**INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES**

**CORAM: GLYNN J**

**14 DECEMBER 1998**

**MATTER NO. IRC6320 OF 1997**

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

# REPORT TO THE MINISTER

# VOLUME I

## INTRODUCTION

On 10 November 1997, the Minister for Industrial Relations referred to the Industrial Relations Commission of New South Wales (the Commission), pursuant to s.146(1)(d) of the *Industrial Relations Act* 1996 (NSW) (the 1996 Act) an inquiry described as the Pay Equity Inquiry.

## THE TERMS OF REFERENCE

Pursuant to section 146(1) of the *Industrial Relations Act* 1996, the Minister for Industrial Relations referred the following terms of reference to the Industrial Relations Commission of New South Wales for inquiry and report:

1. Whether work in female dominated occupations and industries is

undervalued in terms of remuneration paid relative to work in comparable male dominated occupations and industries. The Commission shall have regard to such female and male dominated industries and occupations as it considers sufficient to permit it to make recommendations but shall not be required to examine all such industries and occupations. In determining those industries and occupations the Commission should have regard to the need to impose reasonable restraints on time to complete the Inquiry.

2. The adequacy of tests and mechanisms for ascertaining work value and the extent to which, if at all, they are inequitable on the basis of gender.

3. In developing recommendations as to remedial measures if necessary, consideration shall be given, but not limited to:

   (a) current work value tests;
   (b) the minimum rates adjustment process and other industrial mechanisms including productivity;
   (c) job evaluation techniques;
   (d) matters of discrimination and the *Anti-Discrimination Act* 1977 (NSW) as provided in the *Industrial Relations Act* 1996 (NSW);
   (e) relevant international labour and other conventions, including but not limited to ILO Convention 100 and 111 and the United Nations Convention on Elimination of all forms of Discrimination Against Women.

4. The mechanisms and processes by which pay equity matters can be brought before the Commission.

5. In the conduct of the Inquiry, and in any recommendations contained in its report, the Commission must take into account the public interest and for that purpose must have regard to:

   (a) the objects of the *Industrial Relations Act* 1996 (NSW);
   (b) the likely effect of its decision on the New South Wales economy, in particular, the need to protect the employment base of the State and any adverse impacts on employment opportunities for women; and
   (c) inter-State comparative rates.

As discussed later, the terminology of the Terms of Reference, particularly of Term 1, gave rise to considerable preliminary debate, focussed, in

particular, on the meanings to be attributed by the Inquiry to the words "remuneration" and "comparable" and the stage of the Inquiry at which those meanings should be determined. The relevant interlocutory ruling is set out in Appendix 17, and the final rulings are contained in this section of the Report.

## BACKGROUND TO REFERENCE

This Inquiry is part of what may be termed an "historical hangover" in relation to equal pay, the Inquiry itself being part of a continuum of attempts to achieve a goal that appears to be continually elusive.

The goal of equal pay was perhaps originally regarded as quite simple of achievement: equal pay for equal work. The deficiencies of that approach fairly quickly became apparent after the Federal *Equal Pay Cases* 1969 ( (1969) 127 CAR 1142). In the Federal *National Wage and Equal Pay Cases* 1972 (147 CAR 173) and the *State Equal Pay Case* 1973 (1973 AR 425), the goal was expanded to be equal pay for work of equal value. Although the results of that expansion were positive, that exposition of the principle was also found not capable of achieving the goal completely. In the *Industrial Relations Act* 1996 (the 1996 Act), the definition of "equal pay" was further elaborated, being defined in the Dictionary attached to it as follows:

> **pay equity** means equal remuneration for men and women doing work of equal or comparable value.

The 1996 Act also raises specific concern as to pay equity in s.3,

Objects where at sub-s.(f) it provides:

> (f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,

The aspirations for equal pay are thus embodied in the provisions of the 1996 Act. It is in the actual implementation of those provisions on a day to day basis that difficulties may arise. I am not aware of any specific testing of the current legislative provisions at the time of writing this Report.

In March 1997 the NSW Pay Equity Taskforce submitted to the Minister for Industrial Relations its Final Report of its investigation of the undervaluation of women's skills and methods for addressing pay inequity in New South Wales workplaces. The one exception to a dissenting view delivered by the Executive Director of the Employers' Federation of New South Wales to that Report was his support for an Inquiry into work value.

The Taskforce had been chaired by the Director General of the Department of Industrial Relations. Its members included representatives of women's groups, government departments, employer bodies, the Labor Council, the Bar and academia.

Amongst the 11 recommendations of the Majority Report (see Appendix 15) were the following:

> (2) • that an Inquiry into work value be undertaken in the IRC

[Industrial Relations Commission of NSW] by Ministerial Reference;

Timeframe proposed: Following the appointment of the Deputy President (Pay Equity), the Taskforce recommends that the Inquiry be undertaken. This may occur during 1997.

(3) • that a pay equity State decision be conducted before the Full Bench of the IRC to establish Principles for pay equity in industrial instruments.

Timeframe proposed: Given that deliberations in the State case would, in part, be informed by the outcomes of the Ministerial Reference, the Taskforce recommends that the State case be conducted during 1998.

As already noted, the Minister for Industrial Relations on 10 November 1997 referred an inquiry described as the Pay Equity Inquiry to the Commission.

The Inquiry is a further step in the evolution of the establishment of equal pay for work of equal or comparable value. It is not the last step.

It may be that the future will continue to be the fulfilment of Her Honour Justice *Gaudron's* often quoted statement in these proceedings:

> We got equal pay once, then we got it again, and then we got it again, and now we still don't have it. (Ex 456 p 97 - Final Submissions of NPEC and others.)

**APPEARANCES**

The Commission sought to ensure the involvement of all parties who might have an interest in the subject of pay equity.

Advertisements setting out the Terms of Reference and inviting interested parties to contact the Industrial Registry were published in the following newspapers:

29 November 1997

Sydney Morning Herald
The Daily Telegraph
Newcastle Herald
Bathurst Advocate
Dubbo Liberal
Lismore Northern Star
Tamworth Leader
Wagga Advertiser

1 December 1997

The Australian Financial Review
Broken Hill Truth
Coffs Harbour Adv. [Advocate]
Grafton Examiner
Orange Central
Orange West Daily
Albury B/Mail
Griffith News
Wollongong Mercury

In his endeavours to obtain the widest possible input into the Inquiry, counsel assisting advised some 54 organisations, including the International Labour Organisation, of the Inquiry, the latter also being provided with a copy of the Terms of Reference and of the procedure to be adopted should the ILO wish to seek leave to appear (Ex 2). (Leave to appear was not sought by the ILO.)

In excess of 50 organisations sought and were granted leave to

appear (see Appendix 3). Leave was not refused in any case, but was, in some cases, granted on a provisional basis when nothing more than a token appearance to indicate interest appeared to have been made. Those participating on a regular basis were:

* The ACM New South Wales, Catholic Hierarchy of New South Wales Province of Sydney, Motor Traders' Association of NSW, Road Transport Association, Local Government & Shires Association and Metal Trades Industry Association. [The latter two organisations had originally been represented by the Employers' Federation.]

  Chamber of Manufactures of New South Wales (Industrial) (later to become Australian Business Limited).

* Crown in the right of the State of New South Wales, Public Employment Office of NSW, President of Anti-Discrimination Board, Health Administration Corporation, Home Care Services of NSW, Department of Education and Training.

* Employers Federation and its affiliated organisations, including Professional Hairdressers Association, the Aged Services Association, the Restaurant and Catering Association, the Registered Clubs Association.

  Human Rights & Equal Opportunity Commission (HREOC).

  Labor Council

* National Pay Equity Coalition, The Australian Federation of Business and Professional Women, NSW Division, Women's Electoral Lobby (these 3 organisations, referred to jointly in this Report as NPEC, maintained a roster to ensure a representative appeared on their behalf at each day of hearing).

  Public Service Association of NSW.

  Textile Clothing and Footwear Union.

  Note: Each of the groupings marked * was represented by one counsel/advocate per group.

(There were also some initial responses from individuals but these were not followed up by any of them.)

The Employers Federation and Chamber of Manufactures, the latter becoming Australian Business Limited during the course of the Inquiry, entered separate appearances and their advocates availed themselves of separate rights of cross examination. However, they made joint final submissions and such submissions, even when not specifically noted as such in the Report, are those of the Employers Federation/Chamber.

## PROCEDURE

The procedure adopted, as taken briefly from various Directions issued, was basically that:

> All evidence proposed for the Inquiry to be filed in the Industrial Registry in accordance with the times set in the directions. Counsel assisting to assemble, collate and present such evidence to the Inquiry as counsel assisting considered appropriate.
>
> Any documents as filed to consist of an original plus three copies.
>
> Counsel assisting to be responsible for the service of all evidence upon the parties to the proceedings. [As a matter of practicality the distribution of material was later restricted to those parties who participated in proceedings on a day to day basis]. [In these proceedings no complaint has been made that all information the parties wished to have placed before the Inquiry was not tendered. That has been done, sometimes to the detriment of the orderly progress of the Inquiry as put in train by counsel assisting.]
>
> Subject to determination by counsel assisting (and further subject to leave of the Commission), all witness evidence before the Inquiry to be in the form of an affidavit or witness statement.

Where any party proposed to call evidence before the proceedings, but due to an inadequacy of resources, was unable to produce statements of evidence then the party might approach counsel assisting for assistance in the production of those statements. [I am advised no party availed itself of this concession.]

All evidence before the Inquiry to be led by counsel assisting who would first call and examine the witness (including cross-examination) before cross-examination by any other party.

No witness to be examined or cross-examined by a party to the proceedings excepting where:

1. Notice had been given of the intention to cross-examine to counsel assisting; and

2. A short indication of the areas for cross-examination had been provided to counsel assisting.

Cross-examination to be limited in the proceedings and, if necessary, time constraints to be imposed in order to achieve an expeditious completion of the Inquiry. Some greater (but nonetheless limited) latitude would be provided in the case of expert evidence.

(In practice, the above approach was informally modified to be more flexible.)

Wherever practicable, the parties should promptly meet requests by counsel assisting for the provision of information for the Inquiry. If information was not produced or not produced within a reasonable time of that stipulated by counsel assisting then the Commission would issue subpoenas at short notice. [That procedure had only to be utilised in relation to the outworkers sector of the Inquiry.]

The original timetable set for the progress of the Inquiry was constantly modified to take account of concerns of the parties that they have sufficient time to produce whatever evidence they wished, either oral and/or documentary to support their various positions as to the existence, or otherwise, of any pay inequities based on gender.

Furthermore, for the convenience of all parties, there was maintained in the Office of counsel assisting a "library" comprising copies of the transcript and of exhibits, available for reference. Parties were kept up to date in respect of matters such as changes in the order of witnesses etc. by means of broadcast faxes.

Counsel assisting did not make final submissions to the Inquiry. Instead, he prepared and distributed to the parties a 15 page document entitled "Issues for consideration in the submissions of parties to the Pay Equity Inquiry". (Appendix No. 16). It was emphasised that:

2. the issues which are identified in this document are not intended to direct, confine or restrict the parties in dealing with any issue or matter which they consider appropriate for the purposes of their final addresses. Nor does the paper proceed upon an assumption of the existence of any "undervaluation" as referred to in Term 1 of the Terms of Reference.

3. Furthermore, the matters raised for consideration do not represent issues which the Commission would necessarily consider significant or determinative in the preparation of any report. Nor does the nomination of an issue indicate any particular approach that the Commission may take in this Inquiry. Rather the issues paper is intended to crystallise some issues which have been identified through the evidence or through the approach taken by parties in the presentation of their respective cases in the Inquiry.

4. However, it may be anticipated that if the parties address each of the issues raised the Commission will be advantaged by receiving the conforming or opposing views of parties as to the respective issues. The form and content of each submission will, of course, be a matter for each party.

Apart from the first version of the Employers' Federation/Chamber's submissions, later withdrawn before being tendered, the parties did not, to any great extent, specifically address the Issues paper though it was noted by some that the issues were addressed in the course of submissions generally. It was said by the ACM that:

> In these submissions we are attempting to address those matters raised by the Terms of Reference and by the "Issues for Consideration in the Submissions to the Pay Equity Inquiry" prepared by Counsel Assisting on 7 June 1998. Although this latter document is of assistance, in our submission, the Commission is required to address those issues contained within the Terms of Reference in preference to any additional issues contained within the Counsel Assisting's Issues Paper. (Ex 441 p 2)

While such an approach cannot be criticised, the result of that failure to address some issues directly is that there are gaps existing in relation to parties' arguments as to some of them, in that some parties have addressed them and others not.

## OCCUPATIONS AND INDUSTRIES (TERM 1)

In order to enable the Inquiry to move forward with reasonable expedition and have regard to the second and third sentence of Term 1, it was necessary to select the occupations and industries to be examined. To assist the Inquiry, parties were directed to nominate occupations and industries for that purpose.

There were almost 20 criteria devised by counsel assisting to assist him to decide which occupations and industries he would recommend the Inquiry adopt as exemplars for the purpose of Term 1. Without being exhaustive, those criteria covered the following points as to each industry and occupation proposed:

Demonstrably female dominated.

Male comparator or industry.

Female/male occupation is within NSW jurisdiction.

Female/male occupation has parallels with equivalents within NSW jurisdiction.

Prehistory of study in the female occupation.

Occupation is defined with sufficient certainty to allow data to be obtained for female/male occupation, reasonable likelihood that evidence can be collected within the timeframe.

Total volume of evidence likely to be generated and capacity to deal with it within timeframe (on a scale of 1 to 3).

Demonstrative of particular issues, as follows:

e.g. types of payments, including overawards, penalty rates.

Notorious for low payment of wages to females.

Affects significant number of females.

Subject of mention in processes giving rise to the Inquiry.

Subject of pay claims based on pay inequities.

Public sector.

Number of parties nominating.

There were some twenty industries and occupations nominated (Ex 13) (Appendix No. 6).

On 30 January 1998, having heard submissions from all parties, including one from the Employers' Federation/Chamber opposing all nominations, I determined that the recommendations advanced by counsel assisting as to the occupations and industries to be examined be accepted.

(I note that the negative approach of the Employers' Federation/Chamber, reinforced by the fact that they did not nominate industries and/or occupations either to support their contention that pay inequity did not exist, or against which their extensive expert evidence could, as it were, be field tested, in all likelihood deprived the Inquiry of valuable assistance. The positive approach of the ACM, for instance, in nominating Maintrain, led to evidence which enabled the Crown to be able to make the comment, with which I strongly agree, that "the enterprise agreement at Goninan's Maintrain demonstrated a "good practice" example of a transparent and fair reward system, including the extension of site specific over-award payments applicable to metal workers to the clerical staff" (Ex 453 para 21).)

Full details as to the nominations accepted are set out below:

**1. Child Care Workers**

Private Sector child care - long day care

Child care workers with associate diploma level qualifications employed as

"Advanced Child Care Worker - Qualified" under the Miscellaneous Workers-Kindergartens and Child care Centres, &c. (State) Award illustrated by employment at a number of centres.

Engineering Associate in Metal and Engineering Industry

C3 of the Metal and Engineering Industry (NSW) Interim Award illustrated by employment at AWA - Plessey, North Ryde (male comparator).

(Nominated by the Crown and Labor Council.)

**2. Seafood Processors**

Occupations under the Fish Canning &c. (State) Award - seafood processors at Level 5 "All others" and at Level 4 "butchering" and "unloading" (male comparator) illustrated by employment at Heinz Greenseas, Eden.

Occupations under the Fish and Fish Marketing (State) Award (or related work) - process worker and supervisor (male comparator) illustrated by employment at Bayview Seafood, Taree. [Eventually deleted.]

(Nominated by Labor Council)

**3. Public Sector Librarians**

Librarians in the NSW Public Service

Librarians under the Crown Employees (Librarians) Award illustrated by employment at the State Library of New South Wales.

Geoscientists in the NSW Public Service

Geoscientists under the Crown Employees (Geoscientists - Department of Mineral Resources and Development) Award (male comparator).

(Nominated by the Crown)

**4. Clerical Workers - Private Sector**

Clerical Workers engaged in the private sector

Clerical workers at Level 3 under the Clerical and Administrative Employees (State) Award illustrated by employment at A Goninan & Co Ltd at Maintrain, Auburn.

Tradesperson in the metal and engineering industry

C10 under the Metal and Engineering Industry (NSW) Interim Award (male comparator).

(Nominated by Labor Council)

**5. Hairdressers**

Hairdressers and beauty therapists

Adult employee hairdressers and beauty therapists under the Hairdressers' &c. (State) Award illustrated by employment at a number of salons.

Motor Mechanics

Motor mechanics under the Vehicle Industry (Repair Services and Retail) Award 1983 (Federal) illustrated by employment at Thomsons, Church Street, Parramatta and Beekman Automotive, Miranda (male comparator).

(Nominated by Labor Council and the Crown)

**6. Public Hospital Nurses**

First year enrolled nurse in NSW Public Hospitals

First year enrolled nurse under the Public Hospitals Nurses (State) Award

illustrated by employment at Royal North Shore Hospital.

First Year Coal Miner

First year miner under the relevant federal industrial instrument illustrated by employment at Mt Thorley Mines.

(Nominated by The ACM)

Specific workplace sites were nominated for detailed assessments, and, after some amendments to the original nominations, inspections were made at the following locations:

AWA Plessey, 5 Talavera Road, North Ryde

Redfern Day Nursery, 141-145 Pitt Street, Redfern.

Lady Gowrie Child Care Centre, Elliott Avenue, Erskineville

Heinz Greenseas, Cattle Bay Road, Eden

Maintrain, Manchester Road, Auburn

Outworkers homes - confidential locations

Bonds, Unanderra.

BHP Machine Shop, Port Kembla.

The selected industries and occupations provided a cross section of professional, para professional, skilled, unskilled, trades and non-trades positions, in manufacturing and service industries, and within the public service and private industry.

In accepting the nominations proposed by counsel assisting, I

stressed that the course of the evidence would determine whether any of the industries or occupations placed on the reserve list would be added to, or substituted for, any of the nominated industries and occupations initially chosen for examination. As it transpired there was only one major change, that being the later inclusion of clothing industry outworkers. That change was proposed by counsel assisting. No party sought any change to the selected areas.

It is my understanding that this is the first occasion that clothing industry outworkers have actually given sworn (and where undertaken, tested) evidence to any Inquiry. Special procedures were adopted (see Appendix No. 17) to ensure, as far as possible, the anonymity and safety of outworker witnesses, and to combine some ability for strictly interested parties to test evidence. It must be understood that those protections continue after the making of this Report. Those responsible for considering and implementing any recommendation from this Report should take care to ensure those protections are maintained.

TERM OF REFERENCE 1 (TERM 1)

As already noted the terminology of Term 1 gave rise to considerable debate. That debate revolved particularly around the terms "remuneration" and "comparable", but extended also to "female dominated".

On 20 April 1998, I ruled formally that the final determination of their meanings would await the adducing of all the evidence and the

submissions of the parties. To do otherwise it seemed to me, could have had the effect of cutting off evidence that could prove valuable in the determination as to whether pay inequity based on gender existed in terms of Term 1 and, if the answer was positive, as to what recommendations, if any, should be made to ameliorate that inequity.

On that date, I adopted, as a working definition for the purposes of the Inquiry, the definition of "remuneration" as found in Article 1 of the ILO *Convention* 100:

> 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;

I now make those final determinations.

REMUNERATION

Very early in the Inquiry, the Employers' Federation/Chamber submitted that over award payments did not fall within the meaning of "remuneration" as it relates to "pay equity" in the context of the *Industrial Relations Act* 1996 (ss.19(3), 21 and 23). As was said by *T McDonald* in his early submissions, "the fundamental point of difference between our position on "remuneration" and that of others is the inclusion of over-award payments".

Mr *McDonald* submitted that the term "remuneration", as used in Term 1, when read in the context that the Commission deals with awards, and sets a fair minimum wage, but does not venture into prescribing actual rates, means "award wages". He contended that s.406 precludes the Commission from setting other than minimum rates and so that section would preclude the Commission from the consideration of over-award payments. He canvassed a number of sections of the 1996 Act dealing with "remuneration", accepting it was appropriate to distinguish, in one case only, the use of the term, that being in s.83, to give it a meaning different from that for which the Employers' Federation/Chamber otherwise contended.

In relation to Articles 1 and 2 of ILO *Convention* 100, he contended that the Convention was dealing only with nationally legally established mechanisms for wage determination or collective agreements. Individual over awards did not come into the Convention. In the way the Convention has been implemented in the Federal and New South Wales award systems, no question of over-award payments has been implemented. The international experience, as illustrated by cases cited by parties from the European Courts of Justice, Canada and the USA had very little relevance to this Inquiry, because those cases related to the way in which those particular member countries have implemented the Convention in their own jurisdictions.

No other party ultimately supported the restriction to "award wages" as sought by the Employers' Federation/Chamber group. On that issue,

the original submission made by the ACM Group, represented by Mr *Britt* of counsel, is particularly illuminating:

> In relation to the second issue of remuneration, the parties I represent have some sympathy with the view that will be put by Mr McDonald in these proceedings. When those parties were given an opportunity to discuss with the Attorney the draft terms of reference of this Inquiry they raised those particular parties [sic] and, in fact, sought that the Inquiry be limited to an examination of award rates of pay and award conditions. We accept that the Attorney did not adopt that course of action.
>
> In light of the Attorney not adopting that course of action and inserting the word "remuneration" rather than "award rates of pay" in term 1, we recognise that the term "remuneration" is broader than award base rates of pay. It will include all salary allowances, overtime payments paid by an employer to the employee. We also in our contentions believe that it will cover non monetary benefits provided by the employer to the employee and, in our contentions, we set out in paragraph 12, I will not take the Commission to it, our proposed definition of remuneration. We recognise that for all practical purposes it is similar in effect to that being proposed by Counsel Assisting by adopting the definition of remuneration in the convention.

It was submitted by counsel assisting on 5 March 1998, that the terms "remuneration" and "pay" have to be determined within the context of the terms of reference. (He dealt with the term "pay" as a matter of greater caution. On that point the Crown indicated it saw no ambiguity in the term.)

The nub of counsel assisting's argument was that:

> On the face of the words in Article 1 [of *Convention* 100] it includes both benefits which are monetary and non monetary in their nature and benefits which are in the nature of conditions which do not have a particular cash equivalent, but in any event certainly in relation to any benefits or conditions which do have or are capable of having a cash benefit.

To the extent that the word "pay" is ambiguous in its terms and in the operation of its terms, the Inquiry would give effect to the wide definition provided in the Convention. That Convention deals with the subject matter relatively and precisely as it appears under the new 1996 Act where it refers to pay equity.

There is a forceful argument based upon the High Court's approach in *Minister of State for Immigration v Teoh* ( (1995) 185 CLR 273 at 287) to adopt a construction of the terms consistently with the definition in relation to the international convention.

Article 119 [of the *Treaty of Rome*] is in these terms:

> Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Your Honour, in the relevant treaty for the purpose of the construction of these terms, the word "pay" in the context of equal pay is treated as having a wider meaning not restricted to one associated with mere cash benefits or monetary benefits. By the terms of the definition it impels a reading wider than that which might otherwise be construed by a simple definition or reference to "pay".

That would be a guide to the way the Inquiry might read the terms, "Remuneration" and "pay" as to encompass the meaning of the words in a wider context. Their meaning is discussed in many other authorities in terms of international precedents: *Garland v. British Railway Engineering Limited* (82 IRLR 111), refers to the *Sex Discrimination Act* 1975, the *Treaty of Rome* 119 and: "The European EEC council 1975...207 article 1."

There are a number of cases following a similar line: *Bilka-Kaufhaus* (1986) 1 IRLR 317; *Barber v. Guardian Royal Exchange Insurance Group* (1990) IRLR at 240; *Butler v. British Railway Board* (1982) IRLR 116. They all apply an expansive view to "pay" which is hardly surprising, given the plain words that appear in the treaty. What that means in the definition of "remuneration" for the purposes of term I is that it essentially concerns broadly a return to the employer of the employees working in the service and it will necessarily encompass both cash and non cash benefits.

> That is an unnecessary step for your Honour to take, as it were, to define each one of those ingredients in turn. It would be sufficient in the alternative to simply treat the definition of "remuneration" for the purposes of term 1 as being equivalent to the definition appearing in the convention, that is convention 100.

HREOC, in contending that over-award payments are clearly a significant area of pay inequity, also noted that because awards in the public sector are in general paid rates awards, the question as to how pay equity is to be determined in relation to over award payments is one that is particularly germane to the private sector.

In final submissions, no party supported the approach adopted by the Federation/Chamber. On the contrary, the Commission was urged to adopt its working definition of "remuneration" as its final definition.

The meaning of "remuneration" under the various provisions of the 1996 Act has been recently considered by a Full Bench of the Industrial Relations Commission of New South Wales (*Hungerford* and *Schmidt* JJ, *Connor* C) in *Shead v Summit Western Pty Ltd t/as Blacktown Mitsubishi* (IRC97/3627; 24/7/98; unreported). The appeal proceedings arose from a decision in an unfair dismissal case, when a Commissioner gave a broader, rather than a narrower, interpretation to the term "remuneration" as used in s.83(1) of the 1996 Act. The submissions made to the Full Bench canvassed similar submissions as those made to the Inquiry as to whether the term "remuneration" was confined to the monetary component of an employee's compensation package, or whether the term, being undefined in the 1996 Act,

should be given its ordinary meaning, and so encompass non-cash benefits such as a mobile phone, a motor vehicle, school fees or medical benefits.

The Full Bench held that it was immediately apparent, as *Wilcox* CJ held in *May v Lilyvale Hotel Pty Ltd* ( (1995) 68 IR 112), that the word "remuneration" in its ordinary meaning is not confined to cash benefits. It then proceeded to examine the particular problem in relation to the use of the term "remuneration" in various sections of the 1996 Act, on the basis that the ordinary, though rebuttable, approach to statutory construction, is that there is an expectation that the same word is used with a consistent meaning throughout the statute. Having reviewed the issue in detail, the Full Bench came to the view that the word "remuneration" is not used consistently throughout the 1996 Act. It was satisfied that in Part 6 of Chapter 2 (the unfair dismissals provisions) the word is used in its ordinary broad sense as comprehending an employee's total package as a reward for the work performed.

The elements that comprise "remuneration" have also been considered by the present Industrial Relations Commission and by its predecessors. In 1981, for instance, *Bauer* J in *Durheim v Ireland* (1981 AR 781 at 792), a case decided in relation to s.88F of the *Industrial Arbitration Act* 1940 (the 1940 Act), held that "remuneration" under s.88F(1)(e) of that Act involved more than simply money. Items taken into account by *Bauer* J to assess, what he described as the "gross total remuneration", included amounts for rent and free milk supplied. A more recent variation on the theme of the rental factor was that of an amount for "free of charge messing amenity"

considered recently by a Full Bench of the Australian Industrial Relations Commission in *Bell v McArthur River Mining Pty Ltd* (Print Q1629) in relation to the salary cap in total remuneration in the unfair dismissal provisions of the *Workplace Relations Act* 1996.

However, it may be that such factors may overlap with, or even be factors that are part of the basis for claims such as that made by Dr Wooden, that individuals self select into occupations, and hence many women may select into relatively lower paying occupations, because of their offsetting positive work conditions, such as greater working time flexibility, safer working conditions or better leave conditions are part or whole of the explanation for any gender gaps in earnings (Ex 101 p 11). On that point, reduced fees for child care workers who place their own children in a child care centre could fall to be considered. (However, evidence before the Inquiry demonstrated vividly the circumstances of some such "self selection" into lower paying occupations. A female trimmer employed at Heinz Greenseas achieved the higher paying position of butcher. She returned to trimmers' work, the main reason for doing so being the "male attitudes", for which read "harassment", of one particular male.)

Furthermore, as attempts to maximise benefits to employees become more ingenious, the definition of "remuneration" must be wide enough to encompass the results of those endeavours, in order to enable proper assessments to be made as to existence or otherwise of any pay gap. As a consequence of the ingenuity of employers and employees, the elements to be included within "remuneration" are not static nor are they certain. A Full Bench

of the Australian Industrial Relations Commission (AIRC) (in late 1997) suggested in *Rofin Australia Pty Ltd v Newton* (Print P6855) that the payment of fringe benefits tax may arguably be included in calculating the "remuneration" for the purposes of s.170CC(3) of the *Workplace Relations Act* 1996. (It did not have to decide that issue in that case.) In that same case the Full Bench decided that where a motor car is provided to an employee in lieu of salary that might otherwise have been paid, the private benefit derived by the employee from the provision of that car should be counted as part of the employee's remuneration.

The area of overaward payments was one as to which the Employers' Federation/Chamber expressed particular concern. It was contended that for the Commission to enter this area of overaward payments would be a very radical change from what it had done in the past. It would require the Commission to consider factors not normally taken into account by it, those factors including, for instance, the value of work to the employers, supply and demand of labour, individual performance of employees, labour to costs ratio etc.

Overaward payments have many forms including those that are:

- industry wide;
- organisation wide;
- department wide; and
- personal.

In cases where an individual or even, in appropriate cases, a small discrete group are involved, relief can be sought from the Anti-Discrimination Board. I do not anticipate that a "personal" overaward to an individual would be the subject of inquiry by the Commission in the context of equal pay.

The Commission, in the context of equal pay, has not ignored overawards seen by it to constitute unfairness, as exampled by the comments of *Watson* J in *In re Water and Sewerage Employees- Wages Division (Metropolitan) Award (No. 1)* (1975 AR 377 at 379) in relation to lower "above-award" payments received by female officers as against higher ones for non-tradesmen classifications:

> This differentiation pre-dates current equal pay concepts and should, in my view, disappear. As the payment is in the outside award area, I will make no order in relation to it at this stage. (emphasis mine)

Outside of the equal pay context, published decisions of the Commission testify to the extent of its involvement in the overaward area, particularly relating to bonus problems in the steel industry.

Just Rewards: a Report of the Inquiry into Sex Discrimination in Overaward Payments (AGPS, Canberra, 1992) made a number of findings which do not conflict with evidence presented to this Inquiry. The first of those findings was that:

> 1. A number of factors ... influence overaward payments. These factors include market forces, the concentration of women in more lowly graded positions and in part time and casual work, and occupational and industrial segregation. Limitations on the data available on overaward payments pose difficulties in determining precisely the incidence and level of discrimination in overaward payments, however it is likely that broadly based overaward differentials reflect practices which constitute direct and indirect discrimination on the basis of sex. (my emphasis)
>
> There was also an acceptance that:
>
> ... difference between overaward payments to men and women may be reasonable having regard to supply and demand for particular skills; institutional factors which construct differential market rates; differentiation between full and part time workers.

Despite the attitude of the Employers' Federation/Chamber, it seems that not all employers recoil from independent examination of overawards paid by them. An example of "best practice" in this area was demonstrated to the Inquiry at Maintrain. Mr Colin Edwards, Organisational Development Manager at Maintrain, where clerical (female) employees receive the same over award payments as metal trades (male) employees, said:

> We wanted high morale, we wanted flexible skill, we wanted an intelligent, responsive, responsible workforce and we realised right from the start that we would have to pay to get that.

Acceptance of an extended definition of "remuneration" is not a novel approach in this jurisdiction. It was noted in *In re State Equal Pay Case, 1973* (1973 AR 425 at 434) that the new principle adopted by the Commonwealth Commission appears to be identical with "the principle of equal

remuneration for men and women workers for work of equal value" referred to in Article 2 of the *Equal Remuneration Convention* No. 100 adopted by the ILO in 1951 but not, as at 1973, ratified by Australia; and further "as we understand the matter the [Commonwealth] judgment adopts the Convention principle but in a setting of a conciliation and arbitration systems" (p 438), though the Commonwealth decision had referred to "equal pay for work of equal value".

I find the Employers' Federation/Chamber's contention that Articles 1 and 2 of ILO *Convention* 100 deal only with nationally legally established mechanisms for wage determination or collective agreements, and not with individual overawards, (if that reference to individual overawards is intended to exclude overawards generally) untenable. ILO *Convention* 100 is, as stated in its Preamble, concerned with the principle of equal remuneration of men and women workers for work of equal value. Article 1 defines remuneration for the purposes of the Convention. Article 2 deals with the mechanisms by which the principle may be applied. (My emphasis) The mechanisms set out are not exclusive, but even if they were, Article 2 would not sustain the proposition advanced by the Employers' Federation/Chamber, sub-para (c), in particular, militating against it.

It seems to me that the Federation/Chamber's submissions as to "remuneration" and "over awards" reflect a misconception which appears to have informed the basis of those organisations' approach to this Inquiry. On the basis of their final written submissions, it would appear that they feared that the Commission would seek to "engineer", in order to remove any gender wage

differential found, an outcome that would result in women occupying higher paying jobs within firms and across all occupations (Ex 446 p 31). Moreover, they fear the introduction of equity review mechanisms, which would require employers to pay female employees a compensatory wage or to take other measures to recompense such employees for various female labour market characteristics, would require employers to take financial responsibility for community wide factors over which they have little control, thus transferring social responsibility to employers (Ex 446 pp 31-32).

In view of the limited Terms of Reference, these submissions appear to demonstrate the extreme of one end of a spectrum of the unrealistic expectations as to the immediate outcome of this Inquiry, the other extreme being the hopes of immediate increases in wages to the female employees employed in the occupations and industries examined, or even to female employees generally.

In relation to the elements of remuneration, concentration by employers on the perceived effects, either short or long term, that they regard will have obvious adverse affects on their interests, is a short sighted approach, which needs to be balanced against the wider ramifications of allowing any proven pay inequity to continue. The reasons I say that, though dealt with shortly at this point, are dealt with in more detail in later sections of the Report, more particularly in the chapters dealing with "The Wider Dimensions of Undervaluation" and "Impact of the NSW Pay Equity Inquiry's Decision on the NSW Economy".

It is vitally necessary to any application to the Commission seeking a remedy for an alleged pay inequity/undervaluation of work that all the elements of remuneration for such work be open to examination and to comparison. If any valid element is left outside of that examination, a pay inequity could continue to fester, even though some "remedy" had been applied.

The critical importance of the definition of "remuneration" adopted in relation to examination of claimed pay inequities, is to be gauged from the following extract from the evidence of Mr Cox:

> A critical issue, as identified by Borland in section 2, is whether there is a component of gender discrimination in respect of work value behind at least part of the gender pay gap, which is then suggestive of sub-optimal allocation of resources. If this is the case, then the removal of that discrimination holds the prospect of producing aggregate net economic gains. Whether or not pay equity adjustments do achieve such outcomes will depend inter alia on the effectiveness with which they address only the pure discrimination present, and do not introduce their own distortions ... (Ex 277 para 30) (my emphasis)

Mr Cox was not the only witness to be concerned about distortions in the equation. Mr Richardson says that the very worst thing the Commission could do would be to over-compensate some employees. To do so "would worsen both fairness and efficiency in the economy, at a marked cost in jobs": (Ex 338 para 30). The evidence of other economic experts suggests to me that to under-compensate some employees would have the same adverse effect on fairness and efficiency. In that respect I have in mind particularly the discussion by Associate Professor Borland of efficiency and equity objectives in the

implementation of a pay equity policy (Ex 277, Annex 2, paras 27-32).

The size of any pay increase awarded to remedy a proven pay inequity will be based on deficiencies found in any or all of the elements of the remuneration paid to the employees concerned. The wider economic impacts of that increase have been listed by Mr Cox:

> A pay increase will represent an increase in costs to an employer, an increase in income to a recipient, and possibly lead to an increase in prices for purchases of output produced by the labour in question. These direct impacts may lead to further changes in the supply of and demand for labour, goods and services, productivity, in levels of taxation, welfare payments, and government services, and in the occupational, industry and regional distribution of economic activity. (Ex 277 para 3)

Mr Tubner presents what may be seen as the practical working out of the above statement in respect of one specific area examined by the Inquiry:

> What is probably not understood by the consumers is that the persistence in underpayment of outworkers is indirectly subsidised by consumers through the avoidance of payment of taxation at a number of different levels in the clothing industry, and by payment of government benefits to outworkers who receive low income. If the clothing industry was regulated to the point where makers paid proper wages, deducted tax and maintained records, the consumer would benefit by increased revenue and decreased reliance on government benefits. (Ex 292 para 29)

I have found, in the case of outworkers, that a pay inequity exists, not only in the underpayment , but in the actual valuation, or lack of it, of the work of those persons as expressed in the relevant awards.

In my view, the very definition of "pay equity" in the 1996 Act suggests a wider role for "remuneration". If the term was intended to be limited as submitted by the Federation/Chamber, then it would have been an easy matter to use words such as "award rates". If that narrow approach to "remuneration" were to be accepted, then a purely mechanical process of matching NSW award rates with ABS tables showing female dominated industries, a process able to be undertaken by his own Department, would have provided the Minister with his answer.

In order to come to an accurate conclusion as to the existence or otherwise of an inequitable pay gap based on gender, or, indeed, on any basis, the tribunal needs to know not only the amount of the money received by the employee but also, amongst other factors, what is received in substitution for moneys that would otherwise have to be paid out by that employee (the latter would extend to items covered in salary sacrifice aimed at maximising the benefits to the employee of the nominal dollar amount paid as wages). HREOC raised the inclusion of employers' contributions to any statutory pension or superannuation scheme in the definition of remuneration: *Bilka Kalufhaus GMBH v Webber* ((1986) IRLR 317 at 319 to 320). Mr Cox expressed the view that, in some circumstances, pay i.e. compensation for employment could include non-wage benefits such as superannuation and leave entitlements, and non-pecuniary benefits such as working conditions (Ex 277 footnote 1).

As already discussed, elements that constitute "remuneration" have been increasingly considered in industrial courts and tribunals, particularly

in the areas of unfair dismissals and unfair contract. It seems to me to be artificial in the extreme to try to disregard such elements when "remuneration" is to be considered for the purpose of determining whether pay inequity or undervaluation of work exists.

In the light of the full evidence adduced to the Inquiry and the final submissions of the parties, I formally adopt the definition of "remuneration" as found in Article 1 of the ILO *Convention* 100 for the purposes of this Inquiry. Furthermore, that definition should be applied in the context of any principle established to deal with pay equity or equal remuneration. I also consider that the definition is applicable to s.23 of the Act.

COMPARABLE

This term has been discussed more fully later in relation to "Equal Pay and Remuneration".

Insofar as the Inquiry was concerned, differences between the parties as to the meaning of "comparable" arose in connection with Term 1 and its reference to "comparable male dominated occupations and industries", and also in relation to the definition of pay equity as to being to work of "equal or comparable value".

I deal only briefly with this term. The first aspect largely dropped out of contention after the selection of the occupations and or industries to be

examined was made.

The crux of the submission of the Employers' Federation/Chamber was that:

> In terms of section 23 of the Act we submit that gives the main indication of what "comparable" means. Section 23 repeats the pay equity-type provisions in the Act, which are found in sections 19 and 21 of the definitions. That indicates the Commission must provide for equal remuneration where the work is of equal or comparable value. There must be equal remuneration for work of equal value and also equal remuneration for work of comparable value. We submit an appropriate interpretation of that is that the word "comparable" has to be something close to equal so as to result in equal remuneration.

Counsel assisting's preliminary view, much elaborated ( and accepted) in later oral submissions, is sufficient to demonstrate his, and ultimately the Commission's, view of the meaning of the word "comparable":

1. The meaning should be derived by reference to the use of the word "comparable" in the *Industrial Relations Act* 1996 (NSW) ("the Act").

2. The Act uses the term "comparable" relevantly in two places, namely the definition of "pay equity" in the Dictionary and in the objects in s.3(f). In both instances the legislature refers to "comparable value" as part of the expression "work of equal or comparable value".

3. Plainly, the legislature has distinguished between work which is of 'equal' value and work which is of 'comparable' value, the latter expression presumably having a wider meaning. In both cases the legislature refers to 'value of work'.

4. In the context of the Terms of Reference then, the assessment or examination required to be undertaken concerns the value of work in the respective occupations with a view to establishing the adequacy of remuneration.

5. This approach to ascertaining the meaning of term 1 (and, in particular, the meaning of the term "comparable") is reasonable available as:

   (i) the terms expressly require that regard be given to the "objects" of the Act, which include the term "comparable" value in its object in section 3(f); and

   (ii) the reference from the Minister is entitled "Pay Equity Inquiry" in a reference under s.146. The Minister must have contemplated, therefore, that consideration would be given to the definition of "pay equity" in that Act.

In the course of his later submissions he also said:

> In the contentions of the Public Service Association they extract the dictionary definition of 'comparable' , which in my submission truly represents the meaning of that word as it would be applied in the context of the terms. ... It says 'comparable' in its ordinary meaning does not mean "like" as contended by the Employers' Federation in Ex 11 paragraph 5 it means (1) capable of being compared and (2) worthy of comparison.
>
> At the end of day, your Honour will determine what is capable of being compared and what is worthy of comparison. But your Honour will do so, in my submission, upon the evaluation of the whole of the evidence and the material put before your Honour as part of this inquiry. And that, in my submission, is the purpose of including the word 'comparable'.

The further reason I devote little discussion to the term "comparable" is that it is evident, from the Inquiry, that a decision as to what is to be compared, will need to be made in every equal pay application.

One other fact made clear by this Inquiry is that a comparator, while that may be of assistance in some cases, is not always needed. The outstanding example that substantiates that finding relates to the beauty

therapists, an occupation accepted as a trade, but in which rates are set on the basis of 92% of the trade rate.

Another matter made clear by the evidence is that the choice of a comparator will not always be straight forward. The child care industry is one example of that. The comparison before the Inquiry related to qualifications. However, there was evidence as to the teaching role of child care workers as well as to their caring and nurturing role. In a pay equity application would work value be assessed against the teaching industry or another nurturing industry or both? As another example, would occupations such as nurses look to the service or health industries for comparators?

The determination as to the elements that form part of remuneration, also has ramifications in respect of comparators. In the present Inquiry, for instance, overawards were specified in the case of the nominated clerical sector for examination as to gender bias. In the future, an allegation of undervaluation may be directed at only one element of remuneration. On the experience in the Inquiry that would be a valid and feasible approach.

In the selected industries and occupations, taking into account my final definition of "remuneration", what was able to be compared to come to a finding as to "comparable value of work" included:

- incidence of overaward payments;
- alignment of qualifications;

- the work of employees, male and female, covered by different classifications of the one award;
- work in an industry, undertaken inside, and outside, factories, ("factories" including only those operating in accordance with the applicable law, industrial or otherwise); and
- recognition of qualifications, including post trade qualifications.

Not all of the comparators/comparisons advanced were as helpful as others, but even when they may not always have achieved the outcomes the proponents may have hoped for or expected, they provided most useful information to the Inquiry: Ms Shean's evidence as to the NSWNA's approach to work value and the provision of a "best practice" example as to overawards by Maintrain being significant examples of such information.

In making my findings and recommendations in this Report, I do so on the basis that "comparable" means "able to be compared".

MALE/FEMALE DOMINATED

The necessity to examine the terms "female dominated" and "male dominated" arose only because those terms were used in the Terms of Reference in referring to "occupations and industries". The word "dominated" does not appear in the definition of "pay equity" provided in the 1996 Act. In that Act, "pay equity" is defined as meaning "equal remuneration for men and women doing work of equal or comparable value". (My emphasis)

The submissions by the parties as to the meaning of the term "dominated" ranged from reference to the specifically numerical to a more general approach. The ACM, for instance, submitted that what was meant by "dominated" required that not less than 65% of employees in the industry and/or occupation be of the same sex (Ex 441).

On the other hand the Crown, supported by the PSA, submitted that the "Commission ought have the flexibility to have regard to broader considerations such as the history of the awards in question, the gender distribution historically in the industry and classifications. Where the Commission is satisfied that a particular occupation or industry is either "female dominated" or "male dominated" then it should have the power to make such a ruling".

In adopting the Crown's submissions, Mr *Hatcher* for the PSA said that the PSA did not support the approach there should be some arbitrary percentage figure which would determine that question one way or the other.

It must be stressed that in relation to pay equity, the emphasis is on the value of work. However, in considering work and the element of gender in its valuation, it must be kept in mind that there is more than one aspect in an examination as to gender. There is a distinction between what has been described as women's work and between work in which women are concentrated. Some work, even when undertaken in the main by females, e.g.

in the clerical or retail areas, is not necessarily work that of itself has peculiarly feminine characteristics. The use of a computer, or selling goods from behind a counter, is work that can be equally undertaken by males or females.

On the other hand, examination as to the female aspects, or femininity, of work would be expected to show that involved in such work would be the exercise of skills such as caring, nurturing, dexterity and others mentioned as being feminine in the course of the evidence to the Inquiry. I hasten to say that I do not accept that such skills are limited to females. (I note, in that respect, the evidence that males are being kept out of child care by fear, because of continuing publicity as to child abuse and molestation.) Those "feminine" skills must also be exercised in other fields, as for instance, in the medical area dominated by males. It may be that, on examination, those male dominated areas have been valued for other reasons that have not specifically or consciously, taken those "feminine" skills into account.

The femininity of work, of itself, will not be determined by the numbers of workers undertaking it, even though those numbers may be an indication, even a strong indication, that the wages for such work have been affected adversely by the fact that it is undertaken mainly by women.

In relation to a claim of pay inequity based on an alleged undervaluation of particular work, the numbers of employees affected would be immaterial. If the skills had not been taken into account, it would not matter if the employees constituted a minority or majority of a particular industry or occupation.

It may also be that undervaluation of work is found to attach to a type of work, e.g. part-time or casual. A question arises as to whether that undervaluation would be regarded as gender based simply because, in some instances, more females than males might be part-timers or casuals.

The fact that an industry or occupation has been, or is, female dominated is only one factor to be taken into account in any examination of claims as to undervaluation of work in any such industry or occupation. The emphasis in this Inquiry on gender as a basis for undervaluation arose because of the limits set in the Terms of Reference.

What this Inquiry has shown is that the causes of undervaluation of work may not necessarily affect only work undertaken by females, or of males in a female dominated industry. No such case was, of course, put to the Inquiry, because of its Terms, but it is not beyond the bounds of possibility that the trade of beauty therapists is not the only one, male or female, that has not been properly remunerated as a trade. It is also not beyond the bounds of possibility that there has been a misalignment of qualifications across awards, as occurred in the child care area.

In selecting the occupations and industries to be examined in the Inquiry, such occupations and industries were, in one way or another, female dominated. However, a number of occupations and industries proposed, e.g. the "white" meat as against the "red" meat industry, did not meet the female

domination test, that test, for preliminary working purposes, being a figure over 50%. In such of those cases, where undervaluation of work was alleged, should the proponents of those allegations be denied the opportunity of pursuing an application seeking rectification of a pay inequity? In my view, the answer to that question is a resounding "no"! That is the reason why, in any principle that may be developed, I would urge that it deal with undervaluation simpliciter, not tying access to it to gender, even though the evidence in this case demonstrates that undervaluation is prevalent in female dominated industries where special attention is required.

To limit future examination of occupations and/or industries for possible inequity in pay based on gender to those in which 51%, 65% or any other percentage of employees are females, would impose a limitation on the definition of "pay equity" not found in the 1996 Act, and is a limitation which, in my strong view, should not be imported into it.

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SUMMARY OF FINDINGS AS TO TERMINOLOGY OF TERM 1

I have now found that for the purposes of this Inquiry:

- 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;

- the term "comparable" has its ordinary meaning of "able to be compared";

- in relation to the term "female dominated", I make three findings:

  (i) the term "female dominated" needs only to be determined for the purposes of the Inquiry because of the terminology used in Term 1. While I favour the submissions calling for a broad approach to be adopted to its meaning, there is no need for a formal determination between the competing submissions. In each of the selected industries and occupations, the employee population was overwhelmingly female: child care workers; seafood processors (trimmers); librarians; clerical workers; hairdressers; beauty therapists and nurses;

  (ii) The word "dominated" does not appear in the definition of "pay equity" in the 1996 Act, and, in my view, should not be imported into any consideration of that definition; and

  (iii) I will propose in this Report a new principle of wage fixation. I anticipate that this principle will operate substantially in relation to occupations and industries which have a high concentration of female workers and which have historically been characterised as female. However, the ultimate

> access to the operation of the principle should be determined on a case by case basis by the Commission having regard to the undervaluation contended.

Now that those findings as to "remuneration", "comparable" and "dominated" have been made it is possible to move on to some brief consideration of the Terms of Reference. In that consideration I do not intend to traverse the details of the chapters that follow, but simply to provide some general commentary.

**TERM OF REFERENCE 1 (TERM 1)**

The essence of Term 1 is that the Commission is required to inquire into and to report "whether work in female dominated occupations and industries is undervalued in terms of remuneration paid relative to work in comparable male dominated occupations and industries".

In economic analysis the undervaluation of female work has been described by a number of terms to the Inquiry, those terms including wage gap, gender wage differential and wage discrimination. (The concept is discussed much more fully in the section of the Report headed "Statistical and Economic Analysis of Male and Female Differentials").

According to Associate Professor Borland:

> ... in the absence of direct evidence that the gender wage difference can be explained entirely by differences in non-wage compensation or job conditions, and with evidence which appears to suggest that workers in female-dominated occupations earn less than comparable workers in other occupations, it seems reasonable to conclude that some part of the gender wage differential should be contributed to unequal treatment of male and female employees. (Ex 277, Annex 2, paras 12, 13 and 14)

Associate Professor Borland went on to further elaborate the term "unequal treatment":

> "unequal treatment" is used to refer to a situation where a male employee and a female employee with identical skill-related characteristics receive different amounts of compensation for working in the same job ... in the labor economics literature this is most generally referred to as "wage discrimination".

According to Mr Cox:

> Gender discrimination in this context refers to the gap when all other differences have been accounted for. For example, it is not sufficient to observe that males and females gain different returns to a university degree to conclude that discrimination is present. It is also necessary to take account of all the other factors such as experience that will influence pay. If there is still a difference in returns after adjusting for all these other factors, then the remaining component must be "pure discrimination".

In economic analysis before the Inquiry, the range of undervaluation of work of females as against that of males, depending upon the methodology adopted, was suggested as being between 2 per cent and 35 per cent. Professor Wooden expressed the view that it was 2 per cent, whereas Professor Gregory and Mr Cox were more comfortable with the figures 2 to 5 per cent. In dollar terms, the study by Ms Meg Smith of hairdressers/motor mechanics posited a difference of $153.70 per week in favour of the male motor

mechanics in relation to ordinary time earnings.

Ascertaining the size of the gap (in economic terms or otherwise) was not a prerequisite to enable this Inquiry to progress. What is of importance is that all the economists agree that there is some portion of the pay gap which cannot, at this time, be explained on a basis other than gender.

Even then, it is not merely sufficient to know that economists accept that a gender pay gap does exist (although it does tend to indicate the existence of undervaluation). The existence of undervaluation may be ascertained on a number of bases discussed later in this Report. However, it is necessary to examine specific claims to decide whether, in such cases, a gap actually does exist, whether it is based on gender or on some other cause, whether it calls for remedy, and, if so, to what amount and over what period.

The bases for the Inquiry's findings as to Term 1 are detailed elsewhere in respect of each of the selected industries and occupations. In brief, the Commission has been satisfied, on the evidence, oral and documentary, placed before the Inquiry that undervaluation of work on the basis of gender has occurred in relation to the following occupations and industries studied:

- child care workers;
- seafood processors, Level 5 (female dominated) of the Fish

Canning &c (State) Award vis a vis the work of Level 4 (male dominated) of that same award;

- public sector librarians;
- hairdressers;
- beauty therapists; and
- outworkers in the clothing industry.

The precise bases for the conclusions reached, whether positive or negative, in relation to all the selected occupations and industries examined are addressed in a later section of the Report.

On the basis of the selected industries and occupations, it would seem that a profile which, prima facie, could indicate the possibility, or even the probability, of an undervaluation of work based on gender, would include the following elements:

- female dominated;
- female characterisation of work;
- often no work value exercise conducted by the Commission;
- inadequate application of equal pay principles;
- weak union;
- few union members;
- consent award/agreements, and
- large component of casual workers;

- lack of, or inadequate recognition of, qualifications (including misalignment of qualifications);
- deprivation of access to training or career paths;
- small workplaces;
- new industry or occupation;
- service industry;
- home based occupations.

Originally in the Inquiry there was perhaps the expectation that merely looking at issues globally, such as qualifications, competencies and the like, would be sufficient to properly address the issues raised by Term 1. However, what the Inquiry has shown is that, in the actual assessment of an industry or occupation, the history of the area and of its award regulation is vital to discovering if inequities are truly suffered by employees, and whether any such inequities, if found to exist, are gender based or otherwise. There may well be a combination of factors acting to create undervaluation, and hence, care needs to be taken to avoid simplistic and single dimension approaches to ascertaining whether any undervaluation exists and what remedies, if any, are required.

Such in depth assessment is also necessary to determine what are appropriate recommendations in each case. Therefore, a case by case approach in respect of any claimed pay inequity is absolutely vital, but, as will be seen in the final recommendations, this approach needs to be balanced by a set of practical principles and mechanisms which will avoid unnecessary barriers

and limitations being put in the way of proper examination of any such claim. A dependency upon a purely inter parte approach to arbitration, (as opposed to an inquiry type approach, combined with some genuine co-operation between the parties) will inhibit a full and effective analysis of the issues (particularly given the diversity of areas to be addressed).

**TERM OF REFERENCE 2 (TERM 2)**

It must be remembered that, in this Inquiry, the primary objective of examining the present state of occupations and industries is not simply to determine whether, in any of them, work has been undervalued on the basis of gender. The main objective, in the event that positive findings are made, and they are made, is to examine the adequacy of the tests and mechanisms for ascertaining work value and the extent to which, if at all, those tests and mechanisms are inequitable on the basis of gender (Term 2), and to develop recommendations as to remedial measures to eliminate those deficiencies (Term 3). The industries and occupations examined, together with more general oral and documentary evidence, provide the foundation for the consideration of this Term.

My findings and conclusions regarding Term 2 (and indeed Term 3) are found in the following chapters: "Equal Pay and Remuneration: International Instruments, Industrial Jurisprudence and Statutory Reform" and "Wage Fixing Principles: Work Value, Minimum Rates Adjustment, Structural Efficiency and Special Cases". Work value tests have been formulated, modified and

expanded over many years, but have strong roots in work value examinations of the metal and manufacturing industries. The fact that such industries are male dominated is only one of the factors that it is appropriate to examine in relation to Term 2.

In examining existing tests and mechanisms for ascertaining work value, one must keep in mind not only their adequacy or otherwise in the past, but whether they will be adequate in assessing work in new and emerging industries and occupations. That will require, in my view, at the very least, a re-honing of the first award principle that, prima facie, the rates achieved by the employees themselves are indicators of appropriate rates. The principle has always been rebuttable, but, in the future, will need to be overtly sensitive to gender influences on the achievement of those rates.

Over the last 20-30 years, the work value tests have had to cope with major shifts as to working patterns:

- from manual work;
- to service industries;
- replacement by technology of many functions, including clinical, clerical, manufacturing etc;
- increased multi-skilling, not only resulting in fewer employees being required and also fewer positions being available for the unskilled but, combined with the removal of demarcation between jobs, enhanced valuation of work;

- increased part time work;
- increased casualisation;
- shifts in patterns, nature and type of work; and
- changing education requirements.

Many of those shifts have affected industries/occupations in which women are heavily concentrated or the new or expanded industries into which they have moved e.g. information technology, hospitality etc.

In dealing with new areas of work, which are either totally new or within existing industries, all concerned in the application of work value tests, including the tribunal, will need to become more sensitive to the possibility of gender bias or gender based differentials in wages and conditions, a bias which is more than likely to be difficult to recognise and identify, let alone remedy. It would also assist to minimise the presence of bias, if the processes of arriving at outcomes as to value were to be as transparent to examination as could be developed. One approach to the provision of transparency was the approach adopted by Commissioner *Winter* in the *Metal Trades Award (Re work Value Inquiry)* ( (1967) 121 CAR 587). He set out both work value factors and the weight he ascribed to each in coming to his assessment. Commissioner *Winter* was part of a Full Bench (*Gallagher* and *Moore* JJ, Deputy Presidents and *Winter* C) and he was undertaking a current investigation into work in the metal trades, then commonly known as the Winter Inquiry.

It is understandable that no other investigating exercise could be

cited to the Inquiry. Commissioner *Winter's* investigation of a sample of metal trades classifications (the "Winter Inquiry") had extended, in the first instance, over the better part of a year. The Appendix to his Reasons for Decision ( (1967) 121 CAR 587 at 840ff), and in particular parts 2 and 3, still repay examination as to the practical techniques of carrying out a work value exercise. His reasons for rejecting job evaluation echoed those advanced by the parties in this Inquiry, and, as discussed elsewhere, are reasons with which I concur.

At the conclusion he expressed severe misgivings as to the deficiencies in the processes adopted as to assessment of work value and in the end "relied upon judgment stemming from assessment of work seen during inspections balanced against my general knowledge of the metal industries" (at 847).

Despite the best efforts of all persons involved, it does not seem that the subjective element can be completely banished from any system of valuing work, whether that be by the traditional work value tests adopted by the tribunals, by job evaluation or by competency assessment. As Mr McLelland, Job Evaluation Expert from OCR Management, in his evidence as to remuneration assessments agreed, in any case where equal value is assessed, but different salaries are paid there might be legitimate, or alternatively illegitimate, on pay equity grounds, bases for the differential salaries.

It is for this reason that I consider the introduction of a system of precise 'weighting' will inevitably fail. However, the need for some subjectivity

does not remove the necessity for a transparent approach to the assessments made in work value cases.

**TERM OF REFERENCE 3 (TERM 3)**

Term 3 is concerned with developing remedial measures as might be necessary in relation to work value tests.

At the outset of this discussion, I note that the Terms of Reference in this Inquiry are specifically directed to examining work in female dominated industries and to developing recommendations as to remedial measures for tests and mechanisms for ascertaining work value, should those tests and mechanisms be inequitable on the basis of gender.

For that reason the recommendations I make focus on that aspect of undervaluation. However, it is clear from material before the Inquiry that undervaluation, for causes other than gender and in occupations and/or industries not female dominated, can exist.

It would be my view that the pay equity principle which I later recommend could be more general in application than was perhaps originally envisaged, although it is equally clear from the evidence, that special provisions as to female dominated industries are appropriate.

This Inquiry is limited by its terms in developing recommendations

as those, firstly, going to remedial measures it might see necessary as to overcoming inadequacies in tests and mechanisms for ascertaining work value to the extent to which, if at all, such tests and mechanisms are inadequate on the basis of gender, and, secondly, as to the mechanisms and processes by which pay equity matters can be brought before the Commission (Term 4).

One illustration of the inadequacy of previous tests that was provided to the Inquiry related back to the Federal *Equal Pay Cases*, 1969 ( (1969) 127 CAR 1142 at 1158-1159), which, in relation to equal pay, stated that "the work performed by both the males and females under each determination or award should be of the same or a like nature and of equal value". However, the final principle 9 provided that "notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed".

That principle essentially replicated s.88D(9)(b) of the *Industrial Arbitration Act* 1940 (the 1940 Act), the effects of which are still extant, as examination of the hairdressers' sector in this Inquiry showed. In *In re Hairdressers' &c (State) Award* (67/125; 23/6/70; unreported), *Manuel* CC refused a claim for females to be paid on an equal basis with male hairdressers in one area of hairdressing where equal pay had not yet been achieved. On the basis that the work performed under that particular classification was normally performed by females, he found that s.88D(9)(b) inhibited him from granting the claim for equal rates beyond the existing relativities (p 40).

During the course of the process in accordance with Term 1 to determine which industries and occupations the Commission should have regard to to permit it to make recommendations, some opposition was expressed to proposed areas covered by Federal awards. Such opposition demonstrated once again a non-understanding of the task placed on the Commission by the Terms of Reference.

The Commission had first to determine whether a pay gap based on gender existed. In the event that a positive finding was made, the Commission had then to examine the adequacy of tests and mechanisms to ascertain whether they are inequitable on the basis of gender, and develop recommendations as to such remedial measures as might be necessary to remove any inequities found.

The work value principles utilised in the New South Wales industrial tribunals since their inception have not developed in a vacuum, isolated from those developed in other Australian tribunals, and particularly in the Federal jurisdiction. (A quick glance at the chapter on work value assessment confirms that statement.)

Consequently, any successes and/or failures of the work value principles in the Federal jurisdiction could assist the development of recommendations as to any remedial measures, irrespective of their origin, that might be necessary in this jurisdiction.

It was a matter of some disappointment that the National Tertiary Education Union withdrew its nomination. The sector encompassed, in New South Wales, some 23,000 academic and general staff. Within the sector, there were both male and female dominated areas of work, across clerical, computing, teaching and research, technical and trade areas. The sector appeared to present a relatively compact and useful cross-section of classifications and comparisons.

The evidence before the Inquiry supports studies which show that cultural, economic, social and institutional factors influence the setting of wages, in some cases resulting in pay inequities in respect of male and female employees doing the same work or work of equal or comparable value. Those results may, in some cases, be the quite unintended or unanticipated result of what might on the surface appear a conventional industrial process, e.g. consent awards/agreements, the trade off of conditions such as allowances for casuals etc.

The evidence also shows that self interest and pragmatism on the part of individual employees in some circumstances within particular locations can influence female wages for good or ill. It is noted in the Federal Equal Pay Case (127 CAR 1142 at 1153) that one of the reasons that women in some awards had for many years received the full male wage was as the result of attempts to prevent what was regarded as unfair competition with men, (as could have been the case if they had received lesser rates of pay for the same work).

On the other hand, it was demonstrated to this Inquiry how the determination of male employees kept female employees in a fish cannery not only from training that would allow them access to the better paid positions of butchers, but also from sharing the limited overtime available as cleaners.

The fact that such a culture was not unique to this factory, was made clear in the evidence of Ms Walpole. She described the situation of a female packer in a Queensland meat works who wanted to become a boner and slicer, a much better paying job. The culture of the works is indicated in that there had been a prohibition in an earlier industrial agreement against women become boners and slicers. Although that provision had been changed, and the woman did get a job in the boning room, she had been subjected to such extremely bad harassment, she eventually had to leave the job.

The experience of female employees, as described at Eden and by Ms Walpole, in being actively deterred either from taking up, or staying in, higher paid "male" jobs, is not something that any test devised as to work value could take into account. The work value of the "male" job is not in question. What is in question is the ability of females to access those jobs. The problem, however, is one capable of being addressed in a number of ways, including a dispute notification to the Commission. It should not get that far - such a problem, if within the knowledge of either the employer or the union should be addressed with urgency, determination and without fear or favour. The development of tests and mechanisms which would enable the Commission to intervene at a

relevant stage in such situations is desirable.

Mr *Poynder* for HREOC advanced the following proposition in relation to remuneration: the Commission should consider whether the assessment of work, even if it has no present adverse effect, may affect workers' future remuneration through access to benefits dependent on the earlier assessment, citing *Magorrian and Cunningham v Eastern Health and Social Services Board*, unreported, European Court of Justice, 11 December 1997 at paragraph 15. That was a case which involved psychiatric nurses who, had they worked longer hours, would have been considered mental health workers and, as such, eligible for higher pensions. It did not become clear until they had retired that they would not get these higher pensions.

That case demonstrated a situation in which the gender discrimination involved only became apparent many years later. How does one structure a test that may reveal that discrimination at a much earlier time?

It may not so much be, as was contended by the Crown, that "work value criteria have not reflected well many significant factors of value in female dominated work", (Ex 459 para 172) but rather that it is regarded by parties as being more difficult to demonstrate those significant factors to a Tribunal.

The wage fixing principles were raised, particularly by the PSA, as causing difficulties in the running of work value cases in a number of areas, not only in those that are female dominated e.g. librarians (female), but also in

relation to geoscientists (male) (although in some cases it would appear that the opportunity to conduct such cases was simply not taken).

The evidence of Ms Shean showed that the Nurses Association of New South Wales has taken the difficulties raised by the Crown and the PSA to heart in presenting work value cases. She has been involved in the preparation of all the Association's major work value cases since 1987.

She said that nursing has been a reasonably easy area to work within the work value principle, because of the changes in education, which have been quite dramatic, as well as technological changes. There are enormously varied roles within nursing ranging from the very high tech end of the spectrum to areas of nursing which are much more concerned with communication and other such skills. The Association has emphasised in its evidence and explanations what one might describe as the more generally accepted male skills, such as technology, able to be easily inspected in areas such as neo-natal intensive care and intensive care units.

In relation to an acute admissions ward in a psychiatric hospital it would be somewhat more difficult to demonstrate the skill involved where the nurse is reading and interpreting human behaviour to predict when an acutely ill psychiatric patient may run amuck and smash a ward up with a chair, as opposed to a nurse in the intensive care unit where the patient's progress often can be predicted from reading the dials on a machine, so the nurse knows when to perhaps call for a Registrar because this patient is about to have a cardiac arrest.

In relation to that approach, and the particular example given, I found very interesting the statement of Ms Shean that, historically, psychiatric services were provided through separate hospitals directly administered by the Department of Health and the nurses were public servants. The rates paid to psychiatric hospital nurses, who were mostly male, were higher than those paid in the public hospitals, where nurses were predominantly female.

Significant pay increases in percentage terms have been awarded to nurses through the Industrial Relations Commission. It is also of interest, in the context of the Term 2, that the increases in rates for members of the Association were achieved by the utilisation of wage fixing principles, including the Work Value and Anomalies and Inequities principles, as they existed at any particular time.

The nursing industry also provides a striking example as to how society's current attitudes, as reflected in tribunal decisions, can affect pay and conditions. The evidence of Ms Shean indicated that the recognition of nursing as a profession had been one of the major breakthroughs in comparatively recent times in the battle for recognition of status and for increased wages. However, examination of the first award for hospital nurses shows that in 1936 the Commission had accepted that a profession was involved. In that case, *In re Hospital Nurses (State) Award* (1936 AR 247 at 251), it was said by a Full Bench, on appeal from a decision of *Webb* J, in relation to hospitals in New South Wales that "the work carried on by these institutions is not industry in the

ordinary sense of the word at all, but consists in providing medical and surgical services for the sick ...". In relation to rates for trainees (which it appears were reduced from those awarded by *Webb* J), the Full Bench rejected the submission of the NSWNA that the arduous work of trainees should be assessed at its commercial value as laborious work (ibid at 252). Instead, "trainees in this calling should be regarded as pupils in a profession, rather than employees in an industry. The evidence shows that at many of the larger hospitals there are extensive waiting lists of women anxious to become trainees even in hospitals in which nurses receive no payment at all. (Ibid at 252) ... It is common ground that the trainees are well fed, in most cases provided with a good home and ... with uniforms, are subject to proper discipline, and receive a training both during their working and leisure hours which is very beneficial to them". (Ibid at 253)

In the light of the above example, how is one to identify the cultural and societal influences on rates of pay, at the time those rates are being examined?

In the context of the situation of outworkers I later raise the question as to the role of the Commission as reflecting, or challenging, community attitudes. In my view, the short answer to that is that if those attitudes, or the effects of them on wages and conditions, are known or advised to the Commission, rigorous consideration must be given to them in the light, at all times, of full submissions and evidence being presented, to achieve an outcome in which the interests of workers and society will be balanced to the fullest possible extent.

Giving women more opportunities to become tradespersons (Emerita Professor Hughes) or to reach higher management positions (Rimmer) could increase the average wages received by women. It would not address the quite different problem of undervaluation of women's work.

Sheila Rimmer at the conclusion of her paper "Occupational Segregation, Earnings Differentials and Status among Australian Workers" (1991) stated:

> The overwhelming impression gained from this research is the extremely slow pace of improvement in women's working lives. In the light of other work, the finding that women generally have lower paid and lower status jobs than men is not surprising. It is the stability of their relatively lower position after over twenty years of marked employment growth which is surprising. Whatever the value of the index of segregation, the best hope for improved welfare for women is not necessarily through affirmative action, but through policies to eliminate discriminatory pay practices on other than efficiency grounds, and through policies which ensure equal access to prestigious work within occupations. (pp 215-216) (my emphasis)

There are already provisions in the 1996 Act, which are intended to remedy undervaluation of work, whether or not such undervaluation was based on factors related to gender. I refer, without discussing them further, to such provisions as s.3(f) of the objects of the Act and s.19(3)(e), under which the issue of discrimination, including pay equity, is to be reviewed at least once every 3 years. Even so I believe that these provisions can be improved upon. My recommendations in that respect are to be found in that section of the Report dealing with "Equal Pay and Remuneration: International Instruments, Industrial Jurisprudence and Statutory Reform".

A point in relation to the operation of the 1996 Act arose in the course of a further submission by HREOC that the remuneration negotiated under the collective bargaining agreement constitutes remuneration for the purposes of determining equal pay: *Barber and Co v NCR Manufacturing Ltd* ( (1993) IRLR 95 at 99). HREOC submitted:

> The final example of indirect discrimination and the criteria referred to in our domestic legislation is differential pay results from enterprise or collective bargaining do not justify departing from the principle of equal pay for work of equal value. This is collective bargaining as opposed to bargaining power. Otherwise if the results of collective bargaining could be used to justify moving away from equal pay, employers could separately bargain with separate employees, or different jobs under the same umbrella organisation. I have cited Enderby v Frenchay Health Authority and Secretary of State for Health (1993) IRLR 593 at 595.
>
> That involved vocational speech therapists as against their comparatives, who were male clinical psychologists and pharmacists who managed to secure a better deal by collective bargaining. The European Court of Justice found there had been a breach of Article 119.

It would seem to me that s.35(2) of the 1996 Act is intended to prevent the "divide and conquer" approach indicated in the above cited case. In *Appeal by Council of Holmesglen Institute of TAFE* (Print Q3673), a decision handed down since the finalising of evidence and submissions to the Inquiry, a Full Bench of the Australian Industrial Relations Commission upheld on appeal, in respect of a very similar provision in the *Workplace Relations Act* 1996, a decision by *Smith* C at first instance refusing to certify six s.170LK agreements, which agreements covered six different units within Holmesglen TAFE Institute.

The move from a centralised wage fixing system to the more decentralised system of enterprise bargaining will throw further stress, not on to the operation of the work value principle as such, but on the ability of the Commission to investigate and/or monitor the value that has been placed on the work of male and female employees.

The Industrial Relations Commission has the ability to examine awards, and so be more inquisitive as to changes to conditions for casuals, part time workers and others. Its ability to do so in respect of agreements is more limited. In recommending that the legislation be varied to give the Commission that ability, I realise that that approach is a major development from the way the Commission has operated, by statute, (although not in practice) in relation to agreements until the present decade (with the exception of one short period during the earlier days of the wage fixation principles). As later discussed, I believe such a development is necessary to prevent inequities in work value to develop undetected and unchecked.

In any principle to be developed, or in award reviews under s.19, it would be anticipated that the Commission would require much more than what is now often a ritual response to the requirements of s.35(1)(a) of the 1996 Act and para (i)(e) of the Enterprise Agreement principle in relation to anti-discrimination:

"The agreement does not breach the *Anti-Discrimination Act* 1977".

As was said by the Full Bench in *In re Principles for Approval of*

*Enterprise Agreements* (*Fisher* P, *Cahill* VP, *Bauer* and *Schmidt* JJ, *Neal* C; IRC96/5032; 19/12/96) in relation to the requirement of *Rule* 41 in relation to the filing of a 'comparison and compliance statement':

> It seems to us that something more than a more assertion that the provisions of the *Anti-Discrimination Act* have been complied with is required, and that relevant aspects of the negotiations and the agreement itself should be referred to. (pp 44-45)

Such a statement would apply equally in the context of undervaluation/pay equity.

**TERM OF REFERENCE 4 (TERM 4)**

In relation to Term 4 it seems to me that the Commission, which makes all State awards, and approves all enterprise agreements, must be in the forefront of action not only to guard against pay inequity/undervaluation in those instruments presented to it but also to develop forward thinking strategies to pre-empt the development of pay inequities. That is particularly so in the light of the continuing and rapid shifts, as noted earlier, in employment patterns, often affecting industries and occupations in which females are prominently engaged.

Nothing put before the Inquiry suggested that the usual mechanisms for bringing applications before the Commission could not be satisfactorily utilised in relation to pay equity applications. To the contrary, the Crown parties, NEPC, Labor Council and HREOC accept the Commission as the most appropriate jurisdiction for dealing with pay equity matters. It would also

seem that the Employers' Federation/Chamber accept the jurisdiction, but, rejecting the existence of pay inequity, see no need for any special mechanisms.

However, the issue of onus was raised by the parties, the Labor Council in particular contending that in pay equity matters, there should be some modification to the usual position that the person who asserts proves. The employers resisted any such change.

The submission, it seems to me, does not distinguish the matter at issue - undervaluation of work as against discrimination against employees, particularly female employees. It relates back to discrimination legislation and cases per se.

The material put before the Inquiry in respect of the various selected industries and occupations shows, in my view, that an applicant alleging undervaluation may have different problems from those that arise in other cases presented to the Commission. The collation of award histories, the seeking out of necessary witnesses, (present or past employees), expert witnesses (industry and/or issue specific, e.g. the economy) and the intelligent analysis of such material (as for instance in the librarians' case of a realisation of the import of one table in an earlier report as to the sparsity of qualifications held by males) would be within the capabilities of those alleging undervaluation. However, much of the other relevant material such as company employment policies, position descriptions, pay records, work evaluations etc would be within an employer's control.

As I have earlier noted, it may be the case that the approach to an application alleging undervaluation should be that it be conducted more along the lines of an inquiry rather than as proceedings *inter partes*. There is precedent for that approach in *In re Crown Employees (Teachers - Department of Education) Award* (1970 AR 345 at 516) where it was said that, because the Public Service Board recognised that it had a responsibility to assist the Commission in a most difficult task, the case had been conducted more like an inquiry than adversary proceedings. This may be a matter which could be addressed in proceedings relating to the formulation of a pay equity principle.

In the event that material necessary to assist an applicant's case is held by employers or others, and co-operation as to access to it is denied to an applicant, the usual resources of the Commission may be utilised by the applicant.

**TERM OF REFERENCE 5 (TERM 5)**

This matter is dealt with in a detailed way in that section of the Report headed the "Impact of NSW Pay Equity Inquiry's Decision on the NSW Economy etc". I turn at this point to make some preliminary observations.

The extract set out below from the evidence of Mr Cox (Ex 277 paras 16-22) probably illustrates very concisely the basis that appears to drive employers, to a greater or lesser degree, to fear this Inquiry and its possible

outcomes. (That same extract could also explain the basis of the hopes expressed, in various ways, that the outcome of the Inquiry will be the remedying of all existing pay inequity based on gender.)

The evidence of Mr Cox is that:

16. It is possible to derive crude estimates of the gender pay gap from Australian Bureau of Statistics (ABS) earnings data, and there are more sophisticated estimates in the economics literature of the gender pay gap in Australia. However, various interpretations can be put on these estimates depending on the particulars of the methodology and data utilised. Suffice it to say that there is no single measure that could be characterised as being widely agreed.

17. The most extreme estimates of the size of the gender pay gap come from looking at aggregate average earnings measures by gender. For example, ABS data indicates that in 1996/97 female full-time adult average weekly total earnings were only 79.4 per cent of male earnings. If the average for female dominated occupations is compared with that for male dominated occupations, an even larger value is suggested.

18. However, as many analysts have pointed out, part of these differences can be accounted for by the fact that males on average work longer hours, including additional overtime. This is confirmed by the fact that in a comparison that excludes overtime female average weekly ordinary time earnings (AWOTE) are around 83 per cent of male.

19. The estimates will be further reduced when comparisons are restricted to full time workers, and further reduced again if the focus is limited to adults. Nevertheless, this still leaves gender gaps of in excess of 15 per cent.

20. What then of the quantum of employees who might be directly affected by pay equity adjustments? Pay equity adjustments should only directly impact on employees in female dominated occupations. While around 43 per cent of employees are female (in both NSW and nationally), only a proportion of all females are employed in female dominated occupations. However, pay equity adjustments will also be likely to affect the pay of males in female dominated occupations.

21. According to ABS occupational employment data for May 1996, around 35 per cent of employees are employed in occupations where more than 65 per cent of employees are female - around 65 per cent of female employees and 12 per cent of males. Therefore, if the majority of such occupational groups were to be subject to pay equity related adjustments, quite a large proportion of the total labour force could potentially be impacted.

22. The foregoing discussion provides the basis for many of the concerns raised before the Commission by some of the participants to the Inquiry. Were the aggregate gender pay gap to be closed by pay equity adjustments to be 15 per cent, and were that gap to be closed through increasing the pay of employees in all occupations which are 65 per cent or more female, the pay of the affected groups would need to increase by around 33 per cent. If such adjustments were to be implemented rapidly, it is highly likely that there would be considerable dislocation to the NSW economy and to the employment prospects of some sectors of the population. This may be the view put forward by some parties to the Commission. Nevertheless, the premise is clearly false for at least two reasons. First, under the proposed adjustment mechanism through the award setting process, it will not be possible for pay equity adjustments to be introduced rapidly across a broad range of occupations. The adjustments will not be across the board in the nature of State wage cases. Second, as discussions of the gender pay gap in the economics literature indicate, further adjustments to the aggregate estimates need to be made to take account of differences in the characteristics of female and male employees that are likely to impact on their productivity.

In para 26, he says:

26. A final point to note in regard to the size of the gender pay gap is that the estimates referred to so far relate to the aggregate and tell us little of [sic] nothing about the extent to which pay may need to be increase [sic] in particular occupations. Professor Gregory made the point that the relationship between the ratio of females in an occupation and the pay gap may be non-linear. In particular, the pay gap may be proportionately greater for occupations with very high proportions of females than those with lower proportions. No evidence relating to this point is offered here, but it does seem plausible that this is the case.

> Therefore it is expected that the size of pay equity adjustments will differ and may differ quite considerably between occupations. The required adjustments could be quite large for some occupations.

The fears of the employers may have been exacerbated by evidence such as that in a supplementary witness statement (Ex 184) to the report "Trade Credentials: do they help pay equity?", a research project comparing hairdressers and motor mechanics (Ex 186), in which Ms Meg Smith stated that 1996 earnings data illustrated that:

- on the ordinary time earnings measure, male motor mechanics earned $153.70 more than female hairdressers for slightly less hours; and
- on the total earnings measures, male motor mechanics earned $228.80 more than female hairdressers for slightly more hours. (Ex 184 p 1)

In the report "The Economic Impact of Certain pay - equity scenarios for N.S.W." (revised 5 May 1998), a report prepared for the NSW Treasury by the Centre for Regional Economic Analysis (CREA) at the University of Tasmania (Ex 277 Annex 3), it was stated that just over 60 per cent of the total New South Wales female wage bill is accounted for by female-dominated occupations (p10). However, although it may be that there would be large increases in some occupations and/or industries, that is put in perspective by the CREA Report (Ex 277, Annex 3, pp 30-31), which states that the occupations of Librarians and Hairdressers combined make up only one per cent of the female

wage bill in New South Wales. In New South Wales, the total librarians' wage bill is about half of what it is for hairdressers (Ex 277, Annex 3, p 31). According to Mr Cox, in the case of public sector librarians, the numbers affected are small and the consequences for the New South Wales Budget would be likely to be marginal (Ex 277 para 36).

The fears of employers were somewhat exaggerated. The concerns expressed were sometimes based on extreme assumptions. For example, as in Mr *McDonald's* cross examination of Ms Kerr when he asked her what the impact on the operation of her department at North Shore Hospital would be if wages of Enrolled Nurses were increased to $1000 per week, or if their rates were doubled (from $555.53) (though no one had suggested a pay gap of 100 per cent or of any 100 per cent increase in female wages).

Indeed, Mr Cox said in reply to cross examination by Mr *Britt* that because the results of this Inquiry were not known, Treasury had proceeded from that stand point and therefore would not try to make assertions in that regard. Treasury wanted to examine some scenarios in regard to that issue.

Although, as Mr Cox says, there will be both winners and losers, from any pay equity adjustment, his final paragraph, in my view, places the issue of pay equity in a much wider context:

> Finally, it should be noted that the results in the CREA study and in Table A above do not provide measures of economic welfare changes brought about by pay equity adjustments. Economic welfare measures are broader than measures of output and it is

quite possible for economic welfare to increase even if GDP falls. As already noted above, to the extent that there is gender based work value discrimination, it is likely that pay equity adjustments that counteract this discrimination will improve economic welfare. This is because there will be a better allocation of resources in the economy which is likely to lead to higher levels of productivity. (My emphasis) (Ex 277 para 61)

I would have thought that such an outcome is in the interests of everyone, including employers.

**********

I now turn to other matters.

## ROLE OF COUNSEL ASSISTING

The first ruling in this Inquiry was made on the first day the Inquiry was listed. Its origins lay in a letter from the Employers' Federation and a number of organisations it then represented advising that those organisations did not accept the Draft Directions given by *Glynn* J on 28 November 1997, for the reasons, as they said, that:

Given:

(i) the nature of the subject matter of this Reference;

(ii) the history of the issue leading up to the making of the Reference;

(iii) the clearly adversarial position of the proponents (the Government and the Labor Council) and the opponents (the employers);

(iv) the unambiguous position of the Government as to the absence of pay equity;

(v) the Governments role in selecting and instructing Counsel Assisting;

(vi) the absence of any consultation or hearing about whether Counsel Assisting should be appointed and, if so, who should be appointed and their role;

(vii) the fundamental need for the independence of the Commission to be maintained both in fact and in perception; and

(viii) the importance of the ramifications of the outcome of the case for the State and nationally.

the employers will submit that the role of Counsel Assisting be suspended, and that the Commission first hear interested parties on the issue of whether such an appointment should be made in this case.

Despite the issuing of an *ex tempore* judgment (Appendix 17) rejecting both the Federation/Chamber's primary application, and the secondary one advanced on their behalf in the course of submissions, that being that solicitors other than the Crown Solicitor should instruct counsel assisting, not understanding the role of counsel assisting continued to inform the approach of those organisations, as demonstrated in the myriad of procedural issues raised by them in the course of the Inquiry, such issues being appropriate to proceedings *inter partes*, not to those of this Inquiry. As a consequence, an inordinate amount of time and energy which could have been much more productively used, were diverted from general assistance to all parties to addressing what were, in most instances, matters lacking real substance in relation to the deeper issues before the Inquiry.

To clarify the situation once and for all, the position of counsel assisting in this Inquiry was that described in "Royal Commissions and Boards of

Inquiry - some legal and procedural aspects" by L A Hallett (Monash Studies in Law; Law Book Co., 1982), extracts of which are set out below:

> When as inquiry has been appointed and it is the intention of the government that legal counsel should assist, it is the practice for the Crown Solicitor to be instructed to brief counsel.
>
> ...
>
> The Solicitor-General had approached the Bar Council for its view whether counsel should be "appointed" or "briefed". The reason for the approach was a concern by the Solicitor-General that counsel assisting should be free and not feel bound to follow any particular instructions or line of argument. Normally within professional limits, counsel is "instructed" by a solicitor. If counsel were to be "appointed" rather than "briefed" there could be no question of counsel being constrained in his role of assisting an inquiry.
>
> ...
>
> Reference has been made to the fact that counsel are briefed "to assist" Commissions and Boards. The duty to inquire and report is imposed upon the Commission or Board and it is necessary to examine the function counsel has which is described as "assisting".
>
> When counsel has been appointed or briefed to assist at an inquiry, in practice, the assembly and presentation of evidence necessarily devolves upon him. It is to him that all evidence is submitted, whether it be directly from members of the public, through his instructing solicitor, or perhaps through the secretary to the inquiry. The correlation and presentation of material is an important function of counsel assisting. It is counsel assisting who first calls and examines witnesses.
>
> Because it is counsel assisting who comes into possession of the information which is to be presented, and a person conducting an inquisitorial inquiry would normally only desire to be acting "on the evidence", counsel assisting can find himself faced with difficult questions. How much information should he provide to the Commission or Board before the evidence is formally presented? And should he ultimately present all the information collated or should he exercize [sic] an independent discretion and exclude that which he regards as irrelevant or unhelpful? The first dilemma which can face counsel assisting was referred to by a Canadian Queen's Counsel experienced in assisting Commissions of Inquiry in a submission to the Law Reform Commission of Canada:

> "The question of how much Commission Counsel should tell the Commissioner about the evidence to be given has troubled most Counsel. Some Commissioners merely want to know, in a general way, what any given witness is likely to be testifying about and how long he is apt to be. Other Commissioners, I am told, practically insist on seeing the interview notes in advance, possibly in order to assist in the preparation of their own cross-examination. It is difficult to know how to handle that situation."

...

It is Commissions and Boards which are charged with the duty of inquiry, recommending and reporting. It can be argued that all material should be submitted to the inquiry and that counsel assisting should merely take directions as to what he is to do. In other words, a Commission or Board should instruct counsel about the investigations which are to be made, which witnesses are to be interviewed, the order in which the proceedings are to be conducted and the method by which they are to be conducted.

In theory that is probably the position, but, in practice, counsel assisting have developed, at least in some inquiries, a more responsible role. No doubt that development has taken place because of the calibre of counsel briefed to assist and also because of the exigencies of particular inquiries. Also it can properly be assumed that part of the reason counsel assisting has developed a high degree of independence is that he is standing in the shoes of the Attorney-General representing the public interest. Reference is made below to the fact that in England, at least before the report of the Salmon Royal Commission (1966), the Attorney General often acted to assist Tribunals of Inquiry.

...

Ultimately a Commission or Board has control of an inquiry. It has the duty to conduct the inquiry and counsel is briefed merely to assist in the discharge of that function. Nevertheless, there are cogent reasons for allowing a counsel assisting a degree of latitude or independence in the performance of his function. That independence must depend upon the type of inquiry being undertaken. In an investigatory inquiry there is less likelihood that there would be any significance in the independence of counsel assisting, but in an inquisitorial inquiry it can be extremely important.

This Inquiry has been investigatory in nature. (The specific Victorian experience referred to does not detract from the general principles

involved and are equally apposite for application here.)

The very first statement made by myself in this Inquiry was, as recorded on page 1 of transcript:

> Mr Walton, you have been appointed counsel assisting this inquiry.
>
> (Emphasis added)

Although this Inquiry is not a Royal Commission, comments by the Privy Council in *Mahon v Air New Zealand Ltd & ors* on Appeal from the Court of Appeal of New Zealand ([1984] 1 AC 808 at 814) as to procedures adopted in an investigative inquiry into facts by a tribunal of inquiry are pertinent for consideration:

> An investigative inquiry into facts by a tribunal of inquiry is in marked contrast to ordinary civil litigation the conduct of which constitutes the regular task of High Court judges in which their experience of the methodology of decision making on factual matters has been gained. Where facts are in dispute in civil litigation conducted under the common law system of procedure, the judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search of his own part for the truth; and if the parties' evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lie, he must decide the case by applying the rules as to the onus of proof in civil litigation. In an investigative inquiry, on the other hand, into a disaster or accident of which the commissioner who conducts it is required, as the judge was in the instant case, to inquire into and to report upon "the cause or causes of the crash," it is inevitable, particularly if there are neither survivors nor eyewitnesses of the crash, that the emergence of facts, and the realisation of what part, if any, they played in causing the disaster and of their relative importance, should be more elusive and less orderly, as one

> unanticipated piece of evidence suggests to the commissioner, or to particular parties represented at the inquiry, some new line of investigation that it may be worth while to explore; whether, in the result, the exploration when pursued leads only to a dead end or, as occurred in one particular instance in the present case, it leads to the discovery of other facts which throw a fresh light on what actually happened and why it happened.

It should also be noted that the Privy Council described as "sensible" the procedure to be adopted at the inquiry outlined by counsel assisting the judge, that being that the parties represented should furnish to counsel assisting the judge written briefs of the evidence to be given by their witnesses and that this should be done well in advance of those witnesses being called, so as to enable the evidence to be collated and, if need be, elaborated.

General principles enunciated by *Wilcox* J in *Bond v Australian Broadcasting Tribunal* ( (1988) 19 FCR 494) are also apposite:

> Thirdly, an inquiry instituted by the Tribunal under s17C(1) of the *Broadcasting Act* is inquisitorial in character.
>
> ...
>
> The final proposition is contentious. Counsel for the applicants suggest that, although an inquiry under s17C(1) starts life as an inquisitorial proceeding, it subsequently becomes adversarial in character. This metamorphosis occurs, counsel submit, when witnesses associated with a party potentially adversely affected by the Tribunal's decision are about to give their evidence. At that point, say counsel, procedures commonly associated with inter partes litigation, such as the supply of particulars of allegations, become appropriate.
>
> I see difficulties about this submission.
>
> ...
>
> Secondly, underlying the submission is a notion that, when witnesses associated with a particular party are called to give

evidence, by counsel assisting, or by the Tribunal itself, the Tribunal is then hearing that party's case; so that there is an obligation to supply precise particulars of allegations before those witnesses are called, this notion treats those witnesses as being witnesses for that party, notwithstanding that they are called otherwise than at the initiative of that party.

...

I think that the submissions to which I have adverted are erroneous. The inquiry remains throughout an investigative proceeding. All witnesses called by counsel assisting, or by the Tribunal, are called in aid of that investigation; not to put anybody's "case". I agree that, at some stage, a particular party may wish to put a positive "case" to the Tribunal; and, for that purpose, to call witnesses who might not otherwise have been called. Although it was probably not necessary to so provide, s25(3) specifically affirms the entitlement of a party to take that course. But these circumstances do not mean that, at some stage, the inquiry changes its character from an investigation to an adversarial proceeding or that the entitlement of a party to present his or her own evidence changes the proper characterisation of the evidence of the witnesses called by counsel assisting or by the Tribunal.

..

I have previously referred to the notion adopted by those advising the applicants that those witnesses who have, or who have had, some continuing association with the applicants are necessarily witnesses in the applicants' own case. This is not correct.

...

The witness is called to assist the inquiry. Subject to any special statutory provisions, or agreement, to the contrary, it is for the person conducting the inquiry to determine both the time when that witness will be heard and the order in which the various counsel may question the witness.

...

In support of their submission that they are entitled to determine the order in which the "Bond camp" witnesses give their evidence, counsel for the applicant cite *Briscoe v Briscoe* [1968] P501 and *Barnes v BPC (Business Forms) Ltd* [1975] 1 WLR 1565; [1976] 1 All ER 237. These were both cases in which the court emphasised the entitlement of the representative of a party to determine the order in which the witnesses for that party are to be called. Both cases were ordinary inter partes litigation.

...

> The principle applied in *Briscoe* and in *Barnes* is not in doubt. But it has no application to the present question. The so-called "Bond camp" witnesses are not being called - at least at this stage - as part of the case being made to the inquiry by the present applicants. They are being called, upon the initiative of counsel assisting, because those counsel think that they may be able to assist the Tribunal in relation to the relevant issues.

It is my firm view that counsel assisting should be engaged in inquiries before this Commission. Furthermore, I consider that the procedures adopted by counsel assisting in this case represent a model approach for future investigative type inquiries. I consider that the approach adopted represented an appropriate balance between fairness to those appearing and the need for an efficient management of the inquiry process. The result of the procedures adopted here (together with the direct personal effort of counsel assisting's office) ensured that the interests affected had a great opportunity to participate and contribute within the parameters of a highly efficient and timely inquiry.

## EQUAL OPPORTUNITY AND EQUAL TREATMENT

As I have already noted, the areas as to which recommendations are to be made by the Inquiry, in the event that pay inequity based on gender is found to exist, are very restricted: what changes to existing work value tests and mechanisms need to be made to achieve equitable outcomes? The Terms of Reference did not go to equal opportunity or equal treatment issues per se.

The evidence, such as that given by Ms Bennett, to the Inquiry

does, however, suggest other areas requiring serious consideration by the industrial parties as being serious contributors to pay inequities:

- in relation to casuals, do allowances adequately compensate for additional benefits accruing in more recent times to full time employees, such as family leave?
- where such allowances have been traded off, have the interests of casuals, many of whom are women, been adequately protected or even considered?
- deficiencies in the general educational system;
- lack of access to training;
- unequal access to promotion;
- non recognition of short course qualifications or of on job training or self tuition necessary to obtain proficiency in job functions such as with changing software packages;
- access to career breaks;
- "harder" promotional barriers in awards as against "soft" barriers, not directly gender based.
- cultural attitudes;
- access to overtime;
- effect of hours of work on access, promotion and training.

Although not caught within the Terms of Reference they raise issues that will not go away or be inoperative simply because they are ignored.

Each of those areas would have its own complexities, as the area of casualisation, for instance, demonstrates.

The increasing casualisation and part-time nature of work has particular implications as to the valuation of work. More women than men are employed other than full time. Such people tend not to be members of unions, or if they are, are difficult to involve in union activities of interest to them e.g. award negotiations. More resources are required by the unions to recruit non "full-time" employees. As the numbers of full time members decrease, the unions' financial resources contract, thus leading to a downward spiral of members/finances and consequent inability to recruit and try to protect non "full-time" workers.

Furthermore, and ironically in the light of the above, in relation to the possible devaluation of the work performed by casual employees, such devaluation often occurs out of award/agreement negotiations, the objective being to enhance the valuation/compensation of the work performed by employees employed either full time or part time. On the basis that casual employees are, in the majority, female, and also are often employed in female dominated industries, that undervaluation could also be occurring to bolster the valuation of the work of a majority full time female work force.

It has been received wisdom for many years that an employee could no longer expect to remain with the one employer for his/her working life,

even in the public service, which, up until recent times, has been seen as the rock solid example of permanent employment for life. It came to be accepted that an employee would need to be retrained some three times in the course of his/her working life. Within that acceptance, however, was the understanding that such replacement employment, for its duration, would be permanent and full time.

That, however, may also simply be another phase in the changing expectations as to work. This was not specifically dealt with in the Inquiry. However, there are indications in the day to day work of the Commission, particularly in the unfair dismissal area, that workers may now be moving from permanent to part time employment, with 2 or more jobs being occupied to achieve "full time" employment. If that is to be the case, it reinforces the concerns raised during the Inquiry as to pay inequity for casuals and part timers.

What the Inquiry has revealed are other sources of possible undervaluation that do not affect a specific industry or occupation as such, but rather a class of worker, which class may or may not be female dominated. An outstanding example of such a possible cause of undervaluation is the misalignment of qualifications.

## GENERAL

The Inquiry occupied 54 sitting days, recorded in 2,963 pages of transcript.

One hundred and nineteen witnesses were called at the instance of counsel assisting and of the parties.

The Inquiry has had the advantage of direct evidence from workers and employers, of over arching evidence from people experienced in each of the selected occupations and industries, including representatives of the main professional/industrial organisations, and from experts from different disciplines - industrial, economic and sociological.

There were some 48 expert witnesses whose evidence went to many areas including economic analysis and related analysis of labour markets, pay differentials, the incidence and scope of industrial instruments, the notion of comparable worth, theories of pay equity work value, and job evaluation concerning industrial relations and discrimination.

The decision to adduce direct evidence in relation to the selected industries and occupations prior to determining in advance the meanings of "comparable" and "remuneration", and prior to the adducing of the expert evidence, proved itself to be most effective. The analysis by Dr Clare Burton, for instance, in relation to the complexities and attributes of women's work, directly complemented the evidence given earlier by Librarians employed at the State Library.

(The Commission records, with great regret, the death of Dr Clare Burton who made a valuable contribution in her evidence to the Inquiry.)

The total of 459 exhibits does not in fact reflect the extent of the documentary material tendered. Many of the individually numbered exhibits consisted of multiple documents, studies, articles etc. Indeed, the wealth of the material tendered only became fully evident when the formal hearings concluded and the preparation of the final report became more concentrated. As the bibliography of sources cited shows, the Inquiry has had the benefit of information culled from state, national and international sources. Papers and studies were specifically commissioned to inform the Inquiry's consideration, and have been subject to testing from the diverse parties before the Inquiry.

A number of videos were tendered, including four which were attached to Mr Ian Batty's statement relating to the surveillance and inspections he had undertaken in relation to the outworkers' section of the Inquiry, those videos including coverage of factory premises he had visited. (Also attached to his statement were tape recordings of interviews conducted by him in the course of those same inquiries). Other videos tendered were in relation to the hairdressing section of the Inquiry.

Particular difficulties arose because of the lack of understanding of parties, to a greater or lesser degree, that the proceedings involved an inquiry, not proceedings inter partes. (This was made particularly obvious in the application by the Employers' Federation/Chamber that necessitated the first interlocutory decision to be made at the first directions hearing, as to the appointment of counsel assisting, a subject discussed earlier.)

Problems also arose in relation to the bringing forward of evidence in relation to some of the comparators originally nominated in male dominated industries, either with reference to a specific business/organisation or to a classification in an award covering the employees of the proposed comparator. Unfortunately, parties had not always consulted with the nominated comparator in advance of nomination, leaving the office of counsel assisting to deal with the reaction of such bodies unexpectedly finding themselves being dragged into proceedings of no direct interest to themselves and with all the consequent costs and inconvenience to them that would arise.

The reaction to the evidence, oral and documentary, that has been presented to the Inquiry, has varied widely. On the one hand, all but one party has submitted that in at least one of the selected occupations and industries a pay inequity based on gender has been shown to exist. Remedies were suggested.

On the other hand, the Employers' Federation/Chamber submits that no "undervaluation" has been demonstrated in any of the occupations/industries selected for comparison. The recommendations proposed by that group were the removal of provisions in the 1996 Act which deal with "pay equity" and the restoration of the exemptions for awards and enterprise agreements from the provisions of the *Anti-Discrimination Act* 1977 formerly provided by the now repealed s.54(1)(e).

**ACKNOWLEDGMENTS**

Michael Walton, with whom Patricia Lowson appeared, was appointed counsel assisting.

Counsel assisting with Ms Lowson, first of all had to put in place by 17 December 1997, the date of the first mention of this matter, a solid basic infrastructure to allow the Inquiry to proceed. He then welded together a team, each of whom worked long hours seven days a week, to progress the Inquiry. The core of that team comprised Les McKay (Crown Solicitors Office), Shanti Herd, Sharren Turner and Rebecca Turner and, supplemented by the assistance of Larissa Kotlaroff, Tracy Goodall, Kate Ellson, Peteris Ginters of counsel and Simeon Beckett of counsel.

The Commission's Librarian, Jenny Stonehouse, from the outset of the Inquiry was particularly helpful in gathering together much useful background material.

My Associate, Ms Jackie Sharman, in co-ordinating the interaction between the Office of Counsel Assisting and myself, worked unstintingly, foregoing holidays and weekends to do so. After the winding down of the Office of Counsel Assisting the whole burden of producing the Report document fell on to her.

Whatever benefits flow from this Report to the people of this State will be in large part due to the assistance I received from their combined efforts (all omissions and errors, of course, being my own). Their assistance has given the Report a richness and depth it could not otherwise have had in the time frame of this Inquiry.

I have particularly noted in the section in Outworkers, the assistance given by Mr Ian Batty, a senior inspector with the WorkCover Authority of New South Wales, to the Inquiry. I now formally record my appreciation for that assistance.

At this point, I also place on the formal record my appreciation to the management and employees at the various locations who co-operated so wholeheartedly in organising site inspections to assist the Inquiry in its deliberations. Their courtesy and unstinting help was greatly appreciated in all cases, but particularly so when their organisations were being used to demonstrate a male comparator and their interest was simply to assist the Commission.

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## STATISTICAL AND ECONOMIC ANALYSIS OF MALE AND FEMALE WAGE DIFFERENTIALS

The wage differential between male and female employees is often referred to as the pay gap, gender pay gap or gender pay differential. Many commentators point to a persistent pay gap in Australia. Economists refer to a pay ratio. The pay ratio is simply the ratio of female to male earnings. If women earned the same as men the pay ratio would be measured as one hundred per cent. The pay ratio favours men at the present time when earnings are calculated on a per annum, per week or per hour basis, although the pay ratio rises as the time unit becomes shorter. This occurs because women, on average, work less weeks per year and less hours per week than men (Ex 99 para 1).

In Australia, and in all OECD countries, women earn less on average than men although the pay ratio will vary across countries. In Australia and Scandinavia the pay ratio is higher than in most other countries (Ex 99 paras 1 and 2).

The pay ratio in Australia was very low for 1969 but increased considerably over the next seven years, principally as a consequence of the 1969 and 1970's Equal Pay Case decisions in Australia. As Professor Gregory pointed out, these decisions markedly increased award rates of pay for females and the award changes were rapidly reflected in a change of earnings (Ex 99 para 4). Decompositional analysis of the sources of the gender wage gap, which

analysis I shall discuss shortly, has suggested that the hourly wage differential between female and male workers, that can be attributed to 'wage discrimination', (in the sense that this expression is used by economists as referred to in the quotation from Associate Professor Borland set out below), decreased from 43 per cent to 12 per cent between 1973 and 1989 (Miller 1994 and Associate Professor Borland, Ex 277, Annex 2, para 4). I will return to decompositional analyses of wage differentials later in this section of the report.

**MEASUREMENT**

At the outset, however, it is important to recognise that measures of the gender pay differential will differ, depending upon the methodology employed in ascertaining that differential. Associate Professor Borland in his useful paper entitled *"Consequences of Pay Equity; A Theoretical Perspective"* (Ex 277, Annex 2) contends that the assessment of the male - female wage differential will depend upon the choice of the measure of pay and upon the type of comparison of pay that is made. He describes the differences of approach in the following way:

> First, with regard to the choice of measure of pay, it is possible to calculate relative pay of male and female workers using either hourly wage rates or weekly earnings. Generally the former measure is to be preferred since it reflects differences in the single 'price' of labour whereas the latter measure confounds differences in weekly hours of work and the price of labour. Since weekly hours of work for male employees are greater than for female employees the ratio of female to male weekly employees would generally be below the ratio of female to male hourly wages. Second, comparisons of the pay of male and female employees can be made using 'raw' or unadjusted data on the average hourly wages or weekly earnings of those employees, or after correcting

> the pay data for gender differences in skill and job related characteristics - the latter approach provides an estimate of the
>
> gender pay differential which would exist between male and female employees with identical skill levels working in the same jobs. The latter measure is generally referred to by labour economists as 'wage discrimination' (P 42, footnote 1).

**STATISTICAL DATA**

By way of illustration, the ABS series entitled *Employee Earnings and Hours, Australia* (May 1996) (ABS catalogue number 6306) shows the variation in the estimation of the earnings gap. The earnings gap is 34.6% when the total earnings for all employees are measured. This gap falls to 10.5%, if the earnings gap is measured for full-time adult non managerial employees. Thus the gap falls considerably if overtime and managerial employees are excluded from consideration. If an adjustment is made for "hours paid for", as distinct from actually worked, the measured earning gap in ordinary earnings for full-time non managerial adult employees declines from 10.5% to 9.1% (Ex 101 p 2).

Professor Wooden stated that Australian Bureau of Statistics data indicate that a gap exists between male and female weekly earnings, ranging from 10% to 35% depending upon:

(i) which type of workers are compared; and

(ii) what factors are included in earnings (Ex 101 p 2).

## ECONOMIC ANALYSIS - AGGREGATE DATA

### DECOMPOSITION OF DATA AND VARIATIONS

By way of contrast to the earlier statistical approach, an economic model known as the human capital model seeks to explain the causes of the gap by having regard to the endowments of workers (albeit with some limitations which I will discuss later). The Commission considered a substantial body of economic evidence and literature in which raw data was adjusted by means of decomposition analysis. Regression results are used to decompose the causes of gender wage differential into its different contributing components and provide, inter alia, an estimate of the extent to which the concentration of women in specific occupations contributes to that differential. Thus, an attempt is made to explain the causes of the pay gap and, in particular, whether the pay gap may be attributable to gender, or even to gender discrimination or inequity, as opposed to other factors not associated with gender.

For example, in his statement of evidence, which contained some original empirical research on the issues of gender gap and pay equity, Professor Wooden analysed whether females were treated unfairly in the labour market. He specifically considered the extent to which unequal remuneration of comparable occupations was responsible for wage differentials (Ex 101 p 4).

Thus the economic analysis potentially offers important information

bearing upon the issues raised by this Inquiry. If occupational segregation adversely affects the earnings of women then, as the economic analysis posits, a priori there is a gender based causation for the wage gap. This consideration goes directly, although broadly, to the question of the valuation of women's work, because a finding that an increase in the share of females in an occupation reduces the earnings in that occupation in a significant way, would suggest that there is an undervaluation of the earnings of those persons, leaving aside other considerations such as wage equalisation theories and notions of self selection or choice in earnings determinations.

There are at least two important questions that need to be addressed in reviewing the economic evidence concerning the gender wage differentials. These go directly to the significance which should be placed upon such differentials. Firstly it is necessary to ascertain whether occupational segregation contributes to earnings. Secondly, to what extent does it have an impact. If these findings are affirmative, then it is possible to conclude, prima facie, and at a broad or aggregate level, that there has been an undervaluation of the work of women engaged in the segregated occupations. Put slightly differently, the identification of occupational segregation as having an adverse impact upon women's earnings relates directly to the valuation of those occupations (Gregory T 673 & T 686 and Wooden, Ex 101, pp 4,8,9 & 10). Against these prima facie conclusions, the Inquiry must have regard to countervailing considerations, such as whether there may be some non wage compensation in segmented occupations which counterbalances any depression of wages for females in those occupations.

Associate Professor Borland in his paper indicates that one explanation for the continuation of an earnings differential between male and female employees, notwithstanding the Equal Pay Cases of the 1960s and 1970s is the existence of gender segregation by occupational classification. Table 1 of Associate Professor Borland's paper (Ex 277, Annex 2, p 4) shows a high level of occupational segregation across a range of occupational areas. For example, 72 per cent of health professionals are female, whilst only .6 per cent of the metal, mechanical, fabrication and engineering trades persons workforce, and .08 per cent of automotive trades persons, are female. Similarly, females represent 74.6 per cent of intermediate clerical workers, 70.6 per cent of elementary sales workers and 98.2 per cent of secretaries and personal assistants.

Noting that there are other explanations, Associate Professor Borland concludes that one possible response to findings that occupational concentration for females reduces significantly the earnings of persons in that occupation, is that the implementation of a comparable work policy, wherein the structure of wages should be changed so that the gender composition of occupations would have no effect on the earnings of individuals, should reduce the size of gender differential in hourly wages in Australia (p 5). It is against the background of these considerations I now turn to review to economic evidence in some greater detail.

REGRESSION ANALYSIS

It would seem appropriate to commence with the research conducted by Professor Wooden. Professor Gregory considered that Professor Wooden's methodology raised two essential questions:

(i) across all occupations what is the average effect of the female intensity of an occupation on the hourly rate of pay of men and women? and

(ii) if men were allocated across occupations in the same way as women - and without changing the rate of pay in each occupation - how would the aggregate pay ratio between men and women change? (Ex 100 para 17).

Using the information contained in Professor Wooden's regression analysis (Table 2), Professor Gregory indicated that the answer to the first question would be 6.2%, if industry dummies are excluded, and 10.4%, if industry dummies are included, in the analysis.

The answer to the second question goes to the average effect of female intensity. It is directed to explain what fraction of the pay gap can be explained by occupational segregation. This raises two subsidiary questions: firstly, what the pay effect is, and secondly, how many people are affected.

Professor Gregory explained that Professor Wooden effectively answered the second question as being 2.1%. However, the true answer to the second question was the subject of some debate in the proceedings, both generally, and in relation to an additional and third question raised by Professor Gregory. I will return to these issues after briefly further considering Professor Wooden's analysis.

Essentially Professor Wooden's analysis was based on a replication of the work by Miller (1994). However Professor Wooden used more recent data, and a more extensive array of controls, that is the dummy variables used in the regression analysis (Ex 101 p 1).

Miller (1994) had found that hourly earnings were sensitive to the "maleness" or "femaleness" of an occupation, and found that there was a gender earnings gap of about 6%, which was the result of unequal remuneration of otherwise comparable male and female jobs.

Professor Wooden concluded that the femaleness of an occupation does exert a strongly significant negative effect on both male and female earnings. Thus the results imply that, across industries, women working in almost totally female dominated occupations will earn 6% less than women with otherwise identical characteristics, but who are employed in almost totally male dominated occupations. He says that within industries the effect is somewhat larger (Ex 101 p 8).

The analysis conducted by Professor Wooden concerns linear relationships and shows differences depending upon whether industries are included or not. I will return to the consideration of 'linear relationships' shortly.

When the female/male wage differentials are decomposed into that part due to differences in the mean endowments of men and women workers, 4.2 percentage points of male/female earnings differential appear to be explained by differences in occupational concentration, when industry dummies are excluded (p9). Hence Professor Wooden concludes that unequal remuneration of jobs based on their gender composition has produced an earnings differential between men and women of about 4% (p 9).

However, Professor Wooden then conducts a further analysis in which he excludes managerial employees. He then concludes that the proportion of the average gender earnings differential, which is now only 8.9% according to that analysis, (Table 2 p 9), which is the result of gender based occupational segregational, is now just 2.1 percentage points (p 10). Professor Wooden summarises his conclusions in Exhibit 270 (in reply to Professor Green) as follows:

> Furthermore, the results of my analysis are suggestive of substantial gender discrimination. If it is assumed that I am able to control for all productivity-related characteristics (which is clearly not true, and hence the extent of discrimination will be over-estimated), then the results reported suggest the following:
>
> (i) There is an 8.9 per cent pay gap between men and women (managerial occupations excluded).

(ii) Occupational segregation contributes 2.1 percentage points to the pay gap.

(iii) With respect to other endowments (education, experience etc). women are actually over-remunerated, resulting in a narrowing of the pay gap of 2.8 percentage points.

(iv) Given the above, there is a remaining unexplained differential of 9.6 percentage points (8.9 - 2.1+2.8). This gap is often assumed (by economists) to reflect discrimination (Professor Wooden's emphasis). (p 5)

Notwithstanding different methodological approaches, Professor Green also considered the pay gap to be around 9%-10%. Professor Green contended that adjusting for gender differences in full-time and part-time employment shares, and for gender differences in actual working time, significantly reduces the observed gender earnings gap. He indicates that after adjusting for different proportions of part-time employees and differences in actual hours worked, by gender, Preston (1996) arrived at an adjusted earnings gap per hour of 9%. Professor Green estimates that the female to male ratio of average weekly earnings for full-time employees in NSW is 0.90 for base pay and ordinary time earnings and 0.83 for total earnings, including overtime payments. Hence he concluded that overtime represents a significant component of the female to male earnings ratio (Ex 271 paras 12 to 14).

Professor Gregory considered that the unexplained differential found by Professor Wooden was on the low side for 'this type of [research] work'. He pointed out that different studies had reached different conclusions and that there was little precision in the final percentage amount, which he considered was in a range of 2-6% (Ex 100 para 3). For example, he indicated

that Professor Miller's work relied on a different data base, different period and a different "variance". However, Professor Gregory did find that occupational segregation makes a small contribution to the overall pay gap for men and women (Ex 99 para 29).

Mr Cox, who is a director of Economic Research and Forecasting at NSW Treasury, also considered that Professor Wooden's estimates are "likely to represent the lower boundary for the possible size of the gender pay gap that pay equity adjustments may be required to close" (Ex 277 para 25). Mr Cox considered that, after adjusting for endowments, the differential is "probably closer to the 2 to 5 per cent than 15 per cent ...".

Indeed, Professor Wooden in his 1997 paper "Comparable Worth and the Gender Earnings Gap", referred to by Associate Professor Borland, finds that an increase of 10 per cent in the share of females in an occupation reduces the hourly wage of males in that occupation by 1.3 to 1.9 per cent and of females by 0.6 to 1.0 per cent (Ex 277, Annex 2, p 5).

The economic literature presented to this Inquiry is set out in the Bibliography in Appendix No 1 to this Report. There is a useful summary of much of that work in Table 5 of the Labor Council submission, Exhibit 455. Those studies of the male-female wage differential show different wage gaps in the economic analyses and research, depending upon the methodology employed, ranging from 4 per cent to 32.5 per cent.

There was evidence in the Inquiry which suggested that the actual wage differential may possibly be larger than that estimated by Professor Wooden, particularly in relation to occupational segregation effects, having regard to three methodological considerations:

(i) an examination of non linear or Curbi linear relationships;

(ii) the examination of industry effects; and

(iii) the inclusion of management employees.

LINEAR/NON-LINEAR RELATIONSHIPS

Professor Wooden's analysis was based upon aggregate data, that is the computer system aggregates the relationship across the observations made with respect to individual conditions. In general terms the methodology is dealing with averages. In this analysis, the relationship between earnings and female intensity, or the relationship which traces out the gender occupation effect, is assumed to be linear. Put more precisely, the linear relationship assumes that to move from an occupation that is zero percent female to an occupation that is twenty percent female has the same average effect on hourly earnings as moving from an occupation that is fifty percent female to an occupation that is seventy percent female (Ex 100 para 8).

Professor Gregory queries whether this is a "true relationship" and

refers to the work of Miller (1994), which suggests that the relationship might be non linear, and illustrates the difference in gender effect as between three groups - more than seventy percent male, forty to seventy percent male and less than forty percent male (Ex 100 para 8). Mr Cox considered that it was plausible that the pay gap may be non linear (Ex 277 para 26).

Professor Gregory considers that the linear relationship may underestimate the effect of gender composition on occupations that are "very female intensive". He describes the differences on outcomes as follows:

> In the context of setting awards, and responding to a "comparable worth" we are usually interested in the wages of the most female intensive of occupations and not interested in an average relationship across every occupation. The aggregative methodology adopted by most economists is not well suited for this type of investigation (Ex 100 para 10).

In cross examination Professor Gregory was asked to estimate the effect of introducing a Curbi linear relationship. He estimated that the outcome on average data would be to move the quantum from 2% to 3 to 5% but stressed that the real question was what happened to women in particular occupations.

Professor Wooden adopted a linear analysis because of the R-squared values in his research, and other forms of analysis would have been more complex, more difficult to understand and more difficult to explain. [The higher the R-squared the greater the explanatory capacity.] This is not to say that the non linear relationship could not have been assessed on Professor Wooden's data. In Exhibits 107 and 108 Professor Wooden illustrates the different approaches taken by Miller, Gregory and himself and posits,

diagrammatically, a 'true' relationship. In this 'true' relationship it is clear that the understatement of effect is at the extreme ends of female intensity namely, over 70% and under 30%.

In my view, the estimations deriving from non linear or Curbi linear relationships do increase the aggregate unexplained wage differential and more significantly, as Professor Gregory indicated in his evidence, is particularly significant to the assessments being made by the Commission in this Inquiry.

INDUSTRY DIFFERENCES

As to industry differences it was argued in the Employers' Federation/Chamber submission that the regression analysis demonstrated that industry differences count only for a small difference on the overall size of the female intensity effect. In Table 2 of Professor Wooden's statement (Ex 101), the difference in endowments between industry dummies being included and excluded is .003. However the regression analysis in Table A2 shows a shift from 6.2% to 10.4% when industry variables are taken into account. Furthermore, it should be noted that Table 2 on page 9 of Professor Wooden's statement does not look at the effect of industry dummies when managerial employees are excluded. The precise effect of this change is unclear. It is, however, expected that the inclusion of the fourth panel in Table 2 (dealing with the exclusion of managerial employees) would increase the size of the F coefficient. F (or the '% female') is the proportion of wage and salary earners in the individual's occupation who are female (Ex 101 p 6). In Professor Wooden's