principle of equal remuneration for men and women workers for work of equal value to all employees of central government departments or agencies; and

(b) to encourage the application of the principle to employees of state, provincial or local government departments or agencies, where these have jurisdiction over rates of remuneration.

2. Appropriate action should be taken, after consultation with the employers' and workers' organisations concerned, to ensure, as rapidly as practicable, the application of the principle of equal remuneration for men and women workers for work of equal value in all occupations, other than those mentioned in Paragraph 1, in which rate of remuneration are subject to statutory regulation or public control particularly as regards -

(a) the establishment of minimum or other wage rates in industries and services where such rates are determined under public authority;

(b) industries and undertakings operated under public ownership or control; and

(c) where appropriate, work executed under the terms of public contracts.

3. (1) Where appropriate in the light of the methods in operation for the determination of rates of remuneration, provision should be made by legal enactment for the general application of the principle of equal remuneration for men and women workers for work of equal value.

(2) The competent public authority should take all necessary and appropriate measures to ensure that employers and workers are fully informed as to such legal requirements and, where appropriate, advised on their application.

4. When, after consultation with the organisations of workers and employers concerned, where such exist, it is not deemed feasible to implement immediately the principle of equal remuneration for men and women workers for work of equal value, in respect of employment covered by Paragraph 1, 2 or 3, appropriate provision should be made or caused to be made, as soon as possible, for its progressive application, by such measures as -

(a) decreasing the differentials between rates of remuneration for men and rates of remuneration for women for work of equal value;

(b) where a system of increments is in force, providing equal increments for men and women workers performing work of equal value.

5. Where appropriate for the purpose of facilitating the determination of rates or remuneration in accordance with the principle of equal remuneration for men and women workers for work of equal value, each Member should, in agreement with the employers' and workers' organisations concerned, establish or encourage the establishment of methods for objective appraisal of the work to be performed, whether by job analysis or by other procedures, with a view to providing a classification of jobs without regard to sex; such methods should be applied in accordance with the provisions of Article 2 of the Convention.

6. In order to facilitate the application of the principle of equal remuneration for men and women workers for work of equal value, appropriate action should be taken, where necessary, to raise the productive efficiency of women workers by such measures as -

(a) ensuring that workers of both sexes have equal or equivalent facilities for vocational guidance or employment counselling, for vocational training and for placement;

(b) taking appropriate measures to encourage women to use facilities for vocational guidance or employment counselling, for vocational training and for placement;

(c) providing welfare and social services which meet the needs of women workers, particularly those with family responsibilities, and financing such services from social security or industrial welfare funds financed by payments made in respect of workers without regard to sex; and

(d) promoting equality of men and women workers as regards access to occupations and posts without prejudice to the provisions of international regulations and of national laws and regulations concerning the protection of the health and welfare of women.

7. Every effort should be made to promote public understanding of the grounds on which it is considered that the principle of equal remuneration for men and women workers for work of equal value should be implemented.

8. Such investigations as may be desirable to promote the application of the principle should be undertaken.

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Co-Author with Clare Burton, Chapter 11 in The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment, Allen & Unwin, Sydney, 1991.

APPENDIX
EMENDATIONS TO THE THESIS

Table of Statutes

Insert:
Industrial Conciliation Act 1972 (SA)
Industrial Relations Act 1979 (Vic)
Sex Discrimination Act 1975 (SA)
Equal Opportunity Act 1977 (Vic)

Table of Cases
Insert:

National Wage Case (1974) 157 CAR 293
Replace Ex Parte H V McKay with Ex Parte Harvester v Mckay
Replace Koowarte v Bjelke Peterson with Koowarta v Bjelke Peterson

Page 10 line 1 insert:
Section 51 (xxxv) of the Australian Constitution provides a specific head of legislative power which allows the Commonwealth Parliament to make laws with respect to the conciliation and arbitration of industrial disputes extending beyond the limits of any one State . A strong emphasis on conciliation and arbitration is further reflected within the regulatory framework adopted by State Governments in Australia. The legislative structures developed in Australia by both State and federal Governments have led to an industrial arbitration system where wage claims are negotiated on a collective basis. These negotiations are predominantly undertaken by trade union organisations seeking wage benefits on behalf of groups or classes of employees falling within particular award categories.

The differences in approach to the definition and implementation of equal pay principles has led to important differences in the way in which work value has traditionally been determined in Australia and the United States. In the United States work value is customarily assessed having regard to the "worth" of the work undertaken to the employer. In Australia the value of work has been held to refer to worth in terms of award wage or salary fixation. These differences in approach in part reflect the different institutional systems used to implement equal

pay principles in Australia and the United States. In Australia the focus on conciliation and arbitration through industrial wage bargaining is to be contrasted with the judicial approach adopted in the U.S. with its bias towards legal remedies aimed to enforce individual and representative rights and freedoms..

Page 11 line 20 insert

This is not to say, however, that a difference in earnings between men and women would alone be sufficient to legally establish a complaint of wage discrimination. An evidentiary inference is, nonetheless, capable of arising in certain circumstances where wage differences exist. This is implicitly recognised by the CEDAW Committee: **Footnote** See p295.

It is also consistent with the approach adopted in the *Danfoss* case: **Footnote** (1989) IRLR 532. In this case the European Court held that under the EEC Equal Pay Directive, the burden of proof is on an employer to show that a pay practice is not discriminatory where a female worker establishes, by comparison with a relatively large number of employees, that the average pay of female workers is lower than that of male workers.

p12-13

Footnote 23 insert:

The need to take into account all factors relating to differences in pay is critical to the identification of discrimination in the payment or determination of wage rates. This is so irrespective of whether worth of a job means worth to the employer or whether it is more broadly determined in terms of award wage fixation.

p14 footnote 27 line 2

Replace 1984 with 1988

p 34 line 1

Replace with" Commission in the 1988 National Wage Case and the decision by the Australian Industrial Relations Commission in the 1989 National Wage Case decision. "

p38 line 9 insert:

Equal pay principles were first implemented in Australia in the late 1960's and early 1970's as a result of several test case proceedings brought within the industrial law jurisdiction.

p40 line 12 insert:
In 1918 the decision of *Waterside Worker's Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434* established that the Commonwealth Parliament could only confer judicial power on Courts established under Chapter III of the Constitution.

In the *Wheat case (1915) 20 CLR 54* similar views were expressed by the High Court regarding the need to ensure a distinct separation between the executive and the judicial arms of government. Here it was held that any powers of adjudication exercised by bodies other than courts must be confined to executive and administrative functions.

p40 line 17 insert:
The High Court's decision in *Boilermaker's* was upheld on appeal to the Privy Council: *R v Kirby; Ex Parte Boilermaker's Society of Australia (1956) 94 CLR 254.*

p42 line 5 insert:
In 1936 the High Court held in *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608 that the Commonwealth Parliament had the power under Section 51(xxix) to do anything reasonably incidental to carrying out external treaty obligations. More recently an expansive view of the foreign affairs power was adopted by the High Court in *Commonwealth v Tasmania (1983)* 158 CLR 1 and *Koowarta v Bjelke -Peterson* (1982) 153 CLR 168.

p44 line 6 insert:
"a similar emphasis has been placed on the benefits of conciliation and arbitration as a means of resolving industrial disputes."

Footnote: Legislative changes in Queensland, South Australia and New South Wales have occurred since the cut off point of March 1991 identified at the introduction of the thesis.

Page 46 line 16 insert
In establishing that work provides the same rate of profit to an employer it was held by McNaughton J that:

Footnote 7: Amend to read Section 15A Public Service Act 1984 (Vic)

Page 53 line 4

Insert "federal" before "industrial tribunal"

line 6

Replace "Where a federal award is breached penalties may be imposed by Courts"

line 9 insert

An industrial award does not, however, confer rights on persons who are not parties to it.

Page 54

Footnote: A more detailed account of recent developments in relation to collecting wage bargaining is set out in Chapters 2-8.

Page 55 line 2

delete the word "only"

line 5 insert:

While it is possible for parties other than those nominated under Section 99 of the Industrial Relations Act 1988 (Cth) to notify an industrial dispute, the likelihood of this occurring is remote.

Page 56 line 11 insert:

"It is not possible for a federal industrial wage tribunal to determine an equal pay claim unless "

Footnote: See, for example, *Federated Municipal and Shire Commonwealth Employee's Union of Australia Case.*

Page 57 Footnote 31 insert:

Does this wage disparity accurately reflect gender neutral differences in terms of effort, skill and responsibility in the workplace? See *Handels v Danfoss* [1989] IRLR 533.

Page 58 line 6 insert:

The family day care decision involving the *Federated Municipal and Shire Commonwealth Employee's Union of Australia* was handed down on 5 April, 1991.

The Commission decided that the general finding of a dispute in relation to the Councils sponsoring family day care schemes in Victoria and Tasmania could not be allowed to stand. The Commission determined that any dispute between the

Union and the Councils sponsoring these schemes did not extend beyond Victoria. Accordingly there was no industrial dispute within the meaning of the Industrial Relations Act 1988.

In the concluded view of Justice Boulton, Justice Munro and Commissioner Donaldson:

"the nature of the relationship between the care providers and Councils is not, except in limited cases to which we have referred, one of employment."

The limited cases referred to by the Commission involved an isolated number of Melbourne City Councils. The number of workers employed by these Councils represented a small percentage of the 15, 000 family day care workers engaged to perform child care services . As a result of the decision the vast majority of women workers within the family day care scheme were denied access to the industrial arbitration process governed by the AIRC.

Page 59
Replace Ex Parte H V McKay with Ex Parte Harvester v Mckay

Page 64 line 20 replace:
"Commission" with the word "Court"

Page 105
Footnote: Laura Bennett, "Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission", Journal of Industrial Relations, Vol 30, 1988.

Page 152 line 15:
Delete "and"

Page 154 line 9 insert:

More particularly the number of women participating within the Australian labour market increased from 49.1 % in 1987 to 52 % in 1990. **Footnote**: Australian Bureau of Statistics Catalogue 6203 (1984,1987, 1990). This increase predominantly reflects however, a growth in the participation of part time women workers as distinct from full time employees.

Page 185 line 8:

Replace criteria with criterion

Page 185 line 22:

Replace compliment with complement

Page 196 line 6

Replace Section with Sector

Page 211 p 12 delete:
"Commission"

Page 218 insert:
Footnote: formal adjudication procedures are discussed at pp241-2

Page 222 insert:
Caridi v Steiger illustrates the way in which Section 31 of the Industrial Conciliation and Arbitration Act 1972 (SA) served to prevent an application to the South Australian Industrial Commission in circumstances where the applicants had already lodged a complaint under the Sex Discrimination Act 1984. The case upheld the power of the Human Rights and Equal Opportunity Commission to determine the complaint. As noted at p223 it illustrates the tendency of the Courts to interpret the terms of discrimination legislation as operating consistently with industrial law.

Similarly, the case of *R v Sex Discrimination Board;ex parte Cope* relates to allegations of wrongful dismissal. It chiefly endorses *Wardley*, and illustrates the way in which industrial law and discrimination can coexist: see p 222. It involves a piece of State legislation which has since been superseded. It is not directly concerned with the issue of wage discrimination, or the regulation of women's wage rates.

Page 228 insert:
The broad terms of Section 14 might reasonably be interpreted with reference to the provisions of Article 11 of the Convention attached to the Act. To this extent the terms of Article 11 are relevant to the development of Australian domestic law.

Section 3 of the Sex Discrimination Act 1984 states that one of the objects of the Act is to give effect to certain provisions of the Convention. Article 11 is one such provision.
Sub-Section 9 (10) of the Sex Discrimination Act 1984 provides that:

> "If the Convention is in force in relation to Australia, the prescribed provisions of Part II and the provisions of Division 3 of Part II have effect in relation to discrimination against women to the extent that the provisions give effect to the Convention."

Circumstances can arise where none of the provisions of Section 9 can be relied upon to legally support a claim of sex discrimination in employment other than Sub-Section 9 (10), (e.g a complaint of sex discrimination in Tasmania involving employment in an unincorporated small business). The constitutional validity of Section 14 relies in such cases on the operation of the external affairs power under s 51(xxix) of the Constitution.

Page 245ff
Footnote: The *Waters* decision was handed down in December 1991, immediately following the submission of this thesis for examination. It has not therefore been considered. *Banovic* is referred to at pp 250-251. See p 251 where the issue of whether a requirement or condition will arise is demonstrated to be clearly open to legal argument. This point is reinforced at p255 where the possibility is noted that Section 5(2) might not be legally interpreted in such a way as to support a claim of indirect discrimination in the determination of wage rates.

Page 252 line 19 replace:

S5(1)(a) with S5(2)(a)

Page 255 replace line 4

"In determining whether the Sex Discrimination Act might be applied to remedy complaints of indirect discrimination in the payment of wage rates different fact circumstances will need to be taken into account in each case. Numbers in a workplace, in occupational groups, in industries or sectors could be relevant to determining the base populations necessary to substantiate any particular claim of wage discrimination. Mere numbers in relation to sexual imbalance may not satisfy however the regulatory requirements relevant to the comparison of proportions under Section 5 (2)(a) of the Act.

Whether a requirement is discriminatory will further depend upon the legal determination of the issue of 'reasonableness' "

Page 266

On another view Section 41A of the Conciliation and Arbitration Act might be interpreted as relating to wage determinations made only in respect of Commonwealth government employment.

Bibliography insert:

L. Bennett, "Legal Intervention and the Female Workforce: The Conciliation and Arbitration Court 1907-1921" (1984) 12 International Journal of the Sociology of Law 23

Replace McGarry with McCarry

Replace Ronald with Ronalds (first reference)