The Employers' Federation/Chamber submits that enterprise agreements should not be put in the same class as awards for pay equity considerations for three reasons. Firstly, it is suggested that there is a no net detriment test applying in the Act. Secondly, it is suggested that a mechanism is laid down by the Act to ensure that there is no discrimination in making enterprise agreements. Thirdly, Article 3 of ILO 100 provides for the determination of remuneration in collective agreements should be determined "by the parties thereto" rather than "the authorities responsible for the determination of rates of remuneration" (Ex 446 p 46). (It should be mentioned, in this last respect, that Article 3 is actually referring to the promotion of an objective approach of appraisal of jobs rather than to the establishment of remuneration *per se*).

However, there are a number of significant reasons why enterprise agreements are appropriate for consideration in a pay equity context. These are as follows:

1. As is noted by the Employers' Federation/Chamber enterprise agreements are subject to some regulation and are institutionally based and accordingly, represent a perhaps a more reliable and stable reference point than do discretionary payments.

2. The agreements are formalised and therefore more likely to be transparent. They are certainly more likely to demonstrate the

particular classifications and the definitions thereof as well as distinctions between levels and career paths within the enterprise agreement. This is certainly the case in relation to the motor mechanics section of the Inquiry where there were quite distinct levels between the various groups of employees based on the skill acquisition of the employees.

3. Perhaps most significantly, the enterprise agreements are themselves the subject of regulation by the Commission so that equal remuneration principles under the legislation will be directly applicable to both those enterprise agreements and awards.

I also note that in relation to the evidence at Maintrain that the process of enterprise bargaining and enterprise reform incorporated a reappraisal of the classification and remuneration for clerks relative to other workers who were largely trades and non trades workers. This was undertaken on the basis of skill assessments.

It follows that, in my view, there is significant reasons why the Commission would wish to have regard to enterprise agreements in undertaking any appropriate work value comparison under any principle designed to consider equal remuneration or pay equity.

The position in relation to overaward payments is somewhat different. I am mindful of the submission put by Mr *Britt* of counsel on behalf of

the ACM (Ex 441 para 110) that the Commission should find on the evidence before the Inquiry that the rates of pay in male dominated industries are not homogenous and vary between male employees performing similar tasks within the same industry or even within the same enterprise. It is also submitted that that the size of this differential in male earnings for employees performing comparable work may be considerable. He points to the evidence in the motor industry as to the setting of above award rates and the evidence as to overaward payments at Maintrain and for clerks generally. It is suggested (para 111) that the existence of these differentials demonstrate that other than 'objective' factors are responsible for the level of remuneration and may depend on a range of factors such as product or service market forces experienced by the enterprise; profitability of the enterprise; nature of the employer's business; capital costs; capital to labour ratios; individual performance of the employees; experience of the employees; location and size of the employer; level of unionisation and labour market factors. It is further submitted (para 112) that if the Commission were to consider above award payments then it would have to take an individualistic rather than a collective approach to wage fixation and therefore the Commission should not have regard to overaward payments in the setting of any principles concerning pay equity.

In essence this submission is to the effect that overaward payments are set by market factors and are non amenable to review by the Commission as part of its ordinary wage fixing processes. As I have already stated I consider this submission has some difficulties in relation to enterprise agreements. However, informal overawards require further consideration.

The Crown parties argue that where overawards are based on identifying and investigating factors contributing to work value and productivity, that information should be available to support and legitimise the payments and facilitate closer linkages between rewards and work. (Ex 440 para 309) It was also argued that the Commission has been involved in the regulation of overaward payments over time.

NPEC submits that overawards necessarily form part of the remuneration considered in the context of equal remuneration principles. It is also argued that it is necessary to make transparent the payments so that where there is not an explicit basis for the making of a payment there needs to be some process of review. Thus, it is argued that the mere assertion that market rates are involved is not sufficient (Ex 438).

The Labor Council argues that the Inquiry has evidence as to the factors which create overaward payments. It is argued that it is important to understand that overaward payments are, in part, created by government regulation such as licensing systems which affect the occupational markets, and also by institutional arrangements which provide a basis for the recognition of skill and experience even in overaward areas. A primary element of the Labor Council submission is that the evidence before the Inquiry in the case of motor mechanics reveals that formal and informal work place agreements provide for overaward payments that are attributable either wholly or partly to the recognition of additional skills that have to be acquired as a result of additional training or

experience (Ex 455 para 241).

It is the Labor Council submission that the Commission through the availability of an equal remuneration adjustment should be "able to compensate employees in female dominated areas of employment for the absence of overaward payments" and the "singular or cumulative impact of labour market structures that have combined to inequitably depress remuneration relative to the value of work performed" (Ex 454 para 152). It is argued that this adjustment process would not apply to all areas of disparity associated with overawards and that the Commission would have to weigh the factors that contribute to the disparity.

The appropriate balance between these competing contentions as to overaward payments is to be found in the traditional approach adopted by the Commission in dealing with such factors. I shall turn to some Commission decisions in one moment. In my view, there should be no necessary translation of differences or disparities arising from comparisons between workers receiving and not receiving overaward payments. However, the existence of such payments, in appropriate cases, may be a useful guide to the Commission examining the appropriate level of remuneration that should be paid to employees in accordance with the operation of equal remuneration principles. Moreover, there may be particular cases, for example in an establishment, where it can be demonstrated that the absence of a payment of an overaward to a group of employees directly undervalues their work and the remuneration paid. Indeed this may be ultimately the subject of an application under the *Anti-*

Discrimination Act.

I will briefly refer to some of the cases and evidence referred to by the parties (and evidence in relation to them) as to the involvement of the Federal and State Commissions in dealing with overawards:

1. Professor McCallum gave evidence that tribunals do take into account the market factors. He says that "market power, particularly in an enterprise bargaining system must be of significance but there comes some point where when we see blatant inequity and we would want to address it".

2. Industrial tribunals have made orders in respect of overaward payments, notably by recommending or making orders that overawards not be absorbed against wage adjustments: see for example *Vehicle - Repair Services and Retail Award* (1983) (Print J9407) (Ex 440 para 304).

3. The Crown parties point to a number of decisions of the Australian Industrial Relations Commission confirming the power of that Commission to make orders with respect to overawards - in the textile, clothing and footwear sector (Print K 4148); in the entertainment and broadcasting industry (Print K 2103 and Print K 2101) and the meat industry (56 IR 229) (Ex 440 para 304).

4. NPEC points to the wage fixing principles in relation to the first awards where the Commission is always taking into account existing market rates of pay. They also point of Professor McCallum's evidence to the effect that market arrangements are always going to be a backdrop to the decisions of the Commission.

I have already discussed the Commission's reference to overawards in the implementation of the equal pay cases. In my view the decision of the Australian Industrial Relations Commission in *Australian Manufacturing Workers Union v Alcoa of Australia Ltd* (*the Weipa Case*) ((1996) 63 IR 138) (Ex 429) is also significant. As I have already noted, in that case the Australian Industrial Relations Commission was required to consider a circumstance where employees engaged under the relevant award were paid less than employees who had entered into staff contracts. It was found by the Commission that the only way that an employee under an award would receive the same remuneration as that paid under staff contracts was for that person to sign such a contract, at which point irrespective of how poorly the employee may have been performing his task, the signing of the contract immediately led to the improved benefits (p 190).

The Commission could not find any valid reason why the award employee who was prepared to work under the same basis as a staff employee should receive less pay and conditions. The Commission considered this approach to be discriminatory and unfair and ordered that the company extend to each award employee the same terms and conditions as extended to the staff

employees (namely the overaward payments), provided that the award employees were prepared to work under all of the requirements of the staff contracts. In my view, this decision indicates clearly that in cases where there is unfair and unreasonable difference in remuneration between different classes of employees, and where there is an absence of valid reasons the Commission will intervene to make adjustments by having regard to the level of overaward payments.

As to the assessment of overaward payments in appropriate cases I consider that there is some merit in distinguishing those factors which are labour market driven and those factors which relate to skill and responsibility. Whilst great care needs to be taken in the application and use of overseas authorities, (particularly as the authorities relate to a different statutory scheme), I consider that the decisions in *Handels - Og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiveforening (acting for Danfoss)* ([1989] IRLR 532) (Ex 351) and *Enderby v Frenchay Health Authority and Secretary of State for Health* ([1993] IRLR 591) are useful authorities in demonstrating that a distinction may be drawn between those factors which may be the subject of objective appraisal or review as contemplated by the equal remuneration principle (namely those factors focussing upon skill and like considerations) and those factors which are relating to market forces and the range of other considerations identified by ACM in its submissions.

CONSIDERATION OF UNDERVALUATION WITH/WITHOUT COMPARATORS

It would appear that the *Equal Remuneration Convention*,

particularly in relation to Article 3, paragraph 3 contemplates some form of comparison of the value of jobs (General Survey on Convention No. 100 p 11) (Ex 349). However, the Convention does not prescribe the manner by which an objective appraisal may be undertaken.

There is much to be said for permitting a wide range of methods of assessing value. There should not be a methodology restricted to the assessment with a comparator. This was a position put by both the Labor Council of NSW and the Crown parties. Indeed it appears to be in part adopted by the ACM where it suggests that in the review of wage fixing principles by a Full Bench of the Commission the Commission should reintroduce the Anomalies and Inequities principle which should be restricted to female dominated industries and allow the Commission to make wage adjustments based on the incorrect value of work prior to the second structural efficiency adjustment allowable under the *State Wage Case* 1989.

No doubt, the Commission may have regard to comparators as a guide to the assessment of rates. However, it is equally conceivable that the Commission may come to the conclusion that there is undervaluation *per se* in relation to particular work in a female dominated industry and/or occupation. This was certainly the approach adopted in some of the equal pay cases and is an approach which would be entirely consistent with the existing wage fixing principles. However, the focus needs to be upon the undervaluation of work in female dominated industries/occupations. This may often require an historical

approach and a consideration of whether there has been some "female characterisation" of the work in question or whether the rates have been set due to the sex of the worker. This process would need to be undertaken without the limitations of the work value principles (which would limit inquiries as to work value from a particular datum point). The inquiry should be as to whether some aspect of the processes or mechanisms employed has not fully appreciated the value of a particular class of work. This approach is necessary, in my view, having regard to the evidence presented to the Inquiry in relation to the selected industries and occupations. In particular, I consider that the librarian example commends this approach.

PART VIA OF THE WORKPLACE RELATIONS ACT 1996

There was some reference in submissions to Part VI of the *Workplace Relations Act* 1996 (the WRA).

The PSA submitted that the 1996 Act should be amended to provide for a mechanism whereby pay inequities in award rates of pay could be rectified upon application by an award party. Such an amendment should be at least as wide in scope as Division 2, Part VIA of the WRA (Ex 450 para 2(i)).

The NPEC sought that referral powers similar to those contained in the WRA as applied to the Sex Discrimination Commission should be made available to the President of the Anti-Discrimination Board (NSW) (Ex 452 p 21).

The Labor Council asked that the 1996 Act should reference the international conventions in the WRA (Ex 455 p 105).

The ACM submitted that the Commission, in this Inquiry, cannot make an assessment of undervaluation per se nor make any recommendation concerning any undervaluation without a reference to a "comparator" group. This was contrasted with the ability of the Commission in work value proceedings to make a valuation of work without the need to consider a male comparator. It was said that that was the approach adopted by the Federal Full Bench in the *Equal Pay Case* 1972 (147 CAR 172) and later adopted by Commissioner *Simmonds* in the recent *HPM Case.*

Division 2 Part VIA of the *Workplace Relations Act* 1996 (the WRA) (the Part having been introduced in the 1993 amendments to the formerly titled *Industrial Relations Act* 1988) is entitled "Equal Remuneration for Work of Equal Value". The object of that Division is set out in s.170 BA:

> 170BA The object of this Division is to give effect, or further effect to:
>
> (a) the Anti-Discrimination Conventions; and
> (b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No 90; and
> (c) the Discrimination (Employment and Occupation) Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation No 111.

Section 170 BB provides as follows:

Section 170BB

(1) A reference in this Division to equal remuneration for work of equal value is a reference to equal remuneration for men and women workers for work of equal value.

(2) An expression has in subsection 1 the same meaning as in the Equal Remuneration Convention.

Note: Article 1 of the Convention provides that the term "equal remuneration for men and women workers for work of equal value" refers to rates of remuneration established without discrimination based on sex.

Other sections of particular interest are:

170BC (1) [Orders as appropriate] Subject to this Division, the Commission may make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value.

(2) [Increases in remuneration rates] Without limiting subsection (1), an order under this Division may provide for such increases in rates (including minimum rates) of remuneration (within the meaning of the Equal Remuneration Convention) as the Commission considers appropriate to ensure that, for employees covered by the order, there will be equal remuneration for work of equal value.

(3) [Conditions for order] However, the Commission may make an order under this Division only if:

(a) the Commission is satisfied that, for the employees to be covered by the order, there is not equal remuneration for work of equal value; and

(b) the order can reasonably be regarded as appropriate and adapted to giving effect to:

(i) one or more of the Anti-discrimination Conventions; or
(ii) the provisions of the Recommendation referred to in paragraph 170BA(b) or (c).

[s170BD] Orders only on application

170BD The Commission must only make such an order if it has received an application for the making of an order under this Division from:

(a) an employee, or a trade union whose rules entitle it to represent the industrial interests of employees, to be covered by the order; or

(b) the Sex Discrimination Commissioner.

[s170BE] No order if adequate alternative remedy exists

170BE The Commission must refrain from considering the application, or from determining it, if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an adequate alternative remedy that:

(a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and

(b) will ensure, for the employees concerned, equal remuneration for work of equal value.

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION V HPM INDUSTRIES (THE HPM CASE) (PRINT 9210, 4/3/98) (EX 404)

On 6 December 1995 the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) lodged an application [under s170BD of the WRA] for an order requiring equal remuneration for work of equal value in respect of some employees of HPM Industries, at its site at Darlinghurst, NSW (HPM). The employees subject of the application are engaged under the terms of the Metal Industry Award 1984 - Part 1 [M0039] (the Award).

The *HPM Case* is the first arbitrated proceedings brought pursuant to Part V1A. As the following examination of the decision discloses, the statutory framework pursuant to which the *HPM Case* was brought appears to have led to

a situation where applications for equal remuneration have been rendered more difficult as the result of the requirement to demonstrate some act of discrimination on the part of the employer in setting the rates.

In the *HPM Case* the findings sought by the Applicant were as follows:

(i) that in relation to HPM's Darlinghurst premises, the work performed by process workers and packers is of equal value to the work performed by general hands and storepersons.

(ii) that the current wage rates paid to the process workers and packers are generally lower than the rates paid to general hands and storepersons.

(iii) that the current wage rates paid to the process workers and packers have been established in whole or in part on the basis of the sex of these employees, in particular on the basis that the process workers are overwhelmingly women and all of the packers are women.

(iv) Therefore, the wage rates of the female workers in these jobs at HPM have been established in whole or in part on the basis of discrimination based on sex. (Ex 404 at 10-11)

Having stated that "the issue of discrimination is central to the matter" (p 35), Commissioner *Simmonds* adopted the meaning of discrimination established in the *Third Safety Net Adjustment and Section 150A Review* by the Full Bench (Print M5600). In so doing, he rejected the submissions made by the ACTU/AMWU that the definitions of discrimination established by the *Sex Discrimination Act* 1984 should be adopted. The definitions of direct and indirect discrimination adopted in the *Third Safety Net* decision are as follows:

> direct discrimination occurs when a person is treated less favourably in the same circumstances than someone of a different race, colour, sex, sexual preference, age, marital status, religion,

political opinion, national extraction or social origin would be; or is treated differently in relation to pregnancy or physical or mental disability or family responsibilities.

indirect discrimination occurs when apparently neutral policies and practices include requirements or conditions with which a higher proportion of one group of people than another in relation to a particular attribute can comply, and the requirement or condition is unreasonable in the circumstances.

He had earlier described the legislative requirements:

(a) The legislative requirements

The definition of "equal remuneration for work of equal value" in s.170BB(1) is a reference to equal remuneration for men and women workers for work of equal value. Section 170BB(2) of *the Act* gives that term the same meaning as in the Equal Remuneration Convention. In turn the Convention, in Article 1 provides that the term refers to rates of remuneration established without discrimination based on sex. The Commission has the power under s.170BC to "make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value". Before making an order the Commission needs to be "satisfied that, for the employees to be covered by the order, there is not equal remuneration for work of equal value". It can only make the order if it can "reasonably be regarded as appropriate and adapted to giving effect to" one or more of the Anti-Discrimination Conventions, the Equal Remuneration Recommendation or the Discrimination (Employment and Occupation) Recommdenation. [s.170BC]. (Ex 404 p 34)

In relation to establishing whether the relevant rates of remuneration were established without discrimination based on sex, he said that:

It follows from the definition of equal remuneration for work of equal value that as a first step to making an order the Commission must be satisfied that rates of remuneration have been established without discrimination based on sex. Both the applicant and the respondent ... accepted that a necessary precursor to establishing this [question] was to establish that the work is of equal value. This must be so, as direct discrimination only arises where there is

different treatment in the same circumstances. To establish that the same circumstances exist there needs to be an assessment as to the equivalence of the work. (p 35)

He stated:

The primary issue therefore is whether or not the work of Process Workers is of equal value when assessed against that of General Hands, and whether the work of Packers is of equal value when assessed against that of General Hands and Storepersons. ...

...

I am of the view that in the absence of agreement, [as to the use of competency standards] the appropriate method of evaluating "equal value" is to apply the criteria of work value, as described in the current wage fixing principles. I have come to this view because of the terms of the Convention itself and subsequent reports of the Committee of Experts. The Convention, at Article 2 provides:

...

The Commission's decision in the Equal Pay Case of 1972 [147 CAR 172] provided for 'equal pay for work of equal value'. The decision required:

> *that female rates be determined by work value comparisons without regard to the sex of the employees concerned* [147 CAR 172 (emphasis added)]

That test case principle is still extant. Work value is defined in the context of the existing principles (Work Value Changes) as:

> *the nature of the work, skill and responsibility required or the conditions under which the work is performed.* [Print P1997 p 98]

He concluded:

It follows from the above conclusions [as to the competency standards process] that I am not satisfied, on what is before me, that the different remuneration paid to Process Workers and Packers by comparison to that paid to General Hands and

> Storepersons arises in circumstances that are sufficiently similar as to amount to discrimination based on sex. There was no suggestion by the applicant that any onus was placed on the respondent in the case of an allegation of direct discrimination, and nor could there be. I am unable to make the first finding sought by the applicant (see above p.10), and it follows that I must dismiss the application for an order based on that finding. (p 39)

I draw the inference from what is said above, that the Commissioner accepts that different remuneration is paid to Process Workers and Packers as against that paid to General Hands and Storepersons. However, the first finding he rejected is that "the work performed by process workers and packers is of equal value to the work performed by general hands and storepersons". Under the heading "Other matters", the Commissioner emphasised:

> ... this decision does not come to a conclusion about whether HPM directly discriminates in remunerating Process Workers and Packers. The conclusion on that matter is limited to the specific case put by the claimant. There is no obligation on the respondent to prove the negative, nor did the ACTU/AMWU claim such an obligation. (p 42)

The inference I draw from that last sentence, and from his reference to "onus" in the previous quotation, is that it is the belief of the Commissioner that there is an obligation on the applicant to prove the positive i.e. HPM does directly discriminate in remunerating Process Workers and Packers. It would appear that Commissioner *Simmonds* interprets s.170 BC(3)(a) as having the effect that the applicant must demonstrate that the existing remuneration was based upon discrimination, and that it was therefore necessary to determine the meaning of discrimination for the purposes of applying the equal remuneration provisions.

ADOPTION OF A DISCRIMINATION TEST IN HPM

The Commissioner states that the determination of discrimination is central to the determination of the matter (p 35). This construction of the federal legislation in the *HPM Case* imports the requirements that, in order to establish equal remuneration for work of equal value, it is necessary to establish that rates of remuneration have been established without discrimination based on sex. As I have noted, this criterion is judged by the Commission against an examination of direct and indirect discrimination as defined in *Third Safety Net Adjustment and Section 150A Review.*

This approach to the application of the *Equal Remuneration Convention,* that is, combining it with a definition of discrimination, appears to have significantly circumscribed the limits within which an applicant must demonstrate "sameness", in order to make out an Equal Remuneration application, as compared to the situation that exists under the 1972 *Equal Pay Case* principle where the focus is upon work value in an industrial context.

However, it is not entirely clear from the decision why the Commissioner considered it appropriate to take the step of moving beyond the test of work of equal value to a discrimination test *per se.* The discussion on pages 34 and 35 of the *HPM Case* proceeds on the basis that the appropriate test is that that referred to in ss.170BC (1) and 170BC (3)(a), namely "equal remuneration for work of equal value". However, it is reasonable to infer that the

conclusion reached by the Commissioner at the middle of page 35 is driven by his understanding of the operation of Article 1(b) of the *Equal Remuneration Convention* where he directs himself to the term used in that sub article, namely "rates of remuneration established without discrimination based on sex".

However, those words nowhere appear in the relevant sections. Rather they are incorporated as a notation to the legislation. The relevant operative provision is s.170 BB(2) which says that the expression in s.170 BB(1) has the same meaning as the *Equal Remuneration Convention.* As I have noted earlier in the discussion of the Convention, I do not consider that this imports a test of discrimination simpliciter.

In all of these circumstances Commission *Simmonds* made the following finding:

> I am not satisfied ... that the different remuneration paid to process workers and packers by comparison to that paid to general hands and storespersons arises in circumstances that are sufficiently similar as to amount to discrimination based on sex (p 39).

This finding is made with reference to the definition of direct discrimination as quoted above. Commissioner *Simmonds* then goes on to consider whether the rates of remuneration were established in circumstances of indirect discrimination based on sex. The benchmark he applied was whether the applicant had established that the employer had included requirements or conditions with which a higher proportion of one people than another in relation to a particular attribute can comply, and on the basis of the evidence adduced he

found that the applicant had not established that matter.

HPM AND WORK VALUE

The Commissioner did consider issues related to work value, but in a way subsidiary to his consideration in relation to discrimination. He found that there was no agreement to use competency standards as the basis of assessing value but that, even if there had been such an agreement at the conciliation phase, that would have not bound the arbitrator; further, even if the competency standards were an appropriate means of assessment of the relative value of jobs generally it would be an inappropriate means of assessment in relation to the relative value of process workers and general hands as against packers and storespersons because the groups are not homogenous; and finally, the competency standards exclude a number of matters relevant to the assessment to the value of work (p 36).

Specifically, Commissioner *Simmonds* found that the Commission and, in particular, Full Benches of the Commission have held that the determination of whether or not the work of females is "of equal value" pursuant to the Equal Pay Principle is to be made by work value comparisons and have defined work value as being "the nature of the work, skill and responsibility required or the conditions under which the work is performed" (p 37). Commissioner Simmonds found that it was not open to him to interpose a new method of job appraisal for the purposes of determining "work of equal value".

In relation to overaward payments, the Commissioner accepts that considerations lying behind those payments must not involve discrimination and that in those circumstances any agreement between the parties as to the method of assessment of the overaward payments, where the payments are the result of collective agreements, would be highly persuasive (p 37). This was not a matter in relation to which he was required to make findings in the *HPM Case*.

Commissioner *Simmonds* also refused to find a presumption of equal value arising out of the award classification process particularly in circumstances when the work value case conducted in relation to the Metal Trades Award had occurred some thirty years before and that accordingly could not be presumed that the relativities established by that case could still be justified on work value grounds.

EQUAL REMUNERATION MECHANISM IN THE WORK PLACE RELATIONS ACT AND THE LIMITS OF REMEDIES BASED ON NOTIONS OF DISCRIMINATION IN ANTI-DISCRIMINATION LEGISLATION

An interpretation that the passage of Part VIA of the *Workplace Relations Act* has the effect of altering the operation of *Convention* No 100, is not one with which I would agree. This is predicated upon the interpretation of *Convention* 100 that I have earlier given (that it does not import a discrimination test) and upon an understanding of the operation of the s.170BC(3)(b) as being disjunctive so that reliance may be placed upon the *Equal Remuneration Convention* rather than the on *Anti Discrimination Conventions* for the purpose of satisfying the conditions of the section.

If a view contrary to either my interpretation of the Convention and/or the operation of Part VIA, is taken then for reasons I will give shortly I would recommend to the Minister that any importation of equal remuneration processes of the kind contained within the *Workplace Relations Act* would make clear that discrimination simpliciter was not the test for establishing equal remuneration for men and women performing work of equal value.

In broad terms I have that view for two reasons:

1. Anti discrimination legislation is by its nature and operation unsuited to resolving pay equity issues, and does not adequately address these issues in an industrial context, where there will often be a requirement to establish or create new rights and obligations by awards and/or agreements and in the resolution of disputes (and thereby establish standards at a collective level);

2. Anti discrimination legislation by and large does not sufficiently address systemic discrimination, or undervaluation, deriving from the operation of a broad range of factors including occupational segregation.

Before discussing these matters I dispose of a submission of the Employers' Federation/Chamber that the examination of the notion of discrimination for the purposes of this Inquiry is limited to consideration of

discrimination prescribed by the *Anti Discrimination Act* 1977. It is inconceivable that the Commission could not consider discrimination in the context of the use of that expression either in the Equal Pay Cases or in conjunction with Conventions. Indeed , if further is required, the matter falls squarely under Term 3(b) and (e). I prefer the submission of NPEC in which it is contended that the mere reference in the 1996 Act to the *Anti Discrimination Act* for certain purposes does not preclude a broader view of the meaning of the term "discrimination" being considered in the context of this Inquiry (Ex 456 p 21). I also do not agree that the discussion of the meaning of the word "discrimination" for industrial purposes, including an examination of systemic discrimination, represents a fundamental change of the kind identified by the Employers' Federation/Chamber as would warrant no further discussion of the matter in this Inquiry.

In this regard the evidence before the inquiry clearly demonstrated the limitations of the *Anti Discrimination Act* in dealing with pay equity considerations.

Professor Hunter stated that "The [Anti-Discrimination] Act does not enable comparisons between women working for one employer and men working for a different employer", and that the industrial relations system requires a broader concept of discrimination which is synonymous with systemic discrimination, gender bias or inequity (Ex 459 paras 382, 383).

Dr Puplick gave evidence that the reference to discrimination in

s.19(3) of the 1996 Act "in fact is any circumstance where that equality of opportunity is denied or frustrated". Ms Walpole's evidence was also to the effect that a broader definition of discrimination, such as that found in ILO *Convention* 111 is more suitable to a pay equity environment than the definitions contained in anti-discrimination legislation. She notes that the anti discrimination jurisdiction is focussed on the rights of the individual whereas the industrial jurisdiction must be capable of dealing with collective rights (Ex 209 para 26).

The Labor Council submitted (Ex 454 paras 117-119) that, given the limitations associated with discrimination and the need to demonstrate some degree of intention in the act of discrimination as contemplated in anti discrimination legislation, the better approach is found in the definition of discrimination as set out in ILO *Convention* 111, as follows:

> Any distinction, exclusion or preference made on the basis of ... sex ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". (Ex 436 para 147)

According to the Labor Council, this definition contemplates systemic discrimination which was considered by a Canadian tribunal in *Public Service Alliance of Canada (PSAC) v. Canada (Treasury Board)* ([1991] 14 CHRR D/341 at D349) and described as follows:

> "systemic discrimination...recognises that longstanding social and cultural mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious. Thus, the historical experience which has tended to undervalue the work of women may be perpetuated through assumptions that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men". (Ex 362)

This approach to discrimination simultaneously highlights the limitations of the anti discrimination legislation as well as the broader issues that arise in the context of industrial process dealing with questions of valuation of work.

As HREOC submitted, the current anti-discrimination legislation provides limited remedies for pay inequity, and are inadequate for the following reasons:

1. the anti discrimination legislation contains individual complaint mechanisms and cannot adequately deal with complaints of discrimination on behalf of a large group of women;

2. The definitions of discrimination are limited. They reflect the individualised focus of the anti-discrimination legislation and look to formal equality; and

3. The remedies available under the human rights legislation compensate for past harms caused by discrimination but cannot address structural inequalities or attack the problems for the future. (Ex 433 p 5)

The Employers' Federation/Chamber submits that Australia has done all that is required to comply with ILO *Conventions* 100 and 111, referring

specifically to the effect of s.23 and its associated provisions of the 1996 Act as providing a means by which the Commission is to ensure "equal remuneration for men and women workers for work of equal value", the terms used in Article 2 of ILO 100 (Ex 446 p 114). I note that the Commission's role in this regard should not be constrained by requirements that elevate the concept of discrimination as an essential part of consideration of equal pay for work of equal value. I also note that s.23, referred to in that submission, also covers "other conditions of employment".

If, contrary to my recommendations on this matter, the legislature were to introduce statutory provisions that promote discrimination as a central consideration in the process of examining equal pay for work of equal value, I recommend that the definition of discrimination accord with the broad definition of discrimination as found in ILO *Convention* 111. The use of the direct/indirect discrimination provisions, whether as contained in anti discrimination legislation, or in the hybrid version found in the *Third Safety Net Review Case*, should be avoided if there is to be a full and effective achievement of the *Equal Remuneration Convention.*

In my view a much broader approach to the meaning of discrimination than that contained in anti discrimination legislation is consistent with the evidence as to the role of the industrial jurisdiction in protecting collective rights.

Perhaps more significantly this approach to the definition of

discrimination is the one most in conformity with the requirements of the respective Conventions. In the report by the Committee of Experts into *Convention* No. 111 the Committee, in considering equal remuneration stated emphatically (by reference to its General Survey of 1986 on Equal Remuneration) that equal evaluation of work and equal entitlement of women and men to all elements of remuneration cannot be achieved within a general context of inequality, and that the connection between the principle of *Convention* No. 100 and that of *Convention* No. 111 is paramount in this respect (Ex 359 pp 129-130).

NSW INDUSTRIAL RELATIONS ACT 1996

In broad terms, the *Equal Remuneration Convention,* or at least the principle contained within it, are reflected in the provisions of the NSW 1996 Act concerning pay equity or equal remuneration.

As Professor McCallum points out in his statement of evidence the Act only uses the expression "pay equity" on one occasion that being in s.19(3)(e) (Ex 210 para 20). However, he points out that "pay equity" is a shorthand term and the Statute instead reproduces the "key words" in the Dictionary to the Act. "Pay Equity" is defined in the dictionary to mean:

> "equal remuneration for men and women doing work of equal or comparable value".

In examining this phrase I have had regard to three issues, namely

" remuneration", "comparable", and the interaction of the statute with the ILO Convention. I address each of them inturn.

REMUNERATION

I have already dealt with the meaning of "remuneration" in the Introduction to the Report. Insofar as overaward payments are concerned, I refer to a history of work value assessments that have properly had regard to the fact of overaward payments in comparator industries or occupations, when setting rates of pay in awards which are essentially paid rates awards.

COMPARABLE

The legislation provides for equal remuneration in three sections of the Act; ss.3(f), 21 and 23. In each case the legislation refers to equal remuneration for men and women doing work of equal or comparable value. That expression bears an obvious resemblance to the principle within the Convention although it is not identical to it, most importantly because the legislature refers to "comparable value" in addition to "equal value".

Some parties have submitted that the inclusion of those additional words extends the operation of the provision.

As to the word "comparable", I have considered to what extent, if at all, the inclusion of "comparable" is an extension of the established concept of "equal value".

The starting point for this assessment is in fact to return to the meaning of "value". It will be recalled that the respective Commissions have not applied to the expression "equal value" a requirement that there be identical value. The provisions of the 1996 Act have been brought into existence in the light of those long established equal pay principles and hence the interpretation of the provision should be approached on that basis. Thus, the reference to "comparable value" in the expression "equal or comparable value" must mean something additional to identical or like value.

In my view the inclusion of the words "comparable value" serves two purposes in the legislation. The first purpose is to make plain that the legislation is directed to the comparison of value and not the identification of equivalent job content. Thus the word "comparable" indicates that the Commission is required to make assessments of comparisons of 'value'. Secondly, the word "comparable" makes it clear that the assessment may include a comparison of dissimilar work as well as similar work. Thus, the reference to "comparable" is not to indicate that a likeness of value was required but that by a comparison of the value of work there may be found sufficient basis to establish inequality of remuneration.

THE STATUTE AND THE ILO CONVENTIONS

Equal Remuneration and Discrimination

The NSW legislature clearly contemplates (in my view, in

conformity with the *Equal Remuneration Convention*) a distinction between pay equity or equal remuneration provisions and discrimination provisions. A number of provisions of the Act expressly direct the Industrial Relations Commission's attention to the resolution of industrial issues by reference to anti-discrimination principles. For example "industrial matters" are defined to include discrimination in employment in any industry (including remuneration and other conditions of employment) on a ground to which the *Anti Discrimination Act* 1977 applies [s.6(2)(f)]. I also refer to the provisions of ss.167 and 169.

There is some blurring of this distinction. Section 19(3)(e) requires that the Commission must take into account in the review of awards "any issue of discrimination under the awards, including pay equity". However, this does not, in my view, affect the distinction drawn in the Act between pay equity and equal remuneration, and discrimination. Section 19(3)(e) either contemplates that pay equity issues might arise in relation to the issue of "discrimination under award" or that pay equity should be considered *per se* in an award review. It is more likely that the former approach is correct but this does not alter the distinction in the statute as the legislature merely recognises that there may be some overlap in the areas. This is reinforced by the fact that in this particular provision the legislature is not referring to anti discrimination legislation but rather to the general expression "discrimination under the awards".

Section 3(f) provides as an object of the Act the prevention and elimination of discrimination in the workforce. It then continues by stating "and in

particular to ensure equal remuneration for men and women doing work of equal or comparable value". In my view, the same reasons as I have discussed in relation to s.19, may be applied to this object to permit a conclusion that the distinction is maintained. Whilst the legislature is no doubt emphasising the need to have regard to equal remuneration in the context of preventing and eliminating discrimination in the workplace, it is also distinguishing those concepts by the use of the words "in the workplace". Furthermore, the construction of this object is merely consistent with the proximity between equal remuneration principles and anti-discrimination principles which were identified by the Committee of Experts in relation to *Conventions* 100 and 111 as I have earlier discussed.

The distinction between pay equity and discrimination is made clear in the Minister's Second Reading speech as follows:

> I refer to the range of measures designed to promote equality of opportunity at the workplace, namely, that the objects of the Bill have been bolstered so as to address specifically anti-discrimination and pay equity; the definition of industrial matters includes an expansive reference to discrimination; the Commission is empowered, on its own initiative or on application, to review and rectify issues concerning pay equity and discrimination in industrial instruments; the President of Industrial Relations Commission must appoint one or more designed Deputy Presidents to specialise in matters relating to anti-discrimination and pay equity; the President of the Anti-Discrimination Board is given broad-ranging rights of appearance in proceedings before the Commission involving anti-discrimination matters (Hansard 23 November 1995, p 3856-7).

This distinction between discrimination and pay equity, subject to my earlier comments in that regard, is broadly consistent with that adopted by the Employers' Federation/Chamber in its submission, although its approach to discrimination was based on very narrow concepts of discrimination, exampled by their submission that the Commission should read down s.169(1) (Ex 446 pp 96 to 98).

Thus, whatever the state of uncertainty as to the distinction between discrimination principles and equal remuneration principles in the Federal Industrial Relations system this does not manifest itself in the NSW legislation. I note in making this observation that there is at least one basis upon which it may be suggested that a distinction of the same kind does in fact exist in the federal legislation. Section 93 of the WRA makes particular reference to discrimination statutes in directing the performance of the functions of the Australian Industrial Relations Commission.

Equal Remuneration and Industrial Processes

Furthermore, the orders available under Part VIA of the WRA pursuant to s.170BC do not alter awards or other industrial instruments *per se* but give a remedy by the making of the order for the person or persons being successful under the section. Indeed the statute contemplates, by reference to the *Equal Remuneration Convention* that orders may be made with respect to minimum rates (specifically) and overaward payments (s.170 BC(2)). The exercise of these powers by the Australian Commission is clearly distinguishable

from that Commission's general award making powers in settlement of industrial disputes pursuant to Part VI of the WRA.

In contrast the NSW industrial system provides remedies concerning equal remuneration as part of the ordinary award making and dispute resolution processes of the Act. The following illustrations demonstrate this point:

1. Section 23 is limited to cases where the Commission makes an award. The Crown parties recognise this limitation and note in their submission that "the award system is a fundamental aspect of the NSW industrial landscape and provides an essential underpinning for the protection of wage and conditions of working men and women (Ex 459 paras 433 and 440).

2. Section 21(1)(b) requires the Commission to make an award setting equal remuneration and other conditions for men and women doing work of equal or comparable value on application.

3. Pay Equity is considered in the context of the award review process (s.19(3)(e)).

4. Orders may be made in the resolution of industrial disputes which concern industrial matters (see definition of "industrial dispute" within the Dictionary to the 1996 Act). "Industrial matters" are

defined to include discrimination in employment in any industry (including remuneration or other conditions of employment) (s.6(2)(f)).

5. In exercising its functions the Commission must take into account the public interest, and, for that purpose must have regard to the objects of the Act (s.146(2)). Section 3(f) provides an object of the Act 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 distinction between the NSW and Federal legislation is recognised in the submissions of a number of the parties including Labor Council of NSW, NPEC and HREOC each of whom recommended the inclusion of a mechanism for seeking equal remuneration orders. I consider that there is some substance in these suggestions having regard to my discussion of the requirements of the *Equal Remuneration Convention* and any limitations in existing statutory or other mechanisms which might operate with respect to pay equity or equal remuneration matters. I will discuss some of those legislative restrictions in this section. The further discussion of limitations in mechanisms is found later in this report after I have reviewed the wage fixing principles and the circumstances of the selected occupations and industries. However I note now that I will not recommend the adoption of the provisions of Part VIA of the *Workplace Relations Act per se*. There are two significant reasons for this approach:

1. The distinction between discrimination and equal remuneration is not sufficiently clear in the Federal legislation (and certainly not clear in view of the decision in the *HPM Case*). I do not consider that the incorporation of the requirements of anti-discrimination legislation is an appropriate approach to equal remuneration principles. Nor do I consider that access to equal remuneration or pay equity either as contemplated in international instruments, or more generally, should be confined on the basis of showing gender causation for the existence of a pre-existing inequity as would be contemplated by the incorporation of approaches akin to anti-discrimination legislation.

2. I agree with the views expressed by a number of the experts called in the proceedings and the submissions of a number of the parties (and for that matter the approach contemplated within the NSW legislative scheme) that for a substantial part pay equity or equal remuneration will best be achieved through mechanisms within industrial systems which are able to cater for collective applications which concern prospective issues.

3. The industrial system is better able to deal with the issues of systemic discrimination. Hence, I would wish to have any mechanism for equal remuneration orders (of the kind broadly appearing in the Federal Legislation) made compatible with the

system of industrial relations in this State.

I consider that some amendments to the NSW legislation are required to make the industrial prescriptions fully effective in dealing with pay equity and equal remuneration matters in an industrial context:

(i) Given the importance of the distinction I have drawn between discrimination and pay equity, the object in s.3(f) should be varied so as to distinguish between pay equity and discrimination.

(ii) The Commission's dispute resolution powers should be specifically directed to pay equity matters. An "industrial dispute" is defined as a dispute about an industrial matter. However, s.6 (2) (f) refers to 'discrimination matters' in employment and not to pay equity or to equal remuneration. Furthermore, the powers of the Commission pursuant to s.136 (1) would only be specifically directed to equal remuneration under para (b) (by the operation of ss.21 and 23). Thus, s.6(2) should be varied to specifically incorporate pay equity and the provisions of s.136(1) should be varied to provide that the Commission may exercise any functions under the section so as to achieve pay equity. As the Commission may be required to rectify pay inequities for individuals and smaller groups of workers, then the powers of the Commission under s.136 (1) should expressly empower the Commission to make orders to ensure equal remuneration.

(iii) Whilst it may be that the expression "makes an award" for the purposes of s.23 incorporates the varying or rescission of an award pursuant to s.17, it would create greater clarity if these processes were expressly recognised in s.23. I have in mind the distinction between ss.10 and 17 of the Act. I have not otherwise proposed a variation to s.23 as the section appears to achieve two important functions to promote pay equity:

1. It deals with conditions as well as remuneration; and
2. The word "comparable" has a wider meaning then "equal" as earlier discussed.

(iv) Section 19 (3) (e) should be amended so as to distinguish pay equity and discrimination. A compendious means of achieving that objective (and recommendation (iii) above) would be to vary s.23 so as to refer to award reviews as well as to award making. Furthermore, s.19 (3) should be amended to incorporate a reference to the undervaluation of work. A definition of 'female dominated industries and occupations' should not be incorporated into legislation but the notion of female dominated industries and occupations left to be flexibly addressed and accordingly dealt with on a case by case basis in the consideration of the equal remuneration principle.

(v) Section 33 requires the Commission in setting principles for enterprise agreements to have regard, *inter alia,* to the objects of the Act. As earlier discussed this will incorporate a consideration of pay equity and discrimination matters. However, s.35(1) of the Act requires the Commission to be satisfied as to certain matters before it approves an enterprise agreement. Section 35(1)(a) directs the Commission's attention to all relevant statutory requirements including the requirements of that Part of the Act and of the *Anti- Discrimination Act.* In my view s.35 (1) should specifically refer to the need to ensure pay equity. This approach is consistent with the legislature's express reference to anti-discrimination in s.31 (1) (a) and maintains a distinction between the concepts of pay equity and discrimination.

(vi) The Commission has recently decided that the word "remuneration" is not used consistently throughout the Act: *Shead v Summit Western Pty Ltd t/as Blacktown Mitsubishi* (Matter No. IRC 3627 of 1997, 24 July 1998). In these circumstances it would be prudent to ensure that, in the context of equal remuneration and pay equity provisions the word "remuneration" is defined to have the same meaning as given in the *Equal Remuneration Convention* No. 100 (as I have earlier recommended). This approach will also permit the consideration of overaward payments within the context of the equal remuneration principle.

(vii) Section 47 may have the effect of limiting the Commission's capacity to review enterprise agreements under the equal remuneration principle. These agreements may create pay inequities and it is important that the Commission may have regard to them in setting equal remuneration standards. Accordingly the section should be amended so as to exclude 'pay equity' considerations from the limitations of the section.

(viii) Section 158 (1) should be varied by the removal of the words "or discrimination in the work place".

I will return to these matters in the section of this report dealing with recommendations. There is one other matter which requires attention under this section in relation to the NSW legislation. I have earlier discussed the meaning of "discrimination" for the purposes of the *Equal Remuneration Convention* and ultimately the WRA. The issue arises in a slightly different context in relation to the present form of the NSW legislation. In the case of that legislation the issue concerns the proper construction of the Act where it variously refers to "discrimination".

This was an issue raised by the Employers' Federation/Chamber. In one sense this does not bear upon the recommendations which I am presently discussing. However, as I have proposed the adoption of a mechanism for equal remuneration orders it would seem appropriate that I discuss the definition of "discrimination" within the 1996 Act. Before proceeding to do so I note however

that I will recommend (to the extent necessary) that the meaning of "discrimination" within *Convention* No 111 would be appropriate to be adopted for any equal remuneration orders mechanisms under the NSW legislation.

It is argued for the Employers' Federation/Chamber that references to discrimination in the Act should be confined to the actual grounds of discrimination in the *Anti Discrimination Act.* This argument seems to be largely directed to a discussion of s.169 (1) of the 1996 Act. The argument turns essentially upon the words "take into account", "in exercising its functions" "the principles contained in the *Anti Discrimination Act* 1977".

I do not agree with the interpretation proposed by the Employers' Federation/Chamber. The primary reason for coming to this conclusion is that it is inconsistent with a literal interpretation of the provision. Section 169(1) does not refer to the provisions or terms of the *Anti Discrimination Act* but specifically uses the words "the principles" which in my view plainly import a wider meaning. Further, I agree with the opinion expressed by Mr Puplick, the President of the Anti Discrimination Board NSW (Ex 236) that the principles of the *Anti Discrimination Act* extend beyond the literal application of the provisions of that Act. He notes that there are no specific objects or principles in the *Anti Discrimination Act* but that the preamble to the legislation indicates that it is directed to the promotion of equality of opportunity between all persons. He also points to the Second Reading speech of the Premier of NSW who indicates that the principles underpinning the Act are "that all human beings are born equal, have a right to be treated with equal dignity, and a right to expect equal

treatment in society" (para 47-53).

Furthermore the Commission should approach provisions such as those contained in the *Anti-Discrimination Act*, being beneficial legislation designed to protect basic human rights and dignity, with regard to the Commission's "special responsibility to take account of and give effect to its purpose" (per *Dawson* and *Gaudron* JJ in IW v. the City of Perth & Ors ((1997) EOC 92-892 at 77,295, 146 ALR 696 at 710) citing Waters v. Public Transport Corporation ((1991) 173 CLR 349 at 359).

Additionally, in construing such legislation it is necessary to have regard to the objects of the Act. Section 3(f) makes clear by the use of the words "prevent" and "eliminate" that the legislature intends a wider meaning for discrimination or the principles of discrimination than contemplated in the narrower grounds of the *Anti-Discrimination Act*.

FINDINGS AND CONCLUSIONS

1. The necessary starting point for the assessment of undervaluation of women's work as contemplated in Term 1 of the Terms of Reference is the equal pay cases in the Federal and NSW jurisdictions in the early 1970s. This is so for four important reasons. Firstly, those decisions constitute the single most significant reduction of differences in earnings between male and female workers in Australian history. Secondly, the equal pay cases established fundamental principles directed to the

valuation of women's work and the rectification of gender based inequality. Thirdly, it is clear that the equal pay principles are extant and in consequence capable of being applied to the question of undervaluation for the purposes of this Inquiry. Fourthly, it is inconceivable that the Commission would contemplate remedial action directed to the undervaluation of female work without first considering what is the purpose and scope of the equal pay principles and to what extent those principles might be inadequate to address pay equity.

2. The combined effect of the Federal 1972 *Equal Pay Case* and the 1974 *Female Wage and Base Loadings Case* was to remove gender based wage differentials found in the basic wage and minimum wage components of awards of the Commonwealth Conciliation and Arbitration Commission.

3. A similar result followed in this jurisdiction as a result the decisions in the 1973 *Equal Pay Case* and the *State Wage Case* (1974 AR 195). However, in New South Wales the equal pay loading could be applied directly to the basic wage as the total wage system of the Federal jurisdiction had not been adopted in this jurisdiction. In the result access to basic wage changes in NSW did not depend upon the applicant satisfying the tests otherwise found in the equal pay principle.

4. In the 1972 *Equal Pay Case* the Commonwealth Conciliation and Arbitration Commission introduced the principle of equal pay for work of

equal value. The Commission defined that expression to mean the fixation of award rates by a consideration of the work performed irrespective of the sex of the worker.

5. The NSW Commission adopted the Federal equal pay principle in substance, but not in detail. There are two main points of distinction. Firstly, the NSW Commission appeared to wholly embrace the terms of the *Equal Remuneration Convention* No 100 (which the Federal Commission identified as the genesis of its decision although not determinative of the principle itself). Secondly, the margins for male and female workers were presumed to be equal and properly fixed. This presumption could be rebutted by the making of a case in accordance with the equal pay principle.

6. The NSW Commission determined that the equal pay principle would operate irrespective of the payment of equal pay loadings and the existence from time to time of wage fixing principles. In like manner the Federal Commission proceeded to make wage adjustments as a consequence of the operation of the equal pay principle notwithstanding the existence of adjustments to the total wage in terms of the basic wage component. However, in the 1986 *Nurses Case* the Federal Commission determined that equal pay principles must operate in conjunction with wage fixing principles (at that time the Anomalies principle).

7. Thus, the equal pay principles constituted, at least in NSW, a separate

element of the wage fixing system. The principle could be used to redress undervaluation irrespective of barriers which might otherwise exist in the wage fixing principles to the review of female work. However, it was demonstrated in the 1987 *Nurses Case* that recourse to the Anomalies (as opposed to the Inequities) principle offered no practical barrier to remedial action based on the principle.

8. The common mechanism adopted by the respective Commissions to determine equal value for the purpose of the equal pay principles was work value comparisons. Thus, in order to obtain the objective of the principles, namely the establishment of rates of pay irrespective of the sex of employees the Commissions opted for traditional industrial process to establish value. By this means the Commission gave effect to the *Equal Remuneration Convention* in a manner conforming with the existing system of industrial relations in Australia (a course which was entirely open to them under the terms of the Convention).

9. The use of the traditional work value principle as adopted by the NSW Industrial Commission both prior to and after the introduction of the equal pay principle meant that the Commission was applying a principle that had been used to evaluate female dominated work in the past as, for example, in *In re Crown Employees (Teachers - Department of Education) Award* (1970 AR 345) (referred to in the following chapter).

10. It is equally clear that in adopting the application of the work value

principle in the context of the equal pay principle the Commission was firmly placing the attainment of equal pay based on work value assessment within the industrial wage fixing context.

11. The 1987 *Nurses Case* is significant in that it demonstrates a contemporary application of the equal pay principles in conjunction with a relatively modern version of wage fixing principles. The decision in the 1987 *Nurses Case* is also significant because of the paucity of the consideration given to this decision in the various commentaries on the equal pay principles and its capacity to demonstrate that the implementation of the equal pay principle is somewhat different from that contended for by some of the critics of the operation of the principle.

12. A number of conclusions can be reached from the 1987 *Nurses Case*

(i) The equal pay principle (in using work value assessments) did not act entirely or even consistently to maintain or enhance traditional undervaluation of female dominated work as claimed in some submissions and commentaries. In fact, the determination of the existence of an anomaly and the application of the equal pay principles in that case expressly found that a reliance upon comparisons of female work in that case was inappropriate.

(ii) The decision also embraced as part of the equal pay processes comparisons of dissimilar work which had earlier been undertaken by the Commission and in particular the comparison of the female

dominated occupation work of nursing and the male dominated occupation of tradesmen.

(iii) The equal pay principle was applied in this case in conjunction with a work value principle albeit that the work value principle was in its modern form (namely, a principle which required the demonstration of a change in the nature of work skills and responsibility). However, what this demonstrates is that the combination of the equal pay principle (that is the making of suitable comparisons between male and female work in that case) and the work value principle was adequate to address the undervaluation of the work of nurses at that time. The fact that the work value principle had attached to it a requirement to consider change is really beside the point. Absent that limitation the work value principle, in conjunction with the equal pay principle, was satisfactory to address the valuation of the work of nurses.

13. A review of the implementation of the *Equal Pay Case* in NSW reveals a similar outcome to the implementation of the equal pay principle. A number of the cases in NSW demonstrated that the Commission was prepared to compare female and male work, female and male awards and ultimately dissimilar work between industries. This disposes of the proposition that appeared in some of the submissions and in some commentaries that the implementation of the equal pay principles merely resulted in a reinforcement of the traditional undervaluation of female work in NSW and that there was a total failure to use the final elements of the

comparisons permitted in the equal pay principle namely comparing work of females and males between different awards.

14. Nevertheless, there were limitations in the application of the principles to dissimilar work performed by male and female employees. In part, this was contemplated by the principle itself which saw this type of comparison as exceptional. It is also a result of the limited number of cases which were actually bought under the section, and furthermore, as a result of some of those cases adopting a more conservative approach to comparisons (in some cases with a particular emphasis on discrimination elements).

15. These limitations particularly manifested themselves in the New South Wales cases. The existence of a rebuttable presumption in this jurisdiction acted as an added deterrent to the review of margins and in some cases was effective in defeating the cases bought under the equal pay principle. In the consideration of any principles for the future it is important that presumptions of this type do not play a significant part. Furthermore, it is necessary to avoid notions of onus in equal remuneration cases as placing an onus on an applicant may often cause an injustice. This has been demonstrated in the selected occupations and industries in this Inquiry. The issues associated with equal remuneration are often complex. Factual discovery is often difficult (not the least because of the requirement for historical inquiry). In my view equal remuneration cases should proceed more in the nature of an inquiry than

inter partes litigation.

16. I prefer the analysis of the implementation of the equal pay principles given by Ms Bennett in her paper and evidence before this Inquiry. Ms Bennet challenges the notion that is found in some of the literature that the work value principle is deficient in implementing equal pay principles because of its broad and flexible nature as opposed to the so-called rigour of job evaluation in implementing the comparable worth doctrine. Ms Bennett recognises that the flexibility of the work value principle is essential to the functioning of the Commission which is required to reconcile the tension between various objectives - industrial peace, economic policy, industrial justice and equity. She indicates that it is precisely this lack of flexibility which made the comparable work doctrine unacceptable to the Commission in the 1986 *Nurses Case*. Oddly, as Ms Bennett points out, at the same time as erecting a rigidity in the valuation process, the comparable worth doctrine also removed any effective limits on the way in which comparisons could be drawn thereby challenging the operation of wage fixing principles. Finally Ms Bennett argues that attention should really be focussed upon ensuring that the work value principle is applied in such a manner as to remove gender inequalities.

17. I consider that the establishment of equal remuneration principles within the context of the existing industrial system and using non gender-biased work value principles offers the most effective means of rectifying pay inequity. It follows as well that the solution lies in placing the rectification

of pay inequity in the industrial context.

18. I now turn to consider the specific recommendations which I would propose in the light of my analysis of the *Equal Remuneration Convention*, the equal pay principles and legislation directed to equal remuneration. I shall deal further with the particular elements of work value comparisons in the next section.

GENERAL

19. Having regard to international instruments bearing upon equal remuneration and discrimination, the development and application of the equal pay principles in Australia and in particular in NSW, the conclusions I have reached in relation to the selected industries and occupations and to expert evidence called before this Inquiry, it is my view that remedies designed to remove the undervaluation of work in female dominated industries and occupations should be established within the framework of the existing industrial relations system in NSW. The remedies should be derived from industrial legislation, the principles of equal remuneration developed by the Commission, the principles of wage fixation and the development over time of industrial jurisprudence in relation to equal remuneration.

20. These remedies are distinguishable from remedies available to persons under the *Anti-Discrimination Act*, 1977 (NSW). This legislation should

continue to furnish a remedy to persons suffering discrimination (either direct or indirect) as contemplated by that legislation. Nevertheless, the principles of the *Anti-Discrimination Act* will continue to be taken into account in the exercise of functions under the *Industrial Relations Act*, 1996 (NSW) including the resolution of industrial disputes and award fixing processes.

21. The essence of the distinction that I have drawn between the remedies for undervaluation generally and remedies available for discrimination (either under the *Anti-Discrimination Act* or the *Industrial Relations Act)* is that discrimination simpliciter should not be determinative of the access to or availability of the remedies for undervaluation *per se*. Neither the *Equal Remuneration Convention* nor the equal pay principles require that the attainment of equal remuneration be governed either by the criteria or relief normally found under anti-discrimination legislation or by a pre-condition for access based on gender causation. The pre-condition for relief under anti-discrimination legislation should not govern or act as a precondition for remedies concerning undervaluation of work in female dominated industries and occupations.

22. My recommendations proceed upon the basis that I have found the existence of undervaluation of work in female dominated industries and occupations in New South Wales having regard to economic evidence, general expert evidence and evidence as to the selected industries and occupations.

LEGISLATION

23. The foundation for the legislative scheme designed to address pay equity and the undervaluation work in female dominated industries should be the *Equal Remuneration Convention* (*Convention* No 100). I agree with the recommendation of the Crown parties that there should be a comprehensive legislative base for the implementation of ILO *Convention* No 100.

24. The existing industrial legislation manifests a clear intention to implement the *Equal Remuneration Convention* and does so by placing remedies within the normal industrial framework of award making, agreement making and dispute resolution under the *Industrial Relations Act* 1996 (NSW). In my view this approach is entirely open to the legislature under the *Equal Remuneration Convention* and is preferable to the erection of a specific remedial scheme as appears in Part VIA of the *Workplace Relations Act*, 1996 (Cth).

25. There now exist distinctly different approaches as between the Federal and State Legislatures to industrial regulation which has been recognised in recent State Wage Case decisions. In my view the approach I propose is entirely consistent with the existing legislative scheme in NSW.

26. However, the principal objective is to provide a jurisdictional foundation

from which the Commission can address issues of equal remuneration and the undervaluation of the work of persons engaged in female dominated industries. Those remedies should be developed through industrial jurisprudence and not by a legislative proscription against pay inequity or wage inequality. The development of this industrial jurisprudence should, however, be guided by the establishment of appropriate principles.

27. The establishment of principles to guide the development of pay equity is entirely consistent with:

(i) The approach of the legislature to industrial reform and to the development of protective mechanisms for workers. For example, the legislature has provided for the development of principles in relation to enterprise agreements (see s.33);

(ii) The development of wage fixing principles by the Commission; and

(iii) The development of equal pay principles by this Commission in 1959 and 1973 (and indeed in earlier approaches such as the *Female Hairdressers Case*).

28. The NSW legislative scheme provides an existing and substantial jurisdictional foundation for the implementation of the Equal Remuneration Convention but in my view does require some amendments to give full

effect to the recommendations I make in this Inquiry. In addition to ensuring that pay equity considerations are taken into account in the exercise of all of the Commission's functions, the amendments that I propose are designed to meet the following particular objectives:

(i) to make clear the distinction between remedies for undervaluation and those which are referrable to discrimination;

(ii) to ensure that the reference to remuneration encompasses not only earnings derived from awards but in appropriate circumstances (which will be governed by the principles) earnings outside of the award systems; and

(iii) the Commission's attention is focussed upon pay equity in its deliberations under the Act.

29. I finally turn to consider the submissions of the parties and some particular aspects of legislative change.

30. The Labor Council did recommend changes to the legislative framework in their final recommendations in Exhibit 455. In essence, the changes proposed were designed to ensure a jurisdictional foundation for the making of equal remuneration orders under the Equal Remuneration Principle proposed by the Labor Council.

31. I do not consider that a new Equal Remuneration Part should be created in the Act as proposed by the Labor Council in its recommendations. I have come to this view for a number of reasons.

(i) The Equal Remuneration Part resembles, but is not the same as, the Federal legislative scheme;

(ii) I do not consider that specific equal remuneration orders should be made but rather awards and orders made within the existing industrial framework;

(iii) The proposal appears to contemplate individual access which I do not consider is appropriate. Individual remedies are best placed within the anti-discrimination field;

(iv) A substantial number of the areas to be attended to in the proposed Equal Remuneration Part, as listed in recommendation 15.1 of the Labor Council recommendations, will be met by the amendments to the industrial legislation that I have proposed. Moreover, some of the areas are already caught by the existing provisions of the legislation;

(v) Equal opportunity questions are in part caught by the existing definition of industrial matters within the Act and in part caught by the anti-discrimination legislation (together with the principles of that legislation applying within the industrial context).

32. I acknowledge that an advantage of an equal remuneration division would be to make clear the distinction between equal remuneration and

discrimination. However, difficulties presently encountered with the operation of the Federal legislation would suggest that such gains may be illusory. My interpretation, if correct, of the outcome in the *HPM Case* suggests that there are a number of difficulties with the operation of the Federal legislation.

33. The Crown in its recommendations agrees with the ACM submission that the Anti Discrimination Board should continue to deal with the matters involving discrimination in remuneration, but the Crown does not consider that the Anti-Discrimination Board is the only forum for dealing with equal remuneration matters where overaward or discretionary payments are involved. The Crown submits that the Commission ought to be able to consider these payments in the context of pay equity. The recommendations that I have made are consistent with this approach both in terms of distinguishing between discrimination and equal remuneration and providing by the definition of remuneration that overaward considerations may be dealt with by the Commission.

34. However, it must be recognised that this step represents a departure from the approach under the previous equal pay principles which dealt with award making (even if in their implementation the respective Commissions from time to time dealt with overaward payments). Great care needs to be taken to ensure that the Commissions dealing with overaward payments or discretionary payments is in conformity with, and consistent with, the objectives of wage fixing principles.

35. In my view the proper balancing between the necessity for wage regulation and providing equity in a pay equity context is to be obtained by providing a proper jurisdictional foundation for the Commission to consider such matters in the context of pay equity matters and to guide the exercise of that jurisdiction by appropriate principles and the development of industrial jurisprudence. I also have this in mind that the dispute resolution powers conferred upon the Commission under the amendments to the legislation that I will propose would provide ample basis upon which individual cases or group cases of undervaluation may be considered in relation to total earnings, overaward payments or discretionary payments. No doubt the Commission in undertaking such consideration will have regard to the wage fixing principles, the existing awards and agreements and considerations of that sort.

36. In this context and for reasons I have earlier given in this section of the report I consider it is important that the Commission be able to consider in its award making and dispute resolution processes the remuneration and conditions of employment provided in enterprise agreements. The legislative amendments that I will propose take this consideration into account.

37. It is also important to note, in distinguishing between the existing legislative scheme and the scheme operating in the Federal legislation with respect to equal remuneration, that the current NSW legislative

scheme (and the scheme deriving from the amendments that are proposed in this report) does not require the existence of, or proof of, gender causation for access to the jurisdiction or remedies. The only requirement is that the rates of remuneration are fixed irrespective of the sex of the worker so that there is equal remuneration for work of equal or comparable value. Nowhere in this principle is it necessary that there is established a causal connection between the rates of pay and some pre-existing circumstance connected with the gender of the worker. Nor is there any requirement that an occupation/industry be female dominated before access to the jurisdiction and remedies be achieved. I say this lest there be any doubt whatsoever about how I would contemplate the legislative scheme operating as a result of this report.

38. There is another important element to the legislative scheme that I have recommended. The *Equal Remuneration Convention*, the Equal Pay Principles and ultimately the existing equal remuneration and pay equity provisions of the NSW legislation require for their operation some comparison (although the comparisons might vary widely) between workers (whether they be male or female workers).

39. Both the Labor Council and the Crown sought recommendations to the effect that the use of a comparator or comparators or the choice of comparisons ought not constitute a threshold test for the purposes of pay equity claim. I consider that this approach has some considerable merit. Whilst the use of comparisons might provide an appropriate guide to the

assessment of the value of work and the establishment of remuneration accordingly, comparison processes should not be erected as prerequisites to the establishment of claims for a proper evaluation of work. This conclusion derives directly from my analysis of the selected occupations and industries and my earlier discussion of this matter in this section. I am also mindful of the circumstances under which undervaluation of work in female dominated industries may arise. I agree with the Labor Council submission that the undervaluation of women's work may stem from gendered assumptions in work value assessments, as well as different returns on the basis of sex for equivalent or comparable levels of skills, and awards and agreements which fail through inadequate classification structures to adequately nominate, differentiate and reward skill. Part of this effect derives from the very circumstances which often apply to the female dominated industries. That is rates are set lower because of the existence of occupational segregation or segmentation. The Labor Council describes a combination of factors which are frequently found in female dominated industries and which combine to generate lower returns for workers in those industries than in other industries. The Commission processes should recognise that this combination of factors will of itself contribute to the undervaluation of female work and in the result the attention of the Commission needs to be focussed upon or channelled towards female dominated industries to examine whether as a consequence of those factors, or their combination with other factors, there has been insufficient valuation of women's work, both historically and under current wage fixing processes. (Ex 455 paras 327-334)

40. The process of evaluation of a female dominated industry or occupation may or may not be assisted by reference to male comparators but it would certainly be unjust to exclude the examination of these factors merely because there was not an available male comparator for the purposes of the legislation.

41. I will also propose an equal remuneration and undervaluation principle to address these issues. However, I consider that it is necessary to establish a firm jurisdictional basis from which the Commission's attention will be directed to undervaluation in female dominated industries. This step is necessary because it is clear that the factors that I have referred to make it more likely that undervaluation will occur in those industries as opposed to male dominated industries. One appropriate point at which an examination of this kind should occur is at the point of award review where there are adequate circumstances for complete review of the valuation of work in female dominated industries.

42. Accordingly, my recommendation for legislative change suggests a variation to s.19 so as to specifically refer to any undervaluation. This amendment should ensure that in appropriate cases the Commission will be able to consider whether or not there is an undervaluation of work in female dominated industries and occupations simpliciter without the need for comparisons with other industries, occupations or awards.

43. As I have noted I will propose, in addition to legislation changes, an equal remuneration and undervaluation principle. It would be possible to establish a statutory provision equivalent to s.33 to usher in the new principle. The Labor Council and the ACM suggests as a practical course that the new principle should be incorporated into the wage fixing principles and to this end the Commission should of its own motion, or an application of the parties, move to reconvene the Full Bench of the 1998 *State Wage Case* to consider the implementation and application of the equal remuneration principles and any other consequential amendments required to the current wage principles to ensure the full and proper application of pay equity. Whilst I can see the practicalities of such a proposition I consider the better course (for reasons I provide later in this section) is to establish the principle through a State decision, however it may be initiated.

44. For more abundant caution I return to the recommendation of the parties that discrimination should be defined in the same way as the definition of discrimination in *Convention* No 111. I have not incorporated this proposal into the draft recommendations because of the distinction that I have drawn between equal remuneration and discrimination for the purposes of these recommendations. However, if it was considered, contrary to the recommendations in this report, that discrimination should in some way be the linchpin for the operation of the pay equity mechanisms or for the attainment of equal remuneration then I would recommend the adoption of the definition of discrimination from

Convention No 111. In my view this is an essential step because if the matter is being approached upon the basis of some discrimination requirement in order to achieve equal remuneration then the difficulties associated with this approach would mean that the widest possible definition should be given to 'discrimination' so as to create a workable and effective legislative provision.

45. Before outlining my recommendations for legislative change I now turn to some particular matters raised by the parties.

46. NPEC argued that a deputy president/pay equity with a specialist responsibility for pay equity should be appointed to the Industrial Relations Commission to hear equal remuneration matters. The ACM, in response to other parties, opposed this notion and of the appointment of a pay equity panel which had been proposed by the Crown parties (Ex 444).

47. In my view, there does not appear to be any particular need to appoint a pay equity panel or pay equity DP or to have legislative amendments to that effect. Section 158 (1) already empowers the President of the Commission to designate particular presidential members to deal with matters relating to general award reviews or discrimination in the workplace.

Presently, s.158(1) requires the President to designate particular Deputy Presidents to deal with matters relating to, inter alia, 'discrimination in the

workplace'. The provision does not refer to 'pay equity' or 'equal remuneration'.

In my view it would be inappropriate for a specific Deputy President to be allocated to handle pay equity or undervaluation issues. I have earlier found that such issues are best resolved in an industrial context and the undervaluation in female dominated industries and occupations is largely systemic. Hence, it is likely that the issues will be confronted by all members of the Commission in the exercise of their functions in relation to female dominated industries and occupations. The issues will, therefore, be 'alive' in the general exercise of the Commission's jurisdiction. In my view, it is both unworkable and unwise to attempt to confine that process.

As similar issues arise for discrimination I suggest the reference in s.158(1) should be removed.

48. HREOC seeks a number of recommendations which I will deal with in turn as follows:

(i) There is a recommendation sought that the Human Rights complaints mechanism in the ADB be retained and strengthened. NPEC also suggests various changes to the *Anti-Discrimination Act*. I do not consider that these matters fall within my Terms of Reference.

(ii) HREOC argues for a strengthening of the intervention rights of the

President ADB so that the President may intervene as a matter of right. The ACM submits that there is sufficient right to intervene under the present legislation and refers to ss.34, 167 and 169. In my view there is sufficient power for the President of the Anti-Discrimination Board to intervene in relevant proceedings pursuant to s.167 (2). The maintenance of this provision is consistent with the distinction that I have drawn between equal remuneration and discrimination matters and allows the President to make submissions in suitable cases.

(iii) NPEC has suggested that the President of the Anti-Discrimination Board have power to refer matters arising under the *Anti-Discrimination Act* 1977 to the Commission. This is a sensible suggestion. In such cases the President of the Anti-Discrimination Board should be able to appear as a matter of right.

(iv) It is suggested that an office of Pay Equity Advocate be established within the Registry of the Commission. It is also proposed that the Pay Equity Advocate be empowered to intervene in Commission proceedings. I do not agree with this recommendation. There has been no demonstrated need for such representation or for the establishment of such a specialist role. It would be apprehended that the industrial parties and some specialist bodies intervening would more than adequately be able to put forward submissions in a particular case. As I have already noted I am not recommending individual access which might otherwise give greater force to this proposal. This matter might be

reconsidered after the equal remuneration principle has operated for some time.

49. The Employers' Federation of NSW and the Chamber Manufactures of NSW (Industrial) set out recommendations in Exhibit 448. The brevity of that document is accounted for largely on the basis that those two organisations argue that no recommendations should be made by the Commission in this matter. Rather the Commission is presented with an alternative recommendation (which only arises if the Commission makes any recommendation) to the effect that there should be a removal of any provisions from the *Industrial Relations Act* 1996 which deal with pay equity and a restoration of the exemption of awards and enterprise agreements from the provisions of the *Anti Discrimination Act* 1977.

50. I have some doubts that the latter recommendation sought falls within the scope of the Terms of Reference. As to the first recommendation it is to say the least a surprising one in view of the extensive and complex considerations entertained by the Commission during the course of this Inquiry.

51. I consider that some amendments to the NSW legislation are required to make the industrial prescriptions fully effective in dealing with pay equity and equal remuneration matters in an industrial context:

(i) Given the importance of the distinction I have drawn between

discrimination and pay equity, the object in s.3(f) should be varied so as to distinguish pay equity and discrimination.

(ii) The Commission's dispute resolution powers should be specifically directed to include pay equity matters. An industrial dispute is defined as a dispute about an industrial matter. However, s.6 (2) (f) refers to 'discrimination matters' and not to pay equity or equal remuneration. Furthermore, the powers of the Commission pursuant to s.136 (1) would only be specifically directed to equal remuneration under para (b) (by the operation of ss.21 and 23). Thus, s.6(2) should be varied to specifically incorporate pay equity and the provisions of s.136(1) should be varied to provide that the Commission must exercise any functions under the section so as to achieve pay equity. As the Commission may be required to rectify pay inequities for individuals and smaller groups of workers then the powers of the Commission under s.136 (1) should expressly empower the Commission to make orders to ensure equal remuneration.

(iii) Whilst it may be that the expression "makes an award" for the purposes of s.23 incorporates the varying or rescission of an award pursuant to s.17, it would create greater clarity if these processes were expressly recognised in s.23. I have in mind the distinction between ss.10 and 17 of the Act. I have not otherwise proposed a variation to s.23 as the section appears to achieve two important

functions to promote pay equity:

1. It deals with conditions as well as remuneration; and
2. The word "comparable" has a wider meaning then "equal" as earlier discussed.

(iv) Section 19 (3) (e) should be amended so as to distinguish pay equity and discrimination. A compendious means of achieving that objective (and recommendation (iii) above) would be to vary s.23 so as to refer to award reviews as well as award making. Furthermore, s.19 (3) should be amended to incorporate a reference to the undervaluation of work. A definition of "female dominated industries and occupations" should not be incorporated into the legislation, but the notion of 'female dominated industries and occupations' left to be flexibly addressed and accordingly dealt with on a case by case basis in the consideration of the equal remuneration principle.

(v) Section 33 requires the Commission in setting principles for enterprise agreements to have regard, *inter alia,* to the objects of the Act. As earlier discussed, this will incorporate a consideration of pay equity and discrimination matters. However, s.35(1) of the Act requires the Commission to be satisfied of certain matters before it approves an enterprise agreement. Section 35(1)(a) directs the Commission's attention to all relevant statutory

requirements including the requirements of that Part of the Act and the *Anti Discrimination Act*. In my view s.35 (1) should specifically refer to the need to ensure pay equity. This approach is consistent with the legislature's express reference to anti-discrimination in s.31 (1) (a) and maintains a distinction between the concepts of pay equity and discrimination.

(vi) The Commission has recently decided that the word "remuneration" is not used consistently throughout the Act: *Shead v Summit Western Pty Ltd y/as Blacktown Mitsubishi*, (Matter No. IRC 3627 of 1997, 24 July 1998). In these circumstances it would be prudent to ensure that, in the context of equal remuneration and pay equity provisions the word "remuneration" is defined to have the same meaning as given in the Equal Remuneration Convention No 100 (as I have earlier recommended). This approach will also permit the consideration of overaward payments within the context of the equal remuneration principle.

(vii) Section 47 may have the effect of limiting the Commissions' capacity to review enterprise agreements where equal remuneration issues arise. These agreements may create pay inequities and it is important that the Commission may have regard to them in setting equal remuneration standards. Accordingly the section should be amended so as to exclude 'pay equity' considerations from the limitations of the section.

(viii) Section 158 (1) should be varied by the removal of the words "or discrimination in the work place".

THE EQUAL REMUNERATION PRINCIPLE

52. A number of parties put submissions as to the need to create a new principle dealing with equal remuneration. I will briefly summarise the effect of those submissions.

(i) NPEC argued that a pay equity principle should be established with broad criteria requiring that work value be investigated and that rates be set by methods which are objective, free of sex discrimination (as required by the ILO Convention) and transparent in relation of factors of value employed, weightings attached and the translation of assessed value into remuneration. NPEC put that access to the principle should be the demonstration of a gender related pay disparity, together with evidence of either an evaluation method which shows that the work of the women and men is of equal or of comparable value, or an evaluation method indicating that the rates have been affected by sex discrimination. The circumstances where the latter access provision will apply included rates set being affected by sex stereotype assumptions about women's income needs resulting in undervaluation of women's work for its value. (Ex 438)

(ii) The Labor Council proposed a new equal remuneration principle which provides for a consideration by the Commission of the factors which give rise to sex disparities in remuneration. The Labor Council advanced a draft principle. The factors which are said to give rise to sex based disparity are set out in para 6.2 of the Labor Council's recommendations (Ex 455 p 96). It is submitted that the principle should provide for an equal remuneration adjustment that the Commission can award to female dominated occupations or industries where on its assessment, changes to the classification structure, would not in itself remedy or adequately address disparities in pay. This adjustment may compensate for the absence of overaward payments.

(iii) The key features of the actual principle proposed are that the Commission will have regard to the equal remuneration principle whenever an application is made and whenever it considers matters affecting remuneration; the Commission may be required to establish the equivalence or comparability of value in the broader context and as appropriate; and in making assessments about work value will continue to have regard to the skills, responsibility, qualifications, experience and conditions under which work is performed; the methods used by the Commission as to work value considerations shall be objective and non-discriminatory and an equal remuneration order will be made where the Commission finds

a remuneration disparity that is based on sex. (Ex 455 p 111)

(iv) In considering the equivalence or comparability of value, the Labor Council recommends that the following arrangements may be considered:

(a) Comparison of the value of work may be undertaken across and within industries and occupations;

(b) Comparisons where undertaken may rely on a number of reference points rather than a single comparator;

(c) Comparisons may be undertaken between male dominated and female dominated occupations and industries. However, comparisons are neither necessary nor sufficient for establishing that rates of remuneration have been affected by discrimination, but can contribute to establishing that rates of remuneration have not been determined without discrimination based on sex;

(d) Comparability can rely on such factors as an examination of the history of the female dominated occupation or industry in relation to the undervaluation of work; award histories and the pattern of award variation and developments, the availability of credentialling arrangements, and institutional arrangements that impact on the occupational market(s). The Labor Council also makes additional recommendations as to the assessment of work value and recommends

changes to the work value principle. As to this consideration an amended work value principle is proposed. (Ex 455 pp 113-114)

(v) The Crown parties submit that a new pay equity principle should be established incorporating a new equitable work value test which the Commission is to consider in regard to specific pay equity claims. This principle would operate whenever the Commission considers matters affecting remuneration, including applications by consent, the approval of enterprise agreements/awards, making or varying of awards/agreements and reviewing awards (Ex 459 para 315). The principle should provide the mechanism for determining whether gender based pay disparity exists, whether the disparity reflects discrimination based on sex and will provide for pay equity decisions (Ex 459 p 61). It is submitted that the new pay equity principle should have a broad definition of discrimination pursuant to ILO *Convention* No 111. (Ex 459 p 76)

(vi) The ACM recommends that the Commission reopens the *State Wage Case June* 1998. It suggests that the Bench would then review the existing wage fixing principles to ensure the principles are gender neutral and where appropriate, vary those principles to remove any explicit or implicit gender bias. It is further suggested that in any such review of wage fixing principles the Full Bench of the Commission considers whether the principles are being applied

in a gender neutral fashion. In fact, the ACM recommends that the existing wage fixing principles should be amended to require the Commission and the industrial parties to apply those principles in a gender neutral manner. In particular it is suggested that the work value changes principle needs to be amended to reflect and recognise the different nature of the work performed by female employees and the skills exercised by those employees. Furthermore, it is recommended that the Commission needs to consider whether the Minimum Rates Adjustment process has been properly applied in female dominated industries and occupations and whether the process needs to be amended to reflect and recognise the different nature of the work performed by female employees and the skills exercised by those employees. Finally, the ACM recommends that the Commission consider whether it should reintroduce an Anomalies and Inequities principle which should be restricted to female dominated industries and allow the Commission to make wage adjustments based on the incorrect value of work prior to the second structural efficiency adjustment under *State Wage Case August* 1989 (Ex 441 pp 36-37).

(vii) The Employers' Federation/Chamber submits that there are no deficiencies in the existing wage fixing principles. It makes no submissions in the alternative as to variations in those principles or the establishment of any new principle.

53. In my view, the essential starting point for the consideration of these submissions is the existing equal pay principles. For reasons I have given earlier in these conclusions the equal pay principles should be the foundation for any new pay equity principle. However, the principles do require amendment in order to fully achieve equal remuneration and to fully and comprehensively address the undervaluation in industries and occupations, whether or not female dominated.

54. Two matters immediately follow from this approach:

(i) The equal pay principle should be rescinded and replaced;

(ii) As a matter of consistency with the establishment of the equal pay principles, a new principle should be established by a State decision made pursuant to s.51 of the Act. The *State Equal Pay Case* 1973 (1973 AR 425) proceeded by way of a test case concerning the principles to be applied in making awards fixing wages for women workers and the *Federal Equal Pay Cases* were established on a similar basis. Moreover such an approach will ensure that the principle is applicable to the full range of the Commission's functions and not merely in relation to award making.

55. I am not empowered to create the principle myself, and as the matter will need to be further determined by a State Bench then it would seem more appropriate that I set out what appear to be the elements, as revealed in

these proceedings, of any equal remuneration principle, which will inevitably need to be considered, rather than my attempting to draft the terms of that principle. I also adopt this approach, because, whilst the Labor Council and Crown propose draft principles, the parties have not, by and large, engaged in any significant exchange as to the detail of the proposals in this Inquiry. I will now set out those elements:

(i) The principles be known as "the principles governing equal remuneration and undervaluation of work;

(ii) The principles would serve to ensure that:

(a) all instruments made by the Commission in the exercise of its jurisdiction would provide for equal remuneration and other conditions of employment for men and women doing work of equal and comparable value; and

(b) in female dominated industries and occupations that the work of employees is properly valued and in consequence is properly remunerated.

(iii) The principle apply in all circumstances where the Commission exercises its powers and functions in relation to awards, enterprise agreements and the resolution of industrial disputes including circumstances where the parties to those matters reach consent

arrangements or settlements. The principle would be an essential feature of the exercise of the Commission's powers in award review processes pursuant to s.19 of the Act.

(iv) In implementing the statutory requirement to ensure equal remuneration and other conditions of employment for men and women doing work of equal and comparable value the following should apply:

(a) Remuneration be given have the same meaning as that expression in the *Equal Remuneration Convention* (*Convention* No 100);

(b) The assessment of value be undertaken on an objective basis with the Commission making an assessment as to the value of work using the Work Value principle. The assessment of work value should be objective, transparent, and non-discriminatory. The only requirement shall be to ascertain the true value of the work rather than the demonstration of whether there have been changes in the value of the work. It is not contemplated that such matters would be ordinarily brought under the Change in Work Value principle unless there were work value changes evidence as contemplated by that principle.

(c) The nature of the work value assessments undertaken are

discussed in the next section of the Commission's report.

(d) It is not necessary to find a gender causation or discrimination based on sex in order to make findings. The requirement is directed to the ascertainment of the appropriate value of work and to ensure that there is equal remuneration where there is equal or comparable value.

(e) Comparison for the value of work may be undertaken across and within industries and occupations, between different awards and with more than one comparison if required.

(f) As identified in *In re Crown Employees (Legal Officers - Crown Solicitor's Office etc) Award* (1972 AR 376) the use of comparators is a foundation for wage fixation and is useful only to the extent that it furnishes the guide of some reliability to the proper rates. Accordingly, whilst comparison may be undertaken as to dissimilar work as between male and female workers (regardless of the award or industry in which the work is performed) it will be necessary to establish that there is a proper basis for comparison.

(g) The proper basis for comparison is not restricted to the similarity of work, as the essential ingredient of the principle is equal or comparable value. It is not necessary to find

sameness or like nature of work. However, a range of factors might be relevant in considering comparability such as the history of the female dominated occupation or industry, award histories and the pattern of award variation and developments; the availability of credentialling arrangements and institutional arrangements that impact upon occupational market(s) such as regulatory schemes. Another reference point is the comparable circumstances of other occupations or industries in relation to matters such as education, training, qualifications and competencies.

(h) In making comparisons it may be appropriate to have regard to overaward payments or the absence thereof, provided that the components of the overawards are properly identified. Labour market, as opposed to work value considerations, should be excluded from consideration. In any event, overaward payments can only be used as a basis for comparison where there is no risk of a flow-on of increases in rates of pay.

(v) The principle would provide an alternative basis for the assessment of undervaluation of work in female dominated industries which does not depend for its operation upon the existence of, or the making of, comparisons between female and male rates of pay. This principle will provide for the assessment of undervaluation

simpliciter.

(vi) In female dominated industries and occupations, it shall no longer be the presumption that the rates of remuneration have been properly assessed having regard to either the equal pay principles or proper work value assessments. In this regard it should not be assumed that all work has been valued correctly up to and including the structural efficiency processes and thereafter or that changes in work value have been taken into account. Moreover, it should not be assumed that assessments made by the Commission of the work value of these classes of employees has fully and adequately taken into account all relevant matters. Nor should it be assumed that the Minimum Rates Adjustment process, if undertaken, has been fully undertaken.

(vii) It is essential that the Commission have regard to the history of the award and whether there have been any assessments made of the female dominated work in the past, in considering cases where this principle will apply. Furthermore, it will be important to consider whether the rates have been assessed on the basis of the sex of the worker. By this I do not import a discrimination test. The issue to be considered is a broad one having regard to a range of considerations includes the following:

(a) whether there some 'female characterisation' or labelling of

the work;

(b) whether there some underrating or undervaluation of the skills of the female employees *per se.*

(c) Whether the industry or occupation has undervalued remuneration as a result of occupational segregation or segmentation.

(d) Whether there are features of the industry or occupation which may have the potential to reduce the likelihood of a proper evaluation of the work such as the high degree of occupational segregation, the disproportionate representation of females in part-time or casual work, low rates of unionisation and low representation in workplaces covered by formal and informal work agreements and other considerations of that type.

(e) In considerations of this kind the Commission would be careful to undertake gender neutral assessments of the work and to place sufficient and adequate weight upon traditional work of women such as dexterity, nurturing, interpersonal skills and service delivery. These skills should be reassessed not only in the light of previous work value assessments (if any) but in the light an objective appraisal of those features of work. Clearly, if no previous work value assessment has been undertaken then such an assessment should be undertaken as part of the award review processes.

(viii) The principle shall operate on the basis that male rates of pay shall not be reduced under any circumstances.

(ix) A number of alternative approaches should be available to the Commission to remedy undervaluation. Each case should proceed on its own merits. Some possible approaches include reclassification of work, the establishment of new career paths, changes to incremental scales, reassessment of the broadbanding of classifications or skills, reassessments of definitions and the avoidance of generic descriptions of work which do not properly describe the value of the work.

(x) In all cases the Commission should be mindful of the economic, and in particular the employment impact of any decision to review rates of pay or conditions. Naturally, an incremental or evolutionary approach to reform will facilitate a change in a way that minimises adverse economic or employment consequences. (I discuss these considerations further in the chapter dealing with Term 5 of the Terms of Reference.)

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WAGE FIXING PRINCIPLES: WORK VALUE, MINIMUM RATES ADJUSTMENT, STRUCTURAL EFFICIENCY AND SPECIAL CASES

WORK VALUE

Charles Patrick Mills in *Industrial Laws - NSW* (Sydney, Butterworths, 4th ed.,1976) describes the work value function of the Industrial Relations Commission as follows:

> The function, truly understood, is to consider all the relevant features of the work, to take into account all relevant material, including such as will furnish a guide to fair valuation, to bear in mind the contentions of the parties to the arbitration and, in the light of these things, to fix amounts which the tribunal itself deems to be just and reasonable to meet the circumstances of the case. The amount so fixed will represent the tribunal's view of the value of the work; *Re Crown Employees' (Scientific Officers - Division of Science Services, Department of Agriculture) Award* [*Scientific Officers*] (1962) AR 250 (p 175).

In this chapter I examine the history of work value processes in this Commission, commencing with some introductory comments about the inter-relationships between work value and the overall approach to wage setting. I then consider the elements of work value assessments, followed by a consideration of the attempts by industrial tribunals to contain work value increases and to quarantine them from wage rises generally. I then consider the element of comparative wage justice, followed by a consideration of the introduction of wage indexation. At this point I shall analyse the benefits and deficiencies of the work value process before reviewing the minimum rates

adjustment and structural efficiency principles.

INTRODUCTION

Work value has formed part of the wage fixing processes in both the State and Federal Industrial Commissions for many decades. In NSW, the work value components of a wage claim were dealt in relation to the secondary or marginal wage. The basic wage was set with regard to economic factors including productivity, national economic outlooks, economic factors specific to particular employers and industries and so on. As will be seen from the following discussion, the importance of work value claims increased after the introduction of regular national and state wage cases which granted increases to the economic part of the wage. This left work value claims as the primary source of wage increases outside of the National Wage Case structure.

The process of valuing work performed by employees is an integral part of the overall function of industrial tribunals in a centralised wage fixing system. The broad statutory power pursuant to which the NSW Commission sets wages is found in s.10 of the *NSW Industrial Relations Act* 1996 which provides as follows:

> The Commission may make an award in accordance with this Act setting fair and reasonable conditions of employment for employees.

The process of wage fixing over time has required the Commission to have regard to wages persisting in other industries and occupations. For this

reason the issue of how, when and why the Commission should, or is entitled to, make comparisons with other occupations is a significant and important aspect of the work value principles that have been developed and applied in this Commission. An examination of the history of that process follows.

ELEMENTS OF A WORK VALUE ASSESSMENT

The Revision of Metalliferous Miners Principle and Comparing Work

In Re Metalliferous Miners', etc, General (State) Award (*Metalliferous Miners*) (1928 AR 466 at 471) the following foundational statement in relation to the availability of comparisons is made by the Commission:

> It must always be remembered that the rate of pay awarded in one industry is not to be accepted as a guide to the rate to be awarded in another unless the tribunal is satisfied that the work done in each is fairly comparable. Even when similarity of work has been established it is not enough to look merely at the rates awarded apart from the other conditions of the award in which they are found. It is also necessary to have regard to the circumstances under which the award in question was made, and to examine in detail the conditions as well as the wages awarded and to consider carefully the principles upon which those rates and conditions were fixed in that particular award.

This principle requires the Commission firstly to establish the similarity of the work and then examine:

- the conditions of the comparator award;

- the circumstances under which the comparator award was made;

- other conditions contained in the comparator award; and

- the principles upon which the rates and conditions were fixed in the comparator award.

This principle was described in 1962 as "a sheet anchor of the system which we are not prepared to let go" in the *Scientific Officers Case* (1962 AR 250 at 282, 283) in which case the NSW Commission also referred to the adoption of the principle by the Commonwealth Conciliation and Arbitration Commission which expressly approved it in the *Professional Engineers Base Grade Case* (Print A7855 p.96).

The process of valuing work, and the principles developed and applied by the Commission for that purpose, are described in the *Scientific Officers Case* (at p 274) as follows:

> The principles of wage fixation which the Commission applies and enunciates as guides for itself and for the subordinate tribunals and for the information of those concerned with industrial affairs consist very largely of statements as to what material will be regarded as relevant and what material will be regarded as irrelevant in proceedings involving the fixation of wages.

The *Metalliferous Miners* principle was varied in *In Crown Employees (Legal Officers - Crown Solicitor's Office, &c.) Award* (1972 AR 376) where the Full Bench of the Commission stated as follows:

> We do think, however, that some modification to the principle of the *Metalliferous Miners Case* [1928 AR at p.471] is called for. It will be observed that, as originally formulated, it presupposed that, for one class of work to be comparable with another class of work, it had to be similar. In the state of authorities that is still the current view of the Commission. But the soundness of the view has been criticised. (See article "*Work Value*" by *J.R. Kerr*, Q.C. - now Chief Justice - in the *Journal of Industrial Relations*, vol.6(1), p.1.) It has been pointed out that, in their day to day task of making awards on a work-value basis for a variety of classifications, the tribunals do make comparisons between quite different types of work in order to determine whether one type is work more or less the same as the work in another classification. And it has been maintained, that if it is useful and proper to consider the comparative value of different classes of work regulated by one award, there is no valid reason why a consideration of the comparative value of different classes of work regulated by separate awards should be regarded as other than useful and proper. ([1972] AR 376 at p 388-89)

The Commission also approved the movements of wages in the community generally being taken into account, in the following terms:

> We think that it is not only inevitable but also proper that, when reviewing the wages payable in a particular industry, members of the Commission should have regard to their knowledge of movements in wages and salaries of widespread application in the community. This was undoubtedly done in the 1970 *Teachers Case* and the course taken there was inconsistent with the view expressed in some earlier cases. If there is anything in the judgments which have applied the principle of the *Metalliferous Miners Case* [1928 AR at p.471.] which suggests that movements in wages of widespread application in the community are forbidden ground for an arbitrator, then we think that they should no longer be followed. (1972 AR 376 at 391)

This led to the tribunal substantially broadening its approach, in moving toward cross-award and cross-industry valuations and work comparisons.

In disregarding the historical relationship between two classes of work, thereby departing from the approach adopted in the *Scientific Officers Case* (1962 AR 250), it was observed:

> Our decision that, when fixing salaries for legal officers, it is proper to pay regard to salaries fixed for professional engineers because of a proved historical relationship between the salaries of the two classes of officers is a departure from what was decided in the *Scientific Officers Case* [1962 AR 250], where, when called on to fix salaries for scientific officers in the Division of Science Services of the Department of Agriculture, the Commission refused to consider as possible guides the salaries (except those for graduates) payable to other classes of scientific officers and to other classes of professional officers in the Public Service. **We wish to emphasise, however, that this departure is limited to declaring that it is legitimate, when arbitrating on rates for work of a particular class, to take into account rates for work which is shown by documentary or oral evidence to be comparable in value though dissimilar in nature.** [emphasis added] (1972 AR 376 at 391-92).

The Commission considered it appropriate that comparisons be drawn between professional engineers and legal officers, principally because it had been an established relationship between the rates of pay of those classes of employees over a period of time (Ibid at p 389).

However, comparisons drawn with Public Service scientists were treated differently by the Commission. There was a break in the history of monetary relationships between legal officers and scientific officers. The Commission (at p 390) expressed the following important distinction between scientific officers and professional engineers, for the purpose of comparisons being drawn with legal officers:

> **The history did not disclose any identify or other definable relationship in the grading and salaries of legal officers and scientific officers and there was no material allowing any comparison to be made of the value of the work of the two groups.** In our opinion it would not be sound to draw any inferences relevant to the salaries of legal officers from the fact that after a work value inquiry and for stated reasons the Commonwealth Public Service Arbitrator increased the salaries for a wide range of scientific officers in the Commonwealth Service and the Board later decided to apply corresponding increases to scientific officers in the State Public Service. (emphasis added)

Although it expanded the *Metalliferous Miners* principle, the Full Bench rejected the more expansive approach taken by *Sheldon* J in *In re Crown Employees (Electrical Inspectors etc) Award* (1967 AR 513 at 524-525), in which approach the Commission would be required to undertake a checking role of the rates proposed, by reference to rates for dissimilar but reasonably comparable work.

THE DEVELOPMENT OF WORK VALUE PRINCIPLES

The application of the *Metalliferous Miners* principle, as developed over the years in work value cases, required the Commission to take into account various matters as follows:

- similarity of the work (*Metalliferous Miners*);

- circumstances under which the comparator award is made (*Metalliferous Miners*);

- conditions as well as wages applying in the comparator award (*Metalliferous Miners*);

- principles upon which the wages conditions in the comparator award were fixed (*Metalliferous Miners*);

- the nature of the work (*Legal Officers Case* 1972);

- the responsibilities of the work (*Legal Officers Case* 1972); and

- conditions under which work is performed. (*Legal Officers Case* 1972)

Other guidelines developed over the period 1928 to 1970 for the valuation of work included:

- public sector officers, commencing with tertiary qualifications and without experience, are likely to be appropriately remunerated on the same scale (*Legal Officers Case* 1972; *Scientific Officers*);

- value does not mean value to the employer (*In re Clerks (State) Award*) (1959 AR 470) (the *Equal Pay Case*);

- the fact that employees are covered by one award does not, *ipso facto*, mean that the work they are performing is like, or similar,

work that is capable of comparison (the *Equal Pay Case 1959*);

- a work value case is limited to an evaluation of the work itself; other factors are not to be taken into account (*Scientific Officers*);

- a work value case is to be distinguished from an application aimed at maintaining the purchasing power of wages (*Scientific Officers*);

- the Commission is to have regard to the competing submissions of the industrial parties (*Scientific Officers*);

- the Commission is to establish what are just and reasonable rates (*Scientific Officers* at 278);

- the fixture of what is just and reasonable is not done for a fixed point in time, but prospectively for the term of the award (*Scientific Officers* at 278);

- when making a first award existing rates will provide some guidance to the tribunal as to the amounts which will constitute just and reasonable rates (*Scientific Officers* at 278);

- rates being paid may be a poor indication of what is just and reasonable in circumstances of job shortages and low union coverage (*Scientific Officers*);

- the Commission is to consider all relevant factors of the work including training, work performed, responsibilities, achievements, standing in the professional community (*Scientific Officers* at 278);

- the use of rates of pay in other areas, in the absence of evidence as to the comparability of the work, is contrary to the *Metalliferous Miners* principle (*Scientific Officers* at 279);

- wage increments are a measure of the increasing value of an employee's work with regard to experience, practice, observation, and learning (*Scientific Officers* at 284);

- salary differential between grades and classifications in an award reflect relevant work value differences (*Scientific Officers* at 284).

Amendments to the *Industrial Arbitration Act* 1940 in 1959 removed the restriction that had hitherto applied to the NSW Commission in the exercise of its functions, whereby the Commission was restricted to determining the lowest salary rate in an award.

SOME KEY NEW SOUTH WALES DECISIONS ON VALUING WORK USING COMPARISONS

In In re *Marine Motor Drivers, Coxswains &c. (State) Award* (the *Marine Motors Case*) (1960 AR 250 at 259), the Commission held that the

existing wage fixing principles (comprising, in the main, the *Metalliferous Miners Case*) were not affected by the statutory amendments. *Beattie* J quoted a 1958 decision of the Commission regarding the principles as follows:

> (a) A rate of pay awarded in one industry is not to be accepted as a guide to the rate to be awarded in another unless the tribunal is satisfied that the work done in each is fairly comparable.
>
> (b) If similarity of work is established, it is necessary also to consider in detail -
>
> i. the comparative conditions of employment;
> ii. the circumstances in which the award relied on was made; and
> iii. the principles upon which the rates and conditions prescribed by the award relied on were made(*Steel Works Case* (1958 AR 603 at p 621) approving principles enunciated in the *Metalliferous Miners Case* (1928 AR at 471).

In the *Marine Motors Case* the Commission had regard to rates of pay fixed under another and wholly different award. The employer objected to this course on the basis that it infringed the *Metalliferous Miners* principle. *Beattie* J stated as follows:

> I have given to the Guild rates (and by these I mean the Guild rates as increased by *Foster, J.* on 6th May last) such weight as I think proper to give, but I have arrived at my own independent assessment of the wages which should be fixed for coxswain-drivers. (p 266)

His Honour emphasised the historic difference between the two awards, whereby employees covered by the subject award were in charge of smaller boats with lesser horsepower, as compared to the comparator award, citing difference in responsibilities as a continuing distinction between the work.

In *In re Australian Wire Rope Works Pty Ltd, General, Award* (1961 AR 396 at 400), the Commission rejected an application seeking to compare work involving the winding of wire on bobbins, finding that the work performed at the applicant workplace was substantially different from, and involved less responsibility than, the work performed at the comparator workplace. There are two significant aspects to this decision:

(i) the comparison involved having regard to work performed in each instance by females, in other words comparing female work with female work; and

(ii) the Commission applied its normal work value principles in noting that even if the work had been comparable, it would not have had regard to the award covering the comparator work, because it had a "special history" making it "quite unacceptable as a guide in the fixation of the rates of pay for females employed in the wire rope industry". (p 400)

In 1963 the Commission again considered the effect of the 1959 amendments and found that the amendments meant that the Commission was entitled to take into account material that would previously have been irrelevant in relation to the fixation of lowest rates. This meant that the Commission could now take into account the state of the economy and its capacity to meet higher wage levels (*In re Crown Employees (Field Officers - Forestry Commission of NSW) Award* (the *Forestry Officers Case*) (1963 AR 324 at 341, 342).

In addition the Commission found that it had been open to the judge at first instance (*Taylor* P), in making a first award for forestry officers, to consider the agreements and determinations made under the *Public Service Act* and how they had been applied in the past.

In this case the Commission identified the federal *Metal Trades Case* ((1959) 92 CAR 793) as the case that brought the term "work value' into vogue. I discuss the position in the federal arena separately below.

A significant work value case heard in this Commission was *In re Crown Employees (Teachers - Department of Education)* Award (1970 AR 345), in which a comprehensive work value inquiry was undertaken, involving 71 hearing days for the presentation of the Teachers' Federation case in chief, 17 days of submissions, 100 site inspections, and 252 exhibits tendered by the Federation alone. The occupation by this time was predominantly female although males still exceeded females in the secondary school sector.

Significant points arising out of this case include the following:

- the case had been conducted more in the nature of an inquiry than as adversarial proceedings (p 516);

- teachers, being a female dominated occupation, received a 14% wage increase pursuant to a work value case;

the Commission evaluated work having regard to non-manufacturing or 'softer' skills. For example, *Sheldon* J in his judgment, (a minority judgment as to quantum only), refers to a "lasting impression" arising out of the work value case as being one of "satisfaction and gratitude", saying "This should be said because, while disputes concerning teachers are news, the unobtrusive public service rendered in the routine of their daily work is not" (p 521);

- the Commission took into account changes in work value arising out of gradual change, including movement to a "higher professional plane" (p.468), changes to teaching methods, curriculum changes, increased parental-type responsibility (p 478), and different disciplinary approaches;

- the Commission noted the importance of having regard to the history of the award noting that a work value case in 1964 had taken place, but that there had been very significant changes in the work of teachers since then, and what was decided in 1964 did not help the Commission greatly in deciding the salaries to be awarded in 1970. (Salaries had been adjusted in 1967 following discussions between university staff associations and State governments) (p 515);

- the functions of the Commission in a work value case are to review the salaries payable in the industry, notwithstanding any previous Inquiry and "such a review requires us to consider all relevant material placed before us in the arbitration, to bear in mind the contentions of the parties, and thereafter to fix salaries in such amounts as we deem just and reasonable to meet the circumstances of the case" (p 514);

- although there is some reference to "comparable" industries, no such industry is identified, and *Sheldon* J, like the majority, states that there is no substitute for a "just appraisal of the evidence in this case"(p 528);

- the Commission refers to the public interest obligation to maintain teaching as an attractive career choice (*Sheldon* J; p 521);

- the Commission hesitated to conduct a work value case at the same time as amalgamating the two structures applying to second and fourth year trained "assistant teachers", noting in particular the likelihood of much reduced wage increases applying to some employees (p 360).

In relation to this Inquiry, I note that this outcome was apparent in the evidence relating to librarians arising of the variations to the librarians' rate of pay over the years. The Commission's hesitation

in dealing with the classification amalgamation is not reflected in the librarian's Determinations and Agreements, notwithstanding the deleterious wage consequences likely to have been the result;

- the Commission has regard to wages in the community generally, particularly noting that some weight should be given to the fact that in the community generally the average earnings of employees in many industries for a normal week's work "are well in excess of minimum rates fixed by awards" (p 516). The difference between having regard to comparable occupations, as for example occurred in the *Marine Motors Case,* as opposed to having regard to wage movements in the community generally, is highlighted by this extract from the majority judgment:

> ... if ... authorities regard themselves as unable to pay more than an award prescribes, then it is plainly only common sense for the tribunal to fix rates which will go some way towards putting the employees of the authorities on a comparable footing with those who can bargain in the open market. (p 517)

This later proposition was also strongly stated by *Sheldon* J who refers to *Sheehy* J's decision in the *In re Crown Employees (Skilled Tradesmen) Award Case* (1970 AR 214) where over award payments to tradesmen in the private sector were taken into account in the setting of wage rates in the applicant award. *Sheldon* J goes on to state:

> This award is but one of many examples where the exigencies of competition for labour, as well as the requirements of elementary

> comparative wage justice, have led to the creation of award standards designed to correlate to some extent "take home" between recipients and non recipients of over-award payments. Industrial tribunals are enfiladed with much criticism, which perforce must be borne with a patient shrug, but they are still a haven for those whose bargaining power is weak as well as those whose employers feel bound by law or a sound (or sometimes merely hidebound) tradition to pay no more than an independent authority fixes by award.
>
> Teachers of course receive no over-award payments nor do they benefit from any devices within their award to provide even an imperfect substitute. The value that is placed on their work as such in this case, together with any increases on economic grounds applicable to all covered by awards, will determine their actual living standards for the duration of this award. How can a just award be made for them without this fact in mind? They have no bonuses, expense accounts or gratuitous payments of any kind to lift their salaries above award minima. An arbitrator has no comforting assurance that what he awards will be only part of the credit column in the domestic budget. It seems to me that, while these facts can be no more than background in my assessment, it is background which must be influential, and not amorphous. Otherwise this group would receive less than an fair deal. If a relevant factor is disregarded of course it is imponderable, it has in truth been abandoned as a relevant factor and the result must be injustice. ... (p 525)

WORK VALUE IN THE FEDERAL COMMISSION

It is worthwhile at this point to review what was happening in the federal sphere during the preceding decades. I shall distil some of the principles as developed in the Federal jurisdiction:

1. The basic wage component of the federal wage was established having regard to an "ethical standard" designed to meet the needs of a male married worker and some of his dependants: *Arms Explosives and Munition Workers Federation of Australia v. The Director-General of Munitions* ((1943) 50 CAR 191 at 205). It

would be contrary to this principle for the federal Commission to establish wage rates for women by comparing of the efficiency and productivity of women with that of men: *Munitions Workers Case* (p 213).

2. The work value component of the wage, as in the State jurisdiction, formed part of the marginal or secondary component of the wage.

3. In making a new award involving site inspections and extensive evidence, the Commission is not bound by pre-existing relativities with other awards such as the Metals Trade Award (*In Re Federated Ship Painters and Dockers Union of Australia v The Adelaide Steamship Co Ltd* ((1960) 94 CAR 579). In this case the Commission referred to the *Metalliferous Miners Case* as supporting the view that in making a new award the Commission is entitled to have regard to existing relativities and to the reasons for them, although it is not bound by them (p 612).

4. In *Re Base Grade Professional Engineers* ((1961) 97 CAR 233) the Federal Commission considered that, notwithstanding that each is a member of a profession, the comparison between a professional engineer and a medical officer was too tenuous to be of material assistance, having regard to the fact that the medical officers' earnings historically had been related to earnings of private practitioners. The Commission also paid regard to the dissimilar

nature of the duties performed by each. The Commission emphasised the importance of having regard to the actual duties, responsibilities and work value of the applicants, noting the "unique opportunity" afforded by the extensive evidence presented to fix salary rates likely to "meet the ends of justice" (p 325). Other matters relevant to work value considerations included:

- it is inappropriate to compare an employee whose career had just commenced with one in the middle, or at the end, of their career (p 325);
- the making of a new award would not provide grounds for review of remuneration in other areas, with those other areas requiring themselves a work value review if rates are to be adjusted (p 329); and
- a flow on may be expected where there is an assessment based on economic grounds (p 323).

5. In the *Forestry Officers Case* referred to earlier, the State Commission also identified the more usual approach taken federally as involving an economic, as opposed to work value, approach, unlike the NSW jurisdiction where work value cases had been more common. In the *Metals Trade Case* where a 28% increase to the margin was awarded, the Federal Commission identified the *Professional Engineers Case* as being a work value case, unlike the economic type case put in the *Metals Trade Case*,

which was based on a claim for return to relativities that had existed some years earlier.

6. The next Commonwealth value case of significance is the *Metal Trades Work Value Case* ((1967) 121 CAR 587) which involved a full work value review including site inspections and the taking of evidence over a long period of time.

In the New South Wales Industrial Commission, *Sheldon* J, in the *Crown Employees (Teachers - Department of Education) Award Case* (1970 AR 345 at 523-24) described the impact of the *Metal Trades* decision as follows:

> This decision had the greatest (although uncontemplated) impact on wage standards in awards in the history of industrial arbitration. In an economic setting of prosperity and full employment its pronounced intentions were swept aside and this resulted, particularly during 1968 and 1969, in practically all awards (federal and State) operating in NSW not only receiving work value increases but at a level which previously was beyond a union's most optimistic dreams ... The day has long since passed when wage movements of this kind can be ignored merely on the basis of dissimilarity in work. Such a view treats the view the *Metalliferous Miners Case* Principle as a straight jacket rather than as a useful corrective against roaming too far afield ...
>
> The truth is that the *Metal Trades Work Value* Decision of 1967 and its aftermath were so pervasive in their effects on wages that some principles took a buffeting. Certainly industries could no longer be placed in compartments as watertight as before. It was no longer possible to sustain in practice any narrow interpretation of the *Metalliferous Miners Case* principle. In my view, it is better to recognise this frankly than to rationalize. Even award histories lost much of their relevance with late 1967 becoming a new starting point. What happened less than a decade ago often seems, in the industrial milieu, a generation away. All this may have been good or bad, a refreshing wind of change or a dangerous subversion of established award making techniques but the cold facts are beyond debate these, for the purposes of this case, are what matter.