The *Metal Trade Work Value Case* is thus significant both for its impact on wage increases, and as a reference point for work value assessments in other, especially male - dominated, occupations and industries.

The case supports the evidence given by Ms Laura Bennett in these proceedings to the effect that the industrial tribunals have a much greater historic involvement in the work value assessments of blue collar work as opposed to work value assessments in female dominated occupations and, in particular, in the service sector.

In my view, the *Metal Trades Work Value Case* operated as a reference point for a significant number of male dominated occupations and industries for many years thereafter. Indeed it is this case which contains one of the standard reference points for the undertaking of work value assessments, being the list of relevant facts and circumstances which *Gallagher* J set out as having been considered by him in coming to his decision. Those facts and circumstances are as follows:

1. Qualifications;
2. Training and skill;
3. Technological changes;
4. Changed conditions;
5. Changes in metals;
6. Alterations of methods of work;

7. Increased tempo of work;
8. Responsibilities individually and as a member of a team;
9. Availability for skilled work; and
10. Length of time which had elapsed since previous fixation of wages. (p 677)

Other important points arising out of the *Metal Trades Work Value Case* includes the following:

- The increases awarded on the basis of work valuation were not to be taken as setting a pattern for wage increases in other industries;

- There are references to the replacement of skilled labour by machines which were operated by what was described as "unskilled labour", that labour predominantly involving female process workers. The need for manual dexterity as opposed to skill was identified and recognised by the Commission as being part of the work performed by these process workers. On this point, NPEC in its submission is critical of the *Metal Trades Work Value Case* and in particular refers to the rejection of a proposal to introduce a further classification in the female dominated process worker area on the basis that it might create factory jealousies, feelings to which women were assumed to be prone (Ex 456 para 169);

- The Federal Commission rejected submissions by the employers that modern technology, specialisation, planning, simplification and supervision had reduced the value of work, noting, in particular, that simplification may assist the tradesman but does not dispense with the exercise of trade knowledge (pp 674, 675);

- In relation to overaward payments (in relation to which it was submitted that the Federal Commission ought to have regard in assessing the "true value of the work") the Commission did find that, the fact that the employers almost invariably paid more than required by law, would provide a reason not to accede to the employers' submissions against an increase in wages based on work value grounds (submissions which *Gallagher* J did not regard as sound) (p 676);

- The Commission had regard to public interest matters, including the possible deleterious effect on apprenticeships, and the difficulty in attracting or obtaining skilled labour in an industry reliant upon such labour (p 676);

- The Commission noted limitations on some of the nomenclatures of classifications in the *Metal Trades Award*. It considered that the classification descriptions failed to reflect the true skills involved in performance of the work under those classifications;

- The majority agreed that the work value assessments, although only conducted in relation to a minority of classifications contained in the *Metal Trades Award*, should nevertheless be extended to all other classifications. The basis for this decision was said to be the team nature of the work performed. In a minority judgment, *Moore* J disagreed with that proposal finding that it was contrary to the purpose of a work value case (p 749);

- The Commission gave consideration to the use of job evaluation processes as the Commonwealth had produced some job evaluation assessment sheets to the Commission in this case. The Commission rejected a full scale adoption of job evaluation as a basis for setting of salaries in work value cases but noted that such assessments may be of assistance in the overall context of considerations to be taken into account in such cases;

- The Commission directed that an employer was entitled to absorb the work value increases into existing overaward payments. Actually, the work value increases were not absorbed into overaward payments and the Commission was later forced to put a temporary hold to the full application of the *Metal Trade Work Value Case* payments in 1968. That restriction was lifted later in 1968 and, notwithstanding the firm expressions of the Commission to the effect that the work value increases should not extend to other areas, in fact the flow-ons occurred in a number of industries.

Nevertheless, the sentiments expressed by the Commission in relation to the inappropriate flow-on of the increases awarded to the metal trades workers was taken into account by the New South Wales Commission. For example, in *In re Ironworkers' Assistants Etc (State) Award* (the *Ironworkers Case*) (1968 AR 13) a Full Bench heard applications for flow-on of the metal trades work value increases to a number of different awards. The Commission divided those awards into four distinct groups and found that those awards in group A, which were identical the *Metal Trades Awards*, were entitled to receive the metal trades increase. The second group of awards included classifications which were identical to the *Metal Trades Awards*, but the salary attached to those classifications was in fact in excess of the amounts existing at the Federal level prior to the making of the *Work Value Case*. The Commission, with the concurrence of employers, continued the relationship between those awards and applied the metals trade increase to that set of awards. However, in those awards in group C, which included classifications different from those in the *Metal Trades Award*, the State Commission refused to flow-on the work value increase. Similarly, in relation to two separate awards dealing with Fire Brigade employees and officers, the Commission refused to flow-on the metal trades increase but gave leave for a work value application to be made by the union for those awards.

However, notwithstanding the *Ironworkers Case*, it appears from *In re Dispute - Electricity Commission (Wages Staff) Award* (1968 AR 251 at 261) that employers in many cases applied the full increases arising from the *Metal*

Trades Works Value Case.

Another example of the effect of the *Metal Trades Work Value Case* is found in the *Vehicle Industry Award 1953 Case* ((1968) 124 CAR 295), a case often cited in relation to the factors listed by Commissioner *Taylor* to be used in determining just and fair rates as follows:

1. The qualifications necessary;

2. The training period required;

3. Attributes required for the performance of the work;

4. Responsibility for the work, material, and equipment and for the safety of the plant and of other employees;

5. Conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment, etc;

6. Quality of work attributable to and required of the employee;

7. Versatility and adaptability (e.g. to perform a multiplicity of functions);

8. Skill exercised;

9. Acquired knowledge of processes and of plant;

10. Supervision over others or necessity to work without supervision; and

11. Importance of work to overall operations of plant (p 308).

Whilst these factors are often listed as the indicia of 'work value' it must be borne in mind that the principal function of the Commission was to determine just and fair wage rates having regard to:

(a) the work being performed; and
(b) the general level of wages at the time of the fixation (p 308).

The Commission made clear that the above list of factors was not exhaustive but constituted those relied upon in the *Vehicle Industry Case* (p 308).

Insofar as the *Metal Trades Work Value Case* was concerned, the Commissioner specifically rejected the original application by the unions seeking an increase based on that case, instead leaving the door open for the union to bring the work value case for the Vehicle Industry Award which then formed the basis of this decision (p 296).

An important feature of the *Metal Trades Work Value Case* is the extent to which the Commission had regard to internal classification levels when establishing the rates of pay. Although not specifically addressing this matter, it can be inferred that the Commission necessarily made comparisons between significantly different types of work when establishing the award classification structure. Indeed, the descriptions of some of the classifications are in their nature so detailed as to indicate distinct work processes depending upon the workplace where that particular classification is worked.

By contrast Commissioner *Taylor* had little or no regard to salary scales or awards in other industries. The Commissioner also refused to have regard to similarity in job titles as a basis for awarding the metal trades work value increases, noting that the same job title descriptions would apply to significantly different work (124 CAR at 296).

Of further significance is Commissioner *Taylor's* finding that, in the same way as metal trades work value cases should not automatically flow-on to other industries, conversely employees in other industries who traditionally had not benefited from metal trades increases should not thereby be precluded from seeking increases on the basis of their own work value assessment.

Finally I note that in this case Commissioner *Taylor* undertook an exercise which he described as "broad banding" in reducing classifications, making this case a precursor to the later Structural Efficiency principle applications.

A significant work value case in the Commonwealth Conciliation and Arbitration Commission was the *Hospital Employees Federation of Australia v Canberra Community Hospital Board* ((1966) 114 CAR 422). This case forms part of the background to the *Nurses Case* (1987) that I have discussed in the previous chapter.

The Commission undertook a comprehensive review of nursing work, including the learning incidental to the four years training period in residence, the skills of the profession, and the particularly high responsibilities incurred by nurses in their every day activities in the various sections of the industry (p 423).

The Decision refers to an earlier work value case which had been conducted in 1958 when, for the first time, a qualified nurse in the first year of service after graduation was awarded the same marginal standard as that which applied generally at that time to tradesmen in the ACT (p 424).

In the 1966 case the Commission awarded an increase to the margin on the basis of work value, notwithstanding that marginal wages for tradesmen had not at that time moved on any work value ground since 1958 (p 425).

The success enjoyed by the applicant union in that case was not repeated in 1970 when the work performed by nurses was again considered, on

that occasion in the context of an industrial dispute regarding wages and conditions (*Hospital Employees Federation of Australia v Minister of State for Health and the Canberra Community Hospital Management Board* ((1970) 132 CAR 459). The submissions of the parties are of interest in this case partly because the case falls exactly within that period, where the development of comparative wage justice and the move towards relativity based pay increases were occurring, and partly because of the significance of the *Nurses Award* in the context of the valuation of female work and in the context of the 1986 and 1987 Nurses Cases.

In the 1970 Case, the Nurses Federation did not rely to any extent on past assessment of the wages applying at the Canberra Community Hospital; nor did it rely on changes of duties, skills and responsibilities since the previous assessment. Rather the Federation contended that the Commission "should assess what it regarded to be appropriate wages having regard to the duties performed and other salaries in the community generally, uninhibited by previous assessments in this industry either by this tribunal or any other authority" (p 463).

The basis upon which the employers put their submission in relation to taking account of States' rates was on the basis of comparable wage justice (p 464). The employer submitted that a case had not been made out for further wage increases, particularly substantial ones, and further submitted that the Commission ought to have regard to various State Awards and determinations in assessing the rates to be applied in the ACT. In particular, the employer denied that the State decisions had been "constrained in their assessments by slavish

adherence to the principals (sic) of comparable wage justice" (p 463). The nature of this submission indicates the actual restrictions which applied to the application of comparable wage justice, where it was necessary to have some identity between the classifications being compared, rather than having regard to community wage movements generally.

The Commission indicated that it gave due weight to the State rates in its assessment together with other relevant factors but noted that "the Commission's duty is to determine itself what it regards as right and proper in the circumstances" (p 464).

An unusual aspect of this case was that the parties came to an agreement during the course of the proceedings that male and female employees would be granted the same wage rate. The Commission indicated that had such an application been made it would have been refused by the Commission, on the basis that the 1969 *Equal Pay Case* principles did not allow such an equation with the males rates to take place in circumstances where the work is "essentially and usually performed by females" (p 468). The Commission also indicated that if it had proceeded on this basis, rather than on the agreed basis put forward by the parties the Commission would have awarded lower rates than it eventually did in this case.

It is noteworthy that the Commission saw fit to comment that the nurses occupation had not been subject to a work value inquiry subsequent to the *Metal Trades Award Work Value Case* 1967 (p 468). The significance of the

Commission making a point of this matter is that it suggests an expectation that most occupations and/or industries would in fact have benefited from a work value inquiry subsequent to the *Metal Trades Work Value Case*. In relation to the areas examined in this Inquiry, and indeed in relation to prospective applications pursuant to the recommendations made by me, I note that one factor that ought to be taken into account, is whether an award brought to the Commission for review was the subject of a work value inquiry in a period subsequent to the *Metal Trades Work Value Case*.

The Commission goes on to consider the amount payable to a male tradesperson in the ACT being $57.80 per week at the margin. The Commission notes that the rates for female "tradesmen" would be less but that no such rates were brought to its attention. The Commission then goes on to describe the work of a sister grade 1, finding that a sister grade 1 would exercise a skill and responsibility no less than that of the average "tradeswoman", particularly having regard to the nature of her responsibilities towards the patients (p 470-471). Having made that finding, the Commission eventually awarded a margin of $55.50 to the sister grade 1, first year of service, not the margin of $57.80 then applicable to a tradesman in the ACT. The Commission states that:

> As this is a predominantly female occupation, we have been more greatly influenced by the rates payable to other classifications of females than those payable to males. The fact that all parties sought the same rates for males and females had the effect of bringing into the comparisons we have made the rates paid to certain females who benefited by the Equal Pay Decision. The result of this has tended to cause us to award somewhat higher rates for females than we would have prescribed otherwise. We have not "deflated" any rates for the purposes of comparison (p 471).

The effect of the Commission's decision was to reduce the nurses' marginal rate as compared to the rate paid to tradesmen, notwithstanding an earlier relativity with, and indeed increase beyond, the tradesmen's marginal rate. In addition, the Commission notes the likelihood that the tradesman in fact is in receipt of overaward payments, but apparently takes no account of that in the determination for the sister grade 1.

The *Nurses Case* (1987), as I have earlier noted, corrects the determination insofar as it applied a comparison with female rates based on the predominantly female occupations of nursing.

<u>1969 National Wage Case</u>

The *National Wage Case* 1969 ((1969) 129 CAR 617) was the second National Wage Case in which the Federal Commission considered the appropriate increase in the total award wage, the *National Wage Case* 1967 having introduced the total wage as discussed previously.

The Commission made a number of observations in relation to the work value principle:

1. The annual review of the total award wage by way of the National Wage Case would ensure that awards were bought up to date for economic considerations including having regard to movements in

prices and in productivity and that accordingly these aspects should not be considered in work value cases (p 627);

2. The task of fixing wages in work value hearings would involve consideration of the non economic factors which used to be considered in fixing the secondary, or marginal wage, including things such as period of training, skill required, arduousness, conditions under which work is usually performed etc;

3. In the absence of consent the Commission is not able to make a proper assessment of the work value classifications unless information about that work is before the Commission. Examination of the work done, and consideration of changes of work, should be the approaches followed in assessing the total wage for work value. The Commission noted "the great difficulty which may be experienced industrially when tribunals change relativities of rates either within one award or between one award and another. We would therefore suggest that there should be a good reason before relativities are changed" (p 628). The Commission made that statement in the context of work value cases having been run in almost every area since the introduction of the total wage;

4. Concepts such as team work can not be relevant in work value assessments except in rare cases, being rather more of a factor in

the overall function of a work place and also being reflected in economic growth and thereby being properly considered in national wage cases (p 628);

5. A work value assessment should apply for the particular period contemplated at the time of making the assessment and awards should continue to be made prospectively and unless there is some special reason retrospectively should not be awarded (p 628);

6. In work value reviews, the fact that economic matters are taken care of in national wage cases, does not preclude the arbitrator from having a responsibility to consider the economic impact of work value cases (p 629);

7. In times of full employment such as existed at the time, arbitral authorities cannot ignore the existence of overaward payments (p 629);

   This statement no doubt reflects the Commission's experience in the Metal Trades Work Value Case where work value increases were not absorbed into overaward payments despite that outcome being the intention of the Commission.

8. Broad matters contained in the statutory provisions, for example, the definition of "industrial matters", which includes what is right

and fair, and matters concerning the public interest are to be in the mind of the Commission at all times when awards are being made and "it cannot be overlooked even when dealing with provisions which are asked to be inserted by consent" (p 629).

THE PERIOD OF INDEXATION AND WORK VALUE IN FEDERAL AND STATE JURISDICTIONS

Federal Jurisdiction

1974 - The Merchant Service Guild Case ((1974) 158 CAR 949)

In *Port Jackson and Manly Steamship Company Ltd & Anor. v. Merchant Service Guild of Australia* ((1974) 158 CAR 949), *Ludeke* J was asked to undertake a comparative wage justice exercise. Specifically, the applicant referred to "massive wage increases awarded in the community generally" and also made particular reference to the relationship of ferry masters and engineers with the maritime industry (p 951).

His Honour rejected the submission that comparative wage justice is "discernible at a particular point in time", pointing to the NSW Industrial Commission's consideration of this matter in the *Scientific Officers Case* (1962 AR 250 at 282) to the effect that many hundreds of awards will be operative at any one time.

Ludeke J, found however, that the supposed relativity between the ferry masters and the maritime industry was not borne out by the evidence, the relevant awards having been considered independently of one another and having been made at different times and operative for different terms. His Honour then went on to say:

> Further, where an industrial tribunal is asked to accept guidance in a case concerning the salaries of one class of employee by reference to awards dealing with other classes of employees, it is a prerequisite that there be established a basis of comparability in the work performed. (p 951)

<u>National Wage Case - Minimum Wage and National Wage Case - April 1975 (167 CAR 18)</u>

Changes to the work value principle were effected in this case. At the Commonwealth level, the tribunal was prepared to only allow wage increases outside indexation adjustments as follows:

> "7. In addition to the above increases, the only other grounds which would justify pay increases are:
>
> (a) Changes in work value such as changes in the nature of work, skill and responsibility required, or the conditions under which the work is performed. This would normally apply to some classifications in an award although in rare cases it might apply to all classifications.
>
> (b) Catch-up of community movements. As a result of a series of industry wage increases last year a firm base has been widely established with appropriate relativities between and within awards on which indexation can be applied. However, there may be some cases where awards have not been considered in the light of last year's community movements. These cases may be reviewed to determine whether for that reason they would qualify for a wage increase but care must be exercised to ensure that they are

genuine catch-up cases and not leapfrogging. It will be clear that this catch-up problem is a passing one and should not occur under the orderly system of wage fixation we propose as the basis of indexation.

It should be understood also that the compression of relativities which has occurred in awards in recent years does not provide grounds for special wage increases to correct the compression. Compression is a matter which could be raised for consideration in cases dealing with the form of indexation and in cases dealing with national productivity distribution.

8. Any applications under paragraph 7 above whether by consent or otherwise will be tested against the principles we have laid down, and viewed in the context of the requirements for the success of indexation. This does not mean the frustration of the process of conciliation but it does mean that the Commission should guard against contrived work value agreements and other methods of circumventing our indexation plan. We draw attention to section 4(1)(q) of the Act which says that the meaning of "industrial matters" includes "all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." (p 37-8)

National Wage Case - May 1976 ((1976) 177 CAR 335)

The Commission referred to its decision in the *National Wage Case September* 1975, in which it had amended the work value principle, by introducing the specific requirement for "changes in work value" as the relevant principle, the Commission added the following criteria to Principle 7(a):

(i) Prima facie the time from which work value changes should be measured is the last movement in the award rates concerned apart from National Wage and Indexation. That prima facie position can only be rebutted if a party demonstrates special circumstances and even then changes can go back only to 1 January 1970.

(ii) Changes in work by themselves may not lead to changes in

the value of work. The change should constitute a significant net addition to work requirements to warrant a wage increase.

(iii) Where it has been demonstrated that a change has taken place in accordance with the principles, an assessment will have to be made as to how that change should be measured in money terms.

(iv) The expression 'the conditions under which the work is performed' relates to the environment in which the work is done.

(v) In respect of new work for which there is no current rate, an appropriate rate may be struck in accordance with proper work evaluation.

(vi) Re-classification of existing jobs is to be determined in accordance with this principle. (pp 352-353)

This prescriptive approach had the effect of severely limiting the circumstances in which work value adjustments were to be considered. Even when applications met these criteria and could be brought on, the strict tests set out therein explicitly limited and constricted the manner in which the valuations could be viewed and adjusted.

Wage Fixing Principles Case 1978 ((1978) 211 CAR 268)

A complete review of the wage fixing principles was conducted by the Australian Conciliation and Arbitration Commission in the *Wage Fixing Principles Case* 1978 ((1978) 211 CAR 268).

Each of the wage fixing principles was considered in turn, although the principal focus, for current purposes, relates primarily to the concepts canvassed by principle 7.

Principles 7(a) and 7(b), relating to work value changes and catch-up community movements respectively, remained largely unaltered, although the Commonwealth Commission determined that applications under principle 7(b) should be lodged prior to 31 December 1978 and, following this, the principle would be phased out.

One notable change to principle 7(a) was the deletion of paragraph (v), relating to the wages of new awards being set by a "proper work evaluation". This was incorporated into a new principle, principle 9, which, instead of placing reliance upon work evaluation, expressed preference for "the value of work already covered" and the "existing rates and conditions" covering those already previously covered by a State award (p 295).

National Wage Case, June and September Quarters, 1979 (No 2)

This case concerned a review of, and certain observations on, the immediate application of principle 7(a) "Changes in Work Value". ((1980) IASCR 122)

In particular, a trend in the Commonwealth jurisdiction was raised with concern, whereupon there appeared to be a:

> willingness of tribunals to apply "averaging" in determining work value, a practice which results in amounts or rates of increase being applied to classifications under an award without discrimination as between those affected by substantial, little and no change in work (p 127).

As to this trend being at odds with the general principles of wage-fixing it was said:

> However, it is now clear that the scale of this development is inconsistent with the central concept underlying the indexation principles that increases outside national wage should be small. The operation of Principle 7(a) is potentially in conflict with Principle 6 as changes in work value, generally accompanied by increased productivity, are rewarded by higher pay. If Principle 6 is to be viable, Principle 7(a) can overall only be a small source of wage increases. The submission of the employers that productivity can be distributed only once is undeniable (p 127-128).

As to the effect of this trend on the Commission's decision:

> In light of experience we believe that even greater care needs to be taken to <u>limit the comparative wage justice doctrine in work value cases</u>. There is merit in the employers' suggestion for a provision that in assessing work value, regard should be had to "the previous work requirements, the wage previously fixed for the work and the nature and extent of the change". But we believe that this provision would be unduly restrictive and would not allow the valuation of change in work to give any weight to the wages and work requirements of the hierarchy of classifications to which the work in question belongs or to wage increases in the same classification in other awards. Such comparisons may be appropriate in work valuation in certain cases and should be allowed. Accordingly, we propose to refine the present 7(a)(iii) by varying it as follows: "Where a significant net addition to work value has been established in accordance with this Principle, an assessment will have to be made as to how that addition should be measured in money terms. Such assessment should normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work. However, wherever appropriate, comparisons may also be made with other wages and work requirements within the award or to wage increases for changed work requirements in the same classification in other awards (p 129) (my emphasis).

In addition to this variation, the Bench also emphasised the

importance of "significant net addition to work value", as the basis for any wage adjustments applied for under Principle 7(a).

Transport Workers Award, 1972 ((1981) 261 CAR 664)

In this case, a Full Bench of the Australian Conciliation and Arbitration Commission considered an application by members of the Victorian Road Transport Association and others to vary the Transport Workers Award.

It was submitted on behalf of the Federation that following the abandonment of indexation (July 1981), there were no work value principles in existence. In commenting on this proposition, the Full Bench set out the principles applied during the period 1975-1981:

> On one view, the qualification involved in the reference to pre-indexation days negates the suggestion that wage fixation may now proceed unhindered by any principles, but to remove any doubt that may be raised by the ambiguity of the submission, we state the main conventions which have long provided a guide to industrial tribunals constituted under the Conciliation and Arbitration Act in non-economic cases:
>
> 1. The tribunal should examine all aspects of the work, including the conditions under which it is performed, and the skill and responsibilities of those who perform it.
>
> 2. Under normal circumstances, the starting point is the last occasion on which the award rates were reviewed.
>
> 3. Change of itself including evolutionary change may not add to the value of work. If changes have occurred which significantly alter the work, the award rates may be varied.
>
> 4. Where arguments are addressed to the Commission based on comparative wage justice or on the maintenance of relativities, particular care should be taken in the

examination of such arguments to ensure that the Commission can be satisfied that they are appropriate to the assessment of changes in the award rates under review and that inappropriate comparisons are not made involving consent or paid rates awards.

It should be stated that the treatment of work value, allowances, first awards and service increments during the period 1975-1981 reflected these conventions. In general terms it might be said the Principles then applying codified these conventions **with the exception that the use of comparative wage justice was deliberately and specifically restricted** [emphasis added] (p 669).

National Wage Case 1983 ([1983] 4 IR 429)

New Wage Fixing principles were established in this case. Going to the Commission's task in this case, the Bench noted:

The Commission has noted in the past that in the Australian industrial context, centralization or decentralization is a matter of degree. The wage fixing arrangements before 1975 were less centralized than those which prevailed from 1975 to 1981. The special feature of the latter period is that the whole area of wage fixing was subject to a coherent set of principles under which national wage adjustments were the predominant source of pay increases. The consensus referred to above is for a centralized system of this highly structural type. This is the sense in which we use the term centalized system. Our task is to decide whether there should be a return to a centralized system, the principles on which such a system should operate and the time for it to come into operation (p 437).

Substantial alterations to the Work Value principle were effected, and the following principle was set down:

Principle 4 - Work Value Changes:

(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions

under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.

However rather than to create a new classification it may be more convenient in the circumstances of a particular case to fix a new rate for an existing classification or to provide for an allowance which is payable in addition to the existing rate for the classification. In such cases the same strict test must be applied.

(b) Where new work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new work should be compensated by a special allowance which is payable only when the new work is performed by a particular employee and not by increasing the rate for the classification as a whole.

(c) The time from which work value changes should be measured is the last work value adjustment in the award under consideration but in no case earlier than 1 January 1978. Care should be exercised to ensure that changes which were taken into account in any previous work value adjustments are not included in any work evaluation under this Principle.

(d) Where a significant net alteration to work value has been established in accordance with this Principle, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work. However, where appropriate, comparisons may also be made with other wages and work requirements within the award or to wage increases for changed work requirements in the same classification in other awards provided the same changes have occurred.

(e) The expression "the conditions under which the work is performed" relates to the environment in which the work is

done.

(f) The Commission should guard against contrived classifications and over-classification of jobs.

(g) Where through technological or other change the impact of work value change on the work-force is widespread or general, the matter should be dealt with in national productivity cases under Principle 2 (p 472).

National Wage Case - June 1986 ([1986] 14 IR 187)

Whilst no substantive changes were made to the wording of the work value principle, the Bench sought to clarify the operation of the principle in the following terms:

> Notwithstanding the fact that we are prepared to make only limited changes to the wording of Principle 4 we are concerned about the operation of this Principle. There appears to be a tendency to grant increases for a change in the nature of the work at particular establishments when similar changes have previously been taken into account in the averaging process during the work value round in 1978-1980. This is expressly prohibited by the Principle and, if it continues, could lead to across-the-board increases taking place, contrary to the intention of the Principle.
>
> We are also aware of major exercises being carried out which cover key classifications of employees. Unless these exercises can be controlled within the confines of the centralised system they have the capacity to destroy it. For these reasons we believe that work value cases, whether under Principle 4 or Principle 10(b), which seek to obtain increases for key classifications in awards of the Commission should be processed in conjunction with National Wage Cases. This should ensure that changes in relativities in industry cases do not occur so as to lead to claims for restoration of relativities. (pp 220 - 221).

National Wage Case - March 1987 ([1987] 17 IR 65)

Significant changes to the wage fixation principles were made by the Australian Conciliation and Arbitration Commission in this case. Most

notably, a new key principle emphasising co-operation and consultation, was inserted into the wage fixation principles, as the "Restructuring and Efficiency Principle".

In differentiating this new principle from that of the work value principle, the Commission said:

> The work value principle recognises that the level of an employee's skill and responsibility may change significantly due to changes in the nature of work, justifying a wage increase. The new principle is intended to encourage significant and appreciable improvements in efficiency at the enterprise or plant level which may or may not involve changes in skill and responsibility sufficient to meet the tests of the work value principle (p 79-80).

Paragraph 4(g) of the Work Value principle was deleted with the following comment being made by the Full Bench:

> The principle has been in existence in its present form for almost three and a half years, during which it has operated quite satisfactorily, and was subject to review in the National Wage Case decision of 26 June 1986. It is imperative in the current economic environment that only genuine case be processed in accordance with the principle. We have decided however that the existing principle 4(g) is no longer necessary in light of the introduction of the principle dealing with restructuring and efficiency. (p 81)

In lieu thereof, the Commission inserted the following:

> (g) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed taken into account in assessing an increase under this principle shall not be taken into account in any claim under the restructuring and efficiency principle (p 100).

It can be seen from the extracts set out above that at this point, the work value principle became inextricably bound to the structural efficiency principle, thereby limiting the application of 'work value case' to considerations of efficiency and productivity.

Review of Wage Fixing Principles - August 1994 ((1994) 55 IR 144)

An 'Agreed Document' submitted by the parties was endorsed by the Commission, which effected changes in the work value principle. This led to the situation where a party applying for work value increases bore the onus of proving that there had been a significant net increase in the work, and of justifying the shift in relativities across awards expected from a work value increase. The result of this was the insertion of an additional paragraph into par 1(a) of the principle:

> In addition to meeting this test a party making a work value application will need to justify any change to relativities that might result not only within the relevant internal award classification structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position. (p 175)

Safety Net Review - Wages (The Living Wage Case) April 1998 (Print No Q1998)

In the most recent National Wage Case, the Federal Commission received submissions from the ACTU requesting that the principles be rescinded. This proposition was opposed by both ACCI and the Joint Governments. In

deciding to retain the principles, the Commission did move to simplify them. As it currently stands, the Work Value principle is as follows:

6. Work Value Changes

(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.

(b) In applying the Work Value Changes principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed [s.88B(3)(a)].

(c) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

(d) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the August 1989 National Wage Case decision [Print H9100].

(e) Care should be exercised to ensure that changes which

were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.

(f) Where the tests specified in (a) are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work.

(g) The expression "the conditions under which the work is performed" relates to the environment in which the work is done.

(h) The Commission will guard against contrived classifications and over-classification of jobs.

(i) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other principle of this Statement of Principles, will not be taken into account under this Principle. (p 65)

New South Wales Jurisdiction

In re Crown Employees - Legal Officers (Crown Solicitor's Office, etc) Award (Crown Solicitors Case) (1981 AR 488)

In this case *Bauer* J, applied principle 7(a) of the wage fixing principles, as enunciated in the *State Wage Case - June 1979 and September 1979 Quarters (Re Principles)* (1980 AR 270), to an award application by the New South Wales Public Service Professional Officers' Association. In particular, the application of sub-paragraph (a)(iii) of the principle was considered, which read:

> Where a significant net addition to work value has been established in accordance with this Principle, an assessment will have to be

> made as to how that addition should be measured in money terms. Such assessment should normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work. However, wherever appropriate, comparisons may also be made with other wages and work requirements within the award or to wage increases for changed work requirements in the same classification in other awards. (p 498)

After finding that there had been, within the terms of sub-paragraph (a)(iii) of principle 7, a significant net addition to the work, *Bauer* J determined how this addition could be measured in 'money terms', which involved:

> a determination of (i) the previous work requirements; (ii) the wage previously fixed for the work; and (iii) the nature and extent of the change in work (p 498).

In determining what comparisons would be useful in ascertaining the 'appropriate' circumstances in which a comparison with other awards may be made, *Bauer* J set down the following guidelines:

> (a) The base of the two comparisons must be fairly comparable. This means that not only must the work be sufficiently similar for a truly comparable base to be established, but also the value placed upon the work, skill and responsibility must be sufficiently similar.
>
> (b) There should be made available a sufficiently detailed description of the work, skill and responsibility provided for the class being compared, so that an informed conclusion might be made concerning the comparable nature of the base.
>
> (c) There should be a clear statement of the amount, either in money or percentage terms, of the net increase in the value of the work in the award with which it is sought to make comparison.
>
> (d) The value of the net increase must be determined in a manner which will allow the value to be compared in money

terms. This may preclude a comparison where there were steps taken which restructured the award or provided accelerated progressions in either of the awards to be compared.

(e) The determination of the net increase and its valuation in the award to which a comparison is to be made ought to have been made upon the same principles as apply to wage determination in New South Wales. (p 502)

This decision led to the term "fairly comparable" being construed as a concept inclusive of work value, but also extrinsic to it, in that work value not became not only a component of the criteria for establishing comparability, together with skill and responsibility, but also an external guide on the whole, with the purpose of establishing which types of work would be deemed comparable.

<u>In re Electricity Commission of NSW Reference Case (No 1) (E.C. Reference) (1982 AR 286)</u>

In *Re Electricity Commission of New South Wales Reference Case* [No.1], a Full Bench of the Industrial Commission in Court Session considered the following questions referred by the Minister for Industrial Relations:

1. Whether the wages, allowances, remuneration and mode terms and conditions of employment of employees of the Electricity Commission of New South Wales are just and reasonable.

2. To consider and report upon all industrial matters connected with industrial occupations of employees employed by the Electricity Commission of New South Wales (p 287).

In noting the extraordinary nature of the case before them , the

Bench observed:

> All things considered, therefore, the claims we are required to hear and determine, including the claim to re-open during their currency two reasonable, confirmed wage settlements, are quite extraordinary. Be that as it may, our duty if to determine the matters in accordance with the provisions of the Act and proper industrial principles. (p 297)

Only certain aspects of paragraph (1) of the reference were determined and the remainder of the matters were stood over generally. In undertaking their task, the Bench undertook a comparative wage justice exercise in the following terms:

> We have been concerned to form a view as to comparative wage justice between the Electricity Commission employees in New South Wales and in other states, and between Electricity Commission employees and employees in other industries generally (p 310).

This approach denoted an expansive base for comparison, in that it entailed both the comparison of 'like' work, and dissimilar work across dissimilar industries. It should be noted, however, that this was done in the context of a comparative wage justice exercise, and not under the auspices of any work value principle(s).

In *Re Electricity Commission of New South Wales Reference* Case (No.2) (1982 AR 508), the Commission in Court Session handed down its judgment on the balance of the terms of reference.

In approaching its task, the Bench noted:

> The judgments of the Commission (Macken J) of 15 and 30 June 1981 state that the increases awarded to the Wages Division and the Salaried Division employees were within indexation guidelines. Given the procedures followed that can only mean the increases were based "on work value grounds within the indexation guidelines". There were no other grounds within the guidelines which would permit those increases. There was no appeal against those judgments and no submission to us that the increases were inconsistent with the wage indexation guidelines. We accept that those increases to Wages and Salaried Division employees of the E.C. were based on "work value grounds within the indexation guidelines". (p 512)

Because indexation was abandoned in July 1981 by the Federal Commission (260 CAR 4) and in August 1981 by the State Commission (1981 AR 480), the principles as here applied, were not available within any future cases.

State Wage Case 1983 (1983 AR 805)

A Full Bench of the State Commission, in adopting the eleven principles set down by the Federal Commission in the *National Wage Case* 1983, noted that the implementation of these principles "plainly introduces a new system of industrial relations" (p 806).

In adopting the Federal principles, the Commission noted:

> In the light of the submissions put we accept that the practical course is to adopt the eleven Principles, in toto, as a general ruling or declaration of principle by the Commission in Court Session (subject only to amendment required to meet procedural aspects

> because different bodies and tribunals are involved). That adoption will be qualified by the extent that the Principles in their application to specific situations may by [sic] shown to be inconsistent with the Act (p 809).

Of particular note was Principle 4 - "Work Value Changes" (p 814) reflecting the substantial alterations to the Work Value principle made in the *National Wage Case* 1983 ([1983] 4 IR 429).

<u>State Wage Case - July 1986 (Fisher P, Watson J, Macken J, 86/696 and 697, 30/7/86; unreported)</u>

In this case the Full Bench of the Commission in Court Session adopted the principles set down by the *National Wage Case decision* 1986 ([1986] 14 IR 187).

In particular, Principle 4 was continued without any material alteration, although:

> The expression "new work" in paragraph 2 of Principle 4 has been altered to "new or changed work" because, as the National Wage Case said, there may only be one aspect of the work that has changed. The need for conformity with this principle is stressed in the National Wage Case decision in terms which need not be repeated in this judgment. Regard will need to be paid to these strictures in processing cases under Principle 4 by the Commission, Conciliation Commissioners and Conciliation Committees." (p 6)

<u>Costain Pearson Bridge Pty Ltd and the Australian Workers Union, NSW Branch and the Amalgamated Metal Workers Union - Dispute (Watson J; 86/815; 30/10/86; unreported)</u>

In this case it was determined that comparative wage justice was no longer a basis for resolving issues under the Principles.

On appeal from *Cross* CC, *Watson* J considered rates of pay and laundry allowances for employees on a construction of a decline at a mine site. The appeal was squarely based on an argument that the decision was contrary to the Principles governing wage fixation adopted by the 1986 *State Wage Case.*

Watson J established that the issues before the Commissioner at first instance were indeed not based on change and Principle 4:

> A significant net addition to work requirements must be shown. In this respect, both the Commission in Court Session and the Australian Conciliation and Arbitration Commission have said that a strict approach is to be applied to Principle 4. This was re-emphasised in the National Wage Case [Print No.G3600, pp.35-38] (p 6).

In dismissing the appeal, *Watson* J stated:

> It is not difficult to appreciate what the Commissioner has sought to do in this case. He has wished to achieve what he has felt to be a fair result in a difficult situation. Comparative wage justice is, however, no longer a basis for resolving issues under the Principles, which, if they are to be accepted, as they must, cannot be accepted in part only (p 8).

It was at this point that the application of comparative wage justice as part of wage fixation ceased in New South Wales.

<u>State Wage Case March 1987 ([1987] 17 IR 105)</u>

In this case, a Full Bench of the Industrial Commission made

specific statements pertaining to the work value principle. In terms of its application, the Commission referred to statements to this effect as it had made in the *State Wage Case 1986*. In terms of the principle's administration, it was observed:

> We consider that the work value principle should be read as a code and that in any consideration of applications falling within the principle, applications should be scrutinised in the light of each of the provisions of the code and specific findings made. Applications should not be approved unless the tribunal is affirmatively satisfied that the application is genuine, has been tested, and falls squarely within the provisions of the principle (p 110).

Re Crown Employees (Toll Collectors, &c) Department of Main Roads Award ([1987] 23 IR 254)

This was the first case to be run under the new principle, and involved an Anomalies Conference in which an increase above the 4% State wage ceiling was applied for by the Public Service Association of New South Wales on behalf of Toll Attendants at the Harbour Bridge, Berowra and Waterfall.

A proposal was heard that a disability allowance of 4.7% should be paid and ratified under the Anomalies principle for claimed changes in work value and increased disabilities.

In rejecting this proposal, *Fisher* P stated, *inter alia*:

> (i) The changes relied upon amount to no more than at best, changes to routines. They are not of any major or fundamental kind. (p 262)

(ii) The application entirely fails to meet "the strict test for an alteration in wage rates that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification". (1987) 17 IR at 81.

...

(vii) The application does not meet the test of the limited and exceptional situation that might arise wherein the extent of work value changes for classifications or groups have a cost in excess of the second tier ceiling. There are no special or extraordinary reasons established for an anomalies finding.

(viii) I consider that the granting of this claim on the inadequate criteria tendered could become a vehicle for general improvement in wages and conditions. **It is the first claim of its kind under present wage principles and is essentially negative. It relies almost entirely upon the removal of adverse work practices or the re-evaluation of matters which have long been features of the work.** [emphasis added] (p 262 - 293).

This case serves to illustrate the general restrictions placed upon the application of work value principles.

Broken Hill Pty Co Ltd v Federated Ironworkers Association of Australia, NSW Division & Ors ([1988] 27 IR 432)

In this case, a Full Bench of the Commission in Court Session examined, as an anomaly, restructuring and work value considerations in relation to a claim for an increase that was over and above that awarded as part of the second tier restructuring and efficiency decision in *Re Broken Hill Proprietary Limited and the Federated Ironworkers' Assoc of Aust, NSW Division: Dispute re Rod and Bar Products Division, Newcastle Steelworks* (unreported, *McMahon* D.P., 87/932, 18/12/87). Having done so, it set down a strict test to be applied to cases pursuing work value changes.

With regard to production workers in the blast furnace area, the Bench was satisfied that an agreement reached between the company and the Federated Ironworkers Association was soundly based and complied with the work value principles of the *State Wage Case, March, 1987* ([1987] 17 IR 105) "because of special circumstances based on their own facts" (p 435). In its reasoning, the Bench noted that the work value principles applied strict criteria and the strict test was set out as being:

> that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification (p 436).

However, in considering the situation of non-production workers in the blast furnace department, it was said:

> What the changes amount to however might perhaps be more aptly described as changes in routine which do not give rise to work value considerations. Paragraph (a) of the work value principles (set out earlier in this judgment) provides ". . .that changes in work by themselves may not lead to changes in wage rates".
>
> We are not satisfied that genuine work changes have occurred, insofar as they relate to non-production workers, nor has the strict test for an alteration in wage rates been met, consistent with the work value principle which states, inter alia: -
> ... that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification
>
> These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this principle (p 438).

It may be observed that the general approach in applying the strict tests contained in the work value principle to these cases served to restrict its availability in the types of matters which might have otherwise succeeded under the previous form of the principle.

In re Hospital Scientists (State) Interim Award and other Awards (CICS; Cahill VP, Sweeney and Hill JJ; 90/280, 347 and 944; 30/3/92; unreported)

These applications by the relevant unions were dealt as "special cases" under the wage fixing principles, and in accordance with the "part heard cases" provision set down in the *State Wage Case - May 1991*. Accordingly, the relevant principles established by the *State Wage Case - August 1989* were applied.

In choosing to apply the Work Value principle to the applications, the Bench observed:

> Although the unions also placed some ancillary reliance on the Structural Efficiency principle and the Anomalies and Inequities principle we think this case must be determined primarily in accordance with the Work Value Changes principle. (p 15)

In applying the test set out by a judgment of *Fisher* P in *Re Medical Officers - Hospital Specialists (State) Award* ([1990] 33 IR 79 at 83-4), and differentiating change within professional or managerial employment from that of the work generally considered within a work value case, the Bench adopted the following statement from *Fisher* P's judgment:

One of the problems with the application of the "strict test" to professional or managerial employment lies in the nature of change. Change must be accommodated, being an essential part of what professional practice is all about. It does not follow therefore without more, that changes, even spectacular changes, necessarily fall within the work value principle.

Secondly, it has to be understood that new techniques and procedures bring with them their own advantages. For every new technological advance there is likely to be somewhere an inferior technology in part or in whole abandoned. Superior technologies give superior results and tend to free practitioners from laborious, uncertain and more stressful practice. Changes, subject to habituation, do not necessarily make things more difficult or more demanding. They may, but equally they may remove problems, decrease anxieties and uncertainties and as well be more rewarding and more productive.

This is particularly pertinent in a case such as this where it must be said that the practice of medicine generally has been making major strides decade by decade all this century and, indeed, perhaps earlier. **If this consideration was all that was necessary, increases in these fields and in may other professional and managerial fields could be granted without end** [emphasis added] (p 21-22).

THE CURRENT STANDING OF WORK VALUE IN NEW SOUTH WALES

The Work Value principle as it stands, is set out in the 1998 State Wage Case, (*Wright* P, *Cahill* VP, *Schmidt* J, *Harrison* DP, *Patterson* C, IRC98/2204, 3/6/98, unreported) as follows:

6. **Work Value Changes**

(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a

new classification or upgrading to a higher classification.

In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classification to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.

(b) In applying the Work Value Changes principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

(c) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

(d) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the State Wage Case - August 1989.

(e) Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.

(f) Where the tests specified in (a) are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such an assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work.

(g) The expression '<u>the conditions under which work is performed</u>' relates to the environment in which the work is done.

(h) The Commission will guard against contrived classifications and over classification of jobs.

(i) Any changes in the nature of the work, the skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other principle of these Principles, will not be taken into account under this Principle.

CONSIDERATIONS IN RELATION TO WORK VALUE

The Crown parties proposed that the Commission should come to a number of conclusions about work value (Ex 459). As those contentions represent a reasonably succinct statement of the issues raised by the parties as to work value assessments I shall deal with each matter raised below.

The contentions by the Crown parties in this area are as follows:

1. Work value assessment necessarily is affected by the social context in which it occurs. The objective assessment of the value of work which is required under the ILO Convention 100 and the IR Act is best pursued by ensuring transparency about factors and weightings used in valuing work. (para 130)

2. Wage fixing principles have, for extended periods since equal pay was mandated, limited capacity to address historic undervaluing of women's work. (p 27)

3. Work value investigations and cases have not been carried out in

many female dominated occupations. Work value assessments often have been concluded by agreement and often without full consideration of the nature of work and working conditions in female dominated industries and occupations. (para 166)

4. Work value criteria have not reflected well many significant factors of value in female dominated work. (para 172)

As to the first contention the Crown parties additionally submit that:

> While it is possible for subjective elements in assessing work value to be structured and controlled, they cannot entirely be eliminated. It is therefore necessary for the factors and weights to be made explicit so that they can be questioned and revised as necessary. Various systems of evaluating work including job evaluation and competency assessment do envisage a more systematised and specified approach to assessing the value of work. One difficulty can be that such systems can appear to provide more objectivity than they do and they can be manipulated to produce desired outcomes in ways which may be hard to identify and challenge. As was pointed out by many industrial commentators including Deputy President Hancock, the process of attaching money values to work values is not one which can be easily set out (Ex 459 para 153).

These contentions contain, in fact, a number of elements. I shall deal with each in turn:

(a) For reasons which I have identified in the previous chapter, I consider that remedies associated with pay equity should be developed through the existing industrial relations system, modified in such a way as to properly permit the identification and rectification of the undervaluation of work. It is inconceivable that

remedies which are essentially individualistic, court-focussed and directed to the protection of existing rights, including rights established under anti-discrimination legislation, could effectively rectify undervaluation which may relate to whole occupations or industries, and which, at least as to the factors underpinning undervaluation, may be systemic in nature. In my view, this approach is entirely consistent with that adopted by the Federal and NSW Commissions in the establishment of the equal pay principles in 1972 and 1973 respectively. It is also entirely consistent with the Equal Remuneration Convention.

(b) I have proposed that special legislative and wage fixing and other principles should be established so as to permit the full and comprehensive identification of undervaluation and the taking of remedial action on a case by case basis. However, the linchpin to such processes, in my view, is work value assessments. This approach is entirely consistent with the Equal Remuneration Convention, which requires the establishment of objective processes of assessment and evaluation, and the Equal Pay Case principles (which used work value comparisons as a linchpin for the operation of the principles).

(c) I do not consider that job evaluation systems represent a suitable substitute for work value assessments as a mechanism for the valuing of work. I have earlier discussed the limitations of these

systems in the section dealing with librarians and in the previous chapter. I accept the analysis of Ms Bennett who challenges the notion that work value assessments lack the rigour of job evaluation or comparable worth doctrines. As Ms Bennett recognises, the flexibility of the work value principle is essential to the functioning of the Commission so as to permit the reconciliation of various objectives - industrial peace, economic policy, industrial justice and equity. It is precisely the lack of flexibility in systems, such as job evaluation, which made the comparable worth doctrine unacceptable in the Federal jurisdiction in the Nurses Case (1986). The existence of this flexibility of approach does not hinder the introduction of mechanisms which ensure transparency.

(d) An objective assessment should be undertaken of the value of work. There is no reason, in principle, or based upon the authorities of this Commission, which would warrant a departure from a principle confirmed in the 1959 NSW Equal Pay Case that the value of work will be assessed objectively by the NSW Commission and not in accordance with subjective factors, in particular the value of work to the employer.

The Crown parties argued for the introduction of a system of weighting to value work. The Crown parties referred to the values assigned by Commissioner Winter in the Metal Trades Award Work Value Inquiry ((1967) 121 CAR 847) to various work value factors. The Crown parties relied upon the

following extracts from the evidence of Ms Bennett:

> Weighting, in particular, can become a back door method for reproducing existing relativities. In other words even when it is recognised that women's work requires, for example, more skill than was commonly thought that skill may be undervalued relative to that which characterises work in male dominated industries and occupations. This weakness applies to all wage fixing systems. Traditionally commission decisions on work value have listed the work value criteria but have not discussed the relative weights applied to the various criteria or, indeed, whether they were weighted at all. If this procedure is continued then considerable doubt must exist as to the basis of its decision or its equity. Transparency in this respect would add considerable[ly] to the authority of the decision (Ex 233 para 47).

However, Ms Bennett does not argue for the introduction of a formal weighting system for the work value factors, for the very reason that she gives against such prescriptive systems in relation to job evaluation systems. Rather she argues for transparency per se and for flexible systems to evaluate work. I refer to the following evidence given by Ms Bennett:

> Work value can be used to redress undervaluation if it is applied transparently and if consideration is given to eliminating gender biases within the concept. There are a number of sources which could be used to aid this process. These include government publications such as those from the Federal Equal Pay Unit and various industry and occupation studies which examine gender bias in historical wage determination. Finally job evaluation exercises which have been conducted overseas can be used as a source to explicate gender bias in work value concepts [see here her earlier reference to Barber v Guardian Royal Exchange Assurance Group (1990) 2 AllER 660 at 702]. Useful here are those exercises where gender equity was an explicit objective of the exercise and the exercise covered a wide range of work across industries and/or occupations in both female and male dominated areas. (Ex 233 para 29)

In her oral evidence Ms Bennett suggested the following approach

to transparency:

> What transparency requires is that in formulating the decision and in determining the processes, the various steps are made clear and within the reasoning of the decision, the various factors that are taken into account in valuing the work are clearly specified and the weighting, if any, is also specified.

I do not consider the evidence to weighting at the end of this quotation to be a reference to the erection of some formula or criteria containing weights in the assessment, but rather the process of balancing considerations.

In my view, having regard to the history of work value assessment by the Federal and NSW Commissions (particularly prior to the indexation period), the decisions of the respective Commissions have made transparent the reasoning process that has been undertaken by them in assessing the value of work. However, I understand that the propositions which are being advanced, with which I broadly agree, are devoted to ensuring that in the valuation of work processes particular emphasis is placed upon the valuation of work having regard to pay equity objectives. In this sense what is made "transparent" is the process of assessing the undervaluation in female dominated industries, either simpliciter or by the use of comparisons.

Dr Burton gave evidence as to her approach to remedial action in the development of appropriate methodologies and processes for the rectification of undervaluation. I consider that this evidence is particularly significant:

> As I say in my addendum page, given the intractability of this

> problem - not just in this country but in other countries as well - I think we have to be looking at - as my first paragraph in the addendum indicates, we have to be looking into the future and into the long term. I would tend to agree with Laura Bennett as you put her position, that rather than going through a process of a test case, the priority must be, in my view, in enabling the Industrial Relations Commission through the provision of expert advice, to set up processes whereby pay equity both in the pay setting policies and procedures and in associated administrative processes, can be scrutinised and reviewed and through that process - which should be informed by a set of standards - learning should occur about the range of sets [sic] and the range of ways in which the pay equity issue can be more effectively dealt with.

I fundamentally agree with the approach proposed by Dr Burton. The ordinary processes of valuing work in the Commission can be utilised on a case by case basis to rectify any undervaluation of work in female dominated industries provided that the mechanisms of the Commission are directed to the purpose of obtaining pay equity.

As to the second contention by the Crown, I agree that the current form of the wage indexation principle (known generally in the post indexation periods as the 'change in work value' principle) inhibits the full assessment of undervaluation of women's work. This is so essentially because the modern version of the work value principle exists as one of the limited exceptions by which wage movements could occur outside of generalised wage movements. The principal inhibiting factor is the requirement to demonstrate change in the nature of work usually assessed from a datum point. Indeed, the current work value principle in NSW is titled "Work Value Changes" and contains a requirement that "the time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the State Wage Case - August 1989 (State Wage Case - June

1998, p 54.) I also agree with Professor McCallum where he states that work value principles were not designed to address historic evaluation of women's work.

It is for these reasons that the modern form of the work value principles generally known as work value changes is not an effective mechanism to address the undervaluation of women's work. However, I do not agree with the contention of the Crown parties that limitations in the work value principle ipso facto result in an impediment to the operation of the equal pay principles. The equal pay principles were formulated on an entirely different basis. They did not depend upon the operation of the 'work value principle' per se (that is the change in work value principle) but rather operated as a set of discrete principles. The test was the 'value of work' as opposed to changes in work from a datum point. Moreover, the equal pay principle directly contemplated work value comparisons. As I identified in the previous chapter both the Federal and State Commissions consider these principles extant and, as the State Commission made clear at an earlier time, the operation of the equal pay principle can not be restricted to the operation of other wage fixing principles: Re Water Resources Commission (Equal Pay) Award (1979 AR 321).

Leaving aside for one moment any adjustments to work valuation processes that might be necessary to fully implement pay equity principles, it must be said that the earlier (that is pre-indexation) operation of work value principles did not exhibit the limitations of the modern form of the work value principle and in relation to the comparative wage justice principle did permit

comparisons to be drawn (particularly in the modern era of the comparative wage justice principle) between dissimilar work. I have earlier discussed the limitations on the operation of this principle. It is suffice to say that the work value principle, or work value assessments, are adequate as a mechanism to address questions of valuation of work. This is also true of situations where pay equity or pay equity related issues arise. I have in mind specifically the Nurses Case (1987) and the Crown Teachers Case (1970).

The ACM recognises the limitations in the current work value principle by putting forward a recommendation that, in certain limited cases, a review might be permitted of "incorrect value of work" made prior to the second structural efficiency adjustment allowable under the State Wage Case August 1989 (which could be read as the State Wage Case June 1998) (Ex 441 para 99). It suggests that such a review should be done by means of Anomalies and Inequities principle. For reasons I will advance shortly in the discussion of the Special Case principle I do not consider that it is appropriate to resurrect the Anomalies and Inequities principle.

The third contention of the Crown parties is to the effect that work value investigations in the selected areas have not been carried out in female dominated occupations. It is submitted that consent arrangements have often not given a proper assessment of work value and that where work value assessments have been concluded that the assessments have been inadequate.

Ms Bennett makes the following general observation which is

relevant to this contention:

> Part of the difficulty with valuing the work of workers in female dominated industries and occupations is that historically their work has often not received any scrutiny at all in industrial tribunals or it has received relatively little and this compares very much with the situation of a large number of male classifications and a number of areas within male dominated industries as well, in that they themselves have been subjected to repeated scrutiny and this in part reflects the fact that male workers have been able to organise industrially and to have articulate demands in terms of the characteristics of the work they perform and this avenue has not been available to women, so a lot of the skills that may exist in female dominated work are really things that still need to be identified ...

Teaching and nursing professions said to be are the clear exceptions to these general propositions. However, as Ms Shean pointed out in her evidence even in work values cases historically bought for nurses, the Nurses Association avoided bring evidence as to areas of work which were non-technical or where the skills were less directly observable. She gave the example of a psychiatric nurse who must be able to foresee, and ultimately accordingly limit, the likelihood of violent or manic outbursts from patients, but concerning whose work it is more difficult to bring evidence than for a nurse working in one of the high technology areas such as intensive care.

Furthermore, even though the nursing profession has, historically, received scrutiny in the industrial tribunals, that scrutiny of itself does not guarantee that the particular interests of female workers have been paramount in the consideration even of their own union or of the workers themselves. A notable example of that attitude is found in In re Standard Hours - Nursing Staff in Hospitals (1934 AR 316 at 319), in which it was considered whether nurses

should be excluded, in the public interest, from the general declaration of standard hours of 44 per week made earlier that year (1934 AR 17), and work an increased number of hours as ordinary working hours.

It was stated by the Commission (1934 AR 316 at 319) that:

> No party appearing before the Full Bench of the Commission claimed that it was not desirable of the public interest to declare more than 44 hours per week for nurses, and the witnesses called both on behalf of the hospitals and of the nurses themselves agreed that some extension was proper.

(The hours declared ranged from 48 to 55 hours per week.)

However, the Inquiry has clearly received examples of female dominated industries where work value cases have not been conducted and consent arrangements have not properly valued the work. A clear example of the failure of consent arrangements is the seafood processing area. Equally clear examples of the failure to conduct work value assessments are the librarian and beauty therapist areas. Moreover, the Inquiry has received evidence that shows that work value assessments in the child care area have clearly undervalued the work of the child care workers (although these assessments were made in conjunction with the operation of first award principles, the minimum rate adjustment principles, and consent arrangements).

The Crown finally argues that the work value criteria have not reflected adequately many significant factors of value in female dominated work.

Leaving aside the modern requirements to show change from a certain date, the principle otherwise could not, on its face, have this effect as it merely calls for the evaluation of the "nature of the work, skill and responsibility required or the conditions under which the work is performed". These are very general requirements which do not impose a requirement to have regard to the potential for undervaluation of work in female dominated industries and occupations. Thus, the principle may have unintended consequences which have the effect of causing, or of not removing, undervaluation.

The Employers' Federation/Chamber says that there have been no examples put before the Inquiry as to the Commission having failed to take into account "soft skills" (Ex 446 p 78). Putting the submission in this way is slightly misleading of the issue. For example, as I have already pointed out Ms Shean states that in claims bought on behalf of nurses the tendency is to focus on "hard skills" in work, such as equipment and technical changes, rather than caring skills because of the difficulties in demonstrating such "soft" skills to tribunals.

Difficulties with work value assessments were illustrated by the evidence adduced as to the selected industries and occupations. Assessments conducted as part of the Minimum Rates Adjustment principle (albeit by consent) clearly demonstrate that in those circumstances there has been an ineffective evaluation. I have already pointed to the examples of child care and seafood processing. The Crown parties also point to the research of Ms Smith who identified that the traditional work value criteria have not been able to adequately

take account of creative skills which are required in the female dominated trade of hairdressing. My separate conclusions on these points are contained in the conclusions and findings for each selected occupation and industry.

I propose to conclude these considerations by a brief examination of those areas of concern as to skill raised by Ms Bennett in relation to the "relative under-description of skills in female dominated industries and occupations relative to that in male dominated industries and occupations flowing from the greater scrutiny that the latter have received" (Ex 233 para 31).

It is true that there is a predominance of substantial work value assessments in male dominated industries and that skill related considerations tend to be coloured by the processes of evaluation in those areas. This is more likely to be the case under the Minimum Rates Adjustment principle. What Ms Bennet makes clear is the need to "unpack" women's work, then to specifically evaluate the skills often associated with service delivery, as opposed to production. Female occupations are often involved directly with the health and/or welfare of those unable to care adequately for themselves. This requires a range of interpersonal and professional skills which bear little relationship to those found in manufacturing or technically related positions.

As is demonstrated in the child care area it is important not to make assumptions about the nature of the work and to avoid, even by implication, reflecting upon the skills exercised by women on a basis which might have some gender context. For example, where dependency relationships exist, it is

necessary to avoid this being seen as merely an extension of the work performed in a domestic context. Child care workers are not merely child minders nor are they merely involved in communicating with children and their parents. These workers carry out a professional or quasi-professional role which increasingly requires an ability to deal, not only with diverse personalities, but a diverse range of domestic situations, language barriers and disabilities. The workers are ultimately carrying out a function in the development of children.

Ms Bennett refers to work value criteria developed in the manufacturing sector in the context of male work and suggests examination to determine whether such criteria might have been overvalued, for instance, strength required in spurts e.g. lifting, as against endurance, such as standing in one place or carrying heavy trays all day, and notes undervalued qualities such as close concentration and accuracy (see for example the seafood industry). Thus she says it might be necessary to have regard to a range of factors such as:

(a) length and nature of informal training;

(b) responsibility for training new workers;

(c) frequency of rotation between different aspects of production work; and

(d) intensity or pace of work. (Ex 233 para 37)

A further consideration she raises is the weighting given to formal credentials. As was seen in the child care area in these proceedings this is a

particular problem. It is not only a problem of properly recognising qualifications obtained, but of undertaking a proper process of credentialling the qualification. This is demonstrated as a fundamental problem in the valuation of librarians, a problem which has persisted throughout the history of the work of female librarians. It is necessary to properly evaluate the nature of the qualification and how that may be demonstrative of the skills and responsibilities exercised by the workers. Indeed, in the case of female dominated service sectors, it may be that the credentials indicates lower value for the work, which is not the reality, having regard to the objective circumstances of the work itself.

Furthermore, care needs to be taken to look at the forms of 'responsibility' exercised by workers in female dominated industries and occupations. Bias can enter the process if responsibility is defined in terms of the control of assets, or the number of people supervised since women are less frequently responsible for controlling assets and supervising large numbers. To be more gender neutral, other features of responsibility would need to be identified such as coordination and organisation of people or work.

Finally, when turning to conditions under which work is performed, again it might be a matter of exercising some lateral judgement in evaluating women's work. With respect to child care and nursing such conditions which might need to be considered include the exposure to disease and human waste, emotional overload and stress, as opposed to conventional indicators such as dirty work or working in high temperatures.

STRUCTURAL EFFICIENCY PRINCIPLE AND MINIMUM RATES ADJUSTMENT PRINCIPLE

In Appendix No. 8 to this report (Exhibit 32 in the proceedings) there is a substantial discussion of the history of development of the Structural Efficiency principle and the Minimum Rates Adjustment principle in both the Federal and State jurisdictions. I adopt this discussion for the purposes of this report.

The major conclusions that I would draw from this history of the principles are as follows:

(1) The Minimum Rates Adjustment principle evolved from the Structural Efficiency principle and those principles must be seen as complementary provisions.

(2) The fundamental purpose of the Structural Efficiency principle was to modernise awards. The Commission considered that this modernisation process could not be successful without steps being taken to ensure stability between those awards which in the past had led to uncertainty in the industrial relations system. Thus, the Minimum Rates Adjustment principle was designed to ensure that classifications, rates and supplementary payments in an award bear a proper relationship to classification, rates and supplementary payments in other minimum rates awards.

(3) It was essential to the Minimum Rates Adjustment process that comparisons would be made between awards. These comparisons were effectively based upon work value considerations, with the Commission being required to have regard to relative skill, responsibility and conditions under which work is normally performed. This analysis was to be undertaken between "comparable classifications".

(4) The very essence of the process was not one by which comparisons were drawn between like or similar classifications in the traditional sense. The expression 'comparable' in the principle therefore effectively meant comparable upon some other basis than a strict comparison of skills in a traditional sense.

In the Child Care Industry (ACT) Award case, which I have already discussed, the Commission recognised that the classifications of child care worker and engineering tradesperson could not be compared in the "conventional sense". The comparison in that case was undertaken by means of a reference to comparative levels of training and thus, the Commission was required to explore, through the Minimum Rates Adjustment process, the comparison of value using an adaptation of traditional work value methods. Indeed, it was concluded that after the Minimum Rates Adjustment processes had been undertaken that the alteration of the relative position of one classification as opposed to another

would only be undertaken on work value grounds.

(5) The Commission clearly referred to the existence of over award payments in this process and recognised that inequities may exist in the present system as a result of an absence of over award payments for certain groups. It is for this reason that the Minimum Rates Adjustment process proceeded in conjunction with the existence of supplementary payments.

The Employers' Federation/Chamber submits that the only area in which criticism has been made of the MRA process is in relation to the relativity fixed for the Advanced Child Worker. It is said however, that there had not been a deficiency in the application of the principle in that case (Ex 446 p 81-82).

The ACM submits that there is no evidence of any real issue of gender bias in respect of the Minimum Rates Adjustment principle. However, it is submitted that in like fashion to the Work Value principle, there is a concern that in female dominated awards the principle may not have been properly applied due to consent arrangements between parties. In such cases it is submitted a process should be available to reconsider the application of the Minimum Rates Adjustment principle in female dominated industries (Ex 441 paras 100-102).

The Labor Council submits that the Minimum Rates Adjustment processes have proceeded mainly by consent. There is an absence of

comprehensive assessments across awards, occupations and industries. It is also submitted that there is insufficient reference to competency standards and qualifications frameworks in the comparisons that have been as part of the adjustment process.

The Crown parties point to the discussion of the implementation of the Minimum Rates Adjustment principle by Ms Charlesworth (Ex 237) and Ms Kelly (Ex 459 paras 238 ff). Ms Charlesworth indicates that whilst the MRA process has led to increased recognition of the value of work (as an example she gave home care work), the translation process and the implementation via the MRA principle reproduced old relativities maintaining, and underlining, pay inequity. Thus, if there was some undervaluation of skills due to the previous characterisation of an industry, then it is likely that that deficiency was repeated in the MRA process. Ms Kelly points to the fact that there was inadequate re-evaluation of skills and training during the MRA process and points in particular to the Federal *Child Care Industry (ACT) Award* ([1990] 39 IR 194) as an example. In that case, the test did not lie in an apparent inadequacy of any test or mechanism for valuing the work, but in the fact that a proper valuation of the work of child care workers had not been done. Nor was such an evaluation carried out as part of the MRA process. The Crown also points out that the work of Ms Kelly reveals that if the MRA process was properly applied, it did have the potential to remove inequities. In contrast, Ms Charlesworth concluded from her studies that most tests and mechanisms do have some limitations in terms of pay equity, particularly insofar as they do not properly consider the work performed. She points out in particular there has been a failure to assess the following:

(i) level of supervision under which the work is performed;

(ii) level of initiative, judgment, decision making required;

(iii) conditions in which work is done;

(iv) the physical and mental effort required;

(v) equipment used in performing the work; and

(vi) the type and level of responsibility required by the work.

(Ex 237 p 6)

As I have earlier noted, there were deficiencies in the operation of the MRA principle in relation to child care workers. This deficiency resulted from the implementation of the principle although it is clear that the pre-existing undervaluation of the work impacted upon the MRA process. Clearly the principle in itself has not been sufficient in its application to rectify previous gender inequities and in New South Wales those inequities have been worsened by the misapplication of the principle.

The real significance of the MRA principle is the recognition by the Commission that it is possible, and indeed desirable, to compare dissimilar work classifications, for the purposes of properly aligning classifications on the basis of their work value. This process is capable of rectifying pay inequity and in particular is capable of rectifying the undervaluation of female work. However, it is clear to me that this will not be done adequately, in some cases because of the approach of the parties, unless there is some specific principle which is designed to rectify the undervaluation of the work. Hence, the broad principle of

comparisons between dissimilar work based on work value considerations should be maintained but in the context of a principle which also directs itself specifically to addressing the undervaluation of work in female dominated industries.

SPECIAL CASES

The Crown parties note that the former Anomalies and Inequities principles were replaced by the Special Cases provisions in 1991. In fact, in New South Wales the Special Cases provision appears in the Wages Adjustments principle prescribed by the *State Wage Case May* 1991. This follows the deletion of the Anomalies and Inequities principle at a National level in the *National Wage Case April* 1991 ((1991) 36 IR 120).

The ACM in its submission submits that there should be a re-establishment of an Anomalies and Inequities principle in order to consider cases concerning undervaluation of female work. However, this approach is contrary to the direction taken in both the National and State Wage Cases in 1991 in establishing the Special Cases principles. In the *National Wage Case April* 1991 ((1991/ 4 CAR 204) it was submitted by the Australian Federation of Business and Professional Women that there should be an Inquiry into all aspects of skill evaluation for male and female work because of the possibility of the undervaluation of female work. In rejecting the establishment of such an Inquiry, the Australian Industrial Relations Commission held:

> We do not consider that a general skills value inquiry is called for. Such an inquiry would, in our view, prove nebulous. The current principles (including the provision for special cases) already provide ample scope for the review of any specific instances where the work typically performed by females is alleged to be undervalued. We confirm the 1972 Equal Pay principles of the Australian Conciliation and Arbitration Commission [(1972) 147 CAR 172] continue to apply and would be a relevant consideration in any such case (p 259).

It should be noted that the *Nurses Case* (1987) which entertained the application of pay equity principles in the context of an anomalies case occurred before the abolition of the Anomalies and Inequities principle.

Upon the basis of a decision of this Commission in *Re Crown Employees (Administrative and Clerical Officers) (State) Award and other awards (No. 2)* ([1993] 52 IR 243) it is theoretically possible that issues of undervaluation of female work and indeed issues of pay equity could be brought before this Commission in the Special Case principles. In that case the Commission was considering the Special Case principle expressed in these terms:

> Any claim for increases in wages and salaries or improvements in conditions in minimum rates awards or paid rates awards which exceed those allowable under the *State Wage Case* decisions of 4 October 1989 and 29 May 1991 will be processed as a special case before the Commission in Court Session. Provided that applications for approval of enterprise arrangements shall be processed in accordance with the Enterprise Arrangements principle. (p 376)

The Commission interpreted those words in the principles as follows:

> We do not accept the proposition advanced by the respondents that the provision may only be utilised in tandem with some other specific provision of the principles. Such a narrow construction would impose undesirably inflexible restrictions on the Commission. It would also be in conflict with the origins and development of the provision within successive series of principles, a matter to which we have earlier referred.
>
> In our view, the special cases section of the principles provides a mechanism whereby a claim for enhanced wages or conditions beyond those normally allowed under the principles may be brought before the Commission. The hearing of such a claim is to be conducted by the Full Commission (formerly the Commission in Court Session) thus emphasising the special nature of the case. It will be a matter for the Full Commission, after hearing the evidence and submissions, particularly relating to the matters relied on to take the case 'out of the ordinary' and thus to make it 'special', to decide whether the claim, in part or in whole, should succeed. (p 376)

The current form of the principle does not alter the effect of that decision and indeed would appear to strengthen the force of the interpretation there given. In the *State Wage Case June* 1998 (unreported, 3 June 1998) the Special Case principle was stated as follows:

> Except for the flow on of test case provisions, any claim for increases in wages and salaries, or changes in conditions in awards, other than those allowed elsewhere in the principles, will be processed as a special case before a Full Bench of the Commission, unless otherwise allocated by the President.
>
> This principle does not apply to applications for awards consented to by the parties, which will be dealt with in the terms of the Act, or to enterprise arrangements, which will be dealt with in accordance with the Enterprise Arrangements principle. (p 57)

There can be little doubt that a pay equity case would fall within the Special Case principles. Moreover, as noted in the *In re Crown Employees (State) Award Case* ([1993] 52 IR 243 at 376) such pay equity issues could be

combined with other relevant principles such as a Work Value principle or the Structural Efficiency principle.

The difficulty with the Special Case principle being utilised for pay equity matters however, is threefold:

(1) Notwithstanding the long existence of the Special Case principle, there are no examples before this Inquiry where that principle has been used to specifically address issues of the undervaluation of female work.

(2) As earlier noted the equal pay case principles are extant and in accordance with the *Water Resources Case* (earlier referred to), stand alone.

(3) The evidence in this Inquiry demonstrates that even in cases where wage fixing mechanisms are available to be utilised to address undervaluation issues, the nature and complexity of undervaluation in female dominated industries are such as to undermine the effectiveness of the mechanism or its capacity to be fully implemented. This is particularly so in consent matters as was submitted by the ACM. In those circumstances a more cautious and prudent approach is to remodel the existing equal pay principles so as to deal specifically with any problem identified rather than attempting to use existing principles not specifically

designed for that purpose.

(4) This approach will overcome the failure of parties to address pay equity issues and will focus attention on the particular issues of undervaluation.

(5) Moreover, there are special and complex issues arising in such cases as were demonstrated in relation to the selected occupations and industries. This fact seems to have been recognised in 1972 in the creation of 'equal pay principles', and on the evidence in this Inquiry, no lesser or different approach should be taken to establishing a relevant and current principle dealing with pay equity.

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THE WIDER DIMENSIONS OF UNDERVALUATION

In a number of the female dominated industries and occupations examined by the Commission, it was found that there was undervaluation of the work of female employees. I have detailed the elements of, and factors causing, undervaluation in the findings and conclusions made for each selected industry or occupation.

However, it is not possible to identify in all cases that there was a casual connection between the level of remuneration and the gender of the worker, or of direct or indirect discrimination. Moreover, the comparison with male comparators did not always add to the explanation of, or understanding of, the dimensions of undervaluation.

In the Canadian case, *Public Service Alliance of Canada (PSAC) v Canada (Treasury Board)* [1991] 14 CHRR D/341 (Ex 362), the concept of systemic discrimination is discussed. In this concept, there is a recognition that long standing social and cultural mores carry with them value assumptions, that contribute to discrimination in ways that are substantially, or entirely, hidden or unconscious, e.g. assumptions that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men (para 38).

Whilst I agree that of the factors giving rise to undervaluation, and

indeed the identification of undervaluation itself, are difficult to detect, I have some reservation about the importation of concepts like 'systemic discrimination' into this jurisdiction. For a start, the jurisdictional basis for the concept is legislation, which requires an analysis of comparative worth and elements of discrimination, which are not prerequisites to the operation of the industrial laws in Australia, as opposed to anti-discrimination jurisdictions.

Furthermore, for reasons I will develop in the next section, I do not consider that 'discrimination' *per se* should be the linchpin for the assessment of undervaluation. No doubt, anti-discrimination legislation will continue to play an important role in this area, but it has significant limitations for use in an industrial context, or for that matter, in a context in which the remedies being considered are broadly collective and prospective in nature and designed to establish minimum protections or standards for a workforce.

I have in mind the distinction between industrial remedies and discrimination remedies eloquently described by Ms Walpole:

> Q: With that distinction in mind, could you indicate what you intend by the description when it refers to "collective rights" in paragraph 26 and I wonder if you could, in the course of doing that, relate your answer to what you have just discussed in terms of occupational segmentation in relation to paragraph 22?
>
> A: I will start by expanding on that characterisation. I think it is important to remember that discrimination legislation or the discrimination based jurisdiction in Australia essentially comes from its origin document, the UN Declaration on Human Rights. That is all about individual remedies within a social context.
>
> The way that has been translated into legislation in Australia keeps that emphasis, although the emphasis varies depending on which

particular jurisdiction you are in. So in the Federal anti-discrimination jurisdiction - certainly in the area of sex discrimination - there has always been provision for any groups of people to bring an action as well as individuals and of course for organisations - particularly trade unions - to bring an action under that legislation.

On the other hand, in the industrial Relations Framework, it has generally been the case that it is groups of people who can bring an action rather than individuals. In fact, apart from the unfair dismissal area, it is groups that generally can - almost only - appear, certainly in the Federal level. And I know New South Wales has a slightly different system as far as that is concerned.

So, we are starting from who brings the action and on what basis they are bringing the action. That then informs us as to what the likely remedies are to be. Essentially the difference between the two areas is that in the discrimination area what you are looking at is a breach of a right, so it is an action. Somebody has done something that you then take your case and seek a remedy for it.

In the case of labour market segmentation, the most common sort of example would be somebody, a woman has been denied a job because it is felt that it is not suitable for a woman. For example, for a woman to go down a mine. That is a classic sort of example.

She would in the discrimination area bring an individual action and she could get damages for that. Now it may be if you take that example - and there has certainly been some press comment on precisely this - it may be that there is within the industrial relations system a set of rules that has been established collectively that exclude women from going down a mine. That might be a direct rule in the award that says that women are not allowed to do this or it may be, as is more commonly the case now, an indirect rule that says that all people who are hired to go down mines must come off a particular list. That list is made up of members of a particular union, many of whom have worked in the industry before, under the old rule, so they are all men.

If you have got to hire off that list, if you are a woman - sorry, you don't get a look in. That is not a rule that says women can't go in. But that is its effect in that example. So either if you look at - again that woman can bring a case under the discrimination law for indirect discrimination in that circumstance or you can say this is not a good rule, we will go to the Industrial Relations Commission and we will change the rule. The discrimination jurisdiction does not allow you to change the rule. It will give an individual a remedy but it cannot change that rule. That is not within its jurisdiction. To do that you must go to the Industrial Relations Commission to change the rules of the game.

> To my way of thinking that is the critical role that the industrial relations jurisdiction has go to play in terms of addressing this whole issue. While the discrimination jurisdiction can fix an individual problem or even a group of people's problems, I [sic] cannot change the rules.

However, there are some important elements to the concept of systemic discrimination which are presently relevant. These are as follows:

a) The undervaluation need not be a feature of the treatment of an individual or for that matter a class (except in the broadest sense);

b) Undervaluation is often hidden or difficult to discover, other than by significant probing and analysis;

c) There are historical aspects to the development of undervaluation, which are underpinned by assumptions as to worth. An historical analysis is quite important to the detection of undervaluation in female dominated occupations and industries; and

d) The search for a gender based causation for undervaluation is not always necessary as the true causes of undervaluation are more widely based.

Thus, I consider that the following submission of the Labor Council has merit:

> In considering whether female work *per se* in undervalued, it may be prudent to consider whether there are characteristics which are common to female dominated work which set it apart from male dominated work. If such descriptors hold true, it may be possible to consider a set of solutions or remedies relevant to a case by case analysis and remedy Ex 454 para 15).

Characteristics of a female dominated occupation advanced by the Labor Council as being distilled from evidence before the Inquiry included:

- low visibility;
- low union participation;
- in small workplaces;
- in service rather than product related markets;
- tend to have a high incidence of consent award wage movements;
- have a high incidence of part-time/casual work; and
- have work which is described as creative, nurturing, caring and so forth. (Ex 454 para 16)

The above characteristics had been further distilled from 24 characteristics set out in matrix form in a table of comparisons of male and female occupational characteristics in columns headed "male dominated", "female dominated", "Nurses" and "Teachers" (Ex 455 p 84).

In the issues paper prepared by counsel assisting (Ex 327), the question was raised as to whether the assessment of undervaluation of work in female dominated occupations and industries could be undertaken

independently, or separately, of the examination of a male comparator or male comparators? (para 36)

Other matters on this point raised by counsel assisting centred around the further question: "Can the issue of 'pay equity' or 'undervaluation' be addressed by examining it either globally or by reference to significant illustrative groupings of men and women workers?", as for instance, the selected occupations and industries examined in this Inquiry (para 57).

With the exception of the Labor Council submission referred to above, and some brief discussion of systemic discrimination, the parties confined their written submissions to a discussion about male comparators *per se* (and some discussion of the operation of work value mechanisms). I consider that the general comparisons between male and female occupations and industries raised by the Labor Council are appropriate and could give an important insight into undervaluation. It falls within the scope of the Inquiry. Term 1 clearly contemplates both general and specific comparisons between male and female dominated industries and occupations.

As to the consideration of undervaluation simpliciter in a female dominated industry, without comparisons, I consider that such inquiry is an essential element of understanding undervaluation and, in any event, is a necessary adjunct to the consideration of undervaluation on a comparative basis, whether general or specific.

I also agree generally that evidence before the Inquiry raised other factors which have been identified by the Labor Council as contributing to undervaluation, the institutional factors including:

- treatment by industrial tribunals;
- unionisation;
- regulation;
- treatment of and access to qualifications; and
- perceptions of male and female dominated work.

(Ex 454 para 12)

The Crown parties (Ex 459 para 51) identified some broad elements of undervaluation as follows:

(i) historical denial of women's work as skilled in the industrial context (see Exhibits 56, 233 and 209);

(ii) work value tests that emphasise "male" technical and visible skills in manufacturing work, and ignore "female" skills in new areas of work like child care (see Exhibits 56 and 258);

(iii) lack of access to over award payments in female dominated minimum rates awards (evidence on Hairdressing and Child care);

(iv) labour market segmentation and the gendered nature of part time and casual work (see Exhibits 237, 233 and 271);

(v) occupational segregation - (see Exhibits 271, 101 and 99);

(vi) workplace size, industrial power and unionisation (see Exhibits 118, 233, 237);

(vii) industry policy and regulation (see Exhibits 56, 183, 184 and Clothing evidence); and

(viii) market factors, such as geographic location and skill shortages (see Exhibits 183 and 184).

I consider that each of these elements has been identified in one or more of the case studies, although I will discuss the question of market factors and overaward payments separately. These considerations will be important to be borne in mind in the review of awards dealing with female dominated occupations and industries. In particular, it will be necessary, if valuation is to be properly undertaken and adequate remedies found, to have regard to the interaction of these broad factors in generating the adverse circumstances which may apply in female dominated industries and occupations. It is imperative to such an approach that the Commission have regard to the history of wage and condition setting in the industry or occupation examined and to the impact of such historical factors. This much is beyond doubt upon the basis of evidence presented to the Inquiry in relation to the selected industries and occupations.

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PART TIME AND CASUAL EMPLOYMENT

INTRODUCTION

The question as to whether the growth in part time and casual employment has given rise to pay inequities *vis a vis* full time employment did not attract the express attention of this Inquiry. Notwithstanding this fact, during the course of the Inquiry a number of issues were raised in relation to these matters and as a consequence it is necessary to make some reference to them. However, it must be emphasised at the outset that it is not the intention of this Report to specifically and comprehensively address the issue of part time and casual employment. If nothing else the evidence that was presented to the Inquiry simply pointed to the need for a separate and detailed examination of the relationship between full time and casual and part time employment in relation to possible undervaluation of work. At this time, all that this Report can do is to highlight some of the issues which were brought to the Inquiry's attention.

GENDER AND PART TIME EMPLOYMENT

It is widely recognised that part time employment is highly gendered. Data compiled by the Australian Bureau of Statistics indicates that women occupy 73.7 per cent of all part time positions, and that 42.7 per cent of working women are employed in part time positions as opposed to 11.5 per cent of working men (ABS Cat. no. 6203.0, Ex 350).

Evidence presented to the Inquiry also indicated that 65 per cent of all part time positions are located in the following five industries:

1. retail trade;
2. accommodation
3. cafes and restaurants;
4. property and business services; and
5. health and community services.

Significantly, almost 77 per cent of positions in these five industries are occupied by women (ABS, Cat. No. 6203.0, Ex 350).

Evidence of the gendered nature of part time work is also recorded in numerous academic articles which were tendered into evidence. In particular Anne Junor, in her article, "Permanent Part-Time Work: New Family-Friendly Standard or High Intensity Cheap Skill?" (Ex 416 Tab K), stressed that, whilst permanent part time work grew strongly in Australia in the period 1987-1997, this growth was a disproportionately female phenomenon. This finding is borne out in the following table:

	Female			**Male**		
	Change '000	**Share of Change %**	**Change on Base Year (1987 = 100)**	**Change '000**	**Share of Change %**	**Change on Base Year (1987 = 100)**
Permanent Full Time	175.1	24.5	112.6	-5.4	-1.2	99.8
Permanent Part Time	221.6	30.9	163.0	32.0	7.3	159.4
Casual Full Time	40.5	5.7	135.3	.167.0	38.1	177.2
Casual Part Time	278.8	38.9	149.8	245.0	55.9	241.5
Total	716.0	100.0	129.6	438.5	100.0	112.9

(Ex 416, Tab K, p 79)

Extrapolating from this table, Ms Junor notes that between August 1987 and August 1997 221,600 additional permanent part time positions were created for women, and that permanent part time employment, which accounts for 30 per cent of the net increase in women's waged and salaried employment, expanded by 63 per cent compared with an overall growth rate of 29.6 per cent in women's jobs. In contrast, permanent part time employment for men, only contributed to 7.3 per cent of the total increase in male jobs, and the number of men in permanent full time jobs actually declined (Ex 416, Tab K, p 79).

Ms Junor's article goes on to argue that, from an employer's perspective, permanent part time employment allows for a 'flexing' of hours around monthly or average earnings, thereby creating a finer-tuned temporal and numerical flexibility, and greater work intensification, than is achievable through casualisation. As such, she concludes that most forms of employer initiated permanent part time employment are:

> family-unfriendly in terms of income levels, and may even lack family-friendly hours. Their offer of tenure without career advancement can become stultifying over time.
>
> (Ex 416, Tab K, p 91)

As stated in the introduction to this section of the Report the Inquiry simply does not have before it sufficient evidence to allow it to make specific findings on the questions as to whether part time employment has inherent within it pay inequities or whether they may develop out of its implementation. Rather, it is suggested that further investigation is required into ascertaining why part time employment is so highly gendered. In particular, attention needs to be

focussed on the question as to whether part time earnings are simply representative of the pro-rata earnings of full time employees in similar types of employment, or whether part time employment is a different form of employment altogether, which may or may not involve some form of inherent undervaluation, as compared to full time employment.

PART TIME EMPLOYMENT AND EARNINGS

In their submissions to the Inquiry, the Employers' Federation/Chamber submitted (at Ex 446 p 40) that:

> [g]rowth in part time employment has had a significant effect on the overall earnings of women. On an aggregate, average basis, it lowers their average and widens the relative gap to men. However, the earnings gap for women on an hours basis shows a different outcome. These show a pay advantage to women (NB these figures cover 44% of all working women). Part time female employees earn on average $260.00 per week, compared to males $234.30. On average women work 18.2 part time hours per week, men 16.7. This results in an average female hourly rate of $14.28 compared with male $14.00.
>
> Employee Earnings and Hours - 6306.0k, Table 3 shows women who work part time earn more than males for nearly all occupational categories. The gap in favour of women is highest in the associate professional group, where job growth for women has also been higher than mens'. Where women are earning less than men working part time, it is clear that the relatively low number of women in these occupations is acting to reduce the average trades, transport and managers.

Based on the evidence available to the Inquiry, it is not possible for the Inquiry to form any final conclusions about this submission. However, it is noted that that submission appears to be at odds with the statistical data provided by Ms Gillian Whitehouse (Ex 218). In this respect an analysis of the

female part time hourly rate compared to the average ordinary time earnings hourly rate leads to the following conclusions:

1. When comparing the years 1990 with 1996 the female part time rate is consistently higher than the female full time hourly rate with the exception of clerical employees in 1996, sales employees in 1996 and plant operators in 1996. Arguably, these exceptions can be explained by the fact that part time work reflects a high level of casual employment which attracts a casual penalty. However, this is a matter which requires further investigation before definitive conclusions can be reached.

2. The female part time rate in the years 1990 and 1996 is less than the male part time rate in all categories with the exception of para-professionals in 1990 and 1996, sales employees in 1996 and labourers in 1990 and 1996. There is insufficient material before the Inquiry to sufficiently explain these differences. However it is arguable that the higher female para-professional rate can be attributed to the fact that there is a significant concentration of female registered nurses in this category, in that such nurses comprise 75% of the total female part time employment in this occupational group, a group whose terms and conditions of employment are regulated by an award.

3. All occupations have suffered a decline in the part time rate as a

percentage of the full time hourly rate. This indicates, that for both males and females, the part time rate has failed to keep pace with increases in the full time rate. Furthermore, within occupations, the decline has been worse for females than males in all categories, with the exception of sales employees, where there has been a 10 per cent decline for female rates of pay compared to a 13 per cent decline for males.

CASUAL EMPLOYMENT

In addition to receiving evidence directed to the question of part time employment generally, the Inquiry also received some evidence which specifically addressed the question of casual employment and the difficulties associated with remunerating employees employed on a casual basis. In this respect, the Inquiry was assisted by the evidence of Ms Laura Bennett. Ms Bennett's evidence was that working women are "disproportionately found in areas such as casual work which are renumerated on a basis different to that of full/part-time work" (Ex 233 para 8). Furthermore, Ms Bennett's evidence revealed that female employees comprise the majority of casual employees, with estimates suggesting that 30.8 per cent of female employees are employed as casual workers in their main job. In contrast only 18.5 per cent of males are employed as casual workers in their main job. Casual employment is also particularly high in female dominated industries such as recreational, personal and other services and community services and is disproportionately female in retail trade/accommodation and cafes and restaurants (Ex 233 para 10).

The evidence received by the Inquiry suggested that the low unionisation rates of female casuals, combined with their disproportionate employment in small workplaces, has meant that their interests have not always been adequately represented in tribunal hearings. In this respect, the evidence pointed to the fact that casual employees have markedly lower rates of unionisation than permanent employees, 1994 statistics suggesting that only 15.3% of female casual employees were unionised. In contrast the figures for full-time, permanent female employees and for full-time permanent male employees were 38.5% and 43.2% respectively (Ex 233 para 11).

Furthermore, the evidence revealed that, whilst casual employees have traditionally received a variable loading so as to compensate them for the lack of access to benefits such as sick leave and annual leave loading, there have been a number of additional benefits that have accrued to full time employees over the last 20 years which have not accrued to casuals by increases in their loadings. In this respect Ms Bennett gave evidence that the loading which has been built into casual rates of pay was initially introduced as a form of compensation for the irregular nature of the work performed by casuals. Significantly, at the time when this loading was introduced, the conditions which were attached to full time employment were small, and as a consequence the casual loading needed only to take into account a limited number of factors. However, over time there have been a number of additional conditions to which full time employees have been given access e.g. personal/carers leave, yet there has been no commensurate adjustment in casual rates of pay to offset these

additional benefits provided to full time employees (Ex 233 para 12). In this respect Ms Bennett gave the following evidence:

> [T]he monetary allowances [to casual employees] were not adjusted. Those workers are not entitled to those extra conditions which accrued to full-time workers, and even perhaps more worrying in terms of the reasoning of the original decisions, is that the casual rates in a number of cases have been cut, so that at the precise time when on the reasoning of the original decisions you would expect casual rates to increase, casual rates have in fact decreased, so what you have got is, if you look at award conditions in toto, the gap between casual in toto conditions and wages rates and that between full-time workers in fact has increased substantially ...

The issue as to how best compensate casual employees is complex and beyond the scope of this Report. An indication of the difficulties associated with this area is provided by Ms Bennett who comments:

> Dawkins and Norris calculated that for casual workers in the retail industry to be compensated simply for sick leave and the annual leave loading would require a casual loading of 11.25%. Clearly the compensation would depend on the nature of the award benefits which casual workers do not enjoy but two general points can be made. First, non-wage benefits appertaining to permanent work have increased in recent years yet there is little evidence of an re-evaluation of the adequacy of casual loading. Second where casual rates have changed this has, at times, involved a decrease in the loading. On occasion employers and permanent workers have agreed to trade-off casual conditions in return for wage increases and/or the provision of part-time work in the award.
>
> (Ex 233 para 13)

There is a compelling case for a full review of casual loadings in the light of this evidence. Given the proportion of females engaged in this sector, it raises significant pay equity issues, particularly in relation to the proper valuation of the work of employees in female dominated industries.

<u>CONCLUSIONS</u>

The last decade has seen a prolific growth in part time and casual employment in New South Wales. As the evidence received by the Inquiry has shown, the majority of this work is performed by women.

Given the important role that part time and casual employment plays for many employers and employees in this State, it is suggested that there needs to be a comprehensive review undertaken of part time and casual employment in New South Wales, in order that a proper assessment can be made of the basis upon which part time and casual employees are remunerated, and whether or not inequities exist between the pay rates of part time and casual employees, as compared to full time employees, particularly in relation to work in female dominated industries.

In the meantime, examination of the relevant provisions of each award in the course of the review required by s.19 of the 1996 Act could provide more immediate relief in a pay equity context should that be found to be justified.

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IMPACT OF NSW PAY EQUITY INQUIRY'S DECISION ON THE NSW ECONOMY, AND IN PARTICULAR, THE EMPLOYMENT BASE OF THE STATE AND EMPLOYMENT OPPORTUNITIES FOR WOMEN

Term 5 of the Terms of Reference of this Inquiry requires the Commission to take into account, in formulating any recommendations, the public interest and for that purpose the Commission must have regard to, inter alia, the likely effect of its decision on the NSW economy, and in particular, the need to protect the employment base of the State and any adverse impact on employment opportunities for women.

Broadly speaking, the evidence produced by, and most of the submissions of the parties approached this question upon the basis of a potential across-the-board increase in salaries for persons engaged in female dominated industries and occupations. For example, the various economic modelling processes proceeded upon a premise that general increases for persons employed in female dominated occupations would be recommended by the Commission. One such premise was of an across-the-board pay rise for female dominated occupations sufficient to close the gender wage gap by one percentage point (where it was further estimated that 35 percent of all employees are employed in female dominated occupations). Similarly, various economists giving evidence to the Inquiry predicted various economic outcomes upon the basis of general movements in wages (although the precise premise was often left relatively unrefined). There were various debates in the evidence about

staggering or delaying the introduction of wage increases. However, these discussions all proceeded upon the notion of phasing in general salary movements for female dominated occupations or industries.

The Employers' Federation presented an exaggerated version of this approach, no doubt to emphasise the negative impacts it perceived may arise from the introduction of pay adjustments based on the notion of pay equity. This approach was not helpful in assessing the likely impacts and was often guilty of overstatement. For example, in its closing submission (Ex 446 p 128) the Employers' Federation puts that the Treasury evidence gives the clear impression that the "Treasury views the gender wage gap as being 'in excess of 15 percent' ". The references given in support of this view are Mr Cox's evidence [(transcript 2135-2137 and paragraphs 30-32 of Mr Richardson's evidence (Ex 388)]. However, that evidence demonstrates that it is the Employers' Federation and not the NSW Treasury that, in fact, advances a hypothesis based upon 15 percent salary increase (Ex 277, para 19 when read with para 22; T 2134 .56 to T 2135 .21; T 2136 .11). Indeed, the Employers' Federation ultimately advances an hypothesis based upon a 45 percent pay increase to 35 percent of NSW employees (T 2136 .43).

Examination of Mr Cox's statement (Ex 277) and the particular part of his oral evidence relied upon by the Employers' Federation/Chamber to support the above submission shows that Mr Cox in his statement was discussing "estimates of the gender pay gap from economy wide data", that discussion providing "the basis for many of the concerns raised before the

Commission by some participants to the Inquiry". (Ex 277 pp 5-6) In cross-examination by Mr *McDonald* as to impacts postulated in his paper, Mr Cox confirmed his statement on the basis "if the adjustments were of the type that we assume". I set out the later section of his evidence verbatim:

> Q. In determining what sort of pay equity adjustment might be considered, you have regard to an economic model which you were taken to by Ms Gregory and the provision in there for a 3 per cent increase to close 1 per cent of the gender gap?
> A. Yes.
>
> Q. If one was for example to close the gender gap overnight, applying the Treasury model, the impact of that could be quite a shock to the economy which would necessitate the case-by-case approach and phasing in over a period?
> A. Yes, I think that's a reasonable interpretation.
>
> Q. If one was to close the gender gap overnight as it were, using the model, we would apply a 3 per cent increase but for 1 per cent of the gender gap one would have to work out what the gender gap is but on your evidence it is about 15 per cent, that's correct, isn't it?
> A. I haven't suggested the gender gap is 15 per cent. I have said that there are different measures of the gender gap, one of which is 15 per cent but down to 2 per cent according to Wooden's measures.
>
> Q. The rule of thumb that you use is 15 per cent or do you prefer another measure?
> A. I don't believe that the way in which the 15 per cent type of measure is derived is the best methodology. I think the kind of thing that Wooden and other analysts have tried to do - they have tried to adjust that for different endowments as the right kind of way to measure the gap, so it is probably closer to the 2 to 5 per cent than 15 per cent type of thing.
>
> Q. In terms of paragraph 19 of your statement what do you mean when you refer to the 15 per cent gender pay gap there?
> A. I just mean taking that methodological approach, that is the sort of number you would come up with.
>
> Q. When you talk about taking into account particular endowments, what sort of endowments are you referring to?
> A. I am referring to some of the sorts of things that Wooden took into account - skills, experience and other characteristics that

might also pertain to productivity.

...

Q. For those that do not recognise those factors, let's assume that we weren't prepared to recognise the factors associated with human capital theory and we were prepared to accept a gender pay gap of 15%: The consequence of that would be applying the economic model to close the gap there would need to be a 45 percent wage increase for female dominated occupations?
A. I haven't checked the methods. I do not know whether three to one relationship stands up across the whole range.

...

Q. That is applying the model that has been prepared?
A. If one were to apply the work of the university of Tasmania, the increase would be 45 percent to close the gender gap. I would imagine that the increase would need to be of that order of magnitude given that the increase is just going through to occupations which are 65 percent or more female, so, it is not 45 percent across the board; it is just 45 percent to those occupational groups.

Q. Is it correct to say that that occupational group covers bout 35 percent of New South Wales employees, I am referred to paragraph 20?
A. Well I believe that is so, that is correct.

Q. So, that to, as it were, prevent a shock to the economy of a 45 percent increase to 35 percent of New South Wales employees, that's the reason you suggest a case by case phase in?
A. No, it is not, it is because as I suggested in answer to a previous question, the nature of the impact would be quite different according to a particular case being considered and so therefore, I think you need to think carefully about individual cases but there is a sort of secondary point which is the point you are alluding to which is the benefits of having things spread out over time, yes I have already answered questions on that point.

...

Q. Could I go back to this issue of what is the gender pay gap: You say as I understand in paragraph 19, of your statement you refer to one estimate of it being in excess of 15%; is that correct?
A. All I have attempted do is summarise a range of possible estimates there are in the world on this gap. I haven't done any analysis on this issue I just take this as a point of departure.

Q. In your view that would over estimate the gender pay gap

that exists because it fails to take into account aspects of human capital theory and other aspects which explain the pay gap is that correct?
A. I think I would like to give quite a pedantic answer to that question: Gender pay gap is whatever anyone chooses to define as the gender pay gap so that 15% is a measure of the gender pay gap according to that definition of the gender pay gap. If your question is what is the right definition of the gender pay gap which pay equity adjustments should be targeted at then I would suggest that that is something which does make allowance for differences in endowments, those human capital related characteristics. That is obviously, what work of the type I have witnessed and attempted to take into account but I am not saying that wouldn't be a right number but I am just saying it allows for some of the things that should be allowed for.

Q. You are more comfortable with what has been put by the sort of the figures that have been referred to by Wooden of 2 percent and Gregory of 35 [sic] percent or up to 5 percent?
A. I am more comfortable in the sense that it seems to me that it is a better analysis for getting at the number that we are interested in.

In para 30 of Exhibit 338, Mr Richardson said of para 19 of Mr Cox's statement:

> Para. 19 might leave the Commission with the impression that gender pay gaps are "in excess of 15 per cent". To hold that view means Treasury, for example, considers managerial earnings are an appropriate inclusion in measures of the gap...

I have not been left with the impression that Treasury holds that view.

The Crown parties did, however, introduce the concept of a case-by-case approach. I understood this approach to contemplate the hearing of applications to make or vary awards (either in part of in whole) based upon the merits of particular cases.

The Commission does not propose to recommend the introduction of general wage increases for all female dominated occupations and industries or for that matter across-the-board wage increases for all persons engaged in a particular occupation or industry. Rather, the Commission proposes that it should proceed to look at the merits of each case and in doing so weigh up or balance pay equity considerations against the specific economic impact of the application according to a set of principles directed to the achievement of such purposes. By its nature this process will not lead to general salary movements.

Such a process may result in a salary adjustment for an occupation in an award, a salary adjustment for a particular classification in an award, the creation of a new classification or classification levels or grades or simply no wages adjustment at all. Additionally, the Commission may review the definitions for classification and career paths within awards. Upon this basis, all of the estimates of adverse economic impacts based upon a general wage movement for female dominated occupations will inevitably overstate any potential economic impact. In accordance with its traditional practices the Commission can then take into account any particular economic impacts based upon the circumstances of each particular case.

However, the parties did devote some resources to examining potential economic impacts. For completeness, I will deal with that evidence and their submissions so as to create a solid foundation upon which later economic assessments may be undertaken in award reviews in which pay equity issues emerge.

THE ECONOMIC IMPACT OF 1970S EQUAL PAY CASES AND LESSONS FOR THE FUTURE

Given that the attention of the parties has been directed to general wage movements in female dominated occupations a logical starting point for an assessment of the potential economic impact of any adjustment in salaries based on pay equity considerations is an analysis of the impact of the 1970's equal pay cases.

Gregory and Duncan (1981) (Ex 361) found that the equal pay decisions led to a large change in relative wages and were associated with a large increase in employment of females relative to males and, as a result, bought about a large change in income distribution towards females (p 424). The changes in the relative wages of male and female employees did reduce the growth rate of female employment relative to male employment by 1.5 percent per annum over six years during which the equal pay policy was introduced. Most of this effect was due to a reduction of employment in female dominated industries rather than a decrease in the share of females employed within industry groups (Ex 277, Annex 2, para 81).

The authors found that the female unemployment rate from 1964 showed a downward trend and was less sensitive than male unemployment. However, there did appear to be a slight increase with female unemployment relative to male unemployment during 1973 and 1974 at a time when the largest change in relative wages occurred.

In all, the authors found that measured female unemployment appears to have been " remarkably unresponsive to the equal pay decisions". The substitutional response to relative wage changes appears to have been very small as a result of the equal pay decisions. (p 425)

The authors also point out that the 1970s was a period of significant growth for female employment relative to male employment which was the result of the increasing proportion of women within occupations and industries and of the changing consumer demands favouring the products of industries and occupations in which the female share of the workforce is above average (p 426).

The Employers' Federation/Chamber submit that a decade later Professor Gregory investigated the employment wage connection and showed that since the 30 percent real wage increase in Australia in the mid 1970s real wages have remained constant, unemployment has increased fourfold and male full time employment has fallen 25 percent. This is a reference to Gregory (1993) (Ex 408).

However, Professor Gregory's 1993 paper requires some further analysis. He finds that the Australian job loss has been concentrated on males particularly in relation to full-time employment loss (61 and 65). More significantly, since 1976 he finds that women have accounted for 7 of every 10 new jobs for full-time non-managerial employees. Over the same period the

additional women's employment is more evenly spread than additional male employment although the job growth is greatest at the bottom quintile. Women did absolutely and relatively better than men in obtaining employment in the middle of the pay distribution and in this sense there was some substitution, though slight, of women's employment for that of men's (p 67). Real earnings for low and middle pay occupations have fallen steadily according to Professor Gregory in this article and at the same rate until 1987 by approximately 4 percent to 5 percent (p 70). He does find that the close correspondence between aggregate employment and real wages changes suggests that increases in average real wages are major contributors to the deterioration of Australia's macro labour market outcomes (p 75). He makes no specific findings as to relative wages in relation to the outcome of equal pay decisions.

In the article by Gregory R G, Anstie R, Daly A and Hoe, V entitled *Women's Pay in Australia, Great Britain and the United States; the Role of Laws, Regulations and Human Capital* from Pay Equity Empirical Inquiries. (Empirical Inquries, Michael, R; Hartmann, H and O'Farrell, B (eds), Washington National Academic Press, 1989) the authors confirm that there was no noticeable break in the growth of female employment relative to that of males in Australia up to the time of the writing of the article. It was concluded that there was a relatively low elasticity of substitution between men and women in the production process due to the segregation of the labour market (p 237). Furthermore, it was found that, during and after the period of the equal pay initiatives, the unemployment of women continued to fall relative to that of men and appears not to have been affected by the pay changes to a great degree (p 238).

In his statement in exhibit 99 Professor Gregory concluded that over the last two decades most of the growth of employment demand has been in occupations in which women are disproportionately represented.

In relation to the impact of the 1970's equal pay decisions Associate Professor Borland points out the following:

i. Killingsworth (1990) (p 263) also examines the effects of employment of the Australian Equal Pay cases in 1972 and reached similar conclusions to that of Gregory and Duncan: (1981) a not insubstantial initial negative effect that wore off fairly quickly;

ii. McGavin (1983) has criticised Gregory and Duncan's findings although the rejoinder by Gregory and Duncan (1983) points out that even taking into account McGavin's criticisms the employment consequences of the equal pay policies are still 'very small';

iii. Gunderson (1989) generally favours the Gregory and Duncan conclusions although he suggests that a balanced conclusion was that there was some adverse employment effect but not a substantial one given the dramatic increase in female relative earnings. (Ex 277, Annex 2, paras 80-83).

It is at least implicit in the submission put by the Employers' Federation in Exhibit 446 (pages 121-124) that these findings may be discounted due to the changed economic circumstances which have occurred since the 1970's equal pay decisions. There seems to be also some suggestion that there is an equity issue associated with the growth of female employment over male employment and perhaps a third suggestion that the economic circumstances are not suitable to any relative pay adjustment. I will deal with each one of these suggestions during the course of my further discussion of economic impacts.

Associate Professor Borland recognised that in discussing the economic effects of the 1970's equal pay decisions one had to have regard to different macro economic conditions which pertained at the present time in contrast to the mid 1970s. He focuses upon unemployment rates which he states were much lower in the early to mid 1970s and present (Ex 277, Annex 2, p 35). He said that this might suggest that the employment consequences of implementing an equal pay policy could have had more adverse effects had the macro economic circumstances been less favourable.

On the other hand, he correctly points out that the equal pay cases of 1969 and 1972 had an impact on an Australia-wide basis whereas the present matter is restricted to NSW. He then examines a number of studies which discuss the outcome of an adjustment of relative wages. For example he discusses the study by Zabalza and Tzannatos (1985) which looked at the effect of a 20 percent increase in relative wages of female to male employees. This was said to produce a 4 percent reduction in employment in the United Kingdom. He then looks at the more recent study by Manning (1996) which reinterpreted this evidence and found that there was no decrease in female employment that could be attributed to the English Equal Pay Act and interpreted that finding as evidence of monopsony in labour markets. In contrast he discussed the study of Killingsworth for the United States (1990) which compared the effects on employment of the implementation of equal pay policies in Minnesota and San Jose in which it was found that the cumulative effect of the Comparable Worth Policy implemented in 1983 in Minnesota was to raise average wages by 12

percent and 2 percent respectively in male dominated and female dominated jobs and cause a reduction in employment of 4.7 percent and 1.2 percent respectively. In contrast, implementation of a comparable worth policy for local government employees in San Jose during the 1980s was found to have raised wages in female dominated jobs by about 6 percent (with no effect on wages in male dominated occupations); these wage changes translated into employment reductions of about 7 percent in female dominated jobs and no effect in male dominated jobs.

The changes in circumstances identified as being relevant by the Employers' Federation/Chamber are as follows:

i. increases in the rate of unemployment since the early 1970s and increases in the size and speed of unemployment from the mid 1970s;

ii. weaker growth in female employment and labour participation in the 1990s as opposed to the 1980s due to a downturn in certain sectors including retail;

iii. increased competition between males and females for part-time employment;

iv. unemployment is concentrated disproportionately at the bottom income levels with relative high wages for the unskilled being the

factor behind this higher rate;

v. generally changes in the economic circumstances since the 1970s including globalisation of world markets, floating of the dollar, deregulation of the finance sector etc.

It must be said that some amount of the material relied upon by the Employers' Federation in support of these submissions and earlier submissions I have referred to came somewhat belatedly in the proceedings, particularly in relation to material arrived from the Reserve Bank of Australia Conference, Employment and the Australian Labour Market which was held on 9 and 10 June 1998. Many of these documents were tendered as a bundle in Exhibit 408 and hence were not the subject of active discussion during the course of the proceedings. Accordingly the submissions of most of the parties do not address the papers.

It was also particularly difficult to deal with these materials because whilst the materials were referred to as part of a substantial bundle of papers in Exhibit 408 there is no particular referencing providing other than the names of the authors and the titles of the articles. Nevertheless I have endeavoured to deal with these materials so as to deal with the submissions which have been put. Many of the articles referred to in the immediately following section are found in Exhibit 408. Fortunately most of the discussions build upon the discussion of the papers by Professor Gregory and there appears to be no inconsistency in the approaches adopted. I finally note that there was evidence

of Professor Wooden concerning 'changed circumstances' (from those existing at the time of the 1972 Equal Pay Cases) which by and large did not receive much attention in the submission of the parties. I will also deal with that evidence.

It is convenient to distinguish in the material the position in relation to employment, unemployment and real wages.

I have already noted the findings of Professor Gregory that the 1970s was a period of significant growth in female employment. However it should be noted before further examining that phenomenon that since the 1970s, with some variation from time to time, there has been a general growth in female employment (see in Ex 408 Russell and Tease, (pp 34 and 42 and see figure 135) and Borland and Kennedy (1988)) (p 12), Debelle and Vickery (1998) (p 3). This growth can also be seen in the job growth projections in the ABS publication Labour Force Experience (Cat. 6206.0, February 1997) (Ex 354).

These significantly different trends in employment growth and labour force participation rates for male and female employees are evident for the whole of the period relevant to examining the contention that there exist changed circumstances from the 1970s. For females the participation rates increased from 36.6 percent to 53.6 percent between August 1966 and February 1998 whereas for males the participation rate declined from 84.2 percent to 73.0 percent over the same period. For males, the employment/population rate also declined - primarily due to decreases in full-time employment/population rate. At the same time, increases in the part-time/employment rate for females (from 13.5

percent to 21.4 percent between February 1978 and February 1998) have caused a significant rise in the employment/population rate for females (Borland and Kennedy (1998) (p 3). Table 2 of the Borland and Kennedy paper presented to the Reserve Bank Conference (Ex 408) showed a significant growth in employment in all sectors examined for female employment between the second quarter 1983 and the fourth quarter 1989. This is to be contrasted with the decline in male employment over the same period. The decline in male employment was concentrated in manufacturing, construction and agriculture, and the gain for female employment most markedly occurred in trade, finance, community services and personal service industries (Borland and Kennedy (1998) (p 3).

However, Table 1 of the paper of Borland and Kennedy (1998) demonstrates that the growth in female employment slowed during the fourth quarter of 1989 from the first quarter 1988 although the growth in labour force participation was still positive at the end of that period. What is also clear from Figure 5 of the Borland and Kennedy paper is that employment rates for females continued to rise during the whole of the period commencing from the 1980s through to the last quarter examined in 1989, although the growth in female employment has been slower than during the 1980s particularly over the last 9 quarters.

Borland and Kennedy (1998) give a number of possible reasons for this slower growth in female employment in the current expansion as compared with the 1980s which include:

i. a small fraction is to due to slower employment growth across all industries associated with slightly lower rates of GDP growth;

ii. much more importantly a set of specific demand-side factors associated with slower employment growth in industries which are female dominated and in particular retail, finance/insurance/property and health and community services. This accounts for about one half of the difference in total female employment growth between the 1980s and 1990s, that effect being from the depressed performance of the retail sector, reductions in workforce in the finance/insurance industry and public sector reductions in health and community services (Borland and Kennedy (1988) (p 4)).

iii. there are also some possible supply side factors which include increasing competition between males and females for part-time jobs (it would appear particularly from younger males) and changes to government benefits particularly in relation to reductions of assistance in child care. There also seems to be some component of the change associated with mortgage repayments being reduced since the early 1990s having an income effect on labour supply resulting in lower female labour force participation.

The female proportion of the labour force grew consistently from

1986 to 1996 (Australian Women's Year Book 1997-ABS-Cat No. 4124.0, Ex 354). Furthermore the projected annual rate of growth of the female labour force is double that of men for the period 1993 to 2011 and the female participation rate is projected to rise consistently over the same period (Labour Force projections for Australia, 1995-2011, Cat Vol. 5250, Ex 369).

It would appear from the discussion in both Borland and Kennedy (1998) and Debelle and Vickery (1998) that unemployment grew from the 1970s in a number of phases with the most significant change occurring in the mid 1970s and then subsequent increases in the early and mid 1980s and the early 1990s were associated principally with recessions during that time.

Real wages show a mixed picture during the period of the 1970s to date. There was a growth in real wages in the 1970s and early 1990s (Russell and Tease 1.42), although for the period 1976 to 1990 the growth in real earnings appears to have been concentrated in higher earnings rather than low to middle earnings groups. In the latter case it appears to have fallen until 1987 (Gregory (1993) (p 70)). Significantly however from the second half of the 1980s there has been decline in real wages (Russell and Tease (p 42) and (Debelle and Vickery) (p 3). In the second half of the 1980s real unit labour costs fell below the levels of the early 1970s at the time that employment rose steadily.

Professor Wooden contended that increases in wages paid to female dominated occupations can be expected to lead to a decline in female