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Equal Remuneration

under the Fair Work Act 2009

A Report for the Pay Equity Unit of the Fair Work Commission

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A Report for the Pay Equity Unit of the Fair Work Commission

This report is the product of independent research by the authors. The authors take responsibility for the contents of the report and the views it contains are theirs, not those of the staff or members of the Fair Work Commission

ISBN 978-0-9874935-6-9

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Abbreviations

ABI	Australian Business Industrial
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFPC	Australian Fair Pay Commission
AHOTCE	Average Hourly Ordinary Time Cash Earnings
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AMWU	Australian Manufacturing Workers Union
ANZSCO	Australian and New Zealand Standard Classification of Occupations
ASU	Australian Services Union
AWOTCE	Average Weekly Ordinary Time Case Earnings
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention for the Elimination of All Forms of Discrimination against Women
CHRA	Canadian Human Rights Act
CHRC	Canadian Human Rights Commission
Commission	Fair Work Commission
DAs	dental assistants
ECJ	European Court of Justice
EEA	European Economic Area
EEH	Employee Earnings and Hours
EEOC	Equal Employment Opportunity Commission (US)
EHRC	Equality and Human Rights Commission (UK)
<i>ER Case No 1</i>	<i>Re Equal Remuneration Case (2011) 208 IR 345</i>
<i>ER Case No 2</i>	<i>Re Equal Remuneration Case (2012) 208 IR 4465</i>
ERP	equal remuneration principle
EOWA	Equal Opportunity for Women in the Workplace Agency
ETA	Equal Treatment of Men and Women in Employment Act (Netherlands)
ETC	Equal Treatment Commission (Netherlands)

EU	European Union
Fair Work Act	Fair Work Act 2009 (Cth)
FWA	Fair Work Australia
GEA	Gender Equality Act (Norway)
GETA	General Equal Treatment Act (Netherlands)
GPG	gender pay gap
HEF	Hospital Employees' Federation of Australia
HILDA	Household, Income and Labour Dynamics in Australia
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organisation
ISCO	International Standard Classification of Occupations
LHMU	Liquor, Hospitality and Miscellaneous Union
NES	National Employment Standards
PSECA	Public Sector Equitable Compensation Act (Canada)
OECD	Organisation for Economic Co-operation and Development
Ombud	Gender Equality and Anti-Discrimination Ombudsman (Norway)
QIRC	Queensland Industrial Relations Commission
SES	Senior Executive Service
SACS	social and community services
SACS case	<i>Re Equal Remuneration Case</i> (2011) 208 IR 345; <i>Re Equal Remuneration Case</i> (2012) 208 IR 446; and <i>Re Equal Remuneration Case</i> (2012) 223 IR 410
RANF	Royal Australian Nursing Federation
TEEC	Treaty Establishing the European Economic Community
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
URCOT	Union Research Centre on Organisation and Technology
UV	United Voice
WGEA	Workplace Gender Equality Agency
WR Act	Workplace Relations Act 1996 (Cth)

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Executive Summary

The Pay Equity Unit¹ of the Fair Work Commission commissioned this independent report in order to assist parties to proceedings under Part 2-7 of the *Fair Work Act 2009* (Cth) (*Fair Work Act*), which enables the Commission to make an 'equal remuneration order' to ensure 'equal remuneration for men and women workers for work of equal or comparable value' for specified employees. It was commissioned to help parties engage in productive discussions with one another, and to inform them about the matters they might be required to address and the type of evidence that might be required in an equal remuneration proceeding. The report was required to build upon – and indeed it incorporates material from – an earlier report (Romeyn et al 2011) prepared for what was then Fair Work Australia (FWA).

This report is intended to be a resource that:

- explains the background to Part 2-7;
- analyses both Part 2-7 and other relevant provisions in the *Fair Work Act*; and
- outlines how Part 2-7 was interpreted and applied in the only test case to date, involving the making of an equal remuneration order for the social and community services (SACS) sector.

As requested by the Pay Equity Unit, the report is intended to be enriched by a broader discussion of equal remuneration principles, materials, legislation, cases and relevant research, both internationally as well as at the State and national levels in Australia. It also refers to 'good practice' approaches for equal remuneration matters.

Given that the new jurisdiction is at an early stage of development, these tasks have necessarily required us to form and express opinions as to the possible meaning and effect of the legislation. Both those opinions, and our assessment of what might be regarded as good practice in this area, are based on a careful and rigorous assessment of the legislation, its interpretation in the only major test case to date, and a large body of available literature on possible approaches to the issue of equal remuneration, both in Australia and overseas.

We believe that the analysis we have presented will assist both applicants and respondents in understanding and interpreting Part 2-7 of the *Fair Work Act*, and the types of evidence that may be used either in support of, or to resist, the making of an equal remuneration order.

Preparation of this report has involved a two-stage process. A draft report was posted on the Commission's website on 23 October 2013, with interested parties invited to provide written comments to the Pay Equity Unit by 13 November 2013. The 11 responses received can be viewed on the Commission's website.²

We have made various changes to the report in response to these comments. In some instances we have adopted suggested amendments. In others – especially where we do not agree with a comment or have not fully accepted a suggestion for change – we have noted the views of the

¹ The Pay Equity Unit is a specialist administrative unit within the Fair Work Commission that undertakes and commissions independent research and provides information about pay equity matters under the *Fair Work Act 2009*.

² See <http://www.fwc.gov.au/index.cfm?pagename=adminremuneration> (accessed 25 November 2013).

commenting organisation, referencing its submission. We are grateful to those who took the trouble to respond. In our view their input has significantly improved the final document.

Before going on to summarise what appears in each chapter of the report, we would like to make it clear that the report is the product of independent research and represents the views of its authors, not of the staff or members of the Fair Work Commission.

Chapter 1 – Introduction

This chapter introduces the report, outlines its structure, explains our approach to the project and touches on some definitional matters. It also notes the feedback received from stakeholders in response to the draft version of the report released in October 2013 and makes some general comments in response to points raised in a number of the stakeholder submissions.

Chapter 2 – Equal remuneration: The international picture

This chapter commences by outlining the international labour standards which provide a platform for both legislation and practice in Australia, notably the International Labour Organisation (ILO) *Convention No 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (Equal Remuneration Convention No 100). This Convention requires adherence to the principle of ‘equal remuneration for men and women workers for work of equal value’, which is defined by the Convention to mean ‘rates of remuneration established without discrimination based on sex’.

After referring to the interpretation of the Equal Remuneration Convention, Chapter 2 moves to set out some basic international data on the ‘gender pay gap’ (GPG) – defined as a ratio that converts average female earnings into a proportion of average male earnings to calculate the pay gap between the sexes. The Chapter then describes and summarises some outcomes of a series of country studies that are set out in detail in Appendix C.

In these studies, we examine legislation and practice in ten countries, all Organisation for Economic Co-operation and Development (OECD) members, selected because of their comparability to Australia, and because they each demonstrate aspects of what by international standards would be regarded as good practice in relation to the regulation of equal remuneration. These countries are Belgium, Canada, Ireland, Finland, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom and the United States. There is also an analysis of European Union (EU) standards, which set out the requirements for EU countries in terms of achieving equal remuneration. For each country we set out the legislation and some relevant recent case law; provide an overview of the various processes within the country for achieving equal remuneration, including promotional aspects as well as complaint mechanisms; and briefly summarise specific features that are particular to each country.

Chapter 2 summarises lessons learned from the country studies and also highlights aspects of good practice by the selected countries in their endeavours to achieve gender pay equity:

- In relation to *legislation* there is discussion and analysis of the provisions in the various countries as to:
 - ‘work of equal value’;
 - ‘remuneration’;

- the limitations of gender pay equity being dealt with through the lens of sex discrimination;
 - the exceptions which are defined in legislation to allow for differences in remuneration which do not breach the international standard;
 - provisions which reverse the burden of proof in cases so that the entire burden does not lie on the applicant; and
 - the statutory requirements for employers to provide information about remuneration.
- Regarding *national policy*, reference is made to the proactive approach required by all member states of the ILO to develop national plans and policies to address the GPG and promote equal remuneration. Similarly, the European Commission as well as the European Parliament has called on all member states to reduce the GPG and encourage social partners to create more gender-equal wage structures. Country examples of such initiatives are described.
 - *Government institutional supports* which have been developed in each of the countries to address gender pay equity show a diversity of approaches. They include the use of ombudsmen, human rights commissions and pay equity commissions which endeavour to mediate and/or resolve complaints without the need to progress to court litigation. The research undertaken indicates an overall decline in the number of cases taken before courts and tribunals, with most cases being resolved by processes such as investigation, mediation and various forms of arbitration through other governmental institutions. Good practice also reveals the use of experts in relation to assessing work of equal value as well as equal remuneration to be applied, to assist the work of courts, tribunals or other government institutional bodies.
 - The country studies reveal an increasing trend towards either legislation which requires *employers to undertake pay equity measures*, or voluntary self-assessment by employers which is regularly monitored. Depending on the size of the organisation, the pay equity measures may take the form of pay equity plans, audits or annual reports which are regularly monitored and assessed externally by governmental bodies. Good practice examples are discussed, which include references to detailed guidelines developed by government bodies for use of all participants involved in equal remuneration. There is also reference to practice in countries in which there is highly structured centralised collective bargaining and wage setting, but where there is still a requirement for individual enterprises to take and report on pay equity measures.
 - The range of *requirements on employers to provide information on remuneration* present across the countries studied is discussed. Good practice examples are provided.
 - Drawing on examples across a number of the countries studied, a detailed discussion is provided about various models for *assessing the value of work* and in particular, methodologies for appraising work of 'equal value' which are used internationally. The discussion concerns objective appraisals of work and the method for measuring and comparing the relative value of different jobs. It includes a discussion about analytical and non-analytical schemes, recognising that most of the schemes referred to are concerned with single workplaces or organisations. Common analytical schemes are discussed, which include defining and attaching scores to four major factors: skills and qualifications, responsibility, effort and working conditions. Emphasis is placed upon the essential requirement for any

scheme to ensure that the analysis is objective and free from gender bias and, in doing so, to identify hidden or frequently ignored skills of women in feminised jobs. Specific good practices are referred to and in particular whether it is necessary to identify a comparator for the purpose of assessing whether work is of equal value and thereafter to ensure equal remuneration. The conclusion on this portion of the review is that good practice is one which provides the most flexible approaches to identifying and remedying gender pay inequity. Such approaches are not limited by requiring male dominated job comparators, or a male comparator, but may permit a representative comparator, a female comparator or a proxy in the absence of any relevant comparator, or no comparator.

- A final section is on *enforcement procedures and remedies* which are used in the various jurisdictions. All jurisdictions appear to have a common problem of multiple avenues for redress, making it difficult for complainants to understand which jurisdiction to select. In general the options are largely dependent upon whether a complainant is a union member, whether the claim is for gender discrimination or whether it is a claim for gender pay inequity, the nature of the relief sought, and the time-limits related to the claim.

The overall conclusion of Chapter 2 is that a review such as this provides an important opportunity for Australia to consider where it sits in its approach to tackling the ongoing issue of gender pay inequity. The examples presented in the report may suggest ways forward and inform the Commission and parties to applications in considering different approaches in addressing evidence and procedures in equal remuneration cases.

Chapter 3 – The Fair Work Act

This chapter begins by summarising the historical background to the Fair Work Act's provisions. That background is dealt with in more detail in Appendix A, concerning developments in the federal jurisdiction, and Appendix B, which examines approaches at State level. Reference is made, among other matters, to:

- the original practice, within the federal award system, of setting lower minimum rates of pay for women compared to men performing the same work, on the basis that women did not need to support a family;
- the gradual abandonment of that approach and the adoption by the federal industrial tribunal – most notably in the *Equal Pay Cases* of 1969 and 1972 – of the principle of equal pay for equal work;
- the introduction in 1993 of a statutory power for the Australian Industrial Relations Commission to make orders to ensure equal pay for work of equal value, as defined by the Equal Remuneration Convention – a power which, although left largely unchanged by the Howard Government's reforms of 1996 and 2005, was never successfully invoked;
- the adoption in the early 2000s of broader 'equal remuneration principles' (ERPs) by the New South Wales and Queensland Industrial Relations Commissions, in each case in response to detailed pay equity inquiries; and
- the use of those principles to secure wage adjustments in a range of feminised industries (including childcare and community services), until the application of the relevant State legislation in the non-government sector was curtailed by the progressive expansion of the federal system in 2005 and 2009–10.

Key features of the Fair Work Act are then examined. The Fair Work Act addresses the objective of pay equity in two distinct ways. One is through the general provisions for the setting and adjustment of pay rates through modern awards or national minimum wage orders. Both the 'modern awards objective' in section 134 and the 'minimum wages objective' in section 284 oblige the Fair Work Commission to take into account 'the principle of equal remuneration for work of equal or comparable value'. Sections 156(3) and 157(2) also allow modern award minimum wages to be varied for 'work value reasons'. Section 156(4) defines these as 'reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following: (a) the nature of the work; (b) the level of skill or responsibility involved in doing the work; (c) the conditions under which the work is done'.

There has been a long tradition of 'work value' adjustments to award rates. Historically, tribunals have demanded evidence of some *change* in the nature of the work, skill and responsibility required or the conditions under which the relevant work is performed, since the last time that the work in question was formally assessed. But it is as yet unclear whether the Fair Work Act provisions will be interpreted as importing that criterion.

The second (and more specific) set of provisions in the Fair Work Act dealing with pay equity are those in Part 2-7. This permits employees, trade unions or the Sex Discrimination Commissioner to apply to the Commission for the making of an order to ensure that, for specified employees, there will be equal remuneration for work of equal or comparable value. Such an order may increase (but not decrease) rates of remuneration for the affected employees, if necessary in stages. A failure by an employer to comply with such an order, which overrides any inconsistent award or agreement, may result in a penalty being imposed or other remedies being awarded by a court under Part 4-1 of the Fair Work Act.

Our analysis of Part 2-7 in Chapter 3 highlights the following points, among others:

- The provisions embody a broader conception of equal remuneration than under the equivalent provisions in the *Workplace Relations Act 1996* (WR Act), and before that the *Industrial Relations Act 1988*. The Fair Work Act not only refers to work of equal *or comparable* value, but makes no mention of any need to establish discrimination.
- Unlike the position under New South Wales or Queensland law, the Commission is not required to *ensure* equal remuneration. Although it cannot make an order unless it is satisfied that equal remuneration does not exist for the employees concerned, this is a necessary but not sufficient consideration for the exercise of what is framed as a discretionary power.
- In exercising this discretion, the Commission is not constrained by either the modern awards objective in section 134 or the minimum wages objective in section 284, and need not conceive of an equal remuneration order as being part of the 'safety net' of minimum terms and conditions under the Fair Work Act.
- The Commission is, however, obliged by sections 302(4) and 578 to take into account:
 - any determinations made by its Expert Panel (formerly the Minimum Wage Panel) in the annual wage reviews mandated by Part 2-6 of the Fair Work Act;
 - the overall objects of the statute;
 - 'equity, good conscience and the merits of the matter'; and

- ‘the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of [various grounds including sex]’.
- There is nothing in the Fair Work Act that either requires the Commission to formulate an ERP to guide its determinations under Part 2-7, or forbids it from doing so.
- An order under Part 2-7 must be directed to rates of ‘remuneration’. Although this term is not defined in the Fair Work Act, it arguably extends beyond wages to cover any form of reward for services rendered, including non-cash benefits.

Section 721(1) of the Fair Work Act precludes the making of an equal remuneration order if the Commission is satisfied that the employees in question can access an ‘adequate alternative remedy’ that will ensure equal remuneration, under a federal, State or Territory law (including another provision in the Act itself). To constitute an *adequate* alternative, another cause of action would need to be commensurate in effect to an application for an equal remuneration order. In our view, the capacity to seek the making of an enterprise agreement or the adjustment of award rates of pay for the relevant work would not satisfy that criterion.

Section 724 also precludes the making of an order where proceedings for an ‘alternative remedy’ to ensure equal remuneration, or against unequal remuneration, have actually been commenced under a federal, State or Territory law and not been discontinued or failed for lack of jurisdiction. Since it is merely an alternative remedy that is relevant here, as opposed to an *adequate* alternative, section 724 evidently sets a bar that is lower than that required under section 721. It is arguable, for instance, that an applicant could not simultaneously pursue an application for an equal remuneration order and a work value adjustment under sections 156(3) or 157(2).

Chapter 4 – The SACS case

The SACS case was initiated by the Australian Services Union (ASU) and four other unions in 2010, to extend the benefit of an equal pay case successfully run under Queensland law.

In May 2011, in *Re Equal Remuneration Case* (2011) 208 IR 345 (*‘ER Case No 1’*), a Full Bench of what was then FWA determined that work in the SACS sector was undervalued on a gender basis. But it also sought further submissions as to how this might be remedied, and in particular as to the *extent* to which the undervaluation was gender-based. In February 2012 a majority of the Bench accepted a joint ASU-Commonwealth submission that increases of between 19 and 41 per cent should be ordered to the minimum wage rates set by the Social, Community, Home Care and Disability Services Industry Award 2010. There was also a special 4 per cent loading, to recognise impediments to bargaining in the industry: see *Re Equal Remuneration Case* (2012) 208 IR 4465 (*‘ER Case No 2’*). The terms of an equal remuneration order were settled in June 2012: *Re Equal Remuneration Case* (2012) 223 IR 410. The Award itself was not varied, with the order instead operating on a ‘stand alone’ basis. Both the increases and the loading are being phased in over an eight-year period that commenced in December 2012.

Our analysis of the Commission’s rulings in this case highlights the following key features of its reasoning:

- The Commission declined to issue a formal statement of principles, on the basis that this would be premature and run the risk of limiting the discretion available under Part 2-7.

- There is no requirement under Part 2-7 to demonstrate discrimination as a threshold to an equal remuneration claim.
- Undervaluation was adopted as a key part of the Full Bench's approach in assessing equal remuneration claims.
- There is a requirement to establish that the asserted undervaluation is linked or attributable to gender.
- There is no requirement for applications to reference an explicit male comparator group, although such references may be included.
- The 'indicia' of undervaluation developed through the New South Wales and Queensland jurisdictions provide a framework for considering whether there is undervaluation, but do not constitute a prescriptive formula.
- The Full Bench recognised that impediments to bargaining can impede equal remuneration.
- Consistent with approaches utilised in the past, the Full Bench adopted a 'phased' approach to wage adjustments established through the equal remuneration order.
- Additionally, the Full Bench did not indicate that it would depart from its traditional reliance on work value as a means of assessing the value of work.

Chapter 5 – Explaining the gender pay gap: A literature review

The 'gender pay gap' (GPG) has been the subject of intense interest by regulators and researchers alike, both domestically and internationally. A number of factors prompt this interest but key among them is the clear evidence of ongoing gender pay inequity, and the ongoing impact of this inequity on women's current and lifelong earnings. There are a number of different measures of the GPG, which vary according to their inclusion of part-time workers, overtime and bonuses, non-adult and managerial earnings, and whether they are based on weekly or hourly earnings. The available data for Australia identifies the current status of the GPG through a series of measures:

- average ordinary time weekly earnings of full-time adult employees – 17.5 per cent (ABS, May 2013)
- average total weekly earnings of full-time adult employees – 21.1 per cent (ABS, May 2013)
- average total weekly earnings for all employees – 37.4 per cent (ABS 2013, May 2013)
- average hourly ordinary time cash earnings for full-time non-managerial adult employees – 9.3 per cent (ABS 2013, May 2012), and
- average hourly total cash earnings for full-time non-managerial adult employees – 10.8 per cent (ABS 2013, May 2012).

A central theme in labour market and gender pay equity research is understanding the factors that contribute to earnings differences between women and men. This is a wide-ranging area of research and includes consideration of factors such as differences in education and labour market experience, occupational segregation, and social, institutional and workplace practices. Previous work in this area has been considered by gender pay equity inquiries and equal remuneration proceedings, often with a view to assessing how work value decisions contribute to earnings differences, and providing information about the characteristics of undervalued work.

We note in Chapter 5 a consistent finding that there is a significant, persistent, ‘unexplained’ wage gap between women and men. The findings show that only a small proportion of the GPG can be attributed to differences in the productivity-related characteristics of men and women, such as differences in education and workplace experience. Contributing factors to the GPG identified by the research include the undervaluation of feminised work and skills, differences in the types of jobs held by men and women and the method of setting pay for those jobs, and structures and workplace practices which restrict the employment prospects of workers with family responsibilities.

These findings, together with the available industrial case history, indicate that the objective of equal remuneration for men and women workers for work of equal or comparable value poses a series of complex challenges for policy makers, industrial parties, courts and tribunals. Central to this challenge have been the difficulties in addressing and assessing the concept of equal or comparable value, in addition to understanding and accepting how gender has shaped a wide range of intersecting institutional and social processes, such that women are not receiving equal remuneration for work of equal or comparable value.

Chapter 6 – Proceedings under Part 2-7 of the Fair Work Act: Key issues

In discussing the carriage of proceedings under Part 2-7 of the Fair Work Act, we take as a starting point the principles espoused by FWA in the *SACS* case, as set out above, while acknowledging that it is open to the Commission to reconsider its approach in future proceedings. We note in particular the importance of the concept of *undervaluation* in the application of Part 2-7.

Historically, attempts to address issues of gender pay equity, both locally and internationally, have enjoyed only partial success. In relation to Australia, the 1972 principle of equal pay for work of equal value was not applied in full, while the impact of the 1993 equal remuneration legislation was limited by the requirement for applicants to demonstrate that earnings differences were a result of sex discrimination.

These limitations are important to understanding the emergence of undervaluation as an approach utilised by industrial tribunals to hear applications for orders directed towards the objective of equal remuneration for men and women workers for work of equal or comparable value. As a concept, and in contrast to discrimination-based approaches to equal remuneration, undervaluation focuses on the valuation of work in female dominated industries and occupations, so as to determine whether that work has been inappropriately or inadequately valued. A finding of gender based undervaluation may be based on evidence of a failure to recognise or give proper weighting to the characteristics of feminised work. Additionally, other gender-associated factors, either singly or in combination, may have contributed to a lack of (or inadequate) work value assessments, resulting in rates of pay that do not reflect the value of the work.

Key to the emergence of undervaluation, in State proceedings and the federal *SACS* case, has been the absence of a mandatory requirement for specific comparators, whether male or otherwise. The absence of this stipulation is linked to the concept of undervaluation, given that this concept does not revert routinely to a male standard. On this reasoning, validating the undervaluation of women’s work by reference to a comparable male group is inherently flawed, because it cannot be assumed that ‘male’ rates of pay were ever objectively set by reference to work value in the first place. Male comparators might be used for illustrative purposes but are not an evidentiary precondition. Applicants may choose to use a range of comparisons, including other areas of feminised work, but equally comparators may not necessarily assist the tribunal’s assessment of the application.

A potential area of contest in equal remuneration proceedings concerns the parameters of gender-based undervaluation: specifically, the evidentiary bar for gender-based undervaluation, and the means through which parties could demonstrate that undervaluation was gendered or had a gender-associated cause. In the federal *SACS* proceedings, the Full Bench made an initial determination that the work was undervalued on a gender basis, through a series of interlocking conclusions. These were that:

- much of the work is caring work;
- such a characterisation can contribute to devaluing work;
- the work was in fact undervalued; and,
- given that caring work has a female characterisation, the undervaluation was gender-based.

In its direction as to the framing of any remedy, however, the Full Bench effectively imposed an empirical requirement on the applicants, requiring submissions as to what proportion of the undervaluation could be attributed to gender.

The available research on gender pay equity identifies the complexity of separating gender from a range of other reinforcing and interconnected considerations that shape women's earnings. Different dimensions of undervaluation can contribute to pay inequity in an additive and cumulative way. The New South Wales and Queensland tribunals have taken the view that the assessment of equal remuneration claims involves balancing a number of considerations, and that it is not always possible to identify the extent of gender-based undervaluation in a forensic manner. This disinclination by State tribunals to mandate a proportionate identification of gender-based undervaluation is linked to what those tribunals have assessed as a key task, namely assessing the current value of the work in question and ensuring that the minimum rates of pay for it have been properly set.

One of the strengths of the concept of gender-based undervaluation is that it goes to the heart of addressing the institutional and cultural determinants of why women have generally been under-remunerated for their work. The ERPs which have been developed in New South Wales and Queensland articulate important aspects of these determinants, which are acknowledged through academic and other research to have led to women's work being undervalued and under-remunerated.

As to the prospect of a federal ERP (or some equivalent framework) being adopted, we believe that notwithstanding the disinclination of FWA to do this in the *SACS* case, there is no impediment to the Commission choosing to take this path. We note that the development of principles was an approach relied on by the Commission's predecessors, most notably in the area of wage fixing, but also in the area of equal pay. Appropriately formulated, we argue that an ERP could occupy the ground between uncertainty and prescription, guide both the Commission and potential parties, as well as emphasise the importance of the concept of equal remuneration. We consider a principle identifies for applicants and respondents the matters to be addressed in contentions and submissions and could facilitate the efficient conduct of proceedings. An ERP can also acknowledge factors that have been accepted in previous inquiries and tribunal decisions as shaping the undervaluation of feminised work.

If an ERP were to be adopted by the Commission, our view is that it should provide a clear statement indicating that applications are to be assessed on the basis of historical and contemporary gender-based undervaluation, without the requirement to establish discrimination.

Likewise, such a principle should expressly state that an application need not be underpinned by reference to a male comparator. It should provide guidance on how work is to be assessed, including by setting out a non-exhaustive list of matters that may guide the Commission in its consideration of whether past assessments of the work and its remuneration have been affected by the gender of the workers. Put simply, the ERP should at least suggest the steps required to demonstrate that undervaluation was gendered or had a gender-associated cause. These matters could be identified as a framework rather than as a prescriptive formula and contain appropriate safeguards, including a direction that claims are to be assessed on a case by case basis.

In its first decision in the federal SACS case, the Full Bench indicated its concerns about what it termed an 'indicia' approach to demonstrating undervaluation. It rejected an approach whereby applications would simply rest on demonstrating that the work featured in the application shared or paralleled the dimensions of undervaluation featured in the Queensland ERP. Nevertheless, what the Full Bench described as a 'framework' for undervaluation rather than a 'prescriptive formula' may still be a basis for any potential principle. Indeed the Full Bench clearly relied on some of the dimensions outlined in the Queensland ERP to reach a view that the work in the SACS industry was undervalued on a gender basis. Finally the principle should contain clarity about its reliance on the construct of work value, in addition to other relevant work value features as a means of assessing the value of work. The principle should also underpin the importance of gender-neutral determinations of work value in ensuring that rates of pay are properly set. In Australia, work value has been and should continue to be the method relied upon by industrial tribunals. Work value determinations made by tribunals may also be informed by external and internal assessments of job value. The clear objective is that the assessment of work value addresses, without gender bias, all factors relevant to the work.

In Chapter 6 we consider also the type of evidence that may be germane to equal remuneration proceedings. Evidence in these proceedings will rarely be considered in isolation but is likely to be considered in a cumulative way, consistent with the multiple, reinforcing and intersecting factors that impact on the GPG and that shape earnings.

Compilation of an *award history* provides a foundation for reviewing the assessment of work value for the relevant areas of work and may also involve the construction of timelines on the movement of rates for key classifications. Ideally the history should include an account of the timing and scope of any work value assessments made by previous industrial tribunals. If there were work value assessments, it should be indicated what classifications were involved, what criteria were applied, what evidence was considered, and what were the key outcomes. A further consideration includes the use, if any, of benchmark relativities. It may be the case that there has been an absence of work value assessments. Equally, those assessments that were conducted may not have assessed the value of the work correctly, and the work may have been inadequately or incorrectly described. Alternatively, parties may rely on evidence which indicates that work value assessments already undertaken have assessed the value of the work correctly.

It is open also to the parties to compile material that may inform the assessments of the value of the work, including whether it is undervalued, or alternatively, valued correctly. This evidence may supplement or complement the work that is prepared as part of the award history. It may include:

- *Witness statements*, or material that assists to identify all the components of work that is required in particular positions, and within the occupation or industry concerned. This would

include attention to components of work value – the skills and knowledge required to complete the work and the conditions under which it is performed.

- Material to support a contention that there has been a *change in work value*, for example in the form of altered compliance or regulatory requirements, that is not presently recognised in classification descriptions.

It is open also to the parties to present the results of objective assessments of indicative work that falls within the application. These assessments may be sourced from independent job assessment experts. There are newly developed resources available to the parties to assess whether previous job evaluations and any resultant grading that they rely upon are free from gender-bias. These include but are not limited to the *Gender-inclusive Job Evaluation and Grading Standard* developed by Standards Australia, and a skill recognition tool, Spotlight, which was developed by the New Zealand Department of Labour and has also been taken up in Australia.

Parties may compile labour market profile and earnings data to assist the Commission's understanding of the relevant sector or occupation. As an example, *occupational and industry data* disaggregated by gender may provide some guidance on employment patterns. This may include the degree to which relevant occupations are either feminised or masculinised, in addition to patterns of vertical and horizontal segregation by gender within the occupation or industry, and patterns of full-time and part-time employment. *Wage patterns and methods of pay setting* disaggregated by gender may provide some guidance on the degree of award reliance, and the extent of enterprise bargaining for those areas of work that fall within the application. It is open to the parties to bring forward additional evidence, including from labour economic studies, with a view to drawing conclusions about the factors that contribute to the gender wage gap, and submitting that the portents of undervaluation are in evidence or not evident. This material may also draw on material concerning wage patterns and methods of wage setting in addition to occupational and industry data. It should be noted, however, that these studies frequently rely on aggregate data sets that, in all probability, will not parallel the scope and incidence of the award or agreement cited in the application for equal remuneration orders.

In applications for equal remuneration orders that are confined to a *single workplace or organisation*, it is likely that evidence similar to that outlined for award based applications will be presented, but localised to the particular organisation or workplace. In this instance it may be possible – subject to privacy and confidentiality restrictions – to utilise material submitted by the organisation to the Workforce Gender Equality Agency (WGEA) pursuant to the reporting requirements in the Workplace Gender Equality Act 2012. Such material may include an analysis of earnings that provides a level and breakdown of different components of wages (base pay, over-award or over-agreement pay, bonuses and so on), by factors including occupation, gender and hours of work.

In conclusion, we would stress that addressing and resolving matters of gender-based undervaluation, within the framework of the Fair Work Act, is neither automatic nor straightforward. We acknowledge it is entirely open to the Commission to determine an interpretation of Part 2-7 other than the one we have advanced. But we hope that the data and analysis presented in this report may inform parties to future proceedings about frameworks (be they an ERP or otherwise) which could lay down clear markers for the task of establishing (or refuting) gender based undervaluation.

1 Introduction

The issue of whether male and female workers should be accorded equal remuneration is one that has engaged the attention of Australian regulators for at least a century. It is the subject of international labour standards that, since 1993, have been formally enshrined in federal labour law. It has generated important test cases in both the federal and State industrial tribunals. It is also addressed in various sections of what is now Australia's main labour statute, the *Fair Work Act 2009* (Cth) (Fair Work Act), most obviously in Part 2-7. This authorises the Fair Work Commission (Commission) to make orders ensuring 'equal remuneration for men and women workers for work of equal or comparable value'.

To date, this power has been exercised in one major case, involving the social and community services (SACS) sector.³ But it is clear from other applications lodged under Part 2-7 that the Commission will be called upon to address the question of equal remuneration in other industries and occupations, and possibly too in relation to particular workplaces. The next major test of the provisions is likely to come with the determination of applications lodged by various unions in relation to certain workers in the childcare industry.⁴

1.1 Purpose and scope of the report

In July 2013 the Commission's Pay Equity Unit engaged us to prepare a research report that would:

- assist parties to equal remuneration proceedings under Part 2-7 to engage in productive discussion and work towards greater consensus in relation to the proceedings; and
- inform potential parties about the matters they might be required to address and the type of evidence they might be required to bring as part of an equal remuneration proceeding.

The terms of reference for the report also required it to include:

- a discussion of Part 2-7;
- an overview of matters that an application for an equal remuneration order and/or associated submissions might address to satisfy the requirements of Part 2-7;
- an overview and discussion of supporting information or evidence which would be useful to inform equal remuneration proceedings;
- a discussion of any equal remuneration materials, legislation, cases and relevant research which might be useful in relation to Part 2-7, including:
 - approaches to equal remuneration matters in other jurisdictions, including both internationally and at the State and national level in Australia;
 - relevant legislation;
 - decisions of courts and tribunals dealing with equal remuneration or related issues;

³ See *Re Equal Remuneration Case* (2011) 208 IR 345; *Re Equal Remuneration Case* (2012) 208 IR 446; *Re Equal Remuneration Case* (2012) 223 IR 410. These decisions are collectively referred to as 'the SACS case' in this report.

⁴ For details of this matter, see <http://www.fwc.gov.au/index.cfm?pagename=caeremuneration&page=introduction> (accessed 16 October 2013).

- submissions to and reports of inquiries into equal remuneration by governments or other bodies;
- data sources that could be used to inform equal remuneration proceedings;
- published research on equal remuneration;
- ‘best practice’ approaches for equal remuneration matters; and
- any other relevant material.

In meeting these objectives, we considered that it was vital to understand the international labour standards which provide a platform for both legislation and practice in Australia. These standards are set out in various international instruments, but in particular the International Labour Organisation (ILO) *Convention No 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (1951). We have also had regard to approaches taken in other countries with regard to legislation and processes for achieving equal remuneration. We have been especially interested in the way in which equal remuneration for work of equal value is assessed under different country systems. Our research in this area has helped us to amplify the scope of international labour standards, as well as to identify what in international terms may be considered ‘good practice’ approaches to tackling equal remuneration and the universal dilemma of the ‘gender pay gap’ (GPG).

In order to describe and analyse the regulatory framework under the Fair Work Act, as required by our terms of reference, we have focused on the new Part 2-7, as well as the provisions in sections 721 and 724 dealing with alternative remedies. Other sections requiring analysis have included those dealing with the ‘modern awards objective’ (section 134); the ‘minimum wages objective’ (section 284) and the requirements for work value adjustments to modern award minimum wages (sections 156 and 157).

The process of analysing this regime has inevitably required us to express opinions as to the meaning of what are novel statutory provisions. In that regard we have, unsurprisingly, devoted considerable attention to the decision by Fair Work Australia (FWA), as the Fair Work Commission was then known,⁵ in the *SACS* case – the only instance to date in which Part 2-7 has been considered and applied. Our aim has been to identify issues arising in the conduct of that case, and in the decision making process, which might be relevant to the Commission and the parties when addressing equal remuneration issues in future cases. The fact that the case ultimately revealed a significant division of opinion among members of the Full Bench, as explained in Chapter 4, underscores the potential for disparate interpretations in this area.

In order to fully appreciate the decision in the *SACS* case, as well as the interpretation and effect of the current federal regulatory framework, an understanding of past legislation and case law is essential. That extends to the decisions of industrial tribunals within the State system, which for reasons we will explain form an important part of the background to the present federal provisions.

We have also sought in this report to identify and explain analyses of the GPG – defined here as a ratio that converts average female earnings into a proportion of average male earnings to calculate the pay gap between the sexes. The persistent nature of the GPG both nationally and internationally is well-established. Less clear cut is agreement on the contributory and underlying

⁵ FWA was renamed the FWC with effect from 1 January 2013: see Fair Work Amendment Act 2012 (Cth) Sch 9.

factors for that gap. This and associated matters have been the subject in Australia of various inquiries by parliamentary committees and industrial tribunals. The discipline of labour economics offers competing analyses of the scope and nature of women's wage disadvantage, but there is widespread agreement that women, relative to men, do not receive wages consistent with their education and labour market experience. The available research, which we summarise in the report, offers some insights about the factors that contribute to this disadvantage – insights that can potentially assist the parties to equal remuneration proceedings.

Finally, we have endeavoured to provide an information base which can be drawn upon by the various actors and participants involved in equal remuneration proceedings, to better inform them about a very complex and continually developing area of labour law and industrial practice. We believe that the analysis we have presented will assist both applicants and respondents in understanding and interpreting Part 2-7 of the Fair Work Act, and the types of evidence that may be used either in support of, or to resist, the making of an equal remuneration order.

1.2 Structure of the report

Of the many ways in which this report could have been structured, we have chosen to follow a pathway of:

- setting the global scene, by describing the international labour standards on equal remuneration, providing international data on the GPG and summarising key elements of the approaches taken in selected overseas jurisdictions (Chapter 2);
- analysing the treatment of equal remuneration under the Fair Work Act (Chapter 3);
- outlining the SACS case and explaining the various decisions given by FWA (Chapter 4);
- reviewing available literature on how the GPG might be explained and assessed (Chapter 5); and
- drawing on the research we have undertaken for the above purposes, outlining approaches which might usefully guide the conduct of future proceedings under Part 2-7 of the Fair Work Act (Chapter 6).

The report also includes three substantial appendices. The first two detail the development of equal remuneration regulation at the federal level (Appendix A) and under the State industrial systems (Appendix B). The third, Appendix C, provides an overview of the approaches taken in the European Union and ten selected countries – Belgium, Canada, Ireland, Finland, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom and the United States.

1.3 Terminology

The laws, decisions and literature that we have reviewed for the purpose of this report utilise a range of different terms to describe the objective of regulation in this area, including 'equal remuneration', 'gender pay equity', 'pay equity' and 'equal pay'. Frequently, these are used interchangeably. A variety of similar terms – 'pay inequity', 'gender pay inequity', 'unequal pay' – are likewise used where the objective of equal remuneration for men and women workers is not met.

The diverse use of such terms cannot be homogenised, but it is possible to set out some key understandings that inform the choice of language in this report. For the most part, we use the term

equal remuneration, most obviously because it is the phrase adopted in the Fair Work legislation. Where we speak of *gender pay equity*, we are generally using that term to describe an objective – that being equality in remuneration between men and women in the paid workforce. This can be extended to all forms of remuneration, and includes equality of access to all forms of remuneration. As a clear example, the ILO defines remuneration to include ‘the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable, directly or indirectly, whether in cash or in kind by the employer to the worker and arising out of the worker’s employment’: see section 2.2.2. The foundation provided by ILO standards on equal remuneration is detailed further in the next chapter.

In practice, the goal of gender pay equity can be conceived in various ways. At its broadest, it can encompass regulatory and policy approaches that seek to ensure equal access to all forms of employment and remuneration, not just equality in remuneration as such. But it is the latter objective that is explicitly adopted in the Fair Work Act. The Act seeks to ensure that where men and women workers perform work of equal or comparable value, it should be remunerated equally. Gender pay equity is thus achieved where people are rewarded equally for their work, irrespective of whether they are men or women. There have been difficulties, historically and currently, in applying this framework, particularly as to how the criteria of ‘equal value’ or ‘equal or comparable value’ are assessed and, where relevant, remedied. These issues are addressed in Chapters 3 and 4, as well as in Appendices A and B.

As for the terms ‘employees’ and ‘workers’, these are generally used interchangeably throughout the report. Strictly speaking, ‘employees’ are often understood for legal purposes to mean those who work for someone else’s business or organisation under a contract of employment; whereas the term ‘workers’ can also comprehend those who agree to provide their labour on some other basis, for instance as independent contractors or as volunteers. As we explain in Chapter 3, Part 2-7 of the Fair Work Act is for the most part applicable only to employees in the narrow sense. Hence our focus throughout the report is primarily on the question of equal remuneration for male and female *employees*. Nevertheless, we often use the term ‘workers’ as a synonym for employees, partly for variety, but partly also because it is the term actually used in relevant legislation or case law.

1.4 Preparation of the report and feedback from stakeholders

Preparation of this report has followed a two-stage process. A draft report was posted on the Commission’s website on 23 October 2013, with interested parties invited to provide written comments to the Pay Equity Unit by 13 November 2013. Parties were advised that all comments, including the names of persons or organisations providing them, were to be published on the Commission’s website.

A total of 11 comments or submissions were received, from the following organisations:⁶

- Australian Business Lawyers & Advisors, on behalf of the Australian Chamber of Commerce and Industry (ACCI), Australian Business Industrial (ABI) and the Tasmanian Chamber of Commerce and Industry;
- Australian Federation of Employers and Industries (AFEI);

⁶ See <http://www.fwc.gov.au/index.cfm?pagename=adminremuneration> (accessed 25 November 2013).

- Australian Industry Group (Ai Group);
- Australian Institute of Employment Rights;
- Business SA;
- Centre for Work + Life, University of South Australia (Associate Professor Sara Charlesworth and Fiona Macdonald);
- Chamber of Commerce and Industry of Western Australia;
- Livingstones (on behalf of a number of clients in the childcare industry);
- Local Government NSW;
- SafeWork SA; and
- Workplace Gender Equality Agency (WGEA).

Seven of the submissions came from employer organisations or other bodies representing employers, two from government agencies, and two from independent researchers or advocates. We note that no responses were received from trade unions or other worker organisations.

We have made various changes to the report in response to these comments. In some instances we have adopted suggested amendments. In others – especially where we do not agree with a comment or have not fully accepted a suggestion for change – we have noted the views of the commenting organisation, referencing its submission.

A number of comments on the draft report appear to reveal a degree of confusion about the nature and purposes of the project that led to this report. There are therefore three specific points which we feel it necessary to emphasise.

The first concerns authorship. Various comments speak of the report as being ‘by’ the Pay Equity Unit, or more broadly the Commission. We strongly emphasise that the report is the product of independent research, and represents the views of its authors alone. It is work that has been commissioned and published by the Commission, but it is not in any sense work *by* the Commission or its Pay Equity Unit.

The second matter concerns the relationship of our project to the childcare industry proceedings that, as noted in the introduction to this chapter, have recently been initiated. The existence of the project may have been publicised after those proceedings commenced, but the project was conceived and development was already under way before the childcare claim was lodged. The report was (and still is) intended to operate as a general resource for those interested in the operation of Part 2-7 of the Fair Work Act.

Thirdly, we have not in our view travelled beyond our terms of reference, but instead appropriately responded to them. We were asked, as independent researchers and analysts, to present a view as to the interpretation and application of Part 2-7 and, as well, to suggest ‘best practice’ approaches for equal remuneration matters. Given that the new jurisdiction is at an early stage of development, these tasks have necessarily required us to form and express opinions, as noted earlier in this chapter. Those opinions are firmly based on a careful and rigorous assessment of the legislation, its interpretation in the *SACS* case and a large body of available literature on possible approaches to the issue of equal remuneration, both in Australia and overseas.

All that said, we acknowledge that many valuable points were made by stakeholders in response to our draft report. We record our gratitude to those who took the trouble to respond. In our view their input has significantly improved the final document.

1.5 Acknowledgments

In preparing this report we have drawn heavily on – and indeed reproduced material from – an earlier research report on equal remuneration principles prepared for what was then FWA (Romeyn et al 2011). We are grateful to the Commission (and to the authors) for permission to use this resource, with appropriate attribution in the relevant parts of the text. We would also like to thank the staff of the Commission’s Pay Equity Unit who provided support and assistance in relation to the project, in particular Shannon-Kate Archer, Mike Preston and Kim Rusling.

That said, and as noted in section 1.4, the findings and views that appear in this report should not be attributed to the Commission or its Pay Equity Unit. As authors, we take full responsibility for the content of this publication. We do, however, repeat the thanks expressed in section 1.4 to those organisations that commented on the draft report published in October 2013.

This project was organised through the University of Adelaide, and we wish to thank the staff of both the Adelaide Law School and Adelaide Research and Innovation for their help in making it happen. In particular, we want to acknowledge our gratitude to Hannah Hannaford Gunn and Henry Winter for their efficient and helpful research assistance, and to Renee Hakendorf for the cover design.

2 Equal remuneration: The international picture

This Chapter takes a global view of the treatment of equal remuneration, focusing on three aspects. The first involves the international labour standards concerning equal remuneration. We discuss their relevance, interpretation and application, looking first at instruments promulgated by the United Nations (UN) and then in more detail at those of ILO. The second concerns the international approaches that have been used to ascertain whether the goal of equal remuneration has been achieved in different countries, by reference to the concept of the GPG. Understanding the key concepts and different forms of data gathering are important when considering the various ways of assessing the GPG, as well as the way in which it is used – a subject to which we return in more detail in Chapter 6. Thirdly, we look at some of the lessons to be learnt from a review of how equal remuneration is addressed in ten different countries around the world.

2.1 United Nations instruments

2.1.1 Universal Declaration of Human Rights

The *1948 Universal Declaration of Human Rights* (UDHR) sets out the basic rights and freedoms to which all women and men are entitled. It seeks to establish a common international standard by which fundamental human rights are protected. The UDHR refers to the protection and promotion of equality between men and women and specifically provides that: ‘Everyone, without discrimination, has the right to equal pay for equal work’ (Article 23(2)). Furthermore, it stipulates that ‘everyone who works has the right to just and favourable remuneration’ (Article 23(3)). Australia became a signatory to the UDHR in 1948.

As the name of the instrument infers, the UDHR is not of itself binding, but the fundamental rights and freedoms it contains have become binding through two other instruments adopted in 1966: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights 1966. Of these, it is the former that specifically refers to equal remuneration.

2.1.2 International Covenant on Economic, Social and Cultural Rights

Included within the ICESCR is the proposition that states recognise the rights of everyone to the enjoyment of just and favourable conditions of work, in particular remuneration. Article 7 requires that as a minimum all workers should be provided with:

fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

The ICESCR was ratified by Australia in 1975.

2.1.3 Convention on the Elimination of All Forms of Discrimination against Women

The *1979 Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) requires that states take appropriate measures to eliminate discrimination against women in a number of fields, including employment, and ensure equality for men and women. Article 11(1)(d) specifically mentions ‘the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work’.

In addition to this provision, in 1989 the UN's Committee on the Elimination of Discrimination against Women adopted General Recommendation No 13.⁷ This requires states to adopt gender neutral job evaluation systems and compare the 'value of those jobs of a different nature, in which women presently predominate, with jobs in which men presently predominate' (paras 2–3). Australia ratified CEDAW in 1983.

2.2 ILO instruments

2.2.1 Introduction

ILO Conventions are international treaties, which are drawn up and adopted by the International Labour Conference according to rules set out in the ILO Constitution. Once they have been adopted by the International Labour Conference⁸, they are open to ratification by member states. Member states which have ratified an ILO Convention are then legally bound under international law by its content and according to Article 19(5)(d) of the ILO Constitution are obliged to take 'such action as may be necessary to make effective the provisions of [the] Convention'.

ILO Recommendations, on the other hand, are drawn up and adopted by the International Labour Conference (ILC) according to rules identical to those that govern the Conventions, but they are not binding legal instruments and are therefore not open to ratification. Their purpose is usually to accompany the Convention to which they relate and complete its provisions by recommending ways to implement the Convention.

Declarations are instruments that can be adopted by either the ILC or the ILO's Governing Body.⁹ These are not subject to ratification and their influence largely depends on the purpose and aim of their adoption. International Labour Conference declarations differ from Conventions and Recommendations. They are not technically binding since they are not open to ratification, however, because of their subject matter and the process by which they are developed and voted upon in the ILC, they are regarded as being of a solemn nature, and may be perceived as an expression of customary international law. A recent example is the 1998 Declaration on Fundamental Principles and Rights at Work. By reason of the ILO Constitution, all member states are obliged to respect, promote and realise the fundamental principles and rights of work, whether they have ratified the fundamental conventions or not. These fundamental principles are contained in what the ILO's Governing Body has designated as the eight 'Fundamental Conventions' and four

⁷ Available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom13> (accessed 4 October 2013).

⁸ The ILC is one of the three main bodies which make up the ILO. The other two main bodies are the Governing Body and the International Labour Office. The ILC is the general assembly of all member states of the ILO. It is tripartite and each member state is represented by two government delegates, an employer delegate and a worker delegate. The essential tasks of the ILC include adopting international labour standards and adopting resolutions that form guiding principles for ILO policy and activities. It also elects members of the Governing Body and decides whether to accept new member states. Each delegate is entitled to vote individually irrespective of the vote cast by the other delegates from the member state. A majority of two thirds of the votes cast by delegates present is necessary for a final vote for the adoption of a Convention or Recommendation or other instruments such as a Declaration.

⁹ The Governing Body performs the role of an executive. It is tripartite and is composed of 28 members of government, 14 employers and 14 workers. 10 of the government seats are permanently held by the most industrially important states, the other government members are elected by the government delegates to the ILC. Employers' and workers' representatives are elected by their respective delegates. The Governing Body can take decisions on ILO policy and establish the agenda for the ILC, amongst other responsibilities.

'Priority Conventions'. The Conventions on Equal Remuneration and Discrimination (Employment and Occupation), discussed below, are two of the Fundamental Conventions.¹⁰

The principle of equal pay for women and men for work of equal value has been an objective of the ILO since its foundation in 1919. It is expressed in the Preamble to the ILO Constitution as one of the conditions which are urgently required, namely the 'recognition of the principle of equal remuneration for work of equal value'.

The major specific ILO instrument on equal remuneration arose as a result of a Resolution on Equal pay for Equal Work for Men and Women Workers in 1948 which was adopted by the Economic and Social Council of the United Nations. This Resolution led to the adoption by the ILO in 1951 of Convention No 100 concerning Equal Remuneration (generally referred to in this report as 'the Equal Remuneration Convention'), and also Recommendation No 90 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value¹¹ (Equal Remuneration Recommendation).

2.2.2 Equal Remuneration Convention

Three Articles in the Equal Remuneration Convention set out the primary obligations of member states:

Article 1

For the purpose of the Convention -

- (a) the term 'remuneration' includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;
- (b) the term 'equal remuneration for men and women workers for work of equal value' refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
2. This principle may be applied by means of:
 - (a) national laws or regulations;
 - (b) legally established or recognised machinery for wage determination;
 - (c) collective agreements between employers and workers; or

¹⁰ The others are the Forced Labour Convention 1930 (No 29), the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87), the Right to Organise and Collective Bargaining Convention 1949 (No 98), the Abolition of Forced Labour Convention 1957 (No 105), the Minimum Age Convention 1973 (No 138) and the Worst Forms of Child Labour Convention 1999 (No 182). The Priority or 'Governance' Conventions are the Labour Inspection Convention 1947 (No 81), the Employment Policy Convention 1964 (No. 122), the Labour Inspection (Agriculture) Convention 1969 (No 129) and the Tripartite Consultation (International Labour Standards) Convention 1976 (No 144).

¹¹ For a detailed history of the background to the Equal Remuneration Convention, see Määttä 2008: 91ff.

(d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.
2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.
3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Australia ratified the Equal Remuneration Convention in 1974.¹²

2.2.3 Equal Remuneration Recommendation

The Equal Remuneration Recommendation is not binding on member states, but it contains measures to facilitate the application of the principles of the Equal Remuneration Convention (Swepston 2000; Romeyn et al 2011: 77). After referring to the Equal Remuneration Convention, the Recommendation states that it is desirable to indicate 'certain procedures for the progressive application of the principles laid down in the Convention'.

Paragraph 1 provides that member states should ensure the principle of equal remuneration applies to all employees of central government departments or agencies, as well as employees of State, provincial or local government departments or agencies where these have jurisdiction over remuneration rates. States are also encouraged by Paragraph 2 to consult with employers' and workers' organisations and take action to ensure the application of the principles in all occupations 'as rapidly as practicable'. This should particularly be done in relation to the establishment of minimum or other wage rates in industries and services determined under public authority, industries and undertakings operated under public ownership or control and, where appropriate, work executed under the terms of public contracts.

In addition, Article 5 requires member states 'to establish or encourage the establishment of methods for objective appraisal of the work to be performed, whether by job analysis or by other procedures, with a view to providing a classification of jobs without regard to sex'. Any such methods should be applied in accordance with the provisions of Article 2 of the Convention.

2.2.4 Other ILO instruments

Other ILO Conventions which either refer to equal remuneration or further the objectives of the Equal Remuneration Convention, are the *Discrimination (Employment and Occupation) Convention 1958* (No 111); the three ILO conventions on minimum wage fixing (Nos 26, 99 and 131); and the *Workers with Family Responsibilities Convention 1981* (No 156) (Swepston 2000; Romeyn et al

¹² For details of this and other ILO ratifications by Australia, see http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102544 (accessed 23 September 2013).

2011: 77). Australia has ratified each of these instruments, but we concentrate here on Convention No 111.¹³

The principal objective of Convention No 111 is to eliminate all discrimination, as defined in the Convention, in respect of all aspects of employment and occupation through the concrete and progressive development of equality of opportunity and treatment in law and practice. Member states are required to develop and implement a multifaceted national equality policy (ILO 2012b: 307). Discrimination is defined in Article 1 of the Convention as ‘any distinction, exclusion or preference made on the basis of [certain grounds¹⁴], which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’. Through this broad definition, the Convention covers all discrimination that may affect equality of opportunity and treatment, and any discrimination, either in law or in practice, and whether direct or indirect, falls within its scope (ILO 2012b: 312).

Article 1(3) defines ‘employment’ and ‘occupation’ as including access to vocational training, access to employment and to particular occupations, as well as to the ‘terms and conditions of employment’. This last phrase is further enunciated in Recommendation No 111 concerning Discrimination in Respect of Employment and Occupation. This recommendation requires member states to formulate a national policy to be applied by legislation, collective agreements or other means so that all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of ‘remuneration for work of equal value’ (Paragraph 2(b)(v)). As a consequence, equal remuneration for work of equal value should be a component of any national policy (ILO 2012b: 317).

2.2.5 Interpreting the Equal Remuneration Convention

The most important source of interpretation with regard to the ILO Conventions is the work undertaken by the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR). The mandate of the CEACR has recently been the subject of discussion and is set out in the most recent report of the Committee on the application of international labour standards (ILO 2013). In summary, the CEACR is an independent body composed of legal experts charged with examining the application and implementation of ILO Conventions and Recommendations by member states. In order to do this, it must consider the legal scope and meaning of those instruments (ILO 2013: 13). The CEACR is not authorised to give definitive interpretations of Conventions. The competence to do that is vested in the International Court of Justice under Article 37 of the ILO Constitution. However, in the absence of a contradictory ruling from that court, the opinions and conclusions of the CEACR are considered as valid and generally recognised as guiding the actions of ILO member states (ILO 2013: 13–14).

The CEACR’s views on the interpretation of the Equal Remuneration Convention can be found in a number of sources. These include the Committee’s ‘general surveys’ of reports on the Convention (ILO 1975, 1986); a 2007 report on ‘Equality at Work: Tackling the Challenges’ (ILO 2007); and ‘Giving Globalisation a Human Face’, a publication which provides an easy reading guide on the

¹³ The importance of the ILO’s minimum wages Conventions and the impact they have on equal remuneration is discussed in Romeyn et al 2011: 77–91.

¹⁴ The grounds as set out in the definition are race, colour, sex, religion, political opinion, national extraction or social origin and ‘such other distinction exclusion or preference ... as may be determined by the Member... after consultation ...’.

interpretation and application of the Convention, together with examples of good practice (ILO 2012b: 275–305).

The CEACR has expressed the view that the application of the Equal Remuneration Convention involves examining equality at two levels: first, the level of the job – whether the work is of equal value; and second, the level of remuneration – whether the remuneration is equal (ILO 2012b: 275). As the definition in Article 1(a) makes clear, the word ‘remuneration’ refers to more than just ordinary, basic or minimum wages or salaries. It includes ‘any additional emoluments’, even if not payable directly by the employer to the worker concerned (ILO 2012b: 288).

As for the concept of ‘work of equal value’, this requires equal remuneration to be paid to men and women, not only when they perform the same or identical work, but also when they perform work which is different yet nevertheless of equal value. It is this notion that has proved the most problematic. Many member states still apply this concept in a limited way and confine it to either the ‘same work’, ‘similar work’ or even ‘substantially identical work’. Although ‘value’ is not explicitly defined by the Equal Remuneration Convention, contextually it requires something more than market forces to determine its application, as market forces may be inherently gender biased (ILO 2007: 271; ILO 2012b: 281). As the ILO’s Director-General stated in a recent report (ILO 2007: 74):

Pay equity is about redressing the undervaluation of jobs typically performed by women and remunerating them according to their value. This is not necessarily a reflection of market factors or skill requirements, but may mirror differences in collective bargaining power, preconceived ideas about scarce skills/market rates or the historical undervaluing of ‘female’ jobs.

The concept of ‘equal value’ also requires some method of measuring and comparing the relative value of different jobs (ILO 1986: para 138). This requires an examination of the respective tasks involved, undertaken on the basis of entirely objective and non-discriminatory criteria to avoid the assessment being tainted by gender bias. While the Equal Remuneration Convention does not proscribe any specific method for such an examination, Article 3 presupposes the use of appropriate techniques for objective job evaluation, comparing such factors as skill, effort, responsibilities and working conditions (ILO 2007: para 4). At the same time, the corollary is that differential rates between workers are compatible with the principles of the Convention if they correspond, without regard to sex, to differences determined by such evaluation.

Article 3(1) of the Equal Remuneration Convention states that promoting the principle of equal remuneration requires an ‘objective appraisal of jobs’. This expression refers to mechanisms or procedures used to examine the content of jobs, so as to classify them according to their value. Jobs or occupations of equal value are required to be equally remunerated for both men and women. By way of summary, the ILO (2007: 272) has indicated that appraisal of jobs:

- is separate from the assessment of each worker's productivity or performance;
- is required to be based on job content rather than according to the workers’ gender or other personal characteristics; and
- must itself be based on objective and entirely non-discriminatory criteria, to avoid the very assessment being tainted by gender bias.

The ILO (2008b) has published a ‘step by step guide’ which sets out good practice for developing gender neutral job evaluations. The evaluation of jobs is based on four factors: qualifications,

work/effort, responsibility, and conditions of work.¹⁵ As a matter of practice the factors are usually broken down into sub-factors and require weighting processes to be applied.

More recently, in 2013, the ILO has published a practical guide to illustrate how equal remuneration for men and women for work of equal value can be applied in a variety of ways according to each national context (Oelz et al 2013). It draws upon the ILO's work, including comments of the ILO supervisory bodies, and is broadly aimed at assisting government officials, workers' and employers' organisations, policy makers and practitioners. Chapter 5 is devoted to comparing jobs and determining equal value, and describes in detail various job evaluation methods. It also provides examples of selected job evaluation methods, which are regarded as free from gender bias. The topics covered by the publication include describing two formal job evaluation methods, the first being global or ranking evaluation methods and the second being analytical job evaluation methods. Also included is a list of frequently overlooked job characteristics in 'women's work' under each of four categories: skills, physical and emotional demands, responsibility and working conditions. There is also reference to job evaluation methods used in Sweden, Switzerland, Spain and the United Kingdom.

The CEACR has indicated that the principle of equal remuneration should be applied beyond the enterprise level, since the remuneration paid by each employer is often based on rates fixed through conditions and procedures that go beyond that enterprise (such as collective agreements, public sector pay scales or through the minimum wage processes). The reach of the comparison between jobs performed by men and women should be as wide as permitted by the level at which wage policies, systems and structures within a country are coordinated (ILO 1986: para 54).

The challenges for governments and courts lie in how to implement the broad principles articulated by the ILO at a domestic level. As Cornish (2007: 231) has observed: 'It is clear that the difficulty lies not in the breadth of the international rules but in fashioning the pay equity mechanisms that will deliver the promise of those standards.' The ILO has provided considerable assistance in its recent publications as referred to above, to help achieve pay equity. Much depends on the approaches taken in each of the countries for implementation, and for countries to find ways to better monitor and assess pay equity outcomes.

2.3 Gender pay gap data

Before examining the varying approaches to pay equity in different countries, it is relevant to look at international data on the GPG.

Prior to doing so it is useful to note that some international data is based on median earnings, while other data is based on average (mean) earnings. In Australia the most commonly used data in the calculation of the earnings gap is average (mean) earnings. The difference between the two measures is this:

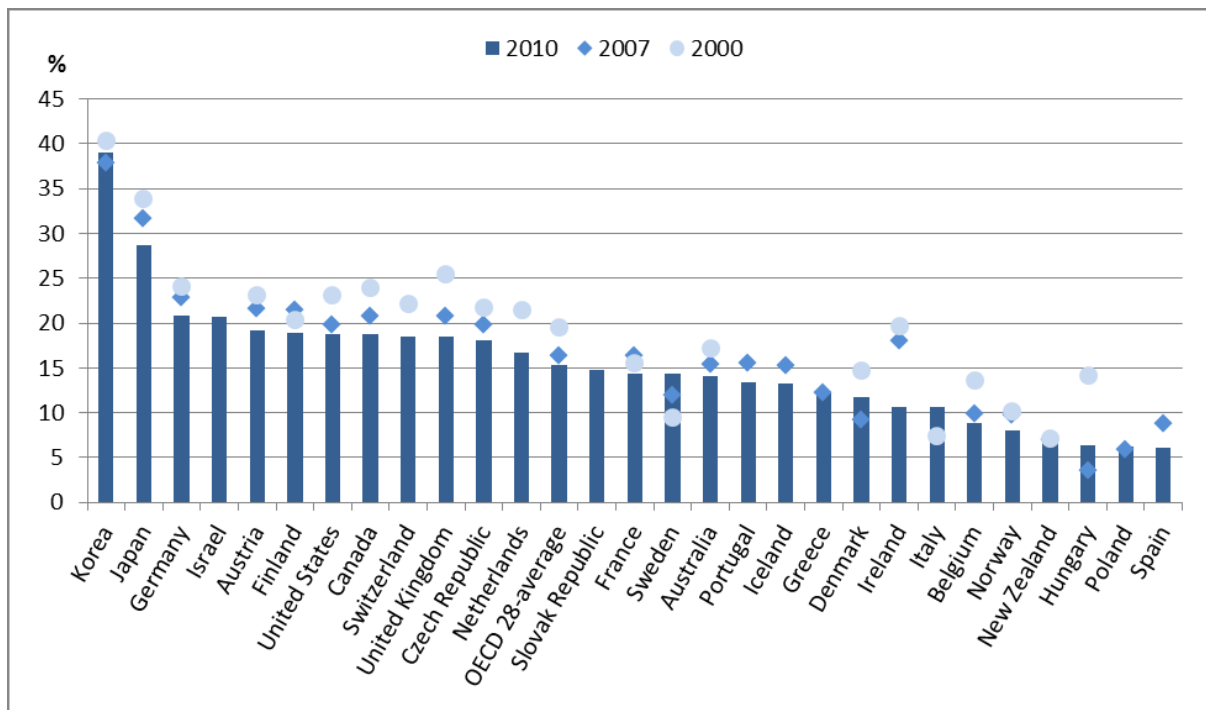
- *Average* (mean) earnings is the amount obtained by dividing the total aggregated earnings of the group under question (for example all adult males, or all adult females) by the number of units in that group.

¹⁵ These four factors are also reflected in the New South Wales Industrial Relations Commission's wage fixing principles (see sections B.2.2) and the Queensland Industrial Relations Commission's Equal Remuneration Principle (see B.3.2).

- *Median earnings* is the amount which divides the earnings distribution into two equal groups, half having earnings above the median, half having earnings below the median.

The Organisation for Economic Co-operation and Development (OECD) regularly publishes data on gender gaps in wages compiled by its Social Policy Division (OECD 2012). This data covers each of the countries we have selected for more detailed analysis. Two selected charts demonstrate overall GPGs for full-time employees and, more specifically, the gap in full-time earnings at the top and bottom of the earnings distribution. For the purposes of these figures the 'gender wage gap', in unadjusted form, is measured as the difference between male and female earnings expressed as a percentage of male earnings. Estimates of earnings used in the calculations refer to gross earnings of full-time wage and salary workers. However, this definition may slightly vary from one country to another.

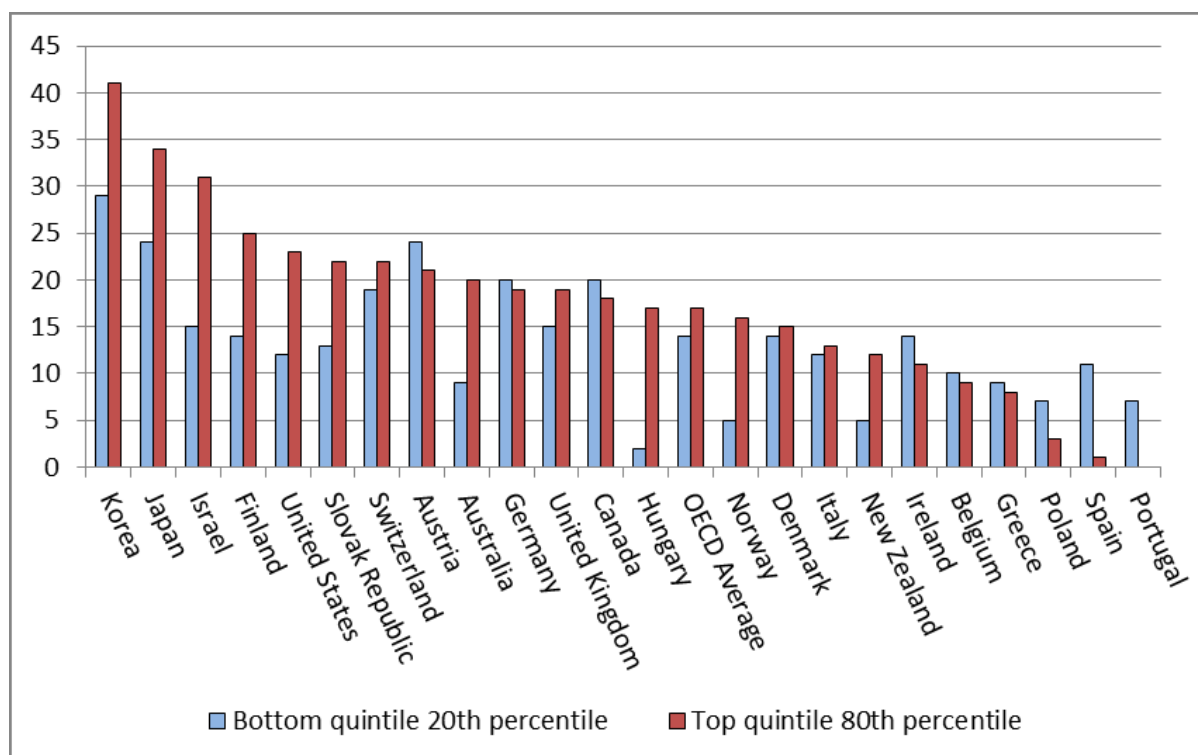
Figure 2.1: Gender gap in median earnings of full-time employees, 2000, 2007, 2010



Source: Data sourced from OECD (2012), OECD Family Database, OECD, Paris (www.oecd.org/social/family/database), specifically, LMF1.5: Gender pay gaps for full-time workers and earnings differentials by educational attainment, <http://www.oecd.org/els/soc/LMF1.5%20Gender%20pay%20gaps%20for%20full%20time%20workers%20-%20updated%20290712.pdf> (accessed 15 September 2013)

The GPGs indicated in Chart 1 are smallest in Spain, Poland, Hungary, and New Zealand. In almost all countries, the GPG in median earnings has decreased over time. The OECD average GPG for women's wages in comparison with men, fell from around 20 per cent to 15 per cent over the period. This average includes very high gaps in Korea and Japan. The greatest decrease over the 10 year period was achieved by Ireland which fell from around 20 per cent to slightly over 10 per cent. The United Kingdom fell from 25 per cent to below 18 per cent. In Canada, the GPG dropped from just under 25 per cent to around 18 per cent.

Figure 2.2: Gender gap in full-time median earnings at the top and bottom of the earnings distribution, 2010



Source: Data sourced from OECD (2012), OECD Family Database, OECD, Paris (www.oecd.org/social/family/database), specifically, LMF1.5: Gender pay gaps for full-time workers and earnings differentials by educational attainment, <http://www.oecd.org/els/soc/LMF1.5%20Gender%20pay%20gaps%20for%20full%20time%20workers%20-%20updated%20290712.pdf> (accessed 15 September 2013)

Generally speaking, the GPGs for the top eightieth percentile (the highest earners) overall is greater than the GPG for the bottom twentieth percentile (the lowest earners). The OECD report suggests that the smaller gap for the low earners in many countries reflects the influence of legislated minimum wages and collective agreements to protect low income workers (OECD 2012: 1).

Canada and Ireland reveal a different trend. In Canada, the lowest earning women have a marginally larger wage gap of 20 per cent of male earnings, in comparison with the highest earners where the gap is around 18 per cent. In Ireland, the low earners have a pay wage gap of around 14 per cent, in comparison with slightly over 10 per cent for the high earners. This contrasts with New Zealand, Norway, Hungary and Australia, where the pay gap is significantly higher for the high earners in comparison with the low earners. It is to be noted that Hungary and Norway have a disproportionately high gender gap at the top of the distribution and that in these countries the gap between the median earnings of male and female is a more reliable indicator of the pay gap (OECD 2012: 1).

The OECD data is dependent upon definitions which are used in each of the countries and therefore there can be some variation. It is also only able to use data from 2010. More recent data can be found through other sources. For example, more up-to-date information on European Union (EU) member states can be found in the reports *Tackling the gender pay gap in the European Union* and *Progress on equality between women and men in 2012: A Europe 2020 initiative*

(European Commission 2013a, 2013b), which refer to Eurostat data. The latest Eurostat data is set out below.

Figure 2.3: Gender pay gap, average gross hourly earnings, selected EU countries

	2010	2011
EU (27 countries)	16.2 (p)	16.2 (p)
Austria	24.0	27.3 (e)
Belgium	10.2	10.2
Bulgaria	13.0	13.0
Croatia	15.5	17.6 (p)
Czech republic	21.6	21.0
Denmark	16.0	16.4
Estonia	27.7	27.3
Finland	20.3	18.2 (p)
France	15.6	14.8 (p)
Germany	22.3	22.2 (p)
Hungary	17.6	18.0
Ireland	13.9	n/a
Italy	5.3	5.8
Latvia	15.5	13.6
Lithuania	14.6	11.9
Netherlands	17.8	17.9
Norway	16.1	15.9
Poland	4.5	4.5
Portugal	12.8	12.5
Romania	8.8	12.1
Slovakia	19.6	20.5
Slovenia	0.9	2.3
Spain	16.2	16.2 (p)
Sweden	15.4	15.8
Switzerland	17.8	17.9
United Kingdom	19.5	20.1

p= provisional e= estimated

Source: Eurostat, 'Gender pay gap in unadjusted form', http://epp.eurostat.ec.europa.eu/portal/page/portal/labour_market/earnings/main_tables (accessed 15 September 2013).

Note: The data in this figure represents the difference between the gross hourly earnings of male employees in female as a percentage of average gross hourly of male paid employees. The population consists of all paid employees in enterprises with 10 employees more. The GPG indicator is calculated within the framework of the data collected according to the methodology of the Structure of Earnings Survey (EC Regulation: 503/1999).

As can be seen from this statistical set, there is some variation between the OECD and the Eurostat data in relation to the GPG. However, the trends can still be seen, and generally speaking the gap has lowered between 2010 and 2011 in all but eight countries. These datasets do not, however, include GPG statistics in respect of Canada, New Zealand, Australia and the United States.

In respect of the United States, the most recent statistics can be derived from the United States Bureau of Labor Statistics (2013), which suggests the gap is 23 per cent based on median

earnings of full time employees. In New Zealand, the Ministry of Women's Affairs and the Human Rights Commission rely on the annual New Zealand Income Survey, a subset of the Household Labour Force Survey, which looks at individual earnings. It reports that in 2012 the median hourly earnings between men and women resulted in a pay gap of 9.3 per cent (Statistics New Zealand 2012).

When looking at the country analyses, we should caution that it is not possible in the context of this report to assess the contributing factors to the GPG differentiation between the countries and analyse the extent to which differing legislation and practices have impacted upon a narrowing of the gap.

2.4 Lessons from other countries

For the purpose of this report, research has been undertaken across a number of different developed countries. The countries selected for specific focus were identified as having approaches in legislation and practice which contain elements comparable to the situation in Australia. Ten countries were chosen, all of which are members of the OECD. These are Belgium, Canada, Ireland, Finland, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom and the United States. We have also undertaken a separate analysis of EU legislation. With the exception of Norway, all the countries selected which are not EU member states have common law systems. The 10 countries were also selected because the ILO in its publication *Giving globalisation a human face* noted that they all displayed instances of good practice (ILO 2012b).¹⁶

The results of these country studies are set out in Appendix C. The approach taken in each case is to set out the legislation and some relevant recent case law; provide an overview of the various processes within the country for achieving equal pay, including promotional aspects as well as complaint mechanisms; and briefly summarise specific features that are particular to each country. Some additional examples from other countries are also included, generally to illustrate more innovative approaches.

The various approaches discussed in Appendix C have, in one form or another, been based on the requirements of the Equal Remuneration Convention, together with ILO interpretation of the principles and materials which point to good practice in this area. In addition, those countries which are part of the EU have been driven to a very large extent by EU Directives and European Court of Justice (ECJ) case law. These are to the same effect as the ILO Convention and have a strong focus on promoting pay equity in a way that requires positive action to be taken by governments and employers' and workers' organisations.

2.4.1 Key practices in the selected countries

What we have identified as 'good practice' in these countries in relation to pay equity involves a coherent strategy within the country, with responsibilities at every level. This approach to considering good practice uses the benchmark of the minimum standards set out in Article 2 of the Equal Remuneration Convention, which indicates that the principle of equal remuneration for men and women workers for work of equal value may be applied by means of national laws or

¹⁶ Furthermore, information for these countries was available in English, whereas for other countries the bulk of source material was not available in English and was therefore unable to be considered for this report.

regulations, legally established or recognised machinery for wage determination, collective agreements between employers and workers, or a combination of these various means.

The government's responsibility is to ensure that *legislation* properly reflects and supports the requirements for pay equity and to also have a *national policy* of proactive promotion of pay equity including goals and targets. It should also ensure that there are *government institutional supports* such as equal pay commissions, labour commissions or human rights commissions which have staff dedicated to assist the process of proactive measures to attain pay equity, as well as to assist in the process of resolving pay inequity claims. The government also has a special responsibility by reason of itself being an employer and it should ensure that there are proper mechanisms for addressing pay inequity within the public sector.

Although government may not be in a position to directly control remuneration in the private sector, many measures are now being taken in countries to legislate and require *employers to themselves undertake pay equity measures*, a process which is in turn monitored by government instrumentalities.

There are also responsibilities for employers' and workers' organisations which are crucial to achieving pay equity at the national level. This is usually achieved through *social dialogue*, not only between the social partners (for example for the purposes of collective bargaining), but also with the government through tripartite dialogue. Further, employers are under an obligation at law to ensure equal remuneration for work of equal value and are also prohibited from discriminating against women in relation to conditions of work which would include remuneration.

In order to achieve pay equity, there need to be *appropriate models for assessing the value of work* for the purpose of then ensuring that work of equal value receives equal remuneration. There are some different approaches as to how this is achieved, but there are some common features which appear from the country approaches.

As part of the government responsibility, there needs to be adequate processes for seeking redress for examples of alleged pay inequity, such as *commissions, ombudsmen, tribunals and courts*. Whichever venue provides redress, the complaints system needs to be simple and available to individuals and groups with *effective enforcement procedures and remedies*.

Each of these features, together with examples of good practice from individual countries, are discussed in turn below. It should be noted that when using the term 'other countries' in the sections that follow, we are generally referring to others in the group of countries which have been reviewed in this report, as opposed to other nations outside that group.

2.4.2 The 'work of equal value' standard

The starting point at an international level for considering good practice is the wording which is used within the Equal Remuneration Convention: 'equal remuneration for work of equal value', which is the same terminology used in Article 157 of the Treaty on the Functioning of the European Union (TFEU) and in Directive 2006/54/EC on the implementation of the principle of Equal Opportunities and Equal Treatment of Men and Women in matters of Employment and Occupation (the 'Recast Directive': see section C.1.1.3).

A survey of the countries discussed reveals that most use that terminology, or adopt other expressions which substitute the word 'remuneration' for 'pay' and then define it in a broad way so as to indicate it is not limited solely to wages. Other countries refer to 'the same work or work of

equal value' or substitute the words 'equal value' with the words 'same value' or 'comparable value'. These expressions would comply with the Convention.

There are some other countries which have used a restricted version of the standard. For example, in Ireland the Employment Equality Act uses the expression 'like work', which is more limited than 'work of equal value'. However because Ireland is a member of the European Union, it is obliged to recognise and enforce the provisions of Article 157 of the TFEU when interpreting equal pay legislation. This is exemplified in the decision of the ECJ in *Kenny v Minister for Justice, Equality and Law Reform* [2013] C-427/11 (*Kenny*) (see section C.3.1). It is interesting to note that the Equality Authority advocates an approach that is more expansive than that set out in the relevant legislation. In its Guidelines for Employment Equality Policies in Enterprises, for example, the Authority makes reference in its discussion of gender pay discrimination to work which is 'similar' or 'involve(s) work of equal value', where the legislation is confined to 'like work'. The Guidelines also identify external benchmarking and refer to the use of 'marketplace' as a benchmark, but note that there is a weakness: 'because gender bias may already exist in certain sectors, there is a danger that external benchmarking may inadvertently perpetuate gender discrimination' (Equality Authority 2013: 6,11).

In Finland, the 1986 Act on Equality between Women and Men does not use the term 'equal value' at all, but instead refers to 'pay or other terms of employment so that an employee or employees are more disadvantaged on the basis of sex than one or several other employees employed by the same employer'. In other words, in relation to gender pay, the focus is on discrimination and comparative disadvantage between employees of different sexes. Nonetheless, Finland would be required to apply Article 157 of the TFEU in the approach taken under that Act. The extent to which this has been implemented in practice is questionable, for the reasons discussed in section C.4.2.

In Canada at the federal level, pay equity is dealt with in section 11 of the Canadian Human Rights Act (1985) (CHRA), which uses the expression 'work of equal value'. But in the federal Public Sector Equitable Compensation Act (PSECA), which relates to the public sector only, the ILO has noted that comparisons are only able to be made between jobs which have 'similar' duties, which is more narrow than the approach in the Equal Remuneration Convention (see section C.9.2). At the provincial level in Canada there is considerable variation. For example, equal pay for the same or similar work is a requirement of employment standards legislation in Ontario, Manitoba, Saskatchewan, Yukon, Newfoundland and the northern territories; whereas equal remuneration for work of equal value is required in Nova Scotia and New Brunswick, though only in the public sector (see section C.9.3).

In New Zealand, the expression 'the same or substantially similar skills' is used and the case of *Service and Food Workers Union NGA Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 ARC 63/12 at [20] demonstrates the limitation of its application (see section C.10.1). Notwithstanding the differing wording, New Zealand has some of the best practices for achieving pay equity and a lower GPG than many other countries.

In the United States there is considerable variation between federal and State legislation. At the federal level, the Equal Pay Act 1963 prohibits sex based wage discrimination and refers to 'equal work' on jobs which require 'equal skill, effort, and responsibility'. This is more limited than the international norm. Title VII of the federal Civil Rights Act prohibits discrimination against employees on the basis of sex, which includes payment of wages and refers to unlawful employment practices based on 'disparate impact'. The Civil Rights Act is interpreted as potentially

extending beyond the narrow confines of the Equal Pay Act, as discussed in section C.11. The legislation across the 50 States also varies. Generally, the legislation in many States uses the same or similar wording as that set out in the federal Equal Pay Act 1963. There are, however, States which provide for comparable work or comparable worth, such as Montana. Although few States refer to the concept of comparable worth in their legislation, some 14 States have been noted as having made comparable worth and pay equity adjustments of some kind in selected occupations (see section C.11.3).

It is to be noted that if pay equity is contained within discrimination legislation only, unless the legislation itself defines gender discrimination by reference to a failure to provide equal pay for work of equal value, then the legislation itself is more limited and may not capture feminised labour sectors. This is, for example, the situation in Finland.

2.4.3 Defining equal value

In addition to the requirement for equal remuneration for 'work of equal value', some of the countries in our study expressly identify the criteria to be applied when assessing equal value and also recognise aspects of gender segregation in jobs. For example in Norway, section 5 of the *Gender Equality Act 2005* provides that pay for work of equal value shall apply 'regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective wage agreements'. In addition, section five provides that work of equal value is to be determined 'after an overall assessment in which importance is attached to the expertise that is needed to perform the work and other relevant factors, such as effort, responsibility and working conditions'. The definition is inclusive and allows other factors to be taken into account (see section C.6.1).

Similarly in Sweden, the *Discrimination Act 2009*, Chapter 3, section 2, indicates that work is to be regarded as of equal value with other work if, on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work is to take into account criteria such as knowledge and skills, responsibility and effort and in particular working conditions (see section C.7.1).

Although not using the expression 'work of equal value', United States legislation (both federally and also in some States) specifically refers to assessing work by having regard to skill, effort, responsibility and working conditions (see section C.11.1).

In Canada, section 11 of the CHRA identifies the criteria relevant to assessing work of equal value and refers to skill, effort, responsibility and working conditions. These are further elaborated in the Equal Wages Guidelines 1986, issued pursuant to section 11 of the CHRA (see also section C.9.1).

2.4.4 Defining 'remuneration'

In relation to the word 'remuneration', the Equal Remuneration Convention requires more than just a consideration of ordinary, basic or minimum wages or salaries; it includes all work emoluments, whether in cash or in kind. A number of countries (other than those countries examined here) define remuneration to include benefits such as the supply of uniforms, laundering work clothes, the provision of accommodation or food, vocational allowances, productivity bonuses, seniority allowances, residential allowances and dependency allowances (ILO 2012b: 288).

Generally speaking, however, when the global scene is considered, the focus is usually limited to wages alone. Account is rarely taken of overtime and bonuses, or of other forms of benefit such as leave from work. Also it would appear that court cases tend to focus mainly on differential wages or salaries and not always the entire remuneration package.

In the EU 'pay' is defined in Article 157 of the TFEU as meaning the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which a worker receives directly or indirectly in respect of employment. As noted in section C.1.1.2, the ECJ has also treated pay as having a very broad definition, which includes not only basic remuneration but also:

- overtime payments;
- bonuses;
- travel expenses/ allowance;
- compensation for attending training courses and other self-education expenses;
- termination/redundancy payments; and
- pensions.

In *Brunnhofer v Bank der Osterreichischen Postsparkasse AG* [2001] ECR I 4961 (*Brunnhofer*) at [80], the ECJ provided guidance as to the broad scope of the concept of 'equal pay':

Equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees, but also in the light of each aspect of pay taken in isolation.

Many countries have defined the word 'remuneration' or 'pay' in legislation to encompass broader factors beyond economic ones:

- In the EU countries this is demanded by EU standards, for example in Belgium (see section C.2.1) and Norway (see section C.6.1), but not Finland at the present time (see section C.4.1).
- In the Netherlands, the concept of pay, as defined in the Equal Treatment of Men and Women in Employment Act (ETA) and applied by the Dutch courts, is in line with the wide interpretation given by the ECJ (Sjerps 2007: 68). It includes occupational pensions as well as a wide range of 'benefits' that flow from the employment relationship. For example, section 9(2) sets out that 'non-cash salary components shall be taken into account as pay at the market value that can be assigned to them'.
- By contrast, in Ontario 'pay' is limited to monetary amounts, which means all salaries, wages, payments and benefits paid or provided to an employee for performing work for which they receive a fixed or ascertainable amount (Ontario Pay Equity Commission 2012: 105).
- In New Zealand, 'remuneration' is defined as meaning the salary or wages actually and legally payable and includes overtime bonuses, special payments and allowances whether paid in money or not (see section C.10.1).

The topic of pensions is highly important in the context of EU member states as it is dependent on wages and tax contributions made over a work life. This aspect is not always considered in countries outside the EU, where there can sometimes be universal pensions paid by government, regardless of previous wages received. However, sometimes universal coverage may be combined with contributions required to be made by employers towards superannuation funds for an

employee based on their wages. Therefore the issue of pensions and the disadvantage which occurs to women later in life by reason of having lower 'remuneration' is also relevant.

Good practice is best demonstrated by broad definitions of 'remuneration' in legislation to encompass all aspects of benefits associated with employment in order to reflect the real level of disadvantage that occurs to women when they are not remunerated fairly.

2.4.5 Exceptions

Some countries have specified that differences in remuneration are allowable in certain situations. Section 8 of Ontario's Pay Equity Act expressly states that the Act does not apply to prevent differences in 'compensation' between a female job class and a male job class if the employer is able to show that the difference falls within certain narrowly defined exceptions, which are as follows:

1. a formal seniority system that does not discriminate on the basis of gender;
2. a temporary employee training or development assignment that is equally available to male and female employees and that leads to career advancement for those involved in the program;
3. a merit compensation plan that is based on formal performance ratings that does not discriminate on the basis of gender;
4. the personal practice known as 'red-circling' where based on gender neutral re-evaluation process the value of a position has been downgraded;
5. a skills shortage that is causing a temporary inflation in remuneration because the employer is encountering difficulties in recruiting employees with the record skills for positions in the job class;
6. if the employer can show, after having achieved pay equity, the differences in compensation between bargaining units result from differences in bargaining strength of the units;
7. if an employer designates a position as being 'casual'.

A similar approach is set out in the CHRA, section 11(4) of which refers to the 'reasonable factors' which are considered a legitimate basis for differences. These are further elaborated upon in the Equal Wages Guidelines 1986. The factors included in the list are:

- different performance ratings, where a formal system of performance appraisal is in place;
- seniority;
- red circling of a position which has been downgraded or an employee has been demoted; or
- rehabilitation assignment; temporary training position; internal labour shortage in a particular job classification; reclassification of a position to a lower level; and regional wage rates (see section C.9.1).

In the United States, section 206(d) of the Equal Pay Act names four exceptions: a seniority system; a merit system; a system which measures earnings by quantity or quality of production; and 'differential based on any factor other than sex'. As discussed in section C.11.1, this last factor has resulted in courts sometimes accepting a 'market forces' theory to justify pay differentials, in spite of the 1974 Supreme Court decision in *Corning Glass Works v Brennan* (1974) 417 US 188.

The importance of articulating exceptions in legislation is to provide clarification on the criteria which may explain remuneration differentials between men and women doing work of equal value. This process helps in identifying the unexplained gaps once all other objective gender neutral factors have been brought to account.

2.4.6 Burden of proof

An important influence on EU member states is the burden of proof provision set out in Article 19(1) of the Recast Directive, which states that:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

There is no definition of the principle of 'equal treatment' set out in the Recast Directive, but there is case law that assists in the approach to be taken with regard to the burden of proof. In *Brunnhofer* [2001] ECR I 4961 at [80], the ECJ held that:

[I]t is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay.

The importance of having a provision which reverses the burden of proof is twofold. First, it recognises that the employer has the obligation in law to ensure that there is gender pay equity. Second, the bases for setting remuneration typically lie within the knowledge and control of the employer, making it difficult for a complainant to carry the burden of proving the case throughout legal proceedings.

Therefore under EU law it is for the employee to adduce evidence that the pay she receives from her employer is less than that of her chosen comparator, and she does the same work or work of equal value to that performed by her comparator (*Brunnhofer* [2001] ECR I-4961 at [58]; *Kenny* [2013] C-427/11 at [19]). Such evidence would amount to a *prima facie* case of discrimination on the basis of sex. It would then be for the employer to prove that there was no breach of the principle of equal treatment in relation to pay (*Brunnhofer* [2001] ECR I-4961 at [60]). The employer by way of defence could either:

- deny that the conditions for the application of the equal pay principle were met, for example by establishing that the activities actually performed by the two employees were not in fact comparable; or
- justify the difference in pay by objective factors unrelated to any discrimination based on sex, by proving that there was a difference, unrelated to sex, to explain the payment of a higher monthly supplement to the chosen comparator (*Brunnhofer* [2001] ECR I-4961 at [59]–[62]; *Kenny* [2013] C-427/11 at [20]).

Importantly in *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 03199 the ECJ held that where an

employer applies a system of pay which is lacking in transparency, it is open to a female worker to establish on a *prima facie* basis, in relation to a relatively large number of employees, that the average pay for women is less than that for men. If so, it is then for the employer to prove that its practice in the matter of wages is not discriminatory. While allowing that recourse to the criterion of length of service may involve less advantageous treatment of women than of men, the ECJ went on to hold that the employer does not have to provide special justification for such an approach (at [24]–[25]). By adopting that position, the ECJ acknowledged that rewarding accumulated experience which enables a worker to perform their duties better constitutes a legitimate objective of pay policy.

In Belgium, Article 33 of the Gender Act transposes Article 19 of the Recast Directive regarding the burden of proof, and obliges a claimant to present a *prima facie* case, after which the defendant must demonstrate that there is no discrimination. A *prima facie* case is established by producing ‘elementary statistical material which reveals an unfavourable treatment’ (Article 33(3)).

The burden of proof in pay discrimination cases in Finland is divided between the alleged victim and the defendant, so that the victim must substantiate on a *prima facie* basis an allegation of pay discrimination. The onus then shifts to the defendant to show that there has been no violation.

In Norway section 16 of the Gender Equality Act provides that: ‘if there are circumstances that give reason to believe that there has been direct or indirect differential treatment ... such differential treatment shall be assumed to have taken place unless the person responsible proves on the balance of probabilities that such differential treatment nonetheless did not take place’.¹⁷ This provision requires an employer to prove, on the balance of probabilities, that differential treatment did not take place. A *prima facie* case is required, however, before the burden shifts to the employer (Equal Pay Commission 2008: 6).

In the United Kingdom, the use of the burden of proof is discussed in *Hartley v Northumbria Healthcare NHS Foundation Trust* (UK Employment Tribunal, ET Case no 2802136/2007, 6 April 2009). A discussion about the burden of proof arose in three circumstances related to whether job evaluation schemes which had been applied to staff in the National Health Service (NHS) were gender discriminatory, both in the framework of the evaluation as well as in its application to specific jobs. In essence the Tribunal decided that even if there had been a job evaluation study undertaken to establish equal or comparable value, that did not mean that jobs were thereby of equal value for the purposes of determination later in court. A challenge could still be raised about the process as well as the application. There was also discussion of the burden of proof when an employer wished to avoid a reference of an equal value issue to a panel of independent experts appointed by the Tribunal. In essence, a reference can be avoided if the employer can point to a study or studies and evaluations complying with equality provisions in section 1(5) of the Equality Act 2010. It is then for the employee to show reasonable grounds for suspecting that the evaluation was made under a system which discriminated on grounds of sex or is otherwise unsuitable to be relied upon (at [575] to [580]).

¹⁷ Section 3 of the Act defines direct and indirect differential treatment. In relation to indirect differential treatment, as it is a generalised statute it lacks clarity as to how it should be applied in relation to equal pay. For example the legislation states that indirect differential treatment is permitted ‘if the action has an objective purpose that is independent of gender and the means that is chosen is suitable, necessary and not disproportional intervention in relation to the said purpose’.

By contrast, the same approach regarding burden of proof is not taken in the other countries in our study.

In the United States, before an employer is required to proffer an affirmative defence based on the four exceptions under section 206(d) of the Equal Pay Act, a plaintiff must establish a *prima facie* case showing wage discrimination. The plaintiff, usually female, must then identify a comparable (male) employee who makes more money for performing 'substantially equal' work, which requires equal skill, effort, and responsibility under similar working conditions.

Alternative remedies are available in the United States pursuant to Title VII of the Civil Rights Act. Title VII has been interpreted as extending remedies beyond the narrow scope of the Equal Pay Act and potentially offers relief where men and women were in different jobs and were not performing 'equal work' (see section C.11.1). Section 703(k)(1)(A) of Title VII refers to the burden of proof in unlawful employment practices based on 'disparate impact'. This section is confusingly worded; the consequence is that in the context of gender pay claims, the plaintiff has the burden of persuading the fact-finder that the employment practice used by the employer adversely affects the employment opportunities of women. If the plaintiff fails to meet this burden, the court must dismiss the action under Rule 41(b) of the Federal Rules of Civil Procedure. Case law indicates that a three-step model applies. The plaintiff must first prove a disparate impact. If that is established, then the employer must demonstrate that the challenged practice is justified by 'business necessity' or that the practice is 'manifestly related' to job duties. If the employer does not meet the burden of production and persuasion in proving business necessity, the plaintiff prevails. However, if the employer does meet these burdens, then there is a third step which requires the plaintiff to demonstrate that alternative practices exist that would meet the business needs of the employer which would not have a discriminatory effect.

There are no specific burden of proof legislative provisions in either Canada or New Zealand. In Canada, in *Public Service Alliance of Canada v Canada Post Corporation* [2011] 2 FCR 221 Justice Evans discussed the standard of proof when finding that members of the complainant and comparator groups were performing work of equal value. He concluded that the balance of probabilities was appropriate and added (at [198]):

Because it may be impractical to collect the necessary data for all the jobs performed by members of the groups, it is sufficient to evaluate the work performed by representative samples of the groups.

2.4.7 Requiring employers to provide information on remuneration

One of the significant impediments for women in raising pay equity issues is that there is often insufficient information available to them on a regular basis to know what remuneration applies to other employees in different jobs or different sectors, even at the basic level of wages and even within the same enterprise. They do not even have the starting point to know about differential wages applicable to either equal jobs or jobs of equal value (Chicha: 2006: 55; Ontario Pay Equity Commission 2011: ch 3).

The need for transparency arises first and foremost with regard to the information provided by an employer to employee representatives that are participating in either the process of job evaluations or collective bargaining. As JämO (the Swedish Equality Ombudsman) has emphasised (as quoted in Chicha 2006: 55):

In order for a trade union to meaningfully participate in the work, it must thus have access to relevant information about pay or other conditions that concern an individual employee.

In Québec, article 29 of the *Pay Equity Act* of 1996 provides that the employer is required to disclose to pay equity committee members information relevant to the elaboration of a pay equity program. A similar approach has been adopted in Sweden (Chicha 2006: 55–6).

In the United Kingdom, section 77 of the *Equality Act 2010* contains provisions which prevent the enforcement of pay secrecy clauses in employment contracts.

The European Commission's *Strategy for equality between women and men (2010-2015)* highlights strategies to eliminate unequal pay (European Commission 2010). This includes exploring with social partners possible ways to improve the transparency of pay (see section C.1.2.4). Furthermore, in determining the difference in pay received by a female worker and a male worker, the ECJ has stressed the need for genuine transparency, which may only be achieved if the principle of equal pay is observed in respect of each of the elements of remuneration granted to men and women: see *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 at [33]–[34]).

Good practice would require laws that entrench the provision of information to employees who seek to claim pay inequity based on gender. This could involve provision of information to employee representatives or to individual complainants subject to confidentiality provisions depending on the particular circumstances.

2.4.8 National policy

The responsibility for equal remuneration under the Equal Remuneration Convention falls on member states. It is those states which have the responsibility for ensuring equal remuneration for men and women workers through laws and other machinery, and also to take measures to promote objective appraisal of jobs to achieve that end (see section 2.2.3).

Similarly in the EU, both Article 157 of the TFEU and the Recast Directive place responsibility firmly on member states to ensure the principle of equal pay for work of equal value. They require states to address the problem of continuing gender-based wage differentials and to ensure enforcement of remedies and penalties (see sections C.1.1–C.1.2).

The European Commission's *Strategy for equality between women and men (2010–2015)* highlights five areas of action, one of which is specifically on equal pay (European Commission 2010). The strategy notes that there are many causes of this pay gap; in particular, segregation in education and in the labour market. In order to contribute towards eliminating unequal pay, pursuant to the Strategy the Commission will:

- explore with social partners possible ways to improve the transparency of pay;
- support equal pay initiatives in the workplace such as equality labels, 'charters' and awards;
- institute a European Equal Pay Day; and
- seek to encourage women to enter non-traditional professions, for example in the 'green' and innovative sectors.

In addition, the publication *Progress on Equality between Women and Men in 2012 – A Europe 2020 Initiative* assesses the situation as at 2012 and cites good practices from many of the member states (European Commission 2013b). Furthermore, in 2013 the European Commission published *Tackling the Gender Pay Gap in the European Union*, which suggested many strategies and again highlighted good practice in each of the member states (European Commission 2013a).

Those good practices include annual reports made by member states on the gender gap; examples of plans and audits to enable employers to measure progress in implementing gender equality and gender pay; and in some cases mandatory legislative requirements for their provision. Furthermore, reference is made to the importance of introducing pay transparency and the report also provides examples of implementing equal pay tools.

More recently the European Parliament has called on member states to take on more proactive roles in endeavouring to reduce the GPG and to encourage social partners to create a more gender-equal wage structure (see section C.1.3). In particular, the European Parliament has requested the European Commission to support member states to reduce the GPG by at least five percentage points annually with the aim of eliminating it by 2020 (see section C.1.2). If this were to be implemented, it would thereby include obligations on the part of the member states to achieve equivalent progress in their respective countries.

The ILO's CEACR has welcomed the adoption by a number of countries of national plans or policies which provide specific measures to address the GPG and promote equal remuneration for men and women for work of equal value. They include Finland, New Zealand and the United Kingdom (ILO: 2012b: 720).

In Finland, the government has articulated a policy program to reduce the GPG to 15 per cent by 2015, utilising nine goals (see section C.4.2).

In New Zealand, the Plan of Action on Pay and Employment Equity in the public service provides for pay and employment equity reviews in response to plans which have been undertaken in a number of departments. (ILO: 2012b: 720).

The ILO is encouraging more proactive measures to be undertaken by member states which include collecting, analysing and disseminating data and information about the GPG (ILO 2012b: 669). This is seen as highly important to achieving a reduction of the GPG (ILO 2012b: 887–91).

National policies which express short and long-term targets aimed at GPG reduction, accompanied by specific strategies to attain that outcome, plainly amount to good practice.

2.4.9 Institutional supports

This report has assessed the regulatory approaches relied upon in international jurisdictions and identified a diversity of approaches. Generally, gender pay equity complaints are addressed through the use of ombudsmen, human rights commissions and other similar entities for the purposes of mediating and/or resolving complaints without the need to progress to court litigation. Furthermore, there is an increasing emphasis on promoting processes to be undertaken by employers to have pay equity plans or actions within their enterprise, with monitoring to be undertaken by the various commissions.

Within the jurisdictions of the countries reviewed, the role of tribunals and courts is generally viewed as a last resort. There is increasing focus on the need to have national policies which target the problem, ongoing promotion of the importance of gender pay equality and the means to achieve it. This emphasis requires governments, employer associations, employers, unions and workers to agree on equity strategies, plans and actions across industry sectors and individual enterprises. Good practice suggests that these processes should be mandatory rather than voluntary. There needs to be reporting of these actions on a regular basis, as well as efficient and effective monitoring.

The research undertaken in international jurisdictions has also indicated an overall decline in the number of cases taken before courts and tribunals on gender pay equity. A recent report from Europe indicated that very few (if any) claims on gender pay discrimination have progressed to regular or administrative courts in countries such as Austria, Belgium, France, Croatia, Finland, Greece, Latvia, Lichtenstein, the FYR of Macedonia, Malta, the Netherlands, Norway, Poland, Romania, Slovakia and Slovenia (Foubert et al 2010: 20). The same report indicated that case law on equal pay issues was indeed very scarce. Some of the explanations for the scarcity of cases included the problematic scope of comparison, the lack of personal resources for claimants, problems with time limits, and limited compensation and sanction possibilities. An additional explanation centred, in some instances, on a lack of trust in the legal and judicial system, including a lack of capacity to understand key technical concepts. There was also a preference to progress pay equity cases through ordinary labour law mechanisms, including employment discrimination laws (Foubert et al 2010: 21–4).

Ireland and the United Kingdom represent exceptions to this trend. These two countries share another common feature, which is the use of experts or technical advisors appointed by a labour court or tribunal to assist with the determination of equal remuneration issues.

In Ireland (see section C.3.2), there is an emphasis on investigative processes rather than adversarial processes. Equal pay claims may be referred to the Equality Tribunal for investigation by equality officers, and then a recommendation is made following investigation and assessment. A recommendation of the Equality Tribunal may be appealed to the Labour Court. At the Labour Court appeal stage, there is a provision for the appointment of technical assessors and the summoning of witnesses to assist the work of the assessors (Foubert et al 2010: 141). This is an unusual approach, bearing in mind that it is an appeal from a recommendation made by the Equality Tribunal.

In the United Kingdom (see section C.8.2) there are Employment Tribunals with a complaints or grievance procedure. The *Equality Act 2010* empowers the Employment Tribunal, before determining a complaint, to require a member of a panel of independent experts to prepare a report on the question of equal pay. The panel is designated by the Advisory Conciliation and Arbitration Service. There are special tribunal procedures for work of equal value claims, as contained in the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 and Schedule 3 of the Employment Tribunal's (Equal Value) Rules of Procedure. Schedule 3 sets up the process which applies to proceedings involving an equal value claim, depending on whether the tribunal itself is ruling on equal value or requiring an independent expert to prepare a report. This includes a very tight scheduling arrangement. Given the number of cases before it, this is a much-needed requirement. In July 2012, a report was prepared for the Government Equalities Office on equal pay cases and pay audits (Incomes Data Services 2012). An appendix to this report provides case summaries of 41 cases. The study noted that tribunal statistics indicated 280 successful equal pay complaints in the 2010/11 reporting period alone. These cases represented 13.8 per cent of equal pay cases that went to an Employment Tribunal hearing (United Kingdom Ministry of Justice 2011).¹⁸

¹⁸ The 280 cases represent those identified by the Employment Tribunal as being 'successful at tribunal'. The total number of cases that went to a tribunal hearing includes those that are classified by the tribunal as 'successful at tribunal', 'dismissed at a preliminary hearing' (36), 'unsuccessful at hearing' (1700) and 'default judgement' (7).

At the federal level in Canada (see section C.9.2), there are considerable difficulties with tribunal and court procedures. Equal remuneration cases are complicated and protracted, with instances of experts giving testimony for weeks and even months (see *Attorney General of Canada v Public Service Alliance of Canada* (1999) 180 DLR (4th) 95). The Court of Appeal in that case indicated that it would be preferable if the approaches taken in provinces such as Québec and Ontario (see section C.9.3) were utilised.

In Québec the Commission of Pay Equity receives complaints and may then mediate, conciliate or arbitrate the dispute. It has authority to initiate an investigation on its own motion without receiving a complaint. It may also utilise selected experts to conduct investigations.

In Ontario, the Pay Equity Commission includes the Pay Equity Office and the Pay Equity Hearings Tribunal, which work in tandem. The Pay Equity office is responsible for enforcing the province's Pay Equity Act 1990, including investigating and attempting to settle pay claims. This is the prime method by which gender pay matters are resolved. If not, then the Pay Equity Hearings Tribunal is responsible for adjudicating disputes. It has exclusive jurisdiction to determine all questions of fact or law.

In summary, the use of experts to assist with assessing the data and information relevant to whether work is of equal value and/or with remuneration levels which may be appropriate to ensure equal remuneration to provide information and advice to tribunals or other authorities responsible for deciding whether there is gender pay inequity, is an example of good practice.

2.4.10 Requiring employers to undertake pay equity measures

The European Commission publication, *Tackling the Gender Pay Gap in the European Union* in 2013, suggests many strategies and highlights good practice in each of the member states (European Commission 2013a). Those good practices include annual reports published by member states on the gender gap; examples of plans and audits to enable employers to measure progress in implementing gender equality and gender pay; and in some cases mandatory legislative requirements for their provision.

The ILO welcomes and indeed encourages measures which require employers to develop a plan to address equal pay. For example, Finland obliges both public and private undertakings with more than 30 workers to develop an equality plan, which must include information that enables workers to monitor the equality situation in the enterprise, including differences in pay. It must also set out measures to achieve pay equity and include a review of the impact of measures previously taken (ILO 2012b: 723).

Reference is also made to Sweden which, by virtue of the *Discrimination Act 2008*, Chapter 3, requires an employer with 25 or more workers to survey and analyse provisions and practices every three years regarding pay and other terms of employment and pay differences between women and men performing work that is regarded as equal or of equal value (ILO 2012b: 723; European Commission 2013a: 18).

In Austria, the National Action Plan for Gender Equality in the Labour Market includes a compulsory requirement for companies to publish equal pay reports over staggered years which commences with the largest companies. The equal pay reports are compulsory for companies with more than 1000 employees from 2011 for the year 2010, for companies with more than 500 employees from 2012, for companies with more than 250 employees from 2013 and with more than

150 employees from 2014. The goal is to create income transparency and to take measures to reduce GPGs (European Commission 2013a: 18).

In Belgium, the government adopted legislation in April 2012 to reduce the GPG. The law requires differences in pay and labour costs between men and women to be outlined in companies' annual audit. The annual audits are to be transmitted to the National bank and this information is publicly available. The law also stipulates that every two years, firms with over 50 workers should establish a comparative analysis of the wage structure of female and male employees. In the case of discrimination being suspected, women can turn to the firm's mediator who will establish whether there is indeed a pay differential and if so, will try and find a compromise with the employer (see section C.2.2.2; European Commission 2013a: 18).

In Québec, the *Pay Equity Act* of 1996 requires public and private sector employers with more than 100 employees to develop a pay equity plan. Further, an employer with between 50 and 99 employees may choose to set up a pay equity committee to determine value and wages. If there are less than 50 employees, a process is still required and one method which may be chosen is the creation of a pay equity plan (see section C.9.3.3).

In addition to legislative good practice, organisational and governmental bodies have also been established or utilised to take an active role to address pay equity in the marketplace. In Québec, a joint advisory committee with both employer and worker representation has been established to advise the Equal Pay Commission regarding the making of regulations, developing tools in order to facilitate the achievement or maintenance of pay equity and addressing any problems in carrying out the Pay Equity Act (ILO 2012b: 725).

In Ontario the Pay Equity Act places an onus on every employer and pay equity is achieved when every job class in an establishment has been compared to a job class or job classes under one of the comparison methods mentioned in the Act (see section C 9.3.4). Also in 2011, the Pay Equity office in Ontario launched the Wage Gap Program which targets specific non-unionised private sector workplaces of Ontario and obtains compensation data. There is therefore an active monitoring of the self-managed process required by employers to attain pay equity.

Finally, on this point, even in countries such as Belgium, Sweden and Finland which have highly structured centralised collective bargaining and wage setting, there is still a requirement for individual corporations covered by collective bargaining to be responsible for ensuring pay equity within their own organisations.

In summary either a mandatory system, or a self-assessment system requiring pay equity to be implemented by employers, would provide a good base for achieving pay equity. Such a system would be efficiently and effectively monitored and assessed, both within the organisation through social dialogue between employers and employees, as well as by independent bodies such as pay equity commissions.

2.4.11 Models for assessing the value of work

2.4.11.1 Appraising equal value

The Equal Remuneration Convention underlines the importance of objective appraisals of work. The concept of 'equal value' requires a method for measuring and comparing the relative value of different jobs. The Convention provides for the promotion of objective job appraisal on the basis of the work to be performed, where this will assist in giving effect to the provisions of the Convention.

Recognising different contexts, the Convention provides for flexibility in the appraisal methods that can be used. In Australia, 'work value' has been the method primarily relied upon by industrial tribunals, as will be apparent from many of the cases discussed in Appendices A and B).

In contemporary times the ILO has more routinely used the term 'job evaluation' rather than 'job appraisal'. Job evaluation is a broad generic concept incorporating a wide range of methods and processes, practised in a number of contexts, and by a range of stakeholders (including tribunals). Viewed broadly, it is a systematic process for defining the relative worth or size of jobs in order to establish relativities and provide a basis for designing an equitable grade and pay structure (Oetz et al 2013: 39; Armstrong et al 2003: 4). It includes formal and informal approaches. The use of a particular approach may be more common in certain types of context – the key criterion is that the method used to assess the value of jobs be free of gender bias.

There are number of different types of formal job evaluation schemes, including analytical and non-analytical schemes, but also a significant amount of variants and hybrids. In the context of equal remuneration proceedings, analytical job evaluation schemes feature most prominently in those contexts and jurisdictions that favour applications for equal remuneration confined to a single workplace or organisation.

Armstrong et al (2003: 4) describe the most common analytical approach as a 'points-factor scheme'. This has a 'factor plan' which defines the factors and their levels and attaches scores to each level. The factors include:

- skills and qualifications acquired through education, training or experience;
- responsibility for equipment, people and money;
- effort, which can be physical, mental and psychosocial; and
- working conditions, which encompass both physical (eg noise, dust) and psychological aspects (eg stress, frequent interruptions, client aggression).

A weighting is applied to each factor which has regard to levels of intensity or frequency and regard to the importance to the enterprise. The total score of the points attributed to the combination of the factors and their weighting becomes the numerical value of the job (Pay Equity Taskforce 2004, cited in Oetz et al 2013: 39). That figure is then used to determine whether or not different jobs have the same value or comparable value. Different jobs that have the same numerical value are entitled to equal remuneration. Remuneration differences are allowable for equal value jobs, but only if the reason for them is not related to the sex of the job holder (Armstrong et al 2003: 48).

By contrast, non-analytical job evaluation schemes include global or ranking evaluation methods. In these approaches jobs are described and compared in order to place them in rank order or in a grade, without analysing their constituent parts or elements. The most common non-analytical approach is to 'match' roles, as defined in role profiles, to definitions of grades or bands, or to role profiles of jobs that have already been graded. When designing the grade structures, the initial step may be to rank the jobs in order of perceived value (Armstrong et al 2003: 4–5). Thus, ranking methods may ascertain the importance of jobs within organisations, but they do not necessarily determine the difference in value between them. In the view of many commentators, as well as the ILO, non-analytical schemes do not meet the legal requirements for the assessment of equal value (Armstrong et al 2003: 4–5; Oetz et al 2013: 39; Harriman & Holm 2001; Katz & Baitsch 1996; Hastings 2003). But they may still have a place as another means of achieving pay equity.

Job evaluation as a process is not itself immune from gender bias, as the factors and weightings that comprise an analytical scheme, for example, may themselves be gendered. The concern with job evaluation methods is that even when such methods capture the skills of typical female jobs, these often score lower than male jobs. One illustration is the undervaluation of emotion labour – work which is mostly performed by women (Steinberg 1999; Mastracci et al 2006). It has also been noted that even the Hay Guide Chart Profile Method, which has helped reveal the existence of sex discrimination and social prejudices in the assessment of women’s work, displays some gender bias. It can place a heavy emphasis on skills, mental effort and responsibility. As such it may favour high-ranking positions where men prevail, and disregard aspects such as caring and being responsible for other people, which often characterise jobs performed by women (Steinberg 1992; Katz & Baitsch 1996).

2.4.11.2 Methods of objective job appraisals

The analytical job evaluation approaches reviewed in the international jurisdictions assessed for this report are primarily deployed in situations or claims involving a single workplace or organisation. The exceptions mainly involve countries with strong collective bargaining which is centralised at the national level and/or at the industry level. Relevant examples include Finland and Belgium, in both the private sector and the government sector. In Finland (see section C.4.2) there is a national framework agreement which sets guidelines for industry level negotiations. Similarly there are collective agreements for government employees generally. A similar approach is taken in Belgium (see section C.2.2). Other examples of job evaluations not being limited to a single enterprise or workplace can be found in government sectors. Using just one illustration, the provincial jurisdiction of Ontario in Canada undertakes job evaluation across different public sector departments (see section C.9.3.4).

There are two basic approaches to analytical job evaluation. The first is a job evaluation based on identifying job factors (skills, responsibility, effort and working conditions, and sub-factors of each) and applying a weighting (such as intensity, frequency and the importance of the factor to the organisation) to the factors, without gender bias. This process does not require a male or female comparator in order to be free of gender bias. Regard is had to factors relevant to both jobs predominantly done by men and jobs predominantly done by women to ensure, in particular, that job characteristics of ‘women’s work’ is not overlooked. The outcome of this process is a hierarchy of jobs that are free from discrimination. Examples of this form of job evaluation can be found in:

- the ACAS publication Job evaluation: consideration and risks (ACAS 2011);
- the equal pay audit toolkit developed by the UK’s Equality and Human Rights Commission;¹⁹
- the UK’s National Joint Council Job Evaluation System (Oelz et al 2013: 42);
- the guide prepared by Armstrong et al (2003: 4); and
- the Swedish ‘Steps to Pay Equity’ (Harriman & Holm 2001; Katz & Baitsch 1996; Hastings 2003).

Additionally there is an increasing use of software programs such as Analytical Evaluation of Jobs (ABAKABA) and EVALALFI from Switzerland (Oelz 2013: 42);²⁰ ISOS from Spain (Oelz 2013: 42);

¹⁹ Available at <http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/equal-pay-audit-toolkit/> (accessed 2 October 2013).

and the Equal Pay Quick Scan developed by the Netherlands Equal Treatment Commission (Foubert et al 2010: 18).

After such evaluation, the remuneration of those jobs is then assessed to ensure that those that are ranked equal have equal remuneration. Differences in remuneration are permissible if they are given for reasons other than gender, consistent with Article 3 of the Equal Remuneration Convention. In relation to the jurisdictions considered, generally government authorities such as departments of labour, equal opportunities commissions or pay equity commissions promote analytical job evaluation. Examples can be located in the Canadian federal system as well as the provinces of Québec and Ontario, the Netherlands, Norway, New Zealand and the United Kingdom.

The second form of job evaluation requires identifying female and male dominated jobs and then later assessing the value of those gender dominated jobs using factors which are bias free. This form of evaluation requires comparisons to be made between female dominated jobs and male dominated jobs. This does not result in a hierarchy of jobs, but specifically identifies jobs of comparable value. This is often required by legislation. For example, the requirement for identification of 'gender predominance', or 'female dominated jobs' and 'male dominated jobs' is set out in the Pay Equity Acts of Ontario, Nova Scotia and Québec (see section C.9.3), as well as the Equal Pay Acts of New Zealand and Montana (see sections C.10.1, C.11.3). It is also required by the Canadian Human Rights Commission's Equal Wages Guidelines (see section C.9.1). However, not all job evaluation processes require gender dominant jobs for the purposes of comparability. Jurisdictions where this requirement was not evident include the Netherlands, Belgium, Finland, Ireland, Sweden and the United States.

The job evaluation approach which is reliant on utilising a comparator from the spectrum of male dominated jobs within an enterprise may result in no comparison being found within an enterprise and therefore alternative comparators may be required. Ontario is an example of this approach (see section C.9.3.4). Its Pay Equity Act requires that the wages of all employees within 'female job classes' (that is, where 60 per cent or more are female) be adjusted so that they are at least equal to the wages of employees in male job classes found to be of comparable value. Value is determined by four factors: skill, effort, responsibility and working conditions. Three forms of comparison apply: a job to job method; a proportional value method; or a proxy method. The proportional value method compares the female job class with a 'representative' male job class or classes. The proxy method, which is only utilised for employees in the public sector, allows public sector organisations to use female job classes from a 'proxy employer', being a different department in the public sector, so long as those female job classes have had their pay equity wages assessed using the job to job method or the proportional value method.

If no comparator as required by legislation can be found, an action can only be taken by women on the basis of sex discrimination. For example, pursuant to the United Kingdom's Equality Act, where a woman claims gender pay based inequity in relation to her contractual pay and there is no actual male comparator doing work of equal value, then a sex equality clause cannot operate and she must then claim sex discrimination based on a hypothetical male comparator (see section C.8.1).

²⁰ The process used in these two programs involves regression analysis and criticisms have been made that the approach does not adequately take into account female dominated sectors (Chicha 2006).

Various States and provinces in the United States and Canada have used comparable work evaluations which have compared very different jobs undertaken by men and women and included jobs across different government departments. In selected applications, analytical job evaluation has been used to compare female and male dominant jobs, while on other occasions it has been limited to individuals occupying jobs (National Committee on Pay Equity (undated); Oelz et al 2013: 42). For example, clerk typists have been compared to male delivery van drivers; female microfilmmers to grain samplers; a female administrative secretary to a male meat cutter; a female library associate to a natural resource specialist; an administrative secretary to a welder; a taxi/towing regulator to a gardener; and a registered nurse to an electrician (National Committee on Pay Equity (undated)). These examples demonstrate the use of an analytical job evaluation process to assess the comparable value of jobs across very different fields of occupation and employment.

In relation to countries where there is collective bargaining across industries, the process used in arriving at the wage salary structure for the various jobs in the particular industries is not easily ascertained by desktop research. The ILO has described some examples in which it is expressly included in collective agreements that there is a court requirement for objective job evaluation methods to be applied (ILO 2012b: paras 705, 724). In Iceland, collective agreements requiring objective job evaluation methods have been negotiated between 15 unions and the City of Reykjavik. In Algeria there is a national level collective agreement which contains provisions relating to the classification of jobs, which must be established by enterprise agreements using an objective evaluation process including specific criteria for job evaluation. In Luxembourg there is a statutory obligation to negotiate equality plans with regard to employment and remuneration in the framework of collective agreements. In Spain, legislation establishes an obligation to provide information, whenever a new collective agreement is signed, on the pay structure and measures adopted to promote equality with respect to wages. In Belgium, a collective agreement on equal remuneration between men and women workers was extended by Royal Order, providing that all sectors in enterprises must review and adapt their classification systems. This requirement extends to the choice of criteria, weighting of criteria and converting values into remuneration (Oelz et al 2013: 55).

In relation to industry-level collective bargaining, there is a risk, absent an objective job evaluation process which is gender bias free, that where men and women are divided between different industry sectors or different workplaces, any job evaluation approach may not necessarily exclude stereotyping and characteristics of undervalued women's work. Even in countries where there are significant levels of collective bargaining operating across industry sectors, there can be a legislative requirement that individual enterprises, even if within a sector covered by collective arrangements, are required to develop pay equity plans, or pay equity actions or wage mapping. This may apply if they are enterprises with more than 25 employees (Sweden), more than 30 employees (Finland) or more than 50 employees (Belgium). These requirements, if efficiently and effectively monitored, provide an added method to eliminate gender pay inequity.

In the international sphere, there are instances where job evaluation schemes have come under scrutiny, specifically as to whether they may involve sex discrimination. In the case of *Hartley v Northumbria Healthcare NHS Foundation Trust* (UK Employment Tribunal, ET Case no 2802136/2007, 6 April 2009) there was significant discussion of the tools used at the national level and also by the NHS in job evaluation across more than 16,000 staff. The case included a consideration of the mandatory national job evaluation study provisions, the NHS collective agreement and the job evaluation study used within NHS (JES NHS). The claim was largely one of

sex discrimination under the Equal Pay Act 1970 (UK). Challenges were made as to whether the NHS collective agreement, the JES and the NHS approach were discriminatory as to the process of job evaluation generally, and also in its application to specific jobs. The Tribunal gave consideration to the job evaluation methods used, which included analytical job evaluation, using points and weightings, as well as the use of profiles and matching and hybrid matching/evaluation processes, with respect to the grading of employees.

This case is by no means a representative case before the UK Employment Tribunal, but it does highlight how a scheme of job appraisal can be subject to direct judicial scrutiny. The case also raised important issues regarding legal concepts, procedure and evidentiary material. The volume of material in that case was daunting, as indeed was the time taken for its hearing before the Tribunal. It proceeded over 24 days, with 46 ring binders of documents, several containing thousands of pages of audit trails.

2.4.11.3 Reliance on comparators

The experience of the international jurisdictions reviewed for this report, and also the work of the ILO more generally, did not reveal any example where pay inequity was addressed in a manner compatible with the Equal Remuneration Convention, other than by objective job appraisal, and usually by analytical job evaluation processes. In practice, pay inequity issues come to the fore as a result of an allegation or complaint that, for example, women are not being remunerated at the same level as men for the same or comparable work. It is this factor, in those jurisdictions, that has led to the use of comparators for the purpose of assessing whether the allegation or complaint is made out.

The international approaches reviewed indicated that the comparator(s) did not necessarily have to be from a male dominant job, nor indeed be male: they could be female. Comparators in the private sector, although usually from a single enterprise, could also come from a different enterprise. In government, the comparators could come from jobs across different government departments. Furthermore, the comparators did not necessarily have to be doing the same or similar job; comparators could do a whole spectrum of jobs and, using analytical job evaluation, would have values ascribed by which remuneration deficits could be identified and remedied.

One exception to the requirement for a comparator can be found in a recent New Zealand case, *Service and Food Workers Union NGA Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 ARC 63/12, which included a complaint of sex discrimination (see section C.10.1). The court considered the scope of section 3 of the Equal Pay Act 1972 (NZ), which sets out the criteria to be applied in determining whether an element of differentiation in remuneration based on sex exists. It decided that the criteria could not merely be determined by reference to what men would be paid to do the same work, abstracting from skills, responsibility, conditions and degree of effort, as well as any systematic undervaluation of the work derived from current, historical or structural gender discrimination. It was also possible to consider what is paid to males in other industries, if other employees of the same employer, or other similar employers, would be an inappropriate comparator group. The case demonstrates using hypothetical comparators or comparators from other industries.

In conclusion, the examples drawn upon in this section of the report highlight the diversity of approaches and the steps undertaken within particular jurisdictions to address gender bias.

This review suggests that good practice is one which provides the most flexible approaches to identifying and remedying gender pay inequity. Such approaches are not limited to requiring male dominated job comparators, and permit a representative comparator, or female comparators whose jobs have previously been evaluated using a gender bias free job evaluation process (ILO 2008b).

2.4.12 Enforcement procedures and remedies

There is a wide spectrum of enforcement procedures and remedies adopted in the countries studied. They are largely dependent upon whether a complainant is a union member, whether the claim is made for gender discrimination or whether it is a claim for gender pay inequity, the nature of the relief sought and time limitations related to the claim. Generally speaking there is confusion as to where to seek relief.

Titles II and III of the Recast Directive require all EU member states to ensure the enforcement of remedies and penalties. Article 25 indicates that sanctions, which may comprise the payment of compensation to the victim, must also be 'effective, proportionate and dissuasive'. Article 18 provides that where there has been a breach of the principle of equal pay for equal work or work of equal value, member states are obliged to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation. The ECJ has further noted that national law may not preclude the award of interest (*Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR 1-04367).

More recently the European Parliament called on the member states and the Commission to implement strategies that might include, *inter alia*, provision for collective redress against violations of the equal pay principle by enabling individuals or representative bodies to bring a case for others (see section C.1.3). The Parliament stated that Article 20 of the Recast Directive should be revised so as to enhance those bodies' mandate by supporting and advising victims of pay discrimination, and further that there should be legal powers to impose sanctions in cases of breaching the principle of equal pay for equal work and/or to bring wage discrimination cases to court (see section C.1.3).

In relation to practice in the EU countries, the following examples are notable.

- In Belgium, by virtue of the *Protection of Remuneration Act* of 1965, it may be possible to claim compensation for discrimination during the whole period of employment, whatever the duration (see section C.2.2.1).
- In Ireland the Equality Tribunal can order arrears of pay up to a maximum of three years (see section C.3.2).
- In Finland, remedies for victims of pay discrimination are complicated. There is no access to mediation or any similar procedure, other than through the ordinary courts. The Ombudsman for Equality and the Equality Board that supervise the implementation of the 1986 *Act on Equality* mainly act in a consultative and supervisory capacity. They lack the jurisdiction to, for example, prohibit the continuation of a discriminatory practice (see section C.4.2.1).
- In the Netherlands discriminatory dismissals and victimisation dismissals can be ruled to be void under the ETA or the *General Equal Treatment Act* (GETA). The employee can ask the court to invalidate the termination of the contract, whereby an employee can claim wages and seek reinstatement. Alternatively, the employee can claim pecuniary damages before the

courts under the system of sanctions in general administrative law, contract law and/or tort law (see section C.5.2.1).

- In Norway, there are three different processes for enforcement. If a complaint is made under the *Gender Equality Act 2005* (GEA) it can either be made to the Gender Equality and Anti-Discrimination Ombudsman (Ombud) or to the Gender Equality and Anti-Discrimination Tribunal. The Ombud is limited to making a recommendation which is not legally binding, although this is usually followed. The Tribunal does not have the power to award damages or compensation or impose sanctions. An order for compensation for a breach of the GEA can only be made by a court. Compensation is fixed at an amount that is reasonable and the courts will grant compensation from the date of the claim for up to three years. In addition to these remedies the Labour Court has jurisdiction, but it is primarily concerned with collective agreements. If a provision of a collective agreement is found to be in violation of the GEA, it will be declared null and void by the Labour Court so that the compensation to be paid is retrospectively dated back to the moment that the invalid provision was put into force. In short, there are significant limitations for complainants, particularly those that are not covered by collective agreements, to obtain redress for claims of pay inequity (see sections C.6.2–C.6.3).
- In Norway, there is a right to both punitive and economic damages which can be ordered by a Labour Court, but there are complex rules regulating time limits (see section C.7.2.1).

In the non-EU countries, remedies are dependent upon whether a claim is brought before a court, through human rights or equal pay tribunals or commissioners, or through an employment or labour tribunal (see sections C.9–C 11). In Canada, for example, the Canadian Human Rights Act Review Panel has concluded that pursuing a complaint through the current federal system was an onerous process with lengthy and complex proceedings often required to be taken (Ontario Pay Equity Commission 2011: ch 3).

Good practice in this respect is a model in which there are simple processes to make a complaint, preferably through a ‘one-stop-shop’ approach. There should also be provision for back pay to be awarded, subject to reasonable time limits, particularly if an employer has failed to provide remuneration information. Good practice would also have a facility for access to legal aid to assist individual claimants if they are not supported by a union in making a claim. It is usually only a court which can actually enforce a claim and therefore if a mediated outcome or an arbitration requires enforcement, a separate action may need to be instituted in a court.

2.4.13 Conclusion

This review of other countries’ laws and practices provides an important opportunity to consider where Australia sits in its approach to tackling the ongoing issue of gender pay inequity. It provides good examples of trends and specific illustrations of ways to improve outcomes for women workers more generally, and also provides suggestions as to approaches which may inform the Commission in considering evidence and procedures in cases which come before it. In some instances Australia would be a leader in many of the good practices referred to in the review.

3 The Fair Work Act

This chapter explains in some detail the way in which the issue of equal remuneration is addressed under the Fair Work Act 2009. It is particularly concerned with Part 2-7, which empowers the Commission to make equal remuneration orders. However, it is not possible to fully understand the Act's provisions without an appreciation of the way in which the law in this area has evolved, both at federal and State levels. Accordingly, the first section of this chapter briefly reviews some of that background. More detailed accounts of the history of federal and State regulation in this area can be found in Appendices A and B.²¹

3.1 Background: the law prior to the Fair Work Act

3.1.1 Award rates of pay

For most of the twentieth century, pay equity was not an objective of either the federal or State systems of industrial regulation. Indeed the awards that set minimum pay rates for most Australian employees typically discriminated between male and female employees. This was in part explained by an assumption that, unlike women, men needed to be paid a wage that was sufficient not just to subsist on themselves, but to provide for a family. As explained in sections A.3 and A.4, it was not until the *Equal Pay Case* (1969) 127 CAR 1142 and the *Equal Pay Case* (1972) 147 CAR 172 that the federal industrial tribunal, then known as the Conciliation and Arbitration Commission, ended the practice of having different rates within awards for male and female workers. The first of these decisions accepted the principle of equal pay for equal work, although confined it to work performed by women that was of a similar or like nature to that done by men, and excluded work that was 'essentially or usually performed by females'. The second embraced the broader principle of 'equal pay for work of equal value', as embodied in the ILO's Equal Remuneration Convention of 1951 (see section 2.2.2). The *National Wage Case 1974* (1974) 157 CAR 293 subsequently accepted that the minimum wage for award-covered workers should be the same for men and women, thus finally abandoning the 'breadwinner' model of wage determination.

In the 1972 *Equal Pay Case*, the Commission indicated that whether women's work was of equal value to that of men should be assessed by reference to the established concept of 'work value'. Work value is typically defined to include an examination of the nature of the work, the skill and responsibility required and the conditions under which the work is performed. It was the concept relied upon by Australian industrial tribunals in determining wages and salaries for an area of work. The idea of a work value adjustment to minimum wage rates was an accepted part of the wage fixing principles of both federal and State tribunals, while claims concerning 'anomalous' assessments could also be addressed through the 'anomalies and inequities' provisions of those principles. Typically, claims for an adjustment required evidence that there had been *change* in the 'nature of the work, skill and responsibility required or the conditions under which work is performed', since the last time that the work in question had been formally assessed by the tribunal: see eg *National Wage Case March 2007* (1987) 17 IR 65 at 100; and for a more recent expression, *Safety Net Review – Wages, June 2005* (2005) 142 IR 1 at 125.

No further explicit direction on this issue was given until 1986, when the Commission ruled that the 1972 principle could not be applied by reference to the concept of work of 'comparable worth': see

²¹ Some of what follows in this Chapter reproduces material from Smith & Stewart 2010 and Creighton & Stewart 2010.

Re Private Hospitals and Doctors Nurses (ACT) Award 1972 (1986) 13 IR 108. At this point the Commission referred the parties again to the explicit direction to work value in the 1972 equal pay for work of equal value principle. The Commission noted that the 1972 principle remained in operation and directed the parties to the anomalies and inequities principle, which was subsequently used to secure significant pay increases in some female-dominated industries: see eg *Re Private Hospitals and Doctors Nurses (ACT) Award 1972* (1987) 20 IR 420.

3.1.2 The 1993 federal legislation

In 1993, the Keating Government introduced legislation that empowered the Australian Industrial Relations Commission (AIRC) to make equal remuneration orders for specified employees or groups of employees, on application by an employee, a trade union or the Sex Discrimination Commissioner. Under a new Division 2 of Part VIA of the Industrial Relations Act 1988 (Cth), the AIRC had to be satisfied that such an order was necessary to secure 'equal remuneration for work of equal value'. That term was expressly defined, by reference to the Equal Remuneration Convention, to mean rates of remuneration established without discrimination based on sex.

When the 1988 Act was amended and renamed as the *Workplace Relations Act 1996* (WR Act) by the Howard Government's *Workplace Relations and Other Legislation Amendment Act 1996*, the equal remuneration provisions were retained. They also survived the same government's more substantial 'Work Choices' reforms of 2005, effected through the *Workplace Relations Amendment (Work Choices) Act 2005*, though with two major alterations. The amended provisions (now found in Division 3 of Part 12 of the WR Act) explicitly required applications to make reference to a comparator group of employees. In addition, the AIRC was excluded from hearing applications if the effect of the order sought would be to vary a minimum pay rate set for either award-covered or award-free employees under Division 2 of Part 7 of the Act.

In practice, few applications were ever made under the 1993 provisions, and no orders were ever issued, whether before or after the Howard government's amendments. In part, this was because of the difficulty of establishing that any disparity in earnings was the product of some form of 'discrimination': see eg *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (1998) 94 IR 129; *Automotive, Food, Metals Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (1999) 97 IR 374. Both the 1993 provisions and the cases brought under them are discussed in more detail in section A.5, together with the 1996 and 2005 amendments.

3.1.3 The Equal Remuneration Principles in New South Wales and Queensland

During the period that the 1993 federal legislation was in force, there was a much greater degree of activity in tackling gender pay inequity at State level, notably in New South Wales and Queensland.

Section 23 of the Industrial Relations Act 1996 (NSW) requires the New South Wales Industrial Relations Commission to ensure that all new State awards provide 'equal remuneration and other conditions of employment for men and women doing work of equal or comparable value'. This provision prompted a major inquiry into pay equity by the Commission. In her report (Glynn 1998), Glynn J found evidence of significant undervaluation of work in a number of female-dominated industries or occupations (as well as one male-dominated occupation – public sector geoscientists). Although her recommendations for legislative amendments were ignored, the report did lead to the adoption of an Equal Remuneration Principle (ERP), as part of the Commission's wage-fixing principles: *Re Equal Remuneration Principle* (2000) 97 IR 177. This was subsequently used

to identify and correct significant undervaluation of work on the part of public sector library staff and childcare workers, resulting in sizeable wage increases for the workers concerned.²²

In Queensland, a similar report from the Queensland Industrial Relations Commission (Fisher 2001) was more successful in prompting legislative amendments, in the form of the Industrial Relations Amendment Act 2001 (Qld). As a result, the Commission is obliged under the Industrial Relations Act 1999 not just to ensure that awards provide for equal remuneration for work of equal or comparable value (s 126(e)), but to refuse to certify workplace agreements if they do not conform to that principle or disclose that steps are being taken to implement the principle (ss 156(1)(l),(m), 193(b), 203(7)). In contrast to the position in New South Wales, the term 'remuneration' is specifically defined for these purposes (in Schedule 5) to include over-award or over-agreement benefits – that is, benefits provided by an employer in excess of those required as a minimum by the relevant industrial instrument.

As in New South Wales, the Queensland Commission has formally adopted an ERP: see *Equal Remuneration Principle* (2002) 114 IR 305. This has led to significant wage increases for the likes of dental assistants and childcare workers.²³ In *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19 it was also used to secure wage rises for a wide range of community services workers covered by the Queensland Community Services and Crisis Assistance Award. The Commission accepted that existing wage rates in the sector were significantly undervalued, especially when compared to the outcomes from enterprise bargaining in local government and the Queensland Public Service.

What is notable about the New South Wales and Queensland ERPs is that neither requires applicants to demonstrate evidence of sex-based discrimination; it is sufficient that the work in question is shown to be undervalued. Nor do the ERPs require that applications demonstrate undervaluation by way of reference to explicit comparator groups. Undervaluation is not explicitly defined, but the Queensland ERP lists the features of an occupation or industry that may be indicators of undervaluation. These include whether the work has carried a female characterisation, the industrial features of feminised industries and occupations, and whether sufficient and adequate weight has been placed on the skills and responsibilities typically exercised in feminised work. Both ERPs allow an assessment that existing rates of pay may not have been properly set, and provide the capacity for the tribunal to assess the current value of the work.

A distinguishing feature of the Queensland case law is that the Commission has, in some instances, included an Equal Remuneration Component in addition to increases to award rates. These components have been awarded where the Commission was of a view that increases in minimum award rates would not sufficiently address the undervaluation established by the applicants, because of the typical inability of workers in the relevant sector to secure higher wages through enterprise bargaining.

The scope and effect of the ERPs in New South Wales and Queensland have been significantly limited by changes to the configuration of labour law regulation in Australia. After the Work Choices

²² See *Re Crown Librarians, Library Officers and Archivists Award Proceedings* (2002) 111 IR 48; *Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290.

²³ See *Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch)* (2005) 180 QGIG 187; *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association* (2006) 182 QGIG 318.

amendments took effect on 27 March 2006, section 16 of the amended WR Act precluded most State or Territory industrial laws from applying to federal system employers, including all 'constitutional corporations' (that is, trading, financial or foreign corporations). Section 16(1)(c) specifically extended this exclusion to laws allowing a court or tribunal to make an order in relation to equal remuneration.²⁴ The exclusion has been retained under section 26(2)(d) of the Fair Work Act. Indeed its effect is now broader than it was under the Work Choices regime. This is because of the decision by all States except Western Australia to co-operate with the Commonwealth in expanding the coverage of the federal regime (Creighton & Stewart 2010, ch 5). The Fair Work Act now applies to in relation to the employees of 'national system employers'. These comprise:

- all non-government employers (with the exception of non-constitutional corporations in Western Australia, such as sole traders, partnerships or corporations that do not have substantial trading or financial activities);
- all Commonwealth, Victorian and Territory government agencies; and
- local government employers in Tasmania (and possibly some in Western Australia, if they qualify as constitutional corporations).

Hence the only employers in New South Wales and Queensland that can now be the subject of equal remuneration proceedings under the provisions described above are to be found in the State and local government sectors. That said, there are transitional provisions in the federal legislation to ensure that employees who have been shifted into the federal system as a result of the 2005 or 2009 changes retain the benefit of State pay equity orders that had previously been made: see Fair Work (Transitional Provisions and Consequential Legislation) Amendment Act 2009 (Cth) Schedule 3 Part 8, and Schedule 3A Part 4 Division 1A.

3.2 The Fair Work Act: introduction

Unlike the New South Wales or Queensland provisions described above, the Fair Work Act does *not* require the Fair Work Commission to ensure equal remuneration under awards and enterprise agreements. Nor is the goal of pay equity made an object of the Act as a whole.²⁵ But the Act does deal explicitly with the issue of equal remuneration in two distinct ways: as part of the principles relating to the safety net of minimum wages and conditions set under the Act; and by providing more specifically for the making of equal remuneration orders. It also obliges the Commission, in exercising any of its functions, to take into account 'the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination'. The relevant provisions of the Act are set out and analysed in the next two sections.

In theory, it would also be possible for a lack of equal remuneration to be raised under the 'general protections' against wrongful or discriminatory treatment in Part 3-1 of the Act. Specifically, it might be argued that an employer was in breach of section 351, which prohibits 'adverse action' against

²⁴ Section 208(4) of the amended WR Act did seek to preserve the effect of phased wage increases flowing from pay equity-related adjustments made by State industrial tribunals prior to 27 March 2006, even where those increases were due to take effect after that date. But this may not have picked up increases, including ERC increases, that may have been decided upon before the cut-off date, but that were not formally enshrined in an order until afterwards: see Connolly et al 2012: 121.

²⁵ Compare the recommendations of the House of Representatives Standing Committee on Employment and Workplace Relations 2009: 127.

an employee because of (among other possible reasons) their sex. But for reasons explained in section A.6, such individual complaints are likely to be rare.

A further point to note about the Fair Work Act, by way of introduction, concerns its coverage. Mention has already been made of the 'national system employers' to which the Act applies: see section 3.1.3. It should also be understood that the provisions discussed in the next two sections are only applicable to those employers in relation to their *employees*. The term 'employee' is not fully defined in the Act. Instead, it is interpreted by reference to certain well-established common law principles: see eg *Cai v Rozario* [2011] FWA 8307; *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677. Under those principles, a distinction is drawn between employees who work for someone else's business or organisation pursuant to a written or verbal contract of employment, and those who perform work on some other basis, for example as an 'independent contractor' supplying services as part of their own business (see Creighton & Stewart 2010, ch 7). A contractor cannot be covered by an award or an equal remuneration order made under the Fair Work Act, with just one exception. There are special provisions in Division 2 of Part 6-4A that deem a 'TCF outworker' to be an employee for most purposes under the Act, including Part 2-7. A TCF outworker is defined by section 12 to mean a person who performs work in the textile, clothing and footwear industry at residential premises, or at other premises not conventionally regarded as business premises.

3.3 Wage fixing and work value claims

Section 134(1) sets out a 'modern awards objective' that is to guide the Commission in exercising various functions or powers relating to modern awards. The overall objective is to 'ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions'. Among other things, the Commission must take into account '(e) the principle of equal remuneration for work of equal or comparable value'.

The Dictionary in s 12 indicates that the phrase 'equal remuneration for work of equal or comparable value' is defined in section 302(2). That subsection reads as follows:

Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.

Although section 302(2) is part of the equal remuneration order provisions in Part 2-7 discussed below, this definition has effect throughout the Fair Work Act, by reason of its inclusion in the Dictionary and the absence of any indication that it is to operate only in relation to Part 2-7.

There is a further reference to 'the principle of equal remuneration for work of equal or comparable value' in section 284(1). This establishes a 'minimum wages objective' which is to guide the Commission in setting and adjusting minimum wage rates, whether as part of modern awards or through national minimum wage orders. Once again, the Commission is required to take account of the principle, as one of a number of factors, in establishing and maintaining 'a safety net of fair minimum wages'.²⁶

²⁶ Compare section 221(a) of the WR Act, as amended by the Work Choices legislation, which required the Australian Fair Pay Commission to 'apply the principle that men and women should receive equal remuneration for work of equal value' in exercising its minimum wage fixing powers.

To date, the issue of equal remuneration has not featured significantly in the annual wage rulings handed down by the Commission's Minimum Wage Panel, or indeed in submissions to the Panel by major stakeholders (Macdonald & Charlesworth 2013: 581–3). The Panel has placed only limited emphasis on the significance of minimum wage adjustments as a tool for promoting gender pay equity. For example, in *Annual Wage Review 2011–12* (2012) 222 IR 369 at [231] it observed that:

Given women are disproportionately represented amongst the low paid, an increase in minimum wages is likely to promote pay equity, although moderate changes in award rates of pay would be expected to have only a small effect on the overall differences in earnings between males and females

In its most recent decision, the Panel repeated this view, adding that 'there are other mechanisms within the Act, such as bargaining and equal remuneration provisions, which provide more direct means of addressing pay equity': *Annual Wage Review 2012–13* [2013] FWCFB 4000 at [484]–[485]. As in previous rulings it did also, however, cite the need to take account of the principle of equal remuneration for work of equal or comparable value as supporting the maintenance of 'consistent minimum rates', as opposed to taking 'an award-by-award approach to minimum wage fixation' (at [77]).

For completeness, it should be noted that the concept of work value adjustments is also formally recognised in the Fair Work Act. Sections 156(3) and 157(2) expressly allow modern award minimum wages to be varied outside the annual wage review, whether as part of the regular 4-yearly review of modern awards or in between those reviews, so long as this is done for 'work value reasons'. That phrase is defined in section 156(4) to mean 'reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following: (a) the nature of the work; (b) the level of skill or responsibility involved in doing the work; (c) the conditions under which the work is done'.

It may be significant that there is no reference in these provisions to any requirement that a particular *change* in work value be established, although historically (as noted earlier) that has been the basis on which federal and State tribunals have addressed the issue. There have certainly been some cases where it appears to have been assumed that the work value principles established in decisions such as *Re Child Care Industry (Australian Capital Territory) Award 1998* (Australian Industrial Relations Commission, PR954938, 13 January 2005) remain relevant in relation to the Fair Work Act: see eg *Construction, Forestry, Mining and Energy Union v Paper Australia Pty Ltd* [2011] FWA 4267 at [47]. But in *Re Master Builders Australia Ltd* [2012] FWA 62 at [57], Senior Deputy President Watson noted that it was 'not clear that the work value principles of the past apply automatically to work value in the context of s.157(2) of the Act' – although he did not need to decide the point.

3.4 Equal remuneration orders

3.4.1 The provisions of Part 2-7

Part 2-7 of the Fair Work Act deals with equal remuneration orders. Its central provision is section 302(1):

- (1) The [Fair Work Commission] may make any order (an **equal remuneration order**) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

As noted earlier, section 302(2) defines the phrase ‘equal remuneration for work of equal or comparable value’ to mean ‘equal remuneration for men and women workers for work of equal or comparable value’.

An equal remuneration order may be made on application by an employee to whom the order will apply, a registered trade union entitled to represent the interests of such an employee, or the Sex Discrimination Commissioner (s 302(3)). The Commission can only make an equal remuneration order if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value (s 302(5)).

In deciding whether to make such an order, the Commission must take into account any orders and determinations made by its Expert Panel (formerly the Minimum Wage Panel) in the annual wage reviews mandated by Part 2-6 of the Act, as well as the reasons given by the Panel for such decisions (s 302(4)). It is also obliged by section 578 (which applies to all functions or powers exercised by the Commission under the Act) to take into account:

- the objects of the statute;
- ‘equity, good conscience and the merits of the matter’; and
- ‘the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of [various grounds including sex]’.

An equal remuneration order may increase rates of remuneration, but must not decrease them (s 303). Hence, as the Explanatory Memorandum for what was then the *Fair Work Bill 2008* confirms, the Commission could not ‘reduce the higher rates of remuneration of a male (or predominately male) comparator group to bring the rates into line with the lower rates of remuneration of female employees subject to the application’ (para 1196). However, any increases may be phased in, where the Commission considers that it is ‘not feasible’ to provide for equal remuneration with immediate effect (s 304). Section 306 makes it clear that an order will override any term of a modern award, enterprise agreement or Commission order that is ‘less beneficial’ to an affected employee. The same is true in relation to any ‘old’ awards, agreements or pay scales that remain in effect from previous legislation (*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* Sch 10 item 3).

Section 305 provides that an employer must not contravene a term of an equal remuneration order. Since a note to this provision indicates that it is a ‘civil remedy provision’, that means that it is enforceable under the provisions of Part 4-1 of the Act. A corporate employer breaching an equal remuneration order could be required, in court proceedings, to pay a penalty of up to \$51,000 per breach, while an unincorporated employer could face a fine of up to \$10,200 (ss 539, 546). Orders could also be made to redress the effects of the breach, most obviously by rectifying any underpayment to affected employees (s 545). Similar penalties or orders could also be made against anyone else knowingly involved in the employer’s breach (s 550), such as a director, manager or external adviser.

Having set out the relevant provisions of Part 2-7, in the sections that follow we consider various aspects of their potential scope and operation. Where relevant, we refer to the observations of the Full Bench of what was then FWA in the *SACS* case, although that case is considered in more detail in the next chapter.

3.4.2 A more expansive concept of equal remuneration

The Part 2-7 provisions clearly embody a broader conception of equal remuneration than under the equivalent provisions in the WR Act, and before that the Industrial Relations Act 1988. As noted previously, those provisions effectively defined equal remuneration to mean equal rates of remuneration for work of equal value, established without discrimination based on sex. By contrast, the Fair Work Act not only refers to work of equal *or comparable* value, but makes no mention of any need to establish discrimination. In *Re Equal Remuneration Case (2011) 208 IR 345* ('*ER Case No 1*') at [226], the Full Bench agreed that this was 'a significant departure' and accordingly noted that 'decisions under the [Workplace Relations] Act are not directly applicable, being made under provisions limited to equal remuneration for work of equal value'.

The intention that Part 2-7 should have a broader operation was also confirmed in paragraphs 1191 and 1192 of the *Explanatory Memorandum for the Fair Work Bill 2008* (Explanatory Memorandum):

The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.

The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.

The one question mark here concerns the apparent emphasis in the first paragraph on the use of a comparator-based methodology. This is at odds with the approach adopted by the New South Wales and Queensland tribunals, which as noted earlier have rejected any need to establish undervaluation by reference to explicit comparator groups. However, it should be remembered that the Explanatory Memorandum is not part of the Act, but merely an aid to interpretation: see Acts Interpretation Act 1901 (Cth) s 15AB. Moreover, it is not clear that the passage in question was intended to express any kind of limitation on the operation of Part 2-7.

At any event, in *ER Case No 1* the Full Bench, while quoting the above passages from the Explanatory Memorandum with apparent approval, also made it clear that 'a male comparator group is not required' (at [234]). Various employer groups and State governments argued that it was implicit in the terms of Part 2-7, and especially section 302(1), that 'a comparison is required between work performed by women in a female dominated industry or occupation and work performed by men in a male dominated industry or occupation' (at [231]). In rejecting this approach, the Full Bench commented that although the existence of a 'valid male comparator group' might make it easier to demonstrate an absence of equal remuneration, the absence of such a comparator would not be fatal to a claim (at [232]):

The question is whether and how gender-based undervaluation is to be established. The existence of a valid male comparator group which receives higher remuneration than a female dominated group performing work of equal or comparable value is one way of demonstrating the need for an equal remuneration order. We do not accept that as a matter of logic it is the only way. The presence of a male

comparator group might make the applicants' task easier and the absence of such a group make the task relatively more difficult, but it does not follow that in the absence of a male comparator group the application must inevitably fail.

This point was underscored by the willingness of the Full Bench (as discussed in the next chapter) to find that gender-based undervaluation existed in the SACS sector, despite the applicants' decision not to point to a specific male comparator group.

The Full Bench also accepted (at [234]) that 'it is not necessary to establish that rates have been established on a discriminatory basis' in order to secure an equal remuneration order. But again, it stressed that the question of discrimination was far from irrelevant (at [233]):

The essence of a successful application is that the prevailing rates are discriminatory. Whether that discrimination is the result of a conscious act or course of conduct by a particular individual or individuals may be relevant in some cases—for example some cases involving a single employer. But we are dealing with a broad range of rates operating in a diverse industry spread throughout Australia. The idea that the great diversity of rates actually paid has been fixed in a consciously or unconsciously discriminatory way would be difficult to demonstrate and perhaps somewhat artificial. In the particular circumstances of this case, it seems unlikely that discrimination in that sense could play a significant role in deciding whether, for the employees concerned, there is not equal remuneration for work of equal or comparable value. On the other hand, where it can be shown that rates have been fixed on a discriminatory basis, that will be a clear indication of gender-based undervaluation. A case in which no predominantly male comparator group is relied upon can only succeed if the applicant establishes that the remuneration paid is subject to gender-based undervaluation.

This last sentence in particular emphasises that, whether or not an applicant chooses to put forward a male comparator, or to show some discriminatory conduct, it is not sufficient to establish that the relevant work is undervalued – the undervaluation must be based in some way on the gender of the relevant employees. It is notable, however, that the Full Bench did not stipulate any prescribed method by which applications should address this requirement (see section 4.5).

3.4.3 A discretionary power

In New South Wales and Queensland, as mentioned earlier, the State tribunals are required to *ensure* equal remuneration in awards and enterprise agreements. Under the Fair Work Act, by contrast, there is no such imperative. Section 302(1) states that the Commission *may*, not must, make an equal remuneration order. Although it cannot make an order unless it is satisfied that equal remuneration does not exist for the employees concerned, this is a necessary but not sufficient consideration for the exercise of what is framed as a discretionary power. So much was confirmed by the FWA Full Bench in *ER Case No 1* at [227]–[228].

Accordingly, the objective of equal remuneration in the Fair Work Act is merely one of a number of factors to which the Commission must have regard in setting and adjusting minimum rates of pay. It could accept that work was undervalued in a particular industry or occupation, yet choose to do nothing about it. This might, for example, be because of a concern about the economic implications of awarding wage increases: see eg *ER Case No 1* at [230], [274]. Or it might flow from a belief that to grant an equal remuneration order would have a 'chilling' effect on collective bargaining (including multi-enterprise bargaining) in the relevant sector.

As noted earlier, the Commission is obliged by section 302(4), in determining whether or not to make an equal remuneration order, to have regard to the wage-fixing principles established by its

own Expert Panel. It is not, by contrast, constrained by either the modern awards objective in section 134 or the minimum wages objective in section 284, since neither of those provisions applies in its terms to an exercise of power under Part 2-7. This was confirmed in *ER Case No 1* at [229], although the Full Bench added:

Nevertheless considerations related to the safety net, including the terms of modern awards, are apt to be taken into account pursuant to the object in s.3(f) of the Act. We are required, therefore, by s.578(a) to take into account, among other things, the need to ensure there is a safety net of fair, relevant and enforceable minimum terms and conditions.

Despite this comment, we believe it remains true to say that the Commission need not conceive of an equal remuneration order as being *part* of the ‘safety net’ of minimum terms and conditions under the Fair Work Act. That safety net, as section 3(b) makes clear, is provided by the NES, modern awards and national minimum wage orders.

A broader but related point concerns the balance struck by the Commission between its power to make equal remuneration orders and its obligation to act in accordance with the general objects in section 3 of the Act. These objects are broad-ranging but encompass the safety net of terms and conditions, an emphasis on enterprise-level bargaining, protections against unfair treatment and discrimination, and a direction towards economic prosperity and social inclusion.

Finally, it may be noted that while there is nothing in the Fair Work Act that requires the Commission to formulate an Equal Remuneration Principle to guide its determinations under Part 2-7, nor is there anything that forbids it either. Historically, conciliation and arbitration tribunals were willing to articulate principles to guide the process of setting minimum wage rates, or indeed sometimes other conditions of employment. These principles, which could be (and routinely were) modified in light of ongoing reflection and experience, provided valuable guidance to parties as to how certain claims should be presented, and how they would be judged. As noted earlier in the Chapter, and explored at more length in sections B.2 and B.3, the adoption of Equal Remuneration Principles has been integral to the operation of the pay equity regimes in New South Wales and Queensland.

In the *ER Case No 1* at [289] the Full Bench stated that:

We do not at this stage think it is desirable to issue a formal statement of principles in this case. To do so on the basis of one case only would be premature and run the risk of limiting the discretion available under Part 2-7. This decision, together with any other decision we make in these proceedings, will constitute a significant precedent in any event.

This plainly does not preclude the adoption of an Equal Remuneration Principle in future proceedings under Part 2-7, should a Full Bench of the Commission be so minded.

3.4.4 ‘Remuneration’

An order under Part 2-7 must be directed to rates of ‘remuneration’. This is a term that is not defined in the Fair Work Act, although the Explanatory Memorandum suggests (at para 1190) that it ‘encompasses entitlements in addition to wages (ie, it encompasses wages and other monetary entitlements)’. This view is supported by case law on the use of the term in the context of termination of employment provisions. There it has been regarded as having a broader meaning than the word ‘wages’, extending to any form of ‘recompense or reward for services rendered’,

including 'non-cash benefits': see *Oliveri v Australian Industrial Relations Commission* (2005) 145 IR 120 at [25]–[26]; *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 at 81.

In *ER Case No 1* the FWA Full Bench discussed the option of employees in the SACS sector entering into tax-effective 'salary sacrifice' or 'salary packaging' arrangements. The Full Bench observed (at [244]) that it would not be 'appropriate to regard the possible benefits of salary packaging as equivalent to remuneration'. Taken in context, however, there was no suggestion that the kind of non-cash benefits typically associated with salary packaging – extra superannuation contributions, the provision of a motor vehicle, etc – could not qualify as 'remuneration' for the purpose of Part 2-7. Indeed the Full Bench was not discussing how far the term 'remuneration' might extend. Rather, it was rejecting an employer submission that the tax advantages from salary packaging should be 'taken into account in assessing the remuneration of employees in the industry' (at [243]). The Full Bench noted that only a third of employees in the industry took advantage of such arrangements, and that even then the benefits varied from individual to individual. It was for this reason, the uncertain nature of any tax advantages, that the Full Bench determined not to have regard to the availability of salary packaging.

At any event, it seems clear that an equal remuneration order can stipulate rates that are higher than the minimum rates set by a relevant award for the same employees. In other words, it can regulate over-award payments. This is apparent not only from the fact that the equal remuneration order provisions are separated from those relating to minimum rates of pay in Part 2-6 of the Act, but from the confirmation in section 306 that an order can override the terms of an otherwise applicable enterprise agreement.

3.4.5 Alternative remedies

3.4.5.1 Sections 721 and 724

Section 721(1) of the Fair Work Act provides that no equal remuneration order can be made under Part 2-7 if the Commission is satisfied that there is available to the relevant employees an 'adequate alternative remedy' that will ensure equal remuneration for work of equal or comparable value. This may be a remedy under 'a law of the Commonwealth (other than Part 2-7) or a law of a State or Territory'. The reference to Part 2-7 makes it clear that any other Part of the Fair Work Act may constitute a 'law of the Commonwealth' for this purpose.

The Commission is also barred by section 724(1) from dealing with an application if proceedings for an 'alternative remedy' to ensure equal remuneration, or against unequal remuneration, have been commenced under a federal law (again, other than Part 2-7), or a State or Territory law. Conversely, any application under Part 2-7 will itself have the effect of barring the applicant from commencing proceedings for an alternative remedy under any other law (s 724(3)). The exception in both cases is where the application in question is discontinued by the applicant, or fails for lack of jurisdiction (s 724(2), (4)). It is also made clear that the availability of (or application for) a remedy under an employment discrimination law that 'consists solely of compensation for past actions' does not constitute an alternative remedy (ss 721(2), 724(5)).

3.4.5.2 The meaning of 'adequate alternative remedy'

As to what might constitute an 'adequate alternative remedy' sufficient under section 721 to bar an application for equal remuneration order, there is little in the way of guidance from past equal remuneration proceedings. The provisions introduced in 1993 did also provide (in section 170BE of

the *Industrial Relations Act 1988*, and later the WR Act) that the availability of such a remedy would bar an application for an equal remuneration order. However although this provision was considered by a Full Bench of the AIRC in *Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor* (2002) 115 IR 358 (see section A.5.6), this was purely as to whether the availability to an individual employee of an action under anti-discrimination laws constituted an adequate alternative to pursuing an equal remuneration order of *general* application. The Full Bench resolved that it did not, a decision that is effectively now confirmed by section 721(2) of the Fair Work Act. The case was decided on fairly narrow grounds and was in any event concerned with a set of provisions which, as we have noted, embodied a narrower conception of equal remuneration than the present legislation.

One other possible source of guidance as to the meaning of 'adequate alternative remedy' lies in the case law that developed on the use of that term in the original federal unfair dismissal provisions, also introduced in 1993. The wording and context of the relevant provision (section 170EB of the Industrial Relations Act 1988) differ in certain respects from section 721 of the Fair Work Act, so that any comparison must be approached with caution. However in *Wylie v Carbide International Pty Ltd* (1994) 55 IR 326 at 330 Justice Keely of the Industrial Relations Court of Australia accepted that in determining whether a particular remedy could be regarded as 'adequate', it was appropriate to refer to the *Oxford English Dictionary* definition of that word as:

1. Equal in magnitude or extent; commensurate; neither more nor less ...
2. Commensurate in fitness; equal or amounting to what is required; fully sufficient, suitable, or fitting.²⁷

On that basis, it would be necessary to consider whether any possible alternative method of dealing with a pay equity concern could be considered 'commensurate' in effect to an application for an equal remuneration order.

On this point, it is worth noting a small but potentially critical distinction in the wording of sections 721 and 724. The latter bars an application under Part 2-7 if 'proceedings for an alternative remedy' to ensure equal remuneration have in fact been commenced and not discontinued. The test is not whether the other remedy represents an '*adequate* alternative', but merely whether it is an 'alternative'. The Explanatory Memorandum does not offer any explanation for the difference in language. But on ordinary principles of statutory interpretation, it must be assumed that Parliament intended to apply a different and less onerous test under section 724. In other words, it is conceivable that while the mere possibility of seeking a particular remedy might not be enough to bar an application for an equal remuneration order, section 724 might preclude any attempt to pursue that remedy *and* seek an order under Part 2-7.

3.4.5.3 Possible examples

In considering what kind of remedy might be caught by sections 721 and 724, a number of possibilities may be mentioned.

One that may be discounted fairly quickly is the possibility of making an enterprise agreement under Part 2-4 of the Act. It is true that a group of female or predominantly female workers may seek to negotiate higher rates of pay through such an agreement. But even if enterprise bargaining

²⁷ This approach was subsequently cited with apparent approval by Chief Justice Wilcox and Justice Keely in *Liddell v Lembke* (1994) 56 IR 447 at 456.

is a meaningful possibility for a given group, or indeed has happened before in the relevant industry, it is hard to see this option as any kind of an 'alternative' to an equal remuneration order, let alone an adequate alternative. There is nothing to require an employer to reach agreement or to pay any attention to issues of gender pay inequity. An employer may also demand trade-offs for any pay increase that may diminish the effect of any gains to the employees in question.

It is true that under Division 9 of Part 2-4 of the Act, the Commission may issue a 'low-paid authorisation' in relation to a proposed multi-enterprise agreement for a group of unrelated enterprises that employ 'low-paid' workers.²⁸ In such a case, the Commission may take various steps under section 246 to facilitate bargaining; and if no agreement results, it may impose what is effectively an arbitrated outcome by making a 'low-paid workplace determination' under Division 2 of Part 2-5. In theory, such a process could be used to pursue equal remuneration for a feminised sector. But even leaving aside the many requirements that must be satisfied to obtain a determination, and the fact that none has been sought (let alone made) in the first four years of the Act's operation, there is again nothing in these provisions to ensure a focus on equal remuneration.

It is particularly unlikely that the mere availability of enterprise bargaining under Part 2-4 could be sufficient to trigger section 721, since by definition the option of making an agreement is always open – and would thus, if considered as an 'adequate alternative', mean that *no* group of workers could ever seek an equal remuneration order.

This last point applies also to the prospect that the mere possibility of seeking the establishment of, or improvements in, award rates of pay would invoke section 721. The very fact that the Commission's power to grant equal remuneration orders is conferred under a separate part of the Act (Part 2-7) to those dealing with modern awards (Part 2-3) or annual wage reviews (Part 2-6), and is subject to separate criteria and objects (as noted above in section 3.4.3) militates against any suggestion that award-covered employees cannot be the subject of a claim for an equal remuneration order. The fact that section 306 explicitly provides that such an order overrides the effect of any less beneficial provision in an award (or an enterprise agreement) simply strengthens the view that Parliament's intent in creating Part 2-7 was not to treat these various types of instrument as mutually exclusive forms of regulation.

That said, the specific possibility of the Commission being asked under sections 156(3) or 157(2) to vary award rates of pay on 'work value' grounds raises more substantial issues. As we explore later in section 6.3, the concept of 'work value' is necessarily engaged by any claim that equal remuneration for work of equal or comparable value is lacking. Many of the New South Wales and Queensland cases considered in sections B.2 and B.3 were indeed pursued as both equal remuneration *and* work value claims.

The relationship between the two types of claim may in the end depend on what is required in each case to obtain redress. Traditionally, work value claims have required proof that something about the relevant work has *changed* since it was last valued by an industrial tribunal (see section 3.1.1). That type of work value claim is relatively easy to distinguish from a claim for equal remuneration, since even if the latter claim is pursued on the ground that the work in question has been undervalued, the attempt to establish that may have nothing to do with any changes that have occurred, but rather rest on the assertion that the work has *never* been properly valued.

²⁸ The term 'low-paid', it may be noted, is not defined in the Act. For discussion of the low-paid bargaining provisions, see Naughton 2011.

As pointed out in section 3.3, it is at least possible that the new work value provisions in the Fair Work Act may be interpreted not to require any demonstration of a change in value. If so, the strength of the point just made may be diminished but noting also that in eras where a work value case did not require simply that applicants demonstrate a change in work value, but rested on applicants seeking a reassessment of work value, there is evidence that there was insufficient attention to gender-neutral assessments of work value and the valuation of feminised work (see sections B.2.1, B.3.1). Nonetheless, in the *SACS* case the Full Bench of FWA pointed out that the equal remuneration provisions in the Fair Work Act 'are directed not at undervaluation itself, but at undervaluation which is gender-based' (*ER Case No 1* at [266]). This supports the view that the two types of claim are not to be regarded as 'commensurate' in nature.

If that is correct, it would mean that the bare possibility of a work value claim should not be treated under section 721 as barring an application for an equal remuneration order. But given the different (and lower) standard required under section 724, it does not necessarily follow that an applicant could *simultaneously* pursue both types of claim before the Fair Work Commission, as was generally done in the New South Wales and Queensland pay equity proceedings. Depending on the framing and nature of the work value claim, it is certainly possible that it might be treated as a sufficient 'alternative' as to preclude the granting of relief under Part 2-7.

4 The SACS case

The SACS case was the first major test of the equal remuneration order provisions in Part 2-7 of the Fair Work Act. It was instituted by the Australian Services Union (ASU) and four other unions, to extend the benefit of an equal pay case that had already been successfully run in the Queensland Industrial Relations Commission (QIRC) in relation to the social and community services (SACS) sector.

The Queensland case, *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19, is summarised in more detail section B.3.5. It is sufficient here to note that Commissioner Fisher found that the work of the mainly female workforce covered by the Queensland Community Services and Crisis Assistance Award had been significantly undervalued. She granted substantial increases in the minimum rates set by the Award, together with a 1 per cent 'Equal Remuneration Component'. This last was in recognition of the difficulty for workers in the sector to access higher rates of pay through enterprise bargaining. The decision, however, did not affect constitutional corporations in the SACS sector, since by that stage the Work Choices reforms had ensured that all employers in that category were subject to federal rather than State law (see section 3.1.3). By definition too, the Queensland ruling was of no effect outside the State.

The federal claim was itself ultimately successful, though not immediately. In May 2011 a Full Bench of FWA (as it then was) determined that work in the SACS sector was undervalued on a gender basis. But it also sought further submissions as to how this might be remedied, and in particular as to the *extent* to which the undervaluation was gender-based: *Re Equal Remuneration Case* (2011) 208 IR 345 ('*ER Case No 1*'). A further decision was handed down in February 2012, determining the remedy to be awarded: *Re Equal Remuneration Case* (2012) 208 IR 4465 ('*ER Case No 2*'). The terms of an equal remuneration order were settled in June 2012: *Re Equal Remuneration Case* (2012) 223 IR 410.

The order granted significant wage increases for most (but not all) employees performing work covered by the Social, Community, Home Care and Disability Services Industry Award 2010.²⁹ These increases ranged from 19 per cent to 41 per cent, depending on classification, to be phased in over eight years. The decision also provided for a cumulative 4 per cent loading, again phased over eight years, on the basis that there was a limited prospect of enterprise bargaining for employees covered by the award.

This Chapter describes the conduct of the SACS case, focusing in particular on the ways in which the applicants sought to demonstrate undervaluation, both before and after the tribunal's initial ruling.

4.1 The application

In March 2010, an application was lodged with FWA, seeking the making of an equal remuneration order for the social, community and disability services industry: see Application for Equal Remuneration order by Australian Municipal, Administrative, Clerical and Services Union, FWA Form F1, 11 March 2010. It was made by the ASU, together with the Health Services Union, the

²⁹ The order eventually made in the June 2012 decision applies to employees in the classifications listed in Schedule B of the 2010 award (social and community services employees) and Schedule C (crisis accommodation employees). The order does not apply to those covered by Schedule D (family day care employees) or Schedule E (home care employees).

Australian Workers' Union of Employees (Queensland), United Voice (UV) and the Australian Education Union.

The proposed order contained a new set of wage and classification structures for various types of work in the industry, to replace those applicable under (among other instruments) the Social, Community, Home Care and Disability Services Industry Award 2010. The application asserted that work in the sector, predominantly performed by women, was 'emotionally and intellectually demanding' (p 53), yet significantly undervalued (p 55):

The remuneration set by the 2010 Award, and in particular the schedule of wage rates, was influenced by the history of regulation in the industry. The history of award regulation in the industry includes the following features:

- a. Award coverage in the industry is relatively new;
- b. There has been an historical prevalence of low wage awards;
- c. First awards were set without proper valuation of the work;
- d. Where work value increases have been awarded they have not taken into account the historical undervaluation of the work; and
- e. Award stipulated allowances that are inherently low, and/or are low compared to similar or comparable work-related allowances in other industries.

The application also noted that a further factor contributing to the undervaluation of work in the industry had been (p 55):

a lack of opportunity to bargain at the enterprise level due to barriers to enterprise bargaining. Those barriers include:

- a. a low level of unionisation in the workplace,
- b. the number and diversity of small workplaces,
- c. workplaces have only small numbers of employees,
- d. the nature of the work and the priority commitment of workers to the needs of their disadvantaged clients, rather the workers' own rights,
- e. employers comprising volunteer boards with little if any experience in human resource management or industrial relations, and
- f. there being little time available to workers to complete their work, and a lack of excess time to address employment or industrial issues.

It was further noted that 'SACS employees at all levels, and particularly at levels where employees hold tertiary and vocational education qualifications, are paid significantly less than other employees performing similar or comparable work, for example in the state and local government sectors' (p 56). In order to address that problem, the application proposed that employees in the sector receive the rates of pay determined in the QIRC's pay equity ruling, where they were not already applicable.

4.2 The ASU/Commonwealth agreement

During proceedings in the Australian Industrial Relations Commission for the modernisation of awards in the SACS sector, it was revealed that the federal government and the ASU had reached a formal agreement in relation to the equal remuneration claim: see Australian Government and Australian Services Union, 'Heads of Agreement', 30 October 2009 (available at http://www.airc.gov.au/awardmod/databases/social/Submissions/ASU_social_ED2.pdf, as Attachment 5). This committed the government to provide assistance by way of presenting evidence and research on relevant aspects of the sector. It also proposed the development of an agreed statement of facts, something that was seen to have been a useful feature in many of the pay equity cases brought under the New South Wales and Queensland systems, in helping to limit arguments. At the same time, the government reserved its position as to 'the appropriate quantum and funding arrangements of any pay increase' (para 5).

For its part, the ASU acknowledged in the agreement that 'there would be very significant budgetary impacts to state, territory and Commonwealth governments in the event of any significant increase to the current rates of pay of SACS workers' (para 8).³⁰ Accordingly, it indicated it would support an application by the Commonwealth for any wage increases to be delayed by at least six months to allow appropriate funding arrangements to be put in place, and then phased in over a period of at least four and half years, at least in the case of workers outside Queensland.

4.3 Preliminary ruling

The application lodged with FWA made no mention of asking the tribunal to establish an Equal Remuneration Principle. However, the agreement between the federal government and the ASU indicated that the government would 'support the development of an appropriate equal remuneration principle for the federal jurisdiction drawing on the Queensland Equal Remuneration Principle of 2002 and explanatory notes and relevant New South Wales jurisprudence' (para 5).

When the ASU lodged its application, it proposed that the proceedings be divided into two streams: the first dealing with the operation of the equal remuneration provisions under the Fair Work Act, and the second dealing with the substance of the application. The ASU submitted that this course was desirable, as a preliminary decision on the operation of the equal remuneration provisions would provide the parties with guidance concerning the approach that FWA would adopt in addressing the merits of the application. However, the Full Bench convened to hear the application determined not to separate the proceedings, as it was not convinced that this course would result in substantial efficiencies. It also indicated its preference for addressing the operation of the relevant provisions with a factual context before it: *Equal Remuneration Case* [2010] FWAFB 3339.

4.4 Submissions

The ASU's primary contention was that FWA should follow the approach to undervaluation taken in New South Wales and Queensland. This would involve a two stage process. The first step involved establishing that the SACS sector was female dominated, that work in the sector was undervalued,

³⁰ Many employers in the SACS sector deliver public services under contract to federal, State or Territory agencies, and the level of government funding for these services has a direct impact on wage levels: see *ER Case No 1* at [207]–[224], [270]–[272].

and that the undervaluation was referable to the sector being female dominated. The second stage involved addressing the undervaluation by way of remedy.³¹

In seeking to demonstrate that the work was undervalued, the ASU led evidence consistent with the marker points of undervaluation in the Queensland Equal Remuneration Principle. The evidence consisted of testimony from academic and professional experts, union officials and individual employees.³² This evidence, much of which contained a detailed attention to work functions and responsibilities, sought to establish that the services delivered by employees in the industry involved caring work which has a female characterisation. The ASU contended that the characterisation of the work as caring work can lead to undervaluation of the work, by failing to value or account for the complexity of skills that are required to deliver services. On this point the ASU asserted that there had been insufficient and inadequate assessments of work value in the industry, noting also that there had been changes to work in recent years such as increased compliance requirements.

In addition to the evidence led by the applicants, the tribunal visited various establishments in the SACS industry, as well as some State and local government establishments that provided similar services. These site visits 'assisted the Full Bench in gaining a better understanding of the nature and range of SACS industry services and the environments in which services are provided' (*ER Case No 1* at [182]). The proceedings were also in receipt of a comprehensive profile of workers in the social, community and disability services sector. This profile was prepared by the federal government, in accordance with the Heads of Agreement, and included in its submissions (*ER Case No 1* at [124], [225]). Further evidence was led by various employers and employer bodies, consisting of testimony from academics and senior managers in the industry (*ER Case No 1* at [183]–[188], Appendix B).

The application for an equal remuneration order was supported by a number of bodies, including the Australian Council of Trade Unions (ACTU), the Australian Council of Social Service, Jobs Australia, National Disability Services, the National Pay Equity Coalition and the Women's Electoral Lobby. A number of other employer associations also gave qualified support, as did some individual employers, though generally on the condition that any wage increases were appropriately funded by government.

Various employer bodies, however, opposed the application. These included the Australian Industry Group (Ai Group), the Australian Chamber of Commerce and Industry (ACCI) and Australian Business Industrial (ABI). Each outlined the disamenities that would occur if equal remuneration orders were used to circumvent the minimum wages and modern awards objectives and the award safety net. For example (at [83], [89]):

Ai Group contended ... that an equal remuneration order would undermine the stability and maintenance of the modern award safety net ... Making an order would also remove impetus for enterprise bargaining in the SACS industry, contrary to the objects of the Act. Modern award rates should not be aligned with

³¹ For details of this and the other submissions referred to below, see <http://www.fwc.gov.au/index.cfm?pagename=remuneration&page=introduction> (accessed 27 September 2013). The primary submissions are summarised in *ER Case No 1* at [17]–[144].

³² This evidence is summarised in *ER Case No 1* at [146]–[181] and Appendix A. For completeness, we note that one of the authors of this report gave evidence for the applicants.

the negotiated outcomes of enterprise or certified agreements, whether the agreements are in the public or private sectors.

... Ai Group submitted that gender pay equity is a complex issue and that we should not attempt to implement community-wide solutions, including taking into account government commitments in relation to funding, when making decisions about minimum wage cases ... Ai Group warned against job losses and reductions in services and the possibility of the outcome being pursued in other industries where the majority of employees are female.

Various employer bodies also cautioned FWA against adopting the approach utilised in Queensland, with ABI rejecting explicitly the prospect of equal remuneration orders being based on comparisons with occupations covered by bargained outcomes. The Ai Group further illustrated the concern of some peak employer organisations regarding FWA's approach to equal remuneration. In its primary submission, the Ai Group rejected the use of the equal remuneration provisions to initiate increases in award rates of pay. Noting that its primary submission might not be accepted, it identified an approach for FWA to adopt in addressing applications under Part 2-7, including that applications should make explicit reference to the work of comparators.

The Commonwealth encouraged FWA to determine an Equal Remuneration Principle within the scope of the Fair Work Act, but drawing upon the experience of the New South Wales and Queensland jurisdictions. Further, it contended that FWA could utilise a number of approaches to assess whether the work was undervalued, but should give consideration to a range of factors in determining a remedy should undervaluation be found.

The Queensland government made no direct submission on the merit of the application, but directed FWA to the experience in the Queensland jurisdiction of developing and applying an Equal Remuneration Principle. The submissions of the New South Wales and Victorian governments contended that the proper construction of Part 2-7 was that it required a comparison between the work of male and female employees in order to demonstrate that the objective of equal remuneration had not been met.

4.5 The May 2011 decision

A Full Bench of FWA handed down the first of the two major decisions in the proceedings in May 2011 (*ER Case No 1*). The bench was headed by the President, Justice Giudice, and also included Vice President Watson, Senior Deputy President Acton and Commissioners Harrison and Cargill.

The major features of this decision were a finding that the work was undervalued on a gender basis, and a direction to the parties to make further submissions on remedy. In doing so FWA revealed its approach, at this point, to Part 2-7 and its method for assessing whether there was evidence of gender-based undervaluation. As noted in the previous chapter, the Full Bench confirmed that its power to grant equal remuneration orders is a discretionary one, and there is no requirement for applicants to establish that rates of pay were established on a discriminatory basis (*ER Case No 1* at [226], [233]). The Full Bench did not specify that applicants were obliged to nominate a comparator group, and specifically noted that a male comparator group is not required to sustain an application (at [232], [234]). Additionally the Full Bench noted that there was not a specific benchmark of female employment required to enable an application for equal remuneration orders. In making this point the Full Bench noted that the case posed complexities due to the industry wide nature of the application and the diversity of the SACS industry (at [232], [277]).

The Full Bench adopted undervaluation as a means of assessing whether the objective of equal remuneration was met, but indicated its concern at what it described (at [245]) as the 'indicia approach' to demonstrating gender-based undervaluation originally formulated by the New South Wales Industrial Relations Commission in its Pay Equity Inquiry (Glynn 1998). The Full Bench noted that applicants simply identifying the features of undervaluation set out by the Inquiry, or in the Queensland Equal Remuneration Principle, would not necessarily have provided evidence of gender-based undervaluation. It commented (at [248]–[249]):

Many if not most of the indicia may in themselves be gender neutral. While the indicia may be indicative of gender-based undervaluation of work in some circumstances, they may also be observed in workplaces, sectors or industries which are mainly male or in which neither gender predominates. Many workers employed by a small employer are not union members and have low bargaining power. This may be so whether the workforce is predominantly female, predominantly male or neither. The applicants' approach may therefore tend to conceal some of the real causes of undervaluation by imputing a gender bias where none exists.

We do not think that the indicia approach was ever intended to be a prescriptive formula ... Even if all of the indicia are present it does not necessarily follow that gender-based undervaluation exists. Conversely, if none or only a minority of the indicia are present in a particular occupation or industry it does not necessarily follow that there is no gender-based undervaluation. The list of indicia is no more than a framework for considering whether there is undervaluation.

Nevertheless the Full Bench went on to use some of these marker points of undervaluation to consider the position in the SACS industry. Its findings in this regard operated as set of interlocking and reinforcing premises, leading to the conclusion that there was evidence of gender-based undervaluation. It recorded its view that the applicants had established that (at [253]):

- (a) much of the work in the industry is 'caring' work
- (b) the characterisation of work as caring work can disguise the level of skill and experience required and contribute, in a general sense, to a devaluing of the work
- (c) the evidence of workers, managers and union officials suggests that the work, in the SACS industry, again in a general sense, is undervalued to some extent, and
- (d) because caring work in this context has a female characterisation, to the extent that work in the industry is undervalued because it is caring work, the undervaluation is gender-based.

It noted that these conclusions were 'consistent with the evidence of academics and others in this case and with similar conclusions in the Queensland Equal Remuneration decision' (at [254]).

FWA did not make an immediate decision on remedy, but rejected the immediate and straightforward adoption of the rates in the Queensland award. This was in part because of various distinguishing features about the QIRC decision. It was based on an agreed statement of facts that included a concession by all parties that undervaluation existed, something contested by a number of parties in the federal proceeding (at 264)). It was conducted on the basis not just of the QIRC's Equal Remuneration principle, but on work value grounds. The FWA Full Bench considered that 'the [QIRC's] decision to award significant wage increases was not based solely on equal remuneration considerations', and that it was 'unclear what component or proportion was attributable' to the factor of gender (at [265]). It also believed that the decision was based, at least

in part, on local factors and comparisons that were not necessarily applicable to other parts of Australia (at [266]–[267]).

The Full Bench also expressed concern about creating a nexus between the minimum rates of pay in an award and paid or market rates, observing that the ‘distinction between minimum award wages and wages in other instruments, such as enterprise awards and agreements ... has long been observed in the federal system’, even if it had not always been a feature of wage fixation in States such as Queensland (at [260]).

In reaching a conclusion about the SACS sector, the Full Bench observed that if ‘consideration were only given to the position of the direct employers in the SACS industry ... it would be hard to ascribe any gender based reasons for salaries paid’, with ‘no evidence of a preference for one gender over another’ (at 278]). It added (at [279]):

It is also important that the employees chosen by the applicants as notional comparators are themselves likely to be mainly women. The applicants have not sought to establish unequal remuneration for men and women workers by a comparison between employees covered by the claim and a group of employees of a different gender. The fact that there are differences in general rates of remuneration between one workforce made up predominantly of women and another workforce made up predominantly of women may suggest that factors other than gender have contributed to the differences.

Despite these reservations, however, the Full Bench was satisfied that there was cause to intervene. As it noted (at [281]):

[T]here is a large gap in many cases between the rates paid in the SACS industry and those paid in state and local government. To the extent that the gap is gender-based we should take action to correct it if we can. This requires an examination of the causes or probable causes of the differences in rates.

Its formal conclusion was as follows (at [285]):

We record our view, reached on the material before us, that for employees in the SACS industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with state and local government employment.

The applicants were directed to make further submissions on remedy, including specifically the extent to which the undervaluation was gender-based, though without any indication as to what kind of evidence might be required for that purpose (at [286]). The tribunal made itself available to facilitate conciliation between the parties to explore the scope for agreement (at [295]).

4.6 The Joint Submission on remedy

In November 2011, the Gillard Government announced two billion dollars of funding to assist the resolution of gender pay equity in the SACS industry. This funding would allow the Commonwealth to ‘fund its share of any wage increases’ awarded as a result of the equal remuneration proceedings. Included in the announcement was a commitment from the Commonwealth to future Joint Submissions with the applicants on the question of remedy (Gillard 2011).

This development brought a change to the ASU’s position on remedy. In submissions made in June 2011, the ASU had contended that all of the undervaluation was gender-based. This was a position that stood some way from that of the federal government, which assessed that at this point

the ASU had not addressed the requirement to assess the extent to which undervaluation was gender-based.³³ In the wake of the funding announcement, however, the applicants and the Commonwealth formulated an 'agreed outcome' which was put to FWA on 17 November 2011 by way of a joint submission: see *Equal Remuneration Case*, 'Joint submission of the Applicants and the Australian Government on remedy', 17 November 2011 ('Joint Submission').

4.6.1 Identifying the extent of gender based undervaluation

The Joint Submission addressed the proportion of undervaluation attributable to gender at each level of the proposed classification structure in the Social, Community, Home Care and Disability Services Industry Award 2010. This approach was prefaced by submissions noting that 'the task of ascertaining the degree of gender-based undervaluation should not be made so technical and difficult as to hinder the granting of relief when it is clearly warranted' (at [2.25]).

The Joint Submission addressed the task of quantifying gender-based undervaluation in two distinct ways. The first involved taking FWA to the established research record concerning persistent gender-based wage inequities in the Australian labour market. Typically these econometric studies examine earnings differentials between women and men, and through regression analysis assess which proportion of the earnings differentials can be explained by a vector of industry, workforce or productivity characteristics. These characteristics include education, training and experience. That part of the earnings gap which cannot be explained by factors other than gender, typically called the unexplained earnings gap, is held to indicate adverse treatment.³⁴ The Joint Submission, drawing on research tracing developments in these studies and their findings, drew attention to the significant, persistent and unexplained GPG between men and women (at [2.31]).

The second approach utilised by the ASU and the federal government underlined the complexity of the test set by the Full Bench. For each classification and pay point the Joint Submission calculated the undervaluation attributable to gender and the percentage wage increases that would be required to achieve gender neutral wage outcomes. To illustrate this process, we have replicated the steps relied upon in the Joint Submission utilising the Level 3, Year 1 wage rate (Table 4.1). This same approach was followed for the eight classification levels in the 2010 modern award, which span twenty five pay points. The data showed that there were potentially two courses open to FWA. It might determine percentage increases that would align the rates of pay in the modern award with the public sector comparator. Alternatively, it could fix percentage increases that would align the rates of pay in the 2010 modern award to the Queensland Community Services and Crisis Assistance Award.

³³ See *Equal Remuneration Case*, Applicants' Submissions on Remedy, 22 June 2011 at [22]; *Equal Remuneration Case*, Submission of the Australian Government, 8 July 2011 at [3.3]–[3.7].

³⁴ The type of methodology used in these studies is well explained in Cassells et al 2009b: see also section 5.3.1.

Table 4.1: Method relied upon by the Joint Submission to formulate a remedy

Modern Award classification and rate	\$39,042.43
Public sector comparator rate (based on an average of all applicable public sector industrial instruments)	\$49,239.50
Difference between SACS Modern Award and public sector comparator (Total Undervaluation)	\$10,197.07
% undervaluation attributable to gender (based on analysis of caring work by Junor and Briar)	89%
Undervaluation attributable to gender	\$9,075.39
Gender neutral wage outcome (SACS Modern Award rate plus undervaluation attributable to gender)	\$48,117.82
% increase from modern award to achieve gender neutral wage outcomes	23%
% increase from modern award to achieve Queensland SACS rates	20%
Queensland SACS rate	\$46,892

Source: *Equal Remuneration Case, ASU Exhibit 141*

The Joint Submission justified this approach in the following terms (at [2.9]):

The method the Government and the applicants propose in this submission first identifies differences in the value of comparable work nationally, by reference to appropriate public sector comparator rates, and then proposes a means of ensuring that, for SACS workers nationally, there will be equal remuneration for work of comparable value. In this way the Bench is able to ensure that there will be equal remuneration for the employees to whom the [equal remuneration order] proposed by this application will apply, as required by s. 302(1).

The approach of the Joint Submission in attributing a proportion of undervaluation to gender involved the use of ‘caring work’ as a proxy for gender-based undervaluation. Critical here was the centrality of caring work to the Full Bench’s May 2011 decision that work in the SACS industry was undervalued. The Joint Submission relied on a study which assessed the degree of care work at each level of the modern award classification scale (Junor and Briar 2011). Care work was defined to include both direct and indirect care work. *Direct care work* was considered to mean being available in person to assist and work with clients individually or in groups. It included: working face to face with clients, for example in counselling or in providing assistance with daily living; general oversight of vulnerable clients in day care or residential care settings; making phone calls to or on behalf of clients; providing mediation/advocacy in situations involving clients and/or social, medical, legal providers and authorities; and keeping clear, detailed, accurate and easily accessible case notes. *Indirect care work* enables the direct work to occur and to be as effective as possible. It can include program planning, creating training manuals or programs to deal with recurring problems, peer supervision, protecting staff from trauma or attack and providing as safe and healthy a work environment as possible. It also includes receiving or providing on-the job training or educating oneself about the causes of the problems encountered by clients.

4.6.2 The proposed wage increases

The Joint Submission proposed an equal remuneration order based on the percentage increases that would be required to match the rates in the Queensland SACS award, rather than the

percentage increases that would align the rates to the public sector comparator. The increases would operate as a separate order identifying percentage increases to the rates in the modern award, as opposed to a direct variation to the modern award rates. This approach reflected earlier statements by the Full Bench concerning the preservation of award relativities in the modern award (*ER Case No 1* at [285]). The equal remuneration order proposed by the Joint Submission provided for wage increases to be phased in over six years with a cumulative annual loading of one per cent over the first four years of the implementation period, with the loading a recognition of the impediments to bargaining in the industry (at [3.17]).

The decision by the parties to the Joint Submission to base their proposed equal remuneration order on the Queensland SACS Award, rather than the nationwide public sector comparator, appeared to lie in an assessment that the Full Bench would not be amenable to the public sector nexus. The choice of reference guide was important not only due to the assessment of its likely acceptance but also because each provided for different percentage increases, particularly in the more highly skilled classifications. These differences are highlighted in Table 4.2. While the percentage increases are broadly comparable for Classification Levels 2 through 3, the public sector comparison yielded higher increases from Classification Level 4 onwards. In determining to utilise the percentage increases based on the Queensland SACS Award, the Joint Submission noted that 'the final order may not reflect the full extent of the gender undervaluation identified at all levels of the modern SACS award' (at [3.3]). Further, the Joint Submission validated the reference guide provided by the Queensland SACS award on the basis that rates in the Queensland award had been set as a result of an equal remuneration order, and that the classifications in the Queensland SACS Award were almost identical to the federal SACS modern award (at [2.59]).

Table 4.2: Comparison between proposed increases based on public sector comparator rates and Queensland SACS Award

SACS modern award classification	% increases to match nationwide public sector comparator rates	% increases to match Queensland SACS Award
Level 2 Year 1	21	18
Level 2 Year 2	21	18
Level 2 Year 3	20	19
Level 2 Year 4	20	20
Level 3 Year 1	23	20
Level 3 Year 2	24	22
Level 3 Year 3	24	22
Level 3 Year 4	27	23
Level 4 Year 1	36	28
Level 4 Year 2	38	27
Level 4 Year 3	38	28
Level 4 Year 4	37	29
Level 5 Year 1	43	33
Level 5 Year 2	43	33
Level 5 Year 3	44	33
Level 6 Year 1	37	36
Level 6 Year 2	42	36
Level 6 Year 3	40	35
Level 7 Year 1	48	38
Level 7 Year 2	50	38
Level 7 Year 3	50	38
Level 8 Year 1	53	41
Level 8 Year 2	54	41
Level 8 Year 3	52	41

Source: *Equal Remuneration Case, ASI Exhibit 141*

4.7 The February 2012 decision

The Full Bench's February 2012 decision (*ER Case No 2*) included a majority judgment by Justice Giudice, Senior Deputy President Acton and Commissioners Harrison and Cargill, together with a dissenting opinion by Vice President Watson.

4.7.1 The majority decision on remedy

The majority indicated its preparedness to grant equal remuneration orders comprising percentage increases to the rates set by the SACS modern award. It was unwilling to agree to an order that would provide for a nexus with wage rates arising from an equal remuneration order in either a State or local enterprise agreement or an award (at [62]). It also expressed some reservations about the inclusion of indirect care work in the Joint Submission's definition of care work.

Nevertheless, the majority largely accepted the use of care work as a proxy for gender-based undervaluation, noting that the percentages 'proposed in the Joint Submission are appropriate' (at [63]).

There were reservations too concerning percentage increases that were based on an average of applicable public sector rates of pay, given that market factors influenced some aspect of public sector pay rates (at [63], [69]). Nonetheless, there was ultimately little difference in the percentage increases sought in the Joint Submission and those determined finally by the majority of the Full Bench. These rates are compared in Table 4.3. The impact of the determined increases is best illustrated by the weekly wage rates prior to the equal remuneration order for a select group of classifications, for example the diploma, associate degree entry point (Level 3, Year 1, \$770.50), and the three year degree entry point (Level 3, Year 3, \$809.60).

The majority noted the importance of the Commonwealth agreeing to fund its share of the increased costs, but voiced its concern about the risks to programs and activities that were not government funded (at [65]). Accordingly, it determined an eight rather than six year implementation period. This longer implementation period assisted also to assuage the majority's concerns about the proximity of the awarded wage increases to public sector rates, given that by the end of the implementation period, rates of pay in State and local agreements would have increased as a result of enterprise bargaining (at [67]). Even so, the majority agreed to an additional loading, recognising the impediments to bargaining in the industry. Rather than the proposed loading of one per cent per annum for four years, the Full Bench determined to phase the cumulative four per cent loading over eight years (at [69]).

Table 4.3: Comparison between percentage increases sought by Joint Submission and granted by FWA

SACS modern award classification	Joint Submission	FWA
Level 2 Year 1	18	19
Level 2 Year 2	18	
Level 2 Year 3	19	
Level 2 Year 4	20	
Level 3 Year 1	20	22
Level 3 Year 2	22	
Level 3 Year 3	22	
Level 3 Year 4	23	
Level 4 Year 1	28	28
Level 4 Year 2	27	
Level 4 Year 3	28	
Level 4 Year 4	29	
Level 5 Year 1	33	33
Level 5 Year 2	33	
Level 5 Year 3	33	
Level 6 Year 1	36	36
Level 6 Year 2	36	
Level 6 Year 3	35	
Level 7 Year 1	38	38
Level 7 Year 2	38	
Level 7 Year 3	38	
Level 8 Year 1	41	41
Level 8 Year 2	41	
Level 8 Year 3	41	

Source: Equal Remuneration Case, ASU Exhibit 141, ER Case No 2 at [5], [66]

4.7.2 The dissenting judgment

In his dissenting judgment, Vice President Watson took the view that the applicants had failed to demonstrate that any undervaluation of work in the SACS sector was gender-based. He was particularly concerned about the absence of what he described as a 'legitimate comparator'. The applicants had 'not sought to make comparisons between women's pay and men's pay', but rather to establish a comparison with similar work performed in the public sector by workers who were themselves mostly female (at [87], [96]).

Vice-President Watson did not classify the case as an equal pay case, of the sort familiar in other jurisdictions around the world, but rather as an application for a large minimum over-award payment 'for all men and women in the entire SACS industry to a level approaching public sector wage levels' (at [84]). Having alluded to the approach taken in the United Kingdom and the United States, he observed (at [98]–[99]):

Questions of appropriate comparators and causation are important aspects of the case law in other jurisdictions. An inappropriate comparator or an alternative justification for a difference in pay is fatal to an equal pay claim ... This international perspective and considerations of logic require the claim in this matter to be based on the establishment of a reliable benchmark or comparator and the elimination of any factors not related to gender from any comparisons that can legitimately be made. If a benchmark is sought to be utilised, it must be reliable. It must constitute equal or comparable work in every respect. Generalised comparisons of work between industries are insufficient. Comparable roles must be fully assessed against work value criteria. Remuneration for comparable roles must not contain additional elements such as the inevitable differences in pay between employers and between different industries or superior bargaining outcomes that generally arise in different sectors of employment.

The Vice President rejected the use of the public sector as a comparator, given that there were inherent differences between the SACS industry and the public sector which had not been addressed in submissions (at [96]). The available evidence suggested that there was a public sector premium in the Australian labour market that was unrelated to gender (at [101]). He also took the view that the annual loading sought by the Joint Submission and granted by the majority of the Full Bench had the effect of excising the SACS industry from the enterprise bargaining framework, provided a significant challenge to the enterprise bargaining provisions of the Fair Work Act, and set a precedent for other feminised industries where there was an absence of over-award payments. He said that it was 'not an overstatement to suggest that the future status of enterprise bargaining in this and other industries with similar attributes is at stake' (at [119]).

Vice President Watson reached the following conclusion (at [112]):

[T]he current rates of pay for SACS industry employees are not entirely the result of the circumstance that a significant proportion of employees in the SACS industry are female. The rates are the result of market and funding arrangements which cannot be equated with gender undervaluation.

Although it was, he said 'indisputable that employees in the SACS industry deserve more recognition and reward for the work they undertake', the 'strong emotional appeal' of that factor was not relevant to the tribunal's task under Part 2-7 of the Fair Work Act (at [86]). Rather than increase award rates, he advocated the use of government funding to support enterprise bargaining in the sector (at [120]).

5 Explaining the gender pay gap: A literature review

This chapter provides an overview of various inquiries and studies that examine the GPG. It makes reference to international and Australian reviews, including specific pay equity inquiries and studies by labour economists. This overview assists in understanding the factors that contribute to earnings differences between women and men. This is a wide-ranging area of research and includes consideration of factors such as differences in education and labour market experience, occupational segregation, and social, institutional and workplace practices. Previous work in this area has been considered by gender pay equity inquiries and equal remuneration proceedings, often with a view to assessing how work value decisions contribute to earnings differences, and providing information about the characteristics of undervalued work.

This chapter relies extensively on, and reproduces material contained in, an earlier report on equal remuneration principles (Romeyn et al 2011: ch 3).³⁵ In addition to providing a more extensive explanation of approaches to researching the GPG, this chapter also highlights research published since the time of that report.

Besides the specific findings in these studies, this overview is intended to assist with an understanding of some of the key concepts covered in this report.

Before considering this material, however, it is worth noting some measurement issues associated with the GPG.

5.1 Options for measuring the gender pay gap

There is general acceptance in the literature that a GPG exists, both in Australia and internationally. As noted in section 2.3, the GPG is generally expressed as a ratio that converts average female earnings into a proportion of average male earnings to calculate the pay gap between the sexes. The most frequently quoted measure of the GPG in Australia is the ratio between women's and men's average weekly ordinary time earnings for full-time employees. However, as the Office for Women (2008: 2; 2009), the former Equal Opportunity for Women in the Workplace Agency (EOWA 2010)³⁶ and Pointon et al (2012) explain, there are a number of different ways to measure the gap, each of which produces quite different results using Australian data. A number of these measures are set out in summary form in Tables 5.1 and 5.2.

A GPG calculated using average total weekly earnings for all employees produces a GPG of 37.4 per cent, as at May 2013 (ABS 2013). However, this measure has the disadvantage that it makes no adjustment for the fact that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours.

When only the average total weekly earnings of full-time adult employees are considered, the GPG reduces to 21.1 per cent, as at May 2013 (ABS 2013). However, this measure is also problematic. First, it makes no adjustment for the fact that men are much more likely to work and be paid overtime than women. Secondly, it excludes part-time employees from the analysis – the majority of whom are women. Lips (2003: 90) is highly critical of this approach:

³⁵ In particular, in sections 5.1, 5.2, 5.4, 5.5.1, 5.5.2 and 5.5.3 below.

³⁶ EOWA has now been replaced by the Workplace Gender Equality Agency (WGEA): see section A.7.

[Much] of the data used by governments around the world to measure the earnings gap between women and men is based on a model that makes men’s pattern of work the standard, or the norm against which women’s outcomes are judged. If women cannot fit that model, they are omitted from the comparisons or their lower pay is said to be justified.

Converting average total weekly earnings of adult employees to an hourly rate, for full-time and part-time employees, can assist in addressing this issue. However, there are a number of limitations with deriving hourly rates of pay.

Excluding overtime earnings and measuring only ordinary time earnings results in a GPG of around 17.5 per cent for full-time adult employees, as at May 2013 (ABS 2013). However, it should be noted that measures of ordinary time earnings exclude bonuses as well as overtime. Discrimination in the allocation of bonuses may be a factor contributing to the size of the GPG. This measure is the most commonly used as the ‘full-time’ criterion removes the influence of differing working time arrangements while the ordinary time criterion adjusts for the fact that men are much more likely to work and be paid overtime than women (Pointon et al 2012: 6).

Another measure of the GPG uses hourly rates. In Australia this generally derives from the biennial Employee Earnings and Hours (EEH) Survey from the Australian Bureau of Statistics (ABS). This is considered by some to be a more accurate measure of women’s earnings, as it removes the need to control for differences in the hours worked and allows part-time workers to be included. However, some international commentators have raised issues about the accuracy of hourly data (Lips 2003: 89). The detailed data that is available from this survey is for non-managerial employees, thus excluding the impact of managerial earnings. A smaller gap is indicated on the basis of these figures, as fewer women are managers and managerial earnings are higher. In 2012, based on average hourly ordinary time earnings of full-time non-managerial adults, the EEH found a GPG of 9.3 per cent; if overtime earnings are taken into account and total earnings are considered, the GPG was 10.8 per cent (ABS 2012).

Table 5.1 Measures of pay differentials between females and males from ABS Average Weekly Earnings and Employee Earnings and Hours surveys

Measure of earnings	Females (\$)	Males (\$)	Ratio of female to male earnings
Average Weekly Earnings (AWE) survey measure (May 2013)			
Average weekly earnings (AWE) Average weekly total earnings of all employees	849.90	1356.70	0.63
Average weekly earnings for full-time adults (FTAWE)	1267.40	1605.60	0.79
Average weekly ordinary time earnings (AWOTE) for full-time adults	1250.50	1516.40	0.82
Employee Earnings and Hours Survey measure (May 2012)			
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial adult employees	1207.30	1356.30	0.89
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial adult employees	32.20	35.50	0.91
Average weekly total cash earnings (AWCE) for full-time non-managerial adult employees	1226.40	1471.70	0.83
Average hourly total cash earnings (AHCE) for full-time non-managerial adult employees	32.30	36.20	0.89

Average weekly total cash earnings (AWCE) for all non-managerial adult employees	852.50	1226.30	0.70
Average hourly total cash earnings (AHCE) for all non-managerial adult employees	30.50	34.50	0.88

Source: Based on Pointon et al (2012: 5) and updated to include May 2013 data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) and May 2012 data from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey)

Table 5.2 Differing measures of the gender pay gap

Measure	GPG (%)	Main features and limitations
Average weekly earnings (AWE) Average weekly total earnings of all employees	37.4	Includes all weekly earnings for all employees but makes no adjustment that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours.
Average weekly earnings for full-time adults (FTAWE)	21.1	Includes all weekly earnings for all full-time adult employees but makes no adjustment for the fact that men are more likely to work and be paid overtime than women.
Average weekly ordinary time earnings (AWOTE) for full-time adults	17.5	Excludes overtime earnings. Part-time employees are also excluded, the majority of whom are women in lower paid occupations. Includes casual loadings for full-time casuals, effectively inflating women's earnings.
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial adult employees	11.0	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly ordinary time earnings thus excluding overtime.
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial adult employees	9.3	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on hourly earnings.
Average weekly total cash earnings (AWCE) for full-time non-managerial adult employees	16.7	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime.
Average hourly total cash earnings (AHCE) for full-time non-managerial adult employees	10.8	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime. Based on hourly earnings,
Average weekly total cash earnings (AWCE) for all non-managerial adult employees	30.5	Includes all weekly earnings for all non-managerial employees but makes no adjustment that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours.
Average hourly total cash earnings (AHCE) for all non-managerial adult employees	11.6	Includes all weekly earnings for all non-managerial employees. Based on hourly earnings thus takes account, to an extent, of the larger proportion of women work who part-time.

Source: Based on Pointon et al (2012: 6) and updated to include May 2013 data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) and May 2012 data from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey)

Note: These measures are based on data presented in Table 5.1. They are drawn from different ABS instruments.

5.2 Assessing the gender pay gap

There are a number of reasons why the GPG and pay inequity are the subject of assessment. Pay inequity challenges important human and workplace rights that have been recognised internationally. It also imposes costs on individual women and their families in terms of loss of income – losses that accumulate over a lifetime. Recent research suggests that these costs are significant and affect women's economic independence and economic security. Cassells et al (2009a: 27–30) found that GPGs contribute to significant differences in expected lifetime earnings for men and women, as well as gaps in the capacity of men and women to accumulate wealth.

They noted that, despite women's superannuation balances being on the rise, 'they are still not coming close to that of men' (Cassells et al 2009a: 28). While they found partnered women were better off financially, women's generally lower retirement incomes were found to be of concern, given the incidence of divorce (Cassells et al 2009a: 8, 35). The ILO (2007:10) has also emphasised that severe and persistent discrimination at work can contribute to poverty and social exclusion. Eastough and Miller (2004: 271) suggested that at the lower end of the wage distribution, pay inequity can have important ramifications for health, welfare and community policy. Impacts on the economy have also been noted as a result of suboptimal allocation of resources which impact on the efficiency of the labour market – affecting labour supply, labour turnover, productivity and economic growth (House of Representatives Standing Committee on Employment and Workplace Relations 2009: 1–3; Cassells et al 2009b: 20–8).

More recently, inquiries in Australia have been initiated by the relatively stagnant nature of the GPG. As an example, Cassells et al (2009b: 3) noted that between 1990 and 2009 the GPG, although fluctuating slightly, remained between 15 and 17 per cent, with women receiving around 83 to 85 per cent of the average man's wage.

Assessments of the GPG can employ a variety of approaches. Inquiries by international bodies (such as the ILO), parliamentary committees and industrial tribunals draw their findings from a large range of data, including but not limited to figures prepared by labour economists. Additional data can be drawn from case studies, which may be conducted at the industry or occupational level. The ILO (2007), in utilising such an approach, has observed that the causes and dimensions of the GPG are multiple and intersecting. These causes and dimensions are set out in Table 5.3.

Table 5.3 Causes and dimensions of the gender pay gap

<i>Cause</i>	<i>Dimension</i>
Differences in productivity characteristics (or human capital) of men and women	<ul style="list-style-type: none"> • Years of education • Fields of specialisation • Years of work experience • Seniority in the job
Differences in the characteristics of enterprises and sectors employing men and women	<ul style="list-style-type: none"> • Size of the enterprise • Type of industry • Unionisation
Differences in the jobs held by men and women	<ul style="list-style-type: none"> • Women under-represented in higher-paid jobs • Women over-represented in a smaller and lower-paying range of occupations than men • Women and men concentrated in different segments of the same broad occupations • Women over-represented in part-time work
Differences in the number of hours devoted to paid work	<ul style="list-style-type: none"> • Men work longer hours (in paid work) than women
Direct discrimination in remuneration	<ul style="list-style-type: none"> • Different pay for men (higher) and women doing the same or similar jobs • Different job titles (and pay) for the same or similar occupations
Indirect discrimination in remuneration	<ul style="list-style-type: none"> • Undervaluation of the skills, competencies and responsibilities associated with 'female' jobs • Gender biases in job evaluation methods • Gender biases in job classification and job grading systems • Gender biases in job remuneration systems

Source: ILO 2007: 73

The most recent pay equity inquiry conducted in Australia was that conducted by the House of Representatives Standing Committee on Employment and Workplace Relations (2009). Like the ILO, it drew its evidence from a wide range of sources. It concluded that the factors contributing to the GPG are complex and multi-faceted (House of Representatives Standing Committee on Employment and Workplace Relations 2009: 8–9):

- social expectations and gendered assumptions about the role of women as workers, parents and carers resulting in majority of primary unpaid caring responsibilities undertaken by women;
- disproportionate participation in part time and casual employment leading to few opportunities for skill development and advancement resulting in a concentration of women in lower level classifications;
- invisibility of women's skills and status leading to an undervaluation of women's work and the failure to re-assess changing nature of work and skill; unrecognised skills described as creative, nurturing, caring and so forth;
- labour market tenure and engagement, and more precarious attachment to the workforce;
- industry and occupational composition and segregation factors attributable to geography and desirability of work sex discrimination and sexual harassment;
- concentrated in award-reliant employment with less opportunity to collectively bargain for higher wages, working in small workplaces and with low union participation;

- treatment by industrial tribunals and regulation; and the misguided belief that if men and women are subject to the same laws, rules and conditions, then equality will result;
- women's apparent higher job satisfaction with work at a given wage level means employers less likely to feel under pressure to improve wages for employees. Trade off between monetary rewards and non-monetary rewards; working in service rather than product related markets;
- poor recognition of qualifications, including vastly different remuneration scales for occupations requiring similar qualifications and the way that 'work' and how we value work is understood and interpreted within the industrial system; and
- women receive lower levels of discretionary payment such as over award payments, bonuses, commissions and service increments and profit sharing, partly because in the industries where women are employed, over award payments are not usually available.

The inquiries conducted by industrial tribunals can direct their focus to an assessment of pay equity within the scope of particular awards. This was an approach employed by the Industrial Relations Commissions of New South Wales and Queensland in their pay equity inquiries (see sections B.2.1, B.3.1), through the case studies included in their inquiries. In these instances the tribunals had regard to history of the award, including whether there had been any assessments made of the work in the past and whether the rates had been assessed on the basis of the sex of the worker.

It is generally acknowledged that the determinants of the GPG are complex (HREOC 2007; Swebston 2000; Gunderson 1994: 5–9; House of Representatives Standing Committee on Employment and Workplace Relations 2009: 8–9; Preston & Whitehouse 2004: 311–12). It is also generally acknowledged that a significant cause of the GPG and women's lower lifetime earnings is that, despite the profound social changes of the last century, women remain the primary carers for young children and dependent adults and continue to bear the main responsibility for unpaid domestic work. Bearing this 'double burden' can impede women's workforce engagement and career prospects. For example, women may seek out part-time work and breaks from employment to assist them to balance their paid, unpaid and caring responsibilities. Part-time work is often associated with fewer training opportunities and this, combined with periods out of the workforce associated with childbirth and caring responsibilities, tends to impact on women's skills, experience and promotional prospects, resulting in lower levels of pay and lifetime earnings (Office for Women 2008: 5–10; HREOC 2007; Gunderson 1994: 7; Cassells et al 2009a; Rentsch & Easteal 2007; Carney 2009).

5.3 The contribution of labour economics

There have been a number of studies by labour economists that assess contributing factors to the GPG. We begin by making some general points about the work in this field and then move on to examine some of the particular factors highlighted by these and researchers as being relevant in assessing the GPG.

5.3.1 How do labour economists study the gender pay gap?

Labour economics uses particular research methodologies to examine earnings data. The purpose is generally to establish at an aggregate level whether women receive the same labour market rewards as men with comparable qualifications, experience and personal characteristics. This focus arises because gender differences in remuneration received by men and women are not of

themselves inequitable. They do, however, highlight areas of potential undervaluation and where investigation is warranted.

Researchers typically used very large data sets, such as the EEH Survey from the ABS or the Household, Income and Labour Dynamics in Australia (HILDA) Survey. To this data, researchers apply a 'human capital' or 'endowment' methodology in which the relative 'returns' to men and women in the form of earnings or income are compared against their relative 'investments' in education and work experience. Studies may also take account of demographic factors, job characteristics, industry and occupation. Some studies are established to examine the contribution of particular factors to the GPG, such as occupational segregation, industrial segregation, sector (public or private), firm size, income distribution and unionisation. Regression analysis and decomposition methodologies are typically utilised in these studies, generally using the Oaxaca-Binder method or variations of that method to measure female wage disadvantage.

Typically these studies identify 'explained' and 'unexplained' differences in earnings. Thus these analyses may assess what proportion of earnings differences, among women and men, can be 'explained' by the factors included in the regression analysis, such as levels of education and workforce experience. Researchers have variously termed the variables that can be explained 'wage-related characteristics', 'productivity-related characteristics' or 'endowments'. What cannot be explained is often termed the unexplained differences in earnings and are identified as being attributable to gender or an indication of discrimination. In these studies, the different returns received by men and women with the same characteristics are generally interpreted as measuring 'discrimination', but may also include other factors. As Cassells et al (2009b: 4–5) put it, the proportion of the wage gap that cannot be explained by 'rewards' for wage-related or productivity-related characteristics (or endowments) represents 'the extent to which women are paid less than men once all other measurable characteristics are held constant, and may include discrimination as well as any other unobserved differences between men and women'.

As Booth (2009: 600) notes, a fundamental challenge for labour economists has been to identify the extent to which observed gender differences in labour market outcomes for apparently identical men and women are due to 'discrimination', other unobserved factors, or intrinsic differences between men and women. Thus, they have sought to assess the effect on the GPG of measurable differences between men and women which can be explained as deriving from rewards for different individual characteristics (such as differences in education, training and work experience). They have also sought to identify that proportion of the GPG that cannot be explained by such characteristics – or in other words, to identify the extent to which similar characteristics of males and females are rewarded differently by employers.

While these studies may have this overarching purpose, there are a number of key differences between studies that are important to the interpretation of the findings. These include the data on which studies are based (for example, whether they cover all employees, non-managerial employees, workers in specific age groups, full-time or part-time workers, or only low paid employees), and the scale and scope of factors that are included in their regression analysis. As noted, these analyses are most frequently constructed using large data sets, which may not align, for example, to the scope and incidence of an industry award. These different approaches mean that the results of the studies are often not directly comparable. However, general conclusions may be drawn, particularly when supported by different studies.

Cassells et al (2009b: 4, 7, 27–8) also observe that the task of decomposing the GPG has proved to be difficult because the factors that may influence the GPG are complex and likely to vary over time, and because they may interact, causing ‘feedback effects’ (see section 5.3.2) which make isolating particular factors difficult. They also note differences and flaws in the way in which particular variables (such as previous work experience) are measured, which generally result from inadequacies in the data available for some variables. They emphasise that the assumptions underpinning the design of different models can also affect findings. As a result, they conclude that despite extensive research, ‘drawing firm conclusions about the key determinants of the wage gap in Australia from the literature is difficult due to the range of findings, and the wide variation in samples, methods and focus in earlier studies’ (Cassells et al 2009b: 27).

A further difficulty can arise in how we define ‘human capital’. Walby and Olsen (2002: 22) define it as the skills and experience that a person brings to employment that are relevant to that employment. As Cassells et al (2009b: 6) explain, studies of the GPG generally measure human capital through formal educational attainment and years of work experience. Some studies also include additional variables, such as the use of employer-provided training. The literature usually takes as given the human capital developed at the point of entry to the labour market, focusing on post-school training. A data limitation in any study attempting to control for human capital is thus the non-formal acquisition of skills. Historical attribution of capabilities such as ‘caring’ and ‘dexterity’ are not captured by quantitative data variables and have historically been undervalued in the industrial and wages contexts.

5.3.2 Competing analyses within labour economics

Prior to explaining the type of findings generated by labour economists it is also worth noting that these types of studies are frequently the subject of debate, both within and outside the field. These challenges arise because of the assumptions and propositions that underpin ‘human capital’ or ‘endowment’ approaches, and the exclusion of institutional factors.

The central proposition of human capital theory, as advanced by Becker, one of its foremost advocates, is that the acquisition of skills constitutes an investment that will generate future labour market benefits (Becker 1972: 781). Labour markets thus merely reflect differences in human capital brought to them by women and men. This approach is premised on a direct and positive relationship between investment and human capital and earnings. It assumes, consistent with orthodox or neoclassical economics, that rational decisions at the level of the individual are made with a view to maximising income. Wages will approximate the marginal productivity of each employee, which in turn is a function of the level of investment in human capital that each employee has made (Mumford 1989: 69). Within these analyses, ‘employers are modelled as being involved in contract negotiation over labour services’ in a perfectly competitive labour market involving individual employers and employees (Austen et al 2013: 64–5). It is assumed in turn that employers will offer a price for labour – wages – that reflects each employee’s contribution to production, and that employees will be motivated by a desire to maximise the returns of their labour. Differences in wages are related to the market value or price ‘of the commodities they produce and their productiveness’ (Austen et al 2013: 64). The market value is assumed to reflect the social value of the goods and services produced.

Some researchers also suggest, by implication, that regression analysis may understate the disadvantage endured by working women, because the data that guides such research embodies social assumptions that may themselves be flawed. Rubery et al (2002: 5-7) summarised two of the

assumptions underpinning the use of regression analysis. The first is that individual characteristics and work experience – level of education, qualifications, length of service, occupation – are the result of free choices made by men and women. As an example of the limitations of this assumption, they note that women’s lower length of workforce experience may reflect greater household responsibilities. The acquisition of education, the length and form of workforce experience and the choice of occupation may also reflect systemic labour market discrimination.

The second assumption is that individual characteristics are taken as approximate measures of productivity and reward. Olsen and Walby (2004: 30) noted that women may face systemic disadvantage in the acquisition of human capital and that the dichotomy that is frequently made in regression analysis between factors that are associated with either human capital or discrimination may be overdrawn. On these grounds purely quantitative research such as regression analysis is unable to incorporate fully the management and social dimensions of the labour market.

A related criticism is that the assumptions that underpin ‘human capital’ approaches exclude or significantly underplay the institutional context in which the labour exchange (including wage negotiations) takes place (Austen et al 2013: 65). Such dimensions include institutional arrangements for wage setting, including laws and regulations, the integration or co-ordination of wage setting systems, the resilience of gendered norms and valuations in collective bargaining systems, minimum wage systems and job gradings, and the social norms and values influencing changes in wage rates and wage systems (Rubery et al 2002: 91; OECD 2002: 113; Austen et al 2013: 66). On these accounts, the exclusion of institutional factors fails to assess how policies and institutions can be systematically related to unexplained wage gaps (Christofides et al 2013).

Short and Nowak (2009: 273–4) propose an explanation of how social and cultural values and expectations and their ‘feedback’ effects can interact to constrain women’s employment options:

Gender-related values pervade educational choices; education undertaken then affects the jobs offered to women, as does potential employers’ and co-workers’ values and attitudes towards women’s family responsibilities. This affects the opportunities offered to and sought by women for training and developmental experience on the job. The economic value put on an occupation is, in turn, affected by the value put on human capital associated with the occupation by employers and industrial relations commissioners in the industrial relations system. Socially constructed personal values held by these powerful (and mostly male) actors are perceived by interviewees as affecting their assessment of that value. Societal and personal values also affect the monetary value put on skills, particularly those associated with being feminine, such as caring skills used in the service sector ... This all feeds back into educational choice when individuals and their parents anticipate the different treatment of women in the labour market and channel women away from more ‘difficult’ well-paid male jobs.

Such factors contribute to the high degree of segregation in the labour market, with a majority of women engaged in a narrow range of occupations and industries, often involving elements of care and service (such as health care, childcare, education, social assistance and retail trade) and often regarded as ‘unskilled’ or ‘semi skilled’ work. It is frequently argued that these ‘women’s jobs’ and their associated interpersonal, emotional, coordination and other skills, have been undervalued. This may have occurred for a number of reasons, for example because of a tendency to assign more worth to features that are characteristic of the work performed by men, and because women’s low levels of unionisation contribute to limited attention being paid to their claims of undervaluation (see eg Smith 2009; Cortis 2000).

These assessments open up questions concerning the processes, institutional and otherwise, that are utilised to define, codify and value skill (Armstrong 2007). Such accounts work from the basis that skill has a socially constructed value, and that in areas of feminised work, such as customer service work, key aspects have been invisible to skill recognition processes (Junor & Hampson 2005). Within some policy contexts this has placed renewed emphasis on the development of pay and employment equity tools that mainstream the process of skill identification and processes designed to facilitate the 'full recognition of the intangible skills of predominantly female jobs and occupations' (Junor et al 2009: 208).

The differences in approach to the analysis of women's earnings have been the subject of submissions to equal remuneration proceedings, including the SACS case (see Chapter 4). In that case the available data on women's earnings was interpreted differently. For some economists the available data indicated that the earning differences between women and men were 'explained' by the factors modelled in the analysis, while for other economists the differences highlighted inequities (Barón & Cobb-Clark 2010; Cobb-Clark 2010a, 2010b; Cobb-Clark & Tan 2011; Austen 2010a, 2010b; Austen et al 2010; Austen et al 2013).

A related feature of this debate concerns implications for the remedies available to industrial tribunals. Some labour market economists use their analysis of women's earnings to assess the capacity of industrial tribunals to address pay equity. For some, the higher GPGs among high wage employees compared to low wage employees invites some questioning of the capacity of industry tribunals to remedy pay inequity through award variation (Healy & Kidd 2013). As will be addressed in section 5.4.4, there are significant debates in the labour economics studies about whether occupational segregation contributes to pay inequity. For those economists, findings that suggest that women's earnings are improved by the current pattern of occupational segregation indicate that tribunals have a limited rationale to address equal remuneration in highly feminised sectors of the labour market (see eg Barón & Cobb-Clark 2010; Cobb-Clark 2010a, 2010b).

The findings of the most frequently utilised analyses of women's earnings are addressed more comprehensively in the following material. Cassells et al (2009b) provide a clear, comprehensive and relatively recent review of the literature which considers the human capital, personality characteristics and labour market differences (for example, occupational segregation and sector of employment) between men and women which, together with other factors, assist in developing an understanding of the GPG. Their analysis is followed closely in the following sections, although additional and more recent material is included, in particular in relation to the international literature and the role of institutional factors.

5.4 Particular factors in gender pay gap analyses

5.4.1 Education and labour market experience

A significant number of analyses of the GPG assess whether differences in education and labour market experience between women and men explain differences in earnings. Australian studies have found that returns on education for women are generally lower than those for men, despite women's somewhat higher level of educational attainment (Miller 2005; Rummery 1992; Barón & Cobb-Clark 2010; Cobb-Clark & Tan 2011). As Miller (2005: 413) notes, 'additional schooling opens up access to better paying positions more readily for males than for females'. Analysing gender differences in the likelihood of low pay in Australia, Austen (2003: 168) found that there were substantial differences between men and women in terms of the insurance provided by

education against the risk of low-paid employment. For males, she found that each educational qualification reduced the probability of low-paid employment relative to that recorded by those who left school at 15. However, for females, none of these effects was found to be statistically significant. Thus Austen noted that her findings added further weight to studies that showed the rates of return to investments in tertiary qualifications are lower for women than for men. A more recent analysis by Li and Miller (2012) noted that while the GPG for graduates is smaller than that reported in other studies, it widens at the age of graduation and is larger for older age groups in advanced stages of their career. Cassells et al (2009b: 7) observe that the Australian findings on returns to education are suggestive of discrimination and labour market rigidities.

Previous work experience is widely acknowledged in the literature as important, but has proved to be more difficult to measure. It has generally been measured through a range of proxy variables, some of which Cassells et al (2009b: 8) claim have serious flaws: for example, where measures of experience do not take into account breaks in labour market experience or participation in part-time work. Despite these difficulties, Cassells et al (2009b: 8) found that the results from Australian studies (Eastough & Miller 2004; Miller 2005; Rummery 1992) generally confirmed that returns on work experience are higher for men than women. In other words, additional years of labour market experience translate into greater increases in wages for men than for women.

The effects on the GPG of interruptions and alterations to labour market experience (that is, not working or working part-time) due to child bearing and caring duties are also widely acknowledged in the literature as potentially impacting on pay. Cassells et al (2009b: 8, citing Drolet 2001: 7 and Olsen & Walby 2004) noted that the effects of interruptions are not limited to the reduction in earnings for the period not worked. They observed that the possible repercussions of interruptions to work for lifetime levels of pay may arise because:

- non-continuous work is associated with shorter periods of job tenure, which in turn is associated with lower pay;
- the value of human capital may deteriorate while women are out of the workforce. When they return these effects may result in a lower likelihood of promotion or lower wages;
- women facing interruptions to their career may choose not to participate in training, or may decide to accept low-wage jobs;
- labour market withdrawals may coincide with the beginning of women's careers – a time at which the acquisition of job skills (and therefore job advancement and wages growth) is particularly strong for non-withdrawers; and
- withdrawals from the labour force can have a negative impact on earnings through discrimination.

In Australian studies, interruptions to work have generally been captured through variables that measure how many children women have. The presence of children, particularly young children, has also been found to contribute to lower female earnings as it is generally associated with women either withdrawing from the labour market, or participating less in the labour market and working fewer hours than women without children or men (Cassells et al 2009b: 8–9, citing Lundberg & Rose 2000, Sigle-Rushton & Waldfogel 2006 and Eastough & Miller 2004). Interestingly, Eastough and Miller (2004) found that in Australia, among full-time wage and salary earners, women with dependent children earned 7.5 per cent less than women without dependent children, whilst men with dependent children had slightly higher earnings than men who did not

have dependent children. The presence of children has also been found to influence men's and women's lifetime earnings (Cassells et al 2009a).

Cassells et al (2009b: 9, citing Booth & Wood 2006 and Rodgers 2004) observed that in contrast to international findings, in Australia current part-time work status has not been found to be a significant driver of the GPG. However, they noted that a prolonged history of part-time work may be associated with lower pay, due to factors such as lower on-the-job training being offered and taken up. Analysis undertaken by Austen et al (2008: 52) found 'unexplained' differences in gender earnings and noted that the 'penalty' for working on a part-time or casual basis appeared to be higher among women than among men. Watson (2005: 382), analysing earnings and taking casual loadings into account, also found that both men and women were penalised by part-time and /or casual jobs, but that women experienced a higher penalty.

More recently Chzhen et al (2013) examined gender gaps across the earnings distribution for full-time employees in the Australia private sector. Their key focus was an examination of the effect of non-random self-selection into full-time employment. This focus enabled assessment of age of the youngest child in the household, and the prevalence of full-time employment for women with preschool children. Significant evidence of a self selection effect for women into full-time employment was not found to be relevant to the Australian context. Nevertheless, a large gender gap remained, with women receiving lower rewards for their characteristics than men.

Assessing the impact of part-time employment on earnings distribution has also been the subject of international study. In the United Kingdom, Olsen and Walby (2004) pointed out that part-time work in itself may be associated with lower rates of human capital attainment, because years of experience in part-time work may not equate to the same level of skills acquisition (and therefore pay rate) as years of experience in full-time work. More recently Matteazzi et al (2013: 28), in a study of twelve European countries, examined the impact of part-time employment on widening the gender age gap. They concluded that the nature of part-time employment and labour market segregation were greater influences than part-time employment in itself. They found that horizontal segregation or differences in the sector of economic activity helped to explain the GPG among full-time employees, while vertical segregation or differences in the hierarchical ladder explained the earnings differentials between full-time and part-time working women.

Polachek and Xiang (2009) focused on demographic variables to test whether women's incentive for lifetime labour force participation is an important determinant of the GPG. They used three data sets covering 40 countries and undertook analysis at the country rather than the individual level. They found a country's fertility rate, the age gap between husband and wife at the first marriage and the top marginal tax rate to be positively associated with the GPG. They explained that these factors influence women's incentive to participate in the labour market over their lifetime and, hence, their human capital development.

5.4.2 Personality characteristics

A further area of analysis examines whether differences in personality characteristics between women and men provide an explanation for differences in earnings. Booth (2009) found that studies using survey-based psychological variables and studies generated from laboratory experiments both observed gender differences in competitive behaviour and risk-taking. For example, Booth observed that a number of studies have found women to be unwilling or unable to bargain on their own account. Studies have also found that women tend to ask for and receive less than men in negotiations (Booth 2009: 600-601; Peetz & Preston 2007: 29; Rentsch & Easta

2007: 327). However, Booth noted that some studies suggest that these differences cannot be considered innate and can be shaped by the environment in which individuals are placed. Booth suggested that such differences could explain 'some small part' of GPGs and, in particular, the observed widening of the GPG across the income distribution (discussed further below) – identifying this as an area for further investigation (Booth 2009: 605).

Cassells et al (2009b: 6) noted that some recent literature examines the effects of personality characteristics which may affect occupation choice, hours of work, promotion and so on, and thus wages. They observed that Fortin (2008) studied the effects of 'non-cognitive' traits (for example, interpersonal skills, work/life preferences and personality traits such as self-efficacy) on wages and the GPG. Fortin focused particularly on factors which were 'known to differ by gender' (such as the relative importance put on money/work and people/family) and found a modest but significant role for these variables.

Cobb-Clark and Tan (2011) examined the influence of non-cognitive factors on occupational attainment and wages. Using data from the HILDA Survey, they found that non-cognitive traits had a substantial effect on the probability of employment in many occupations, but by no means all. Segregation into some occupations was found to occur because Australian men and women with the same characteristics had very different propensities to enter certain occupations. Examining the effects of the non-cognitive factors (along with other factors likely to influence wage gaps) for each occupation separately, they found that such factors did not provide an explanation for the GPG in Australia. This conclusion was influenced by Cobb-Clark and Tan's findings that occupational segregation is not the major driver of the GPG in Australia (see also section 5.4.4).

5.4.3 Age

Labour market analysis of the GPG is concerned also with the relationship between age and earnings differences between women and men. Australian and international studies have found that the GPG is smaller among young workers, but increases with age. The European Commission found that the GPG tends to widen with age, with women's relative pay lowest for those over 55 years of age (Plantenga & Remery 2006: 21). In a study of US college graduates, the American Association of University Women found that after controlling for hours worked, training and education and other factors, the proportion of the GPG gap that remained unexplained was 5 per cent one year after graduation, and 12 per cent ten years after graduation (Billitteri 2008: 245).

In an Australian study of occupational segmentation, using data from the 1993 Survey of Training and Education, Wooden (1999) found that among young workers, females were better paid than males, although he noted that the gap was quite small. However, he found that among workers aged 30 to 44, occupational segmentation added around four per cent to the GPG, while among the oldest workers in the study it added around nine per cent. Wooden suggested two possible interpretations of these findings. One was that the effects of occupational segmentation on pay equity may be declining over time. Alternatively, he suggested that if the effects of gender discrimination occur through unequal access to promotion, or through women's productivity being undervalued after spending time out of the labour force, then it is to be expected that gender pay inequity would increase with age (Wooden 1999: 168–9).

In a more recent study using HILDA data, Cassells et al (2009a: 25) also found that the wage gap was smaller amongst young workers – with Generation Y women having the lowest wage gap amongst the generations. All Generation Y women were found to receive on average 85 per cent of the average Generation Y men's wage; Generation X women received 62 per cent; and Baby

Boomers around 64 per cent. After taking into account characteristics that affect income (including hours of work, number of children, occupation, industry of employment and work experience), Cassells et al (2009a: 26) found that for Baby Boomer women, the adjusted wage gap was over 13 per cent, while for Generation X women it was 3.5 per cent and for Generation Y women it was 'almost non-existent' at 0.6 per cent. As noted above and suggested by Wooden, these results may reflect the effects of cumulative disadvantage with increased labour market experience.

While not specifically concerned with the GPG, Austen (2003: 168) analysed gender differences in the likelihood of low pay in Australia. She noted that increases in an individual's age generally reduce their risk of low-paid employment. However, she found an important gender-based difference in the relationship between age and the chances of low paid employment for the 50–60 years age group. In Austen's study, women in the 50–60 years age group had a 20.3 per cent higher chance of low-paid employment than women in their twenties. By contrast, she found that men aged between 50 and 60 years had a 4.8 per cent lower chance of low-paid employment than 20 to 30 year old men. She concluded that age does not appear to offer women the same protection against low-paid employment as it does men (Austen 2003: 169–74).

5.4.4 Occupational segregation

As Cassells et al (2009b: 9) explain, possible determinants of the GPG cannot all be characterised as related to individual characteristics (such as age, education and experience). Interest has also focused on the role of failures in the market for labour; particularly labour market rigidities associated with occupational and industrial segregation, insufficient flexibility in the labour market to allow women to combine work with child-rearing, and discrimination. They note that a series of labour market factors broadly associated with wage determination (including occupational segregation, unionisation, public versus private sector employment, industrial sector and firm size) have been the focus of research interest. Their review shows that, while many of these appear to play some role in the persistence of the GPG in Australia, findings are mixed.

Within this area of labour market research there is significant interest in the contribution of occupational segregation to explaining earnings differences between women and men. Occupational segregation by sex has been defined as the extent to which 'women and men are differently distributed across occupations than is consistent with their overall shares of employment' (Cassells et al: 9, citing Watts 2003: 631). It has been a 'persistent phenomenon in contemporary labour markets', including in Australia, where marked differences between men's and women's occupational distribution have been noted (Preston & Whitehouse 2004: 309).

Occupational segregation is 'widely assumed to contribute to ongoing earnings inequality' (Preston & Whitehouse 2004: 309). It has also been suggested that occupational segregation may affect wages due to the effects of 'crowding' – that is, an increased supply of labour competition for a restricted number of jobs (Gunderson: 1994: 7). Other explanations include that employers with some degree of monopsony power³⁷ may take advantage of their superior bargaining strength to push wages down below the value of the worker's contribution (Austen & Preston 1999: 7; Rogers & Rubery 2003: 545–6; Rubery & Grimshaw 2009). A monopsony implies 'that employers may have power in the labour market and are able to use that power to reduce wage levels below

³⁷ For those not familiar with the term, a 'monopsony' occurs where there is only one buyer for a product (as opposed to a monopoly, where there is only one seller or supplier).

“competitive” levels’. It is a power that ‘derives in part from the restricted options available to the labour that they employ’ (Rubery & Grimshaw 2009: 11).

International studies have attributed an important role to occupational segregation when explaining the GPG (for example, Anker 1998; Alonso-Villar & del Rio 2008). Despite this, there is significant debate within the available research about the impact of occupational segregation. Cassells et al (2009b: 10) observed that this is a complex issue, with a range of theoretical and empirical approaches available and different results possible depending on the ways in which occupation and occupational segregation are included in different models (see also Cobb-Clark & Tan 2011).

A number of studies have concluded that occupational segregation contributes to the GPG in Australia (see eg Miller 1994; Preston & Whitehouse 2004; Robinson 1998; Wooden 1999). For example, Wooden (1999: 167) found that women employed in occupations where less than 20 per cent of the employees were women earned nearly 14 per cent more than comparable women employed in female-dominated occupations. Other work, however, has found that occupational segregation has the opposite effect, so that if occupations were desegregated and no longer had unequal representations of men and women, women’s pay would be lower, not higher (Barón & Cobb-Clark 2010; Preston & Crockett 1999a; Watts 2003). For example, Cobb-Clark and Tan (2011: 11) concluded that:

[O]ccupational segregation is not the main driver of the gender wage gap. Australian women earn less on average because they earn less than their male colleagues employed in the same occupation, not because they work in different occupations.

Short and Nowak (2009) suggested that apparent differences in findings between studies of occupational segregation may be explained by the level of aggregation of the data. This is a conclusion shared by Cardoso et al (2012) and Austen et al (2013: 69). Short and Nowak (2009: 273) noted that Pocock and Alexander (1999) and Wooden (1999) found an inter-occupational effect using two digit occupational data, rather than the one digit data used ‘by most articles studied’. In addition, Whitehouse (2001: 73) showed that falling male occupational wages (relative to the occupational average) in some areas of the labour market had effectively ‘bolstered’ intra-occupational gender pay ratios, making analysis of trends more difficult.

Difficulties with incorporating concepts of ‘work value’ in quantitative analysis further complicate analysis of the GPG at the occupational level. There are various limitations on data sources, including the unavailability of occupational data disaggregated to a meaningful level, that limits foundation analysis for identifying which employees are undertaking work of similar or comparable value (Pointon et al 2012: i). This includes questions as to whether proxy measures, such as the Australian and New Zealand Standard Classification of Occupations (ANZSCO), are capable of capturing or identifying comparable value (Pointon et al 2012: i). This is a matter explored by Morgan et al (2011) in assessing the ability of indicative and aggregate skill classification schema and methodologies, such as the ANZSCO and the International Standard Classification of Occupations (ISCO-66) to capture skill levels and value:

The desk-based exercise, ‘objective’ but hardly empirical, of categorising jobs within the hierarchical system sees the criteria of skill level and skill specialisation to group jobs into occupations and occupations into four broader categories up the level of the ‘major group’. Specialization is defined on the basis of field of knowledge, tools used, material worked on, and goods or services produced. These concrete, tangible criteria are not likely to capture the less directly-observable skills of service sector. Skill levels are assigned in specializations using proxy criteria – normally qualifications, length of prior

experience in a similar job, and time spent on on-the-job training – again concrete criteria that may not capture the informal and non-codified aspects of skill (ABS/Statistics New Zealand, 2006: 4-21).

Importantly, the ANZSCO criteria are threshold skill levels required for occupational entry or progression. ANZSCO is not particularly well equipped to take account of any growth or deepening of expertise on the job. Its concept of skill applies better to jobs in organisation-external labour markets (ELMs) than to those in internal labour markets (ILMs), and better still to jobs in occupational labour markets (Piore 1980; Sengenberger 1981; Althuser 1989; Osterman 1987; Kohler et al 2006). A desk based system such as ANZSCO is particularly unlikely to reflect the skills in service occupations that rely heavily on the 'invisible' work processes that are the focus of this paper.

As discussed, the concept of human capital poses particular difficulties in GPG analysis and this problem is compounded in occupational analysis and exacerbated in Australia, given the degree of gendered labour market segmentation.

5.4.5 Industry segregation

A further area of analysis assesses the contribution of industrial segregation to explaining earnings differences between women and men. This includes assessment of differences between public and private sector employment. International studies have found industrial segregation to be an important factor in explaining the GPG. However, the relative importance of occupational and industrial segregation has been found to vary from one country to another, reflecting variation in the level of occupational segregation and industrial segregation between countries (Alonso-Villar & del Rio 2008: 24, 28).

Australian studies have generally shown that industrial segregation widens the GPG (Cassells et al 2009b: 10, citing Cassells et al 2008; Miller 1994; Preston & Crockett 1999a). Preston and Crockett (1999a) found that industrial segregation accounted for around 45 per cent of the explained portion of the GPG – with a particularly strong industry effect in Western Australia and Queensland. Cassells et al (2009b: 10) observed that Australian findings are consistent with those of a number of international studies which have also found that industrial segregation is associated with a larger GPG (see eg Grimshaw & Rubery 2002; Drolet 2001).

In a report prepared for the Australian Fair Pay Commission, Healy et al (2008) found that much of the growth of women's employment over the period 1998 to 2006 had been in four 'low pay' industries: retail, accommodation, property and health services. They also found that changes in employment composition over that period, including the movement of women into low-paid sectors, had increased the GPG, although they noted that the overall effect was small. They noted substantial variation in the GPG across industries. Analysing the extent to which the GPG could be accounted for by women and men's different productive characteristics, they found that 'industries with smaller overall gender wage gaps (ie retail and accommodation) also have the smallest proportion explained by gender-specific differences in human capital' (2008: 239). In contrast, in property and health, where the GPG was larger, human capital characteristics were found to explain a much larger proportion of the overall gap. Healy et al (2008: 239, 261) suggested that one interpretation of this result may be that industries with a strong award structure successfully limit the size of the GPG, but also decrease the wage variance and the consequent returns to human capital.

In a US study, Miller (2009: 69) found that regardless of sector of employment, females had lower hourly rates of pay than males, other things being equal. However, Miller also found the GPG to be

generally larger in the private sector than among government employees. He suggested that the explanation may be differences in pay comparability practices and public sector collective bargaining.

Cassells et al (2009b: 11), reviewing Australian studies of the public/private sector effects on the GPG, also found that the wage gap is generally larger in the private than the public sector (Barón & Cobb-Clark 2010; Kee 2006; Preston 2000; Preston & Jefferson 2009: 326). As Kee (2006: 424) explains:

The principal finding is that in the public sector, the gender gap exists but is distributed fairly evenly across the distribution of wages. However, in the private sector, even after controlling for occupation and industry, the gender gap accelerated at the upper levels of the conditional wage distribution, and hence there is a glass ceiling. Clearly, the observed GPG in both sectors is a result of differences in returns to gender characteristics.

It has been suggested by some researchers that the smaller GPG in the public sector may be related to more intensive anti-discrimination enforcement in that sector (Gregory & Borland 1999; Austen et al 2004: vii). Like Miller in the United States, Kee (2006: 424) suggested that a possible explanation of the identified difference between the public and private sectors could be the adoption of different pay schemes between the two sectors. In particular, the lack of standardised pay schemes across companies and firms in the private sector may provide greater scope for wage settlements for perceived 'high fliers' to favour men. In a review of international experience, Robinson (1998: 30) suggested that the enlargement of the GPG in public sector employment in some countries may arise from the spread of personal assessment as the basis for granting annual wage increases, 'since women tend to do less well under this sort of payment system'.

In Australia the greater prevalence of family friendly arrangements in the public sector has been noted as potentially important in contributing to a reduction of the glass ceiling (Kee 2006: 424). However, recent remuneration surveys of the Australian Public Service, commissioned by the Department of Education, Employment and Workplace Relations, have found gender differences across remuneration at the Senior Executive Service (SES) levels and for nearly all non-SES classifications (Australian Public Service Commission 2010).

5.4.6 Firm size

Labour market analysis is concerned also with assessing whether firm size assists an understanding of earnings differences between women and men. Cassells et al (2009b: 11) found that firm size is associated in the international and Australian literature with higher levels of pay – that is, larger firms pay more than smaller firms on average. They cited work by Daly et al (2006) which found that for both men and women, hourly rates of pay were higher in larger firms. Austen (2003: 166) also noted the strong link between small firms and the chances of low-paid employment. Firm size can also be a function of sector – with some industries and sectors having a higher incidence of small firms than others. Therefore, separating out causality is important in firm size analysis.

Australian and international studies have found that while larger firms tend to pay their employees higher wages, this does not necessarily mean that they have lower GPGs. A study by Mitra (2003) in the United States found that significant wage differentials existed among male and female professionals in every category of establishment size, even after controlling for human capital

variables and other characteristics. Mitra suggested that one factor contributing to the significant GPG in large firms may be unequal access and returns to supervisory jobs in such establishments.

In Australia, Le and Miller (2001: 45) found that women working in 'very large' workplaces (100 or more employees) were more likely to experience wage disadvantage than women working in smaller workplaces. They also found that women working in smaller workplaces had a lower probability of remaining at a wage disadvantage in contiguous years. They concluded that large workplaces played a key role in both generating and perpetuating gender wage inequality (Le & Miller 2001: 47–8). In addition, Cassells et al (2009b: 11) cited findings from the 2008 EEH survey showing that as firm size increases, the raw GPG also increases (ABS 2008).

5.4.7 Income distribution

A significant recent focus in labour market analysis has been the examination of the relationship between income distribution and the GPG. Both international and Australian studies have found that the GPG increases as income increases. Miller (2009: 55) noted that Arulampalam et al (2007) found the GPG to be larger at the top of the wage distribution than it is in the middle of the distribution across each of the 11 European countries included in that study. In Arulampalam et al's study, Spain and Ireland were the only countries not to have a glass ceiling in the private sector, whereas Finland and Ireland were the only countries not to have a glass ceiling in the public sector.

Cassells et al (2009b: 11) identified several studies that investigated the GPG along the income distribution in Australia. Barón and Cobb-Clark (2010), Kee (2006), Miller (2005, 2009), Austin et al (2008) and Preston and Jefferson (2009: 326–7) all found that the GPG increases at the top end of the income distribution; suggesting the prevalence of a glass ceiling in the Australian labour market. For example, Miller (2005: 413), using data from the 2001 Australian Census of Population and Housing Household Sample, found that the standardised gender wage differential increased from around 10 per cent for low-wage earners to 25 per cent or more for high-wage earners. However, both Barón and Cobb-Clarke (2010: 231) and Kee (2006) noted that this effect was most evident in the private sector.

Analysing the determinants of the GPG along the income distribution more closely, Miller (2005: 414) found that the gap between the pay-offs to education for men and women was greater among higher wage earners than it was among the low-wage group. He observed that this was 'symptomatic' of the 'undervaluation of women's skills'.

Barón and Cobb-Clark (2010: 228) used HILDA data from 2001 to 2006 and found that for low-paid workers, the proportion of the GPG explained by workers' productivity-related characteristics was much larger than for higher paid workers:

We find that, irrespective of labour market sector, the gender wage gap among low-paid, Australian workers is more than explained by differences in wage-related characteristics. The gender wage gap among high-wage workers, however, is largely unexplained in both sectors suggesting that glass ceilings (rather than sticky floors) may be prevalent.

It should be noted, however, that Barón and Cobb-Clark's analysis was focused on public and private sector employment and excluded those working for private not-for-profit and other non-commercial organisations (Barón & Cobb-Clark 2010: 230). Healy et al (2008: 239) add further insight to findings for the low paid, noting that:

These differences by industry and occupation highlight an important feature of the low-paid labour market, in that there are generally smaller differences between male and female wages in the sectors where award reliance is high. But the gender differential is only one of several important dimensions of earnings inequality. In the lowest-paid sectors, the problem of inequality manifests less in the specific form of gender disparities, and more in the form of a distribution which is highly-skewed towards low hourly wages. While employees remain within these industries their prospects of attaining better-paying jobs are curtailed by the very small number of such jobs on offer. Male and female wages may be more closely aligned in these sectors, but only because both sexes are disadvantaged in these sectors relative to most other Australian employees.

As Cassells et al (2009b: 11) noted, whilst finding variation in the GPG along the income distribution, researchers have emphasised that a substantial GPG exists at all points of the income distribution, and that efforts to address the gap need to be targeted at all income levels (see also Kee 2006: 424; Miller 2005: 414).

5.4.8 Unionisation

The potential influence of union membership and activity has also been a focus in analysis of the GPG, although there are relatively few recent studies of this factor. Gunderson (1994: 7) argued that unions can be an important vehicle for influencing the jobs available for women and the remuneration for those jobs. However, he observed that while in general unions tend to facilitate greater equality of pay between men and women, they can also contribute to the GPG: for example, where they devote more resources to male-dominated employment which is more likely to be unionised. It should be noted, however, that there have been significant changes to union density and shifts in union attitudes towards female members since Gunderson's study was undertaken.

Cassells et al (2009b: 11) found that some of the Australian literature (Barón & Cobb-Clark 2010; Miller 2005) suggested that unionisation may have contributed to reducing the GPG, particularly for lower wage workers. However, they observed that conclusions about this relationship have been mixed, with Wooden (1999), for example, finding insignificant or weak effects of union membership on wages, and Cai and Liu (2008) finding that unions have a larger effect on men's wages than on women's. Wooden (1999: 165, citing Miller & Mulvey 1996) suggested that some research may have overestimated the relative wage effects of unions by not controlling for the effects of firm size.

5.4.9 Identifying the 'unexplained' part of the gender pay gap

As a result of differences in data, design, methodology and changing labour market conditions, Australian studies have produced a range of results. However, the results of the studies have been consistent over a number of years in their general finding that there is a significant, persistent, unexplained wage gap between men and women. The findings show that only a small proportion of the GPG can be attributed to differences in the productivity-related characteristics of men and women. The larger, unexplained gender wage effect suggests systemic gender bias in the wage system or the undervaluation of women's work.

For example, Le and Miller (2001: 34) summarised the findings of Australian studies as follows:

Most studies report a difference in the mean hourly earnings of men and women of between 15 and 20 per cent. When account is taken of the different skill levels of men and women, a gender wage differential of between 10 and 15 per cent remains. The division of the wage differential between men

and women into explained and unexplained components is reasonably robust across studies (for example, Kidd and Shannon 1996; Kidd and Meng 1997; Meng 1999; Wooden 1999), with around one-quarter being explained, and three-quarters unexplained.

Following a subsequent review of the Australian literature, Eastough and Miller (2005: 259) concluded:

There is ... quite an array of results, but most research conducted since 1980 shows that between 60 and 90 per cent of the difference between average male and average female wages in the working population remains once account is taken of the differences between males and females in the mean value of regressors included in the econometric model of wages. Thus, measures of the gender wage gap range from 7 to 18 per cent, with most estimates being between 12 and 14 per cent.

Similarly, Short and Nowak (2009: 265) concluded from their recent review of the Australian literature that:

These studies find a raw wage gap of between 11.5 per cent (Wooden, 1999) and 19.2 per cent (Preston and Crockett, 1999[a]) and an adjusted wage gap (unexplained by the variables used) of between 8.9 per cent (excluding managerial employees; Wooden, 1999) and 16 per cent (Le and Miller, 2001). These studies confirm the continuation of an 'unexplained' and persistent wage gap between men and women, after allowance for the impact of the range of measured measurable variables, which impact productivity and hours worked (Short & Nowak, 2009: 265).

Cobb-Clark and Tan's (2011: 9) recent study also found a significant component of the GPG which was unexplained, but highlighted the larger intra-occupational component of the gap:

Almost three-quarters of the wage penalty that women face stems from gender differences in the wage returns to human capital, demographic characteristics, and noncognitive skills within occupations. These results are consistent with research on Australian data from the early 1980s which also found that most of the intra-occupational component of the gender wage gap resulted from the unequal wage returns to men's and women's characteristics (Kidd, 1993). Thus, there appears to be an enduring gap in relative wages within the same detailed occupational classification which remains to be explained. Moreover, this is by far the most important source of the overall gap in women's wages.

Cassells et al's (2009b: 5) review of the literature also led them to conclude that:

Findings about the determinants of the Australian gender wage gap generally show that rewards for endowments are more important than endowments themselves ... overall there is substantial evidence to suggest that a combination of discrimination or other unobserved characteristics play an important role in maintaining the wage gap in Australia.

Following on from their literature review, Cassells et al identified a set of key variables to include in a decomposition of the GPG and undertook further analysis using data from the HILDA Survey (which includes part-time workers). They used a simulation approach pioneered by Olsen and Walby (2004) to minimise the drawbacks of traditional decomposition methodologies (particularly in relation to feedback effects). They summarised the findings of their research as follows (2009b: v):

Utilising robust microeconomic modelling techniques, based on a comprehensive and critical evaluation of several methodologies, we found that simply being a woman is the major contributing factor to the gap in Australia, accounting for 60 per cent of the difference between women's and men's earnings, a finding which reflects other Australian research in this area. Indeed, using wage gap analysis from the HILDA survey, the results showed that if the effects of being a woman were removed, the average wage of an

Australian woman would increase by \$1.87 per hour, equating to an additional \$65 per week or \$3,394 annually, based on a 35 hour week.

Other key determinants of the gap that were identified and quantified as part of the microeconomic modelling component of our research were industrial segregation (25 per cent), labour force history (seven per cent), under-representation of women with vocational qualifications (five per cent) and under representation of women in large firms (three per cent).

Overall ... our finding that simply being a woman is the major contributing factor to the wage gap in Australia is significant. Consistent with results from other Australian studies it highlights the considerable impact that discrimination and other differences between men and women, including differing motivations and preferences, can have on reducing the earnings of women relative to men, irrespective of similar labour force and work-related characteristics.

5.5 The impact of institutional arrangements for wages

Researchers have observed marked variation in the overall size of the GPG in different countries and sometimes between regions within a country. This has led them to consider whether and how the institutional arrangements in different countries and regions impact on the GPG. In particular, attention has focused on the regulatory and institutional arrangements of wage determination. This has included the degree of centralisation or coordination of collective bargaining and the presence and role, if any, of minimum wages. These studies, discussed below, include those that examine the impact of institutional arrangements across countries, in addition to those whose focus is confined to Australia.

5.5.1 The concept of the minimum wage

Before proceeding it is important to clarify some key concepts. In the international literature, references to 'minimum wages' are generally to national or regional, statutory minima that establish a wage floor. However, commonly they establish a single minimum rate for adults and a minimum rate for junior employees. In some countries where collective bargaining coverage is extensive (such as the Scandinavian countries – Sweden, Norway, Denmark and Finland), collective bargaining agreements set wage floors, but in many other countries statutory mechanisms give effect to national minima.

By contrast, in Australia multiple minimum wage rates are established through an extensive framework of awards that set a legally binding minimum safety net of wages and conditions of employment. These award rates are not only relevant for award-reliant employees, but also establish legally binding minima for those whose actual rates of pay are determined by over-award payments and collective agreements. For award-reliant employees, award rates may have a direct impact on pay equity. For others, there may be a less direct impact to the extent that over-award payments or collectively bargained rates are influenced by or replicate the relativities in awards.

5.5.2 Systems of wage determination

An ongoing area of interest in gender pay equity research has concerned the impact of systems of wage determination, particularly with a view to assessing the differences between centralised and decentralised systems of wage determination. Within Australia this examination has focused also on assessing the award-reliance of women and men, compared to their participation in enterprise bargaining.

Women have been found to be disproportionately represented amongst the low-paid internationally (Salverda & Mayhew 2009: 151) and in Australia are much more likely than men to be dependent on the award rate (van Wanrooy 2009: 626; Jefferson & Preston 2010: 347). While around 20 per cent of employees are estimated to be totally reliant on awards, award reliance varies across and within major occupational groups (Bolton & Wheatley 2010: 15). A number of female dominated occupations (such as community and personal service workers, sales workers and hairdressers) show high degrees of award reliance.

A range of earlier studies found that decentralised approaches to wage determination were generally less favourable to women than centralised systems, particularly for women on relatively low earnings (see eg Gunderson 1989; Mincer 1985; Blau & Kahn 1992, 1997; Gregory & Daly 1991; Gregory & Ho 1985, Rowthorn 1992; Rubery 1992; Whitehouse 1992; Preston & Crockett 1999b; Swepston 2000: 10; OECD 2002). There were two main reasons for this. First, centralised systems tend to reduce the extent of wage variation across industries and firms and thereby reduce inequality. Secondly, because women are over-represented at the bottom of the wage distribution, centralised approaches that raise minimum pay levels, regardless of gender, also tend to reduce inequality and narrow the GPG.

Summarising the findings from the literature, Gunderson (1994: 13) noted that the earnings gap tended to be smaller in countries with centralised collective bargaining arrangements that emphasised 'egalitarian' wage policies in general (such as Sweden, Norway and Australia) and largest in countries that emphasised a traditional, 'non-egalitarian' role for women in the labour market (such as Japan) or had decentralised, market-oriented wage determination with enterprise-level bargaining (such as the United States and Canada). He also noted that these latter countries had a greater degree of wage inequality in general, and that this accounted for much of the greater GPG because of the over-representation of women at the lower end of the wage distribution.

Building on their earlier work, Blau and Kahn (2003) used micro-data from the International Social Survey Programme for 22 countries over the period 1985 to 1994 to examine the effect of institutions and market forces on the GPG. They found that countries with a more compressed male wage structure (i.e., a narrower male earnings distribution), combined with low female labour supply relative to demand, were associated with a lower GPG. They argued that the inverse relationship between the GPG and male wage inequality suggested that wage-fixing mechanisms, such as 'encompassing collective bargaining agreements that provide for relatively high wage floors', raised the relative pay of women (who were found to be at the bottom of the wage distribution in all countries). Consistent with this view, they found that the extent of collective bargaining coverage in each country was significantly negatively related to the GPG – that is, the greater the extent of collective bargaining coverage, the smaller the GPG (Blau & Kahn 2003: 138–9). More recently, using a 40 country data set covering the period 1970 to 2002, Polacheck and Xiang (2009) confirmed Blau and Kahn's conclusion that greater male or female wage dispersion is associated with a wider GPG, and that nationwide collective bargaining helps to reduce the GPG.

Using census data, Eastough and Miller (2004: 270–1) compared wage outcomes in the wage and salary sector with those for the self-employed in Australia and the United States. They found the GPG to be significantly larger for the self-employed than among wage and salary earners; suggesting that the award system had offered females some degree of wage protection and more equitable earnings. By contrast, their analysis of the United States showed GPGs more than double those in Australia. They also observed that females in self-employment experienced a proportionately greater disadvantage in the US than those in Australia. They concluded that in a

deregulated environment, women experience significantly lower relative earnings, with those in self-employment suffering a more pronounced disadvantage.

Daly et al (2006) analysed institutional arrangements and the GPG in four countries (Australia, France, Japan and the United Kingdom) to assess their role and whether major changes in these countries over the last 30 years had affected the GPG. Their analysis confirmed work published in the 1980s by Gregory and others which found that country specific factors, especially the institutional environment, were important in explaining the GPG. Based on 1997 OECD data, Daley et al (2006: 4) classified Australia and Britain as having the 'most decentralised and uncoordinated wage bargaining systems' of the four countries studied. They found that the GPG did not change substantially for those working full-time over the 1990s in Australia, France and Britain, although it declined in size in Japan. The change in Japan was attributed to the shift away from seniority-based pay structures to structures linked to results, which were found to have benefited Japanese women compared to men. They concluded that deregulation and decentralisation did not appear to have disadvantaged Australian or British women. However, they emphasised that their findings were based on data for females working full-time and might differ if part-time workers had been included in the analysis. Other Australian studies discussed below highlight the limits of aggregate data for analysing the impact of institutional arrangements on women.

5.5.3 Income distribution and systems to address low pay

A related area of research concerns the relationship between earnings outcomes for women and men, and patterns of income or wage distribution. These studies have frequently assessed systems of wage determination (as discussed above). They have also been interested in changes in the representation of women and men, and full-time and part-time workers, at different points in the income distribution, and in the contribution of measures specifically directed to low pay.

For example, Rubery and Grimshaw (2009: 5–7) examined OECD data, and data from the Eurostat Structure of Earnings Survey, and found support for 'the argument that institutional arrangements for regulating low wage work can make a difference in reducing women's vulnerability to low pay'. They also suggested that their findings 'complement the more general finding that more coordinated and centralised wage bargaining institutions generate a more egalitarian wage structure and contribute to closing the pay gap'. In particular, they found that in countries with 'either no or a low level minimum wage coupled with weak collective bargaining coverage', women were almost three times as likely to be low-paid compared to men. Further, they concluded that countries with no or a low minimum wage and weak bargaining were more likely to register wide GPGs.

A major study conducted by the ILO examined the literature and wage trends in member countries (ILO 2008a). The ILO expressed disappointment at the limited progress in closing the GPG in many countries, given women's significant educational achievements. The study found that higher minimum wages were generally associated with reduced wage inequality and gender wage differentials in the bottom half of the wage distribution (ILO 2008a: 43–5). The study also confirmed 'a strong relationship between centralised and /or coordinated bargaining and lower wage disparity, including a narrower gender pay gap' (ILO 2008a: 41). However, it noted that international trends in these two important factors were often in different directions – with a 'revival in minimum wages' contrasted with low and /or declining rates of collective bargaining coverage observed in a number of countries (ILO 2008a: 34–40). The ILO study noted that in some countries, complex systems of minimum wages had emerged to compensate for the absence of effective collective bargaining

arrangements. In its conclusions, the ILO (2008a: 33) emphasised the importance of 'using minimum wages as an instrument of social protection, to provide a decent wage floor, and not – as is often the case – as a permanent substitute for bargaining among social partners'. There should be a 'coherent articulation between minimum wages and collective bargaining', with the two to operate as complementary and mutually reinforcing elements of comprehensive wage policies (ILO 2008a: 33, 67).

Similar conclusions were drawn by the European Commission's Group of Experts on Gender, Social Inclusion and Employment following a review of the literature and a comparative review of the experience of 30 European countries. They noted the importance of wage structures and institutional arrangements in reducing the GPG, and expressed concern at the trend towards more decentralised and individualised arrangements. They concluded that women seemed to be 'swimming upstream'. That is, although women were found to have improved their educational attainment, had fewer children and shorter periods of employment disruption, they were 'confronted with a labour market with growing wage differentials and a reduced share of collectively agreed wages and wage components. As a result, the differences in wages remain more or less the same' (Plantenga & Remery 2006: 8).

Similar findings were evident in Salverda and Mayhew's (2009) examination of the incidence of low pay in 13 European countries and the USA. They found that countries with more 'inclusive' wage-setting institutions experienced lower incidences of low pay. They defined 'inclusive' to mean 'the existence of mechanisms, formal or informal, to extend terms and conditions negotiated by workers with strong bargaining power to workers with less bargaining power'. However, they found that collective bargaining coverage was not necessarily sufficient on its own to avoid a high incidence of low pay. They observed that 'bargaining inclusiveness can be bolstered or weakened by other institutions', including minimum wage legislation, employment protection legislation, product market regulation, social benefits and the regulation of temporary employment (Salverda & Mayhew 2009: 145, 147, 150). With respect to the role of minimum wages, they concluded that 'the mere presence of a minimum wage offers little protection ... Its level, its universal application, and its enforcement are essential' (Salverda & Mayhew, 2009: 152).

While Salverda and Mayhew (2009: 151) observed that the incidence of low pay varied from country to country, like numerous other researchers they found that the composition of the low paid showed 'strong similarities across all countries' studied. In particular, part-timers, the young, women and minorities were disproportionately represented in the low paid group.

Consistent with the findings of international studies, Jefferson and Preston (2007: 127) argued that by 'compressing the wage distribution and raising the relative wage of those on the bottom, the Australian wage setting system was able to deliver greater levels of gender equity than those observed in most other Western developed economies'. Other Australian literature has also demonstrated links between wage setting institutions, wage negotiation and gendered outcomes (Preston & Jefferson 2009: 326; Peetz & Preston 2007; Preston et al 2006; Nevile & Kriesler 2008).

Austin et al (2008) used an analytical method developed by Fortin and Lemieux to identify links between minimum wage decisions and gender differences in earnings in the Australian labour market between 1995–96 and 2005–06. They found that in Australia the real value of the minimum wage was maintained between 1995 and 2005. Considering the implications for gender wage differences, they concluded that the 'minimum wage adjustments awarded between 1995 and 2005 contributed to a reduction in the GPG by approximately 1.2 percentage points' (Austin et al 2008:

6, 33). In addition, they noted that studies of women's labour supply suggested that wage increases have links with women's willingness to participate in the labour force. This led them to conclude that 'minimum wage decisions can play a dual role – increasing wage equity and encouraging labour force participation, particularly among low-wage employees' (Austin et al 2008: 52).

Whitehouse (2001) challenged the notion that Australia's GPG had remained stable despite a prolonged period of deregulation by looking beyond the aggregate statistics. Using unpublished data from the ABS EEH survey to analyse total (rather than ordinary time) hourly earnings, she found that a number of different trends were evident underneath the relatively static picture of the aggregate statistics. In particular, she found a continuing widening of the part-time/full-time earnings gap, which she argued had 'negative implications for the gender pay ratio in the longer term so long as women remain overrepresented in part-time employment' (Whitehouse 2001: 70). She also found evidence that the aggregate gender pay ratio was being bolstered by falling male occupational wages (relative to the occupational average) in some areas of the labour market (Whitehouse 2001: 73). She argued that a 'more divided labour market with increasing differences between full-time and part-time jobs, and casual and permanent jobs' was adversely affecting both men and women in irregular employment, 'although it is the women who currently bear the greatest cost given their overrepresentation in such jobs' (Whitehouse 2001: 74).

Before leaving this topic it is worth noting the release of a recent Productivity Commission Staff Working Paper examining trends in the distribution of income in Australia. This is a highly technical report including detailed discussion of different measures of income inequality and the reporting of data against those measures. The key focus of the report is changes in the distribution of income between 1988–89 and 2009–10 and analysis of recently observed changes in summary measures of inequality. An example here would be higher rates of growth in real individual and household income at the 'top end' of the distributions compared to the 'bottom end'. The report is not specifically directed to gender pay equity and underlines the point that its interest lies in identifying those factors that assist an understanding of *increasing* labour inequality. On this point the authors observe that the 'overall increase in labour income inequality between 1988–89 and 2009–10 appears to have been a result of factors that affect men and women in similar ways' (Greenville et al 2013: 9).

5.5.4 Australian data sources and methods of pay setting

Australian researchers have frequently commented on the need for more detailed earnings data. This matter was raised in the discussion of the impact of occupational segregation on earnings differences (see section 5.4.4). But the particular focus here is on the availability of data that distinguishes between full-time and part-time workers, and also the availability of reliable data on pay setting. These assessments are identified in this section of the chapter and they are joined to more recent data on gender outcomes according to the method of pay setting.

Preston and Jefferson (2007), in examining the stability of Australia's GPG, cautioned against the use of aggregate trend data as an accurate measure of men's and women's labour-market experiences. They found that apparent stability in the GPG (measured by reference to data for all full-time employees) at a national level neglected important variations between State-level data and the growing significance of part-time employment. They also argued that apparent improvements or stability in the GPG at the national level may have been a result of men's deteriorating labour market position. Confirming measurement issues noted above, they argued that measures of the

GPG that focused on full-time employment understated the effects of women's employment in labour market sectors traditionally reliant on award wage-setting processes, including the increasingly important area of part-time employment. They concluded that to gain a more accurate picture required monitoring time-series data on hourly earnings, disaggregated by industry, occupation, sector, sex and method of pay setting (Preston & Jefferson 2007: 80).

A more recent study of earnings differences between women and men was concerned with examining the utility of the HILDA Survey to draw meaningful data on the methods of setting pay, relative to that drawn from the ABS EEH Survey (Wilkins & Wooden 2011). This particular purpose was a matter of some wider investigation in the research community, specifically the need for reliable data on pay setting, and the recipients of the decisions of industrial tribunals (Healy 2011; Healy et al 2011). Having concluded that the HILDA Survey provided meaningful and comparable data to that drawn from the ABS survey, Wilkins and Wooden (2011: 19–20) found that GPGs were smaller for more centralised methods of setting pay (awards), compared to other methods of setting pay:

In summary, there are, on average, no obvious differences between the hourly pay of male and female employees who are award-reliant that cannot be explained by differences in other characteristics that are usually thought to influence pay, such as health and disability, experience, education and skills. In contrast, among other employees who rely on bargaining or individual negotiations for their pay, the gap between men and women's pay that cannot be explained by other characteristics is sizeable, ranging from 8.5 per cent when industry is controlled for to 11.2 per cent when it is not.

More recently, Pointon et al (2012) undertook an analysis of award reliance and difference in earnings in gender. The researchers' key focus was an assessment of whether increases in the minimum wage, and the form of that increase (percentage or flat), impacted the GPG. Their data confirmed that women are more likely than men to be award reliant. As part of their research they assessed earnings differences between women and men according to the method of setting pay, and also by indicative skill levels based on ANZSCO. On this matter the researchers noted the limitations of using aggregated data sets, and proxy measures for work value such as that provided by ANZSCO. A key area of interest was the difference in wage outcomes for women and men who were award reliant, and those who had their pay determined by other means (informal over-award payment, formal collective or individual agreement, or a common law contract). The key findings of this research using ABS data included (Pointon et al 2012: i–iii):

- Women are more likely than men to be award reliant, but are also concentrated in the higher skill levels of both awards, and other instruments.
- Females covered by awards tend to earn more than males. Their Average Hourly Ordinary Time Cash Earnings (AHOTCE) was 106.3 per cent of males and their Average Weekly Ordinary Time Case Earnings (AWOTCE) 103.4 cent of males. A key contributory factor was that women tended to be employed at higher skill levels.
- In contrast to the findings for award-reliant workers, there was a reverse of gender outcomes for employees who were not award-reliant. Females covered by these instruments received an AWOTCE that was 84.9 per cent of males, and an AHOTCE that was 88.4 of males, despite being more highly concentrated than males at higher skill-level classifications.

5.6 Conclusion

Only a small proportion of the earnings differences between women and men can be explained by differences in education and work experience or other productivity related characteristics.

Research assessing explanations for other contributory factors to the GPG assessed by Romeyn et al (2011: 60) and Pointon et al (2012: 3–4) that remain supported by subsequent research include:

- differences in the types of jobs held by men and women and the method of setting pay for those jobs, including:
 - the industries and occupations in which they work, but noting the complexities in the findings concerning the impact of occupational segregation;
 - the location of their work – Australian studies reveal significantly higher gaps for employees in the private than the public sector, in large workplaces, and at the top of the wage distribution than for those at the bottom;
 - the regulatory and institutional arrangements of wage determination, recognising in the Australian context the greater earnings differences between women and men among non-award reliant workers (including factors such as the degree of centralisation or coordination of wage determination and the presence and role, if any, of minimum wages); and
 - different levels of discretionary payments made to those in male and female occupations;
- structures and workplace practices which restrict the employment prospects of workers with family responsibilities, resulting in:
 - differential working times, as females have less access to paid overtime and are more likely to be in part-time or casual positions, but noting the complexities of the research findings concerning the impact of the disproportionate representation of women in part-time work; and
 - less access to training and promotion for female workers;
- the ongoing undervaluation of feminised work and skills, including:
 - differences in pay for males and females doing similar or comparable jobs;
 - different job titles (and pay) for the same or similar occupations;
 - undervaluation of the skills, competencies and responsibilities associated with ‘female’ jobs; and
 - gender biases in job evaluation methods, job classification systems, and job remuneration systems.

6 Proceedings under Part 2-7 of the Fair Work Act: Key issues

6.1 Introduction

We turn now to the carriage of equal remuneration proceedings in the Australian federal jurisdiction. As outlined in Chapter 3, equal remuneration applications are brought under Part 2-7 of the Fair Work Act. In the only proceedings completed under these provisions to date (the *SACS* case, discussed in Chapter 4), the Full Bench of FWA set out an approach to applications for equal remuneration orders with the following key features:

- There is no requirement to demonstrate discrimination as a threshold to an equal remuneration claim.
- Undervaluation was adopted as a key part of the Full Bench's approach in assessing equal remuneration claims.
- There is a requirement to establish that the asserted undervaluation is linked or attributable to gender.
- There is no requirement for applications to reference an explicit male comparator group, although such references may be included.
- The 'indicia' of undervaluation developed through the New South Wales and Queensland jurisdictions (see sections B.2.1, B.3.2) provide a framework for considering whether there is undervaluation but do not constitute a prescriptive formula.
- The Full Bench recognised that impediments to bargaining can impede equal remuneration.
- Consistent with approaches utilised in the past, the Full Bench adopted a 'phased' approach to wage adjustments established through the equal remuneration order.
- Additionally, the Full Bench did not indicate that it would depart from its traditional reliance on work value as a means of assessing the value of work.

The Commission may yet reconsider its approach to these issues and we note that the *SACS* case may have provided a particular set of circumstances that were facilitated by the federal government's funding announcement (see section 4.6). Additionally, as noted in Chapter 1, an application for an equal remuneration order in relation to certain childcare workers is presently before the Commission. In those proceedings the Full Bench has asked the applicants and respondents to address a number of issues concerning the assessment of gender based undervaluation.³⁸ This may provide a platform for the discussion of issues raised in both the May 2011 and February 2012 majority and minority decisions in the *SACS* case.

In this chapter we consider the prospect and content of an equal remuneration principle (ERP) or some equivalent framework, noting that the terminology of 'principle' or 'framework' is less important than considerations of purpose and content. Prior to doing so we assess the key concepts that may be considered in such a principle, noting that the starting point for this consideration is the approach taken by the Full Bench in the *SACS* case and the key concepts that have emerged in recent developments in equal remuneration regulation.

³⁸ See eg the draft directions issued on 8 October 2013, available at <http://www.fwc.gov.au/sites/caeremuneration/listings/NoL-19-Nov-2013.pdf> (accessed 17 October 2013).

6.2 The emergence of undervaluation in equal remuneration regulation

It is clear from the *SACS* case, and from earlier cases in New South Wales and Queensland, that the concept of undervaluation provides a focus for identifying and addressing pay inequity in Australia. Its emergence in Australian labour law was a response to the difficulty in discrimination based approaches to pay equity. This difficulty was evidenced in the *HPM* proceedings and in the under-utilisation of the equal remuneration provisions introduced at a federal level in 1993 and maintained (with some amendments) until the Fair Work Act commenced in 2009 (noting that Part 2-7 did not commence until 1 January 2010).

It had been envisaged that the legislative reference to discrimination in equal remuneration legislative provisions would give the right to equal remuneration a more substantial legal foundation. In practice, the requirement to demonstrate discriminatory processes in the determination of wages made the task of successfully claiming equal remuneration more difficult. The sex discrimination test supported a narrow form of job comparison between men and women. The legal hurdles it imposed also meant that it favoured prosecution at the level of the individual worker, or of the workplace, rather than at the level of an entire industry, sector or occupation. It was these obstacles that led to industrial tribunals in New South Wales and Queensland developing ERPs with undervaluation as a key and central concept.

6.3 What is undervaluation and why is it distinct?

As a concept, and in contrast to discrimination-based approaches to equal remuneration, undervaluation focuses on the valuation of work in female dominated industries and occupations, so as to determine whether that work has been inappropriately or inadequately valued. A finding of gender based undervaluation may be based on evidence of a failure to recognise or give proper weighting to the characteristics of feminised work. Additionally, other gender-associated factors, either singly or in combination, may have contributed to a lack of (or inadequate) work value assessments, resulting in rates of pay that do not reflect the value of the work.

Our assessment is that an equal remuneration approach that focuses on undervaluation is necessarily broader than a work value exercise, at least as traditionally conceived (see section 3.1.1). This is because its scope goes beyond assessing *changes* in work value, or changes in work value within a stipulated time frame. Equally an explicit focus on undervaluation is more capable of assessing whether the objective of equal remuneration has been met. In the New South Wales and Queensland jurisdictions the concept has permitted the tribunal to avoid having to operate on an assumption that existing rates of pay have been properly set. It facilitates an acceptance that past work value assessments, if they have occurred, may have acted to undervalue the work because such assessments have been affected by gender.

This noted, State industrial tribunals considering equal remuneration claims have acknowledged the close relationship between considerations of undervaluation and work value. For example, in *Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290, the applicant, the Liquor Hospitality and Miscellaneous Union (LHMU), led evidence concerning undervaluation *and* changes in work value. It was submitted by the LHMU that the existing classification structure and rates of pay were undervalued due to the feminised nature of the industry, and normative assumptions concerning the valuation of the work concerned with the care, nurturing and development of children. In doing so, the LHMU utilised an award history to demonstrate the absence of any comprehensive assessment of the value of the work, and highlight the impact of consent arrangements on the determination of award rates. The evidence led with

reference to the work value principle concerned changes to licensing requirements, accreditation and training arrangements, as well as health and safety requirements and mandatory reporting obligations flowing from child protection legislation. In considering the nature of the applications before it, the New South Wales Commission held that both the work value change and undervaluation were established. It did not apportion a proportionate weighting to its findings in either claim, but considered (at [243]) that the proper remedy was an ‘assessment of the value of the work to be considered in the context of the awards applying to teachers’ (see also section B.2.4).

In its May 2011 decision in the *SACS* case, the FWA Full Bench noted that the successful claim in *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19 – which as explained in Chapter 4 prompted the federal application that was before FWA – had been pursued on the grounds of both equal remuneration and changes in work value. The Full Bench observed that ‘although work value change is not irrelevant under Part 2-7 [of the Fair Work Act], it is clear that the equal remuneration provisions are directed not at undervaluation itself, but at undervaluation which is gender-based’ (*ER Case No 1* at [266]).

For reasons explained in section 3.4.5, it is unclear whether it is possible to pursue parallel claims for an equal remuneration order under Part 2-7 and for work value adjustments under sections 156(3) or 157(2) of the Fair Work Act. But this does not, in our view, preclude the Fair Work Commission from (a) determining that the work performed by a group of female (or mostly female) workers is undervalued, (b) attributing that undervaluation to factors that are grounded in their gender, and (c) seeking to remedy that undervaluation – even if some part of that undervaluation might alternatively have been capable of being addressed through establishing a change in work value.

6.4 Is the use of comparators central to a finding of undervaluation?

A related question considered in both the New South Wales and Queensland jurisdictions and in the *SACS* case was whether the process of establishing a lack of equal remuneration for work of equal or comparable value *must* be undertaken by reference to some form of comparative exercise. In the *SACS* case the Full Bench did not indicate that comparators were a necessary precondition and specifically noted that applications do not need to specify a male comparator (a view not shared by Vice President Watson in his dissenting decision). As explained in sections B.2 and B.3, the New South Wales and Queensland Commissions have regarded such exercises as potentially helpful, but not as essential. Indeed the Inquiries that preceded the equal remuneration decisions in both jurisdictions held that a concentration solely on comparative assessments including a mandatory requirement for comparators would be unduly limiting.

The absence of a mandatory requirement for comparators, including the absence of a requirement for gender-based comparators, is linked to the concept of undervaluation, given that this concept does not revert routinely to a male standard. Validating the undervaluation of women’s work by reference to a comparable male group can be inherently flawed, because it relies on an assumption that ‘male’ rates of pay were objectively set by reference to work value. On this reasoning, comparisons within and between occupations and industries should not be required in order to establish undervaluation of work. As noted in the *SACS* case, male ‘comparators’ might be used for illustrative purposes but are not an evidentiary precondition (*ER Case No 1* at [232]). Applicants may choose to use a range of comparisons, including other areas of feminised work.

Importantly, comparators may not necessarily assist the tribunal's assessment of the application. When assessing the viability of comparator-based evidence and methodology in valuing work in a heavily feminised industry (the child care industry), the New South Wales Commission agreed with expert evidence which noted that 'the uniqueness of the work of child care workers limited the usefulness of selecting any particular male dominated industry as a "comparator"' (*Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290 at [103]).

Equally, while comparators may not be a prerequisite, they may assist the work of industrial parties and industrial tribunals. As an example, the New South Wales *Crown Librarians* case was built on the findings of the case study developed for the New South Wales Pay Equity Inquiry by the Office of the Director of Equal Opportunity in Public Employment, in which two points/factor job evaluation systems³⁹ were applied in comparing the work of librarians and geologists. The case study included the award structures and histories, career paths and remuneration for both areas of work. Together with the New South Wales Pay Equity Inquiry's own findings, the case study provided a partial basis for agreement between the parties that there was gender-related undervaluation of librarians' work. As the question of whether the work was undervalued was not contested, the Full Bench of the New South Wales Commission that heard the application was not required to provide further guidance than that available in the ERP decision as to what was required to establish gender-related undervaluation. It was accepted, however, that it was appropriate to compare the work of librarians with other public sector-based professions and it was relevant that librarians were paid less than other professions where work value had been assessed by the Commission in setting rates. Relevant factors in the comparison were the requirement for a bachelor's degree or equivalent for entry, and career progression based on experience and merit-based appointment for promotion (*Re Crown Librarians, Library Officers and Archivists Award Proceedings – Application under the Equal Remuneration Principle* (2002) 111 IR 48 at [26]; and see also section B.2.3).

Comparators may also assist industrial tribunals in establishing rates of pay for areas of work they have assessed to be undervalued. In the Queensland *SACS* case, Commissioner Fisher considered that she was required to assess relativities which in the Commission's view understated the nature of the work, skill and responsibilities at levels 5 to 8 of the Queensland Community Services and Crisis Assistance Award – State. In determining how the relativities should more properly be set, the Commission noted comparators were not mandatory but can provide guidance as to appropriate levels of remuneration. In considering the rates to be applied in the Award, the Commission was guided by the rates in a number of different industrial instruments in local government and the Queensland Public Service. In this case, these included bargained outcomes, including the State Government Departments Certified Agreement 2006. The Commission found that this Agreement provided a useful point of comparison because a criterion for its certification was that the rates provided equal remuneration for men and women employees for work of equal or comparable value. The Commission agreed that it was appropriate to use certified agreement rates as a guide to ascertaining appropriate rates. This was consistent with an overriding public interest objective of ensuring that employees in the community services sector are remunerated commensurate with their work value (see also section B.3.5).

³⁹ These were the Hay and OCR systems. The nature of such systems is addressed in section 2.4.11.1.

6.5 Establishing that undervaluation is gender-based or has a gender associated cause

A potential area of contest in proceedings under Part 2-7 concerns the parameters of gender-based undervaluation: specifically, the evidentiary bar for gender-based undervaluation, and the means through which parties could demonstrate that undervaluation was gendered or had a gender-associated cause.

The means through which gender is aligned to undervaluation will inevitably be shaped by the circumstances of individual applications. Nevertheless, parties may wish to consider the material that State tribunals have previously found to be persuasive in this context, noting that a feature of some recent equal remuneration proceedings has been agreed statements of facts between the parties.

- In concluding that hairdressing work was undervalued, Justice Glynn, in the New South Wales Pay Equity Inquiry, identified the inadequacy of the existing flat classification structure and the accompanying absence of a post trade classification structure. Post-trade qualifications and training were not rewarded in hairdressing; in contrast motor mechanics and other male-dominated trade occupations were compensated for additional skills and knowledge (Glynn 1998: vol 1, 383–9).
- In finding that the work of beauty therapists was undervalued, Justice Glynn noted that while beauty culture had been offered as a trade course since 1985, and had been recognised as such in the relevant award from 1989 onwards, the work was not aligned with the trade qualification in the relevant classification and wage rates structure. The Inquiry determined that this was clear evidence of undervaluation of a sort that did not characterise any other trade-based (and primarily male dominated) work (Glynn 1998: vol 1, 340).
- Justice Glynn considered that the inadequacy of classification structures in the relevant State and federal awards was fundamental to a finding that the work of clothing outworkers was undervalued. Specifically, the classification structures did not provide skill descriptors for levels above the trade aligned rate of remuneration. The Inquiry found that the inadequacy of the award classifications was sufficient to reach a finding of undervaluation, and it also found that the work was undervalued by reference to the work of the machinists in the metal industry (Glynn 1998: vol 1, 642).
- Justice Glynn determined that work of a highly feminised seafood processing classification – trimmers – was undervalued. The work of trimmers was undervalued because it had been classified at the same level as the general hand and below that of butchers (a highly masculinised occupation). This situation had its origins in the simple equation of the ‘all others’ female rate with the ‘all others’ male rate in the variations that followed the 1973 State *Equal Pay Case*. This long-standing failure to examine the nature of the work and recognise the dexterous, repetitive, high-speed nature of ‘trimming’ was not remedied by an award variation that had introduced structural efficiency adjustments, and a contributory factor was the consent arrangements between the parties (Glynn 1998: vol 1, 699–709).
- In the New South Wales *Librarians* case, the Full Bench of the Industrial Relations Commission of New South Wales considered and gave weight to the findings of the New South Wales Pay Equity Inquiry (*Re Crown Librarians, Library Officers and Archivists Award Proceedings – Application under the Equal Remuneration Principle* (2002) 111 IR 48 at [28]-[29]; see also section B.2.3). The Inquiry, which had considered a case study involving

librarians and geologists, had found clear evidence of undervaluation had concluded that rates for librarians had been set on the basis that they were not qualified professionally. The value of the work had not been assessed by the Commission for a considerable period and there had been changes in the value of the work that had not been recognised by re-evaluation and/or through new classifications (Glynn 1998: vol 1, 490–7).

- In the New South Wales *Child Care* case, a Full Bench of the New South Wales Commission concluded that, while it might be ‘difficult to detect gender-based undervaluation’, no witness had supplied explanations that challenged the evidence or the findings of the Pay Equity Inquiry (*Re Miscellaneous Workers’ Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290 at [210]; see also section B.2.4). The Inquiry had concluded that the level of pay for childcare workers, a highly feminised occupation, needed to be viewed against the low level of unionisation, their poor access to overtime and payment for overtime, the small size of the workplaces in the sector and the service nature of the industry. These factors had contributed to the poor recognition of the training and credentials held by childcare workers by way of remuneration and career paths in childcare. The industrial processes had not been sufficient to recognise the changing nature of the childcare industry nor to overcome normative assumptions concerning the value of work involving the care and development of young children (Glynn 1998: vol 1, 4270-286).
- Similar evidence was considered in the Queensland *Child Care* case, In these proceedings the Queensland Industrial Relations Commission held that the work performed by childcare workers had been historically undervalued, based on the gender of the workers and assumptions concerning the valuation of caring work (*Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children’s Services Employers Association, Queensland Union of Employers and Others* (2006) 182 QGIG 318, see also section B.3.4).
- In the Queensland *Dental Assistants* case, the Queensland Commission had access to case study material presented at the Queensland Pay Equity Inquiry. The material had identified a female dominated occupation characterised by a high incidence of consent arrangements and the absence of detailed work value assessment. Contributing to the undervaluation was the incomplete or inappropriate application of wage adjustment processes, inadequate recognition of training and qualifications, ‘soft skills’, responsibility and the conditions under which the work was performed (*Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch)* (2005) 180 QGIG 187; see also section B.3.3).
- In the Queensland *SACS* case, the Queensland Commission assessed that factors that contributed to the undervaluation of the work included the female characterisation of that work. Specifically, the nature of the work in the community services sector was considered to be an extension of work undertaken by women in the domestic sphere, including the caring and nurturing of dependants. This characterisation had impeded industrial recognition of the work and there had been an absence of work value investigations in the award. In consequence, the prevailing classification structure and wage rates failed to recognise post-school qualifications held by employees in the sector (*Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19; see also section B.3.5).

In the federal *SACS* proceedings, the Full Bench made an initial determination that the work was undervalued on a gender basis, through a series of interlocking conclusions. These were that:

- much of the work is caring work;
- such a characterisation can contribute to devaluing work;
- the work was in fact undervalued; and
- given that caring work has a female characterisation, the undervaluation was gender-based (see section 4.5 and *ER Case No 1* at [253]).

In its direction as to the framing of any remedy, however, the Full Bench effectively imposed an empirical requirement on the applicants, requiring submissions as to what proportion of the undervaluation could be attributed to gender (see section 4.5 and *ER Case No 1* at [286], [295]). As we explained in Chapter 4, the ASU used a research study to assess the proportion of caring work evident at each classification level in the Social, Community, Home Care and Disability Services Award 2010. Caring work, both direct and indirect, was then used as a proxy for gender. Whether a proxy-based methodology is accessible or appropriate for all applicants, however, is a point of some debate.

As discussed in Chapter 5, the available research on gender pay equity identifies the complexity of separating gender from a range of other reinforcing and interconnected considerations that shape women's earnings. Different dimensions of undervaluation can contribute to pay inequity in an additive and cumulative way.

In New South Wales and Queensland, tribunals have taken the view that the assessment of equal remuneration claims involves balancing a number of considerations, and that it is not always possible to identify the extent of gender-based undervaluation in a forensic manner. This disinclination by State tribunals to mandate a proportionate identification of gender-based undervaluation is linked to what those tribunals have assessed as a key task, namely assessing the current value of the work in question and ensuring that the minimum rates of pay for it have been properly set.

Two further and related issues are raised by an insistence on a proportionate assessment of the contribution of gender to undervaluation. The first is whether this insistence introduces a *de facto* requirement for applicants to rely on comparators. The second is whether this insistence imports the weaknesses in the discrimination-based test that was effectively mandated under the previous federal legislation. Contemporary developments in equal remuneration regulation have indicated that an insistence on comparators may not aid the objective of equal remuneration. Similarly, one of the disamenities of the discrimination-based test was that it invoked a narrow and binary form of job comparison.

Approaches to equal remuneration that affirm equality where women can demonstrate a 'sameness' to men, but are ambivalent or overly restrictive as to how 'difference' from men should be assessed, measured and valued, carry a number of weaknesses. Such approaches can be overly formulaic and historically have failed to contest the undervaluation of feminised work, or to assess the direct and tacit means by which undervaluation may be embedded in the classification, organisation and remuneration of work (Smith 2011, e191). Additionally, these approaches fail to recognise that the value of male work has set key industrial standards and benchmarks, and that binary means of assessment against those standards, such as the discrimination test, have proven to be incapable of assessing the dynamics of gender pay inequity.

One of the strengths of the concept of gender-based undervaluation is that it goes to the heart of addressing the institutional and cultural determinants of why women have generally been under-

remunerated for their work. The ERPs which have been developed in New South Wales and Queensland articulate important aspects which are acknowledged through academic and other research to have led to women's work being undervalued and under-remunerated. This approach is in contrast to an empirical or proportionate weighting methodology, which may not be entirely capable of identifying and addressing gender-based undervaluation and which may unwittingly rely on benchmarks and established norms and practices that have been established in relation to male workers. As Justice Evans observed in *Public Service Alliance of Canada v Canada Post Corporation* [2011] 2 FCR 221 at [208]: 'Establishing the value or, more accurately perhaps, the relative value of work is not a purely scientific exercise' (see also section C.9.2).

Requiring that the parties indicate or attribute the relationship between gender and undervaluation of work, by reason of the existence of feminised features of that work, enables a realistic examination of whether there is a gender-based undervaluation while still retaining the requirements for the work, skill, responsibilities and conditions for work to be assessed and appropriately remunerated.

6.6 An equal remuneration principle

The use of principles and guidelines in domestic and international jurisdictions on a wide range of gender pay equity related matters raises the question of whether a federal ERP would assist the understanding and carriage of matters under Part 2-7 of the Fair Work Act.

This matter has already been considered in the State jurisdictions of New South Wales and Queensland, where ERPs have been articulated. In these jurisdictions the principles were developed in the wake of extensive and resource-intensive inquiries that included detailed case studies, economic evidence and extensive consideration of the capacity of particular regulatory approaches to address gender pay inequity. The principles that were adopted reflected each tribunal's assessment of the approaches that had failed to ensure equal remuneration, and those that were more likely to ensure that this objective was met. As such, they could be regarded as key influences in any contemporary consideration of equal remuneration regulation.

The need, or otherwise, for an ERP was also a question that emerged during the *SACS* case. As noted in section 3.4.3, the Full Bench was not prepared to adopt an ERP at that time, assessing that it would be premature to issue a formal statement of principle that would potentially limit the discretion available under Part 2-7. But nor did it rule out that being done in a future case.

Though it is for the Commission to determine whether an ERP should be adopted in future cases, we make some comments below on the benefits of adopting an ERP and what might be included in such a principle.

6.6.1 Benefits of an ERP

Appropriately formulated, an ERP can occupy the ground between uncertainty and prescription, guide both the Commission and potential parties, as well as emphasise the importance of the concept of equal remuneration. A principle identifies for applicants and respondents the matters to be addressed in contentions and submissions. It could also facilitate the efficient conduct of proceedings, in all likelihood lessening the need for supplementary submissions, and multiple directions or hearings.

We think that key support for the concept of a principle lies in the experience of the New South Wales and Queensland jurisdictions, as detailed in sections B.2 and B.3. One of the clear benefits

of the ERPs in New South Wales and Queensland is the explicit focus they have given to equal remuneration. Through their focus on undervaluation, as the means of assessing whether the objective of equal remuneration has been met, the principles have liberated the tribunals' capacity to assess whether rates of pay for feminised work are properly set.

We believe that there is no impediment to the Commission developing a federal ERP. We note that the development of principles was an approach relied on by the Commission's predecessors, most notably in the area of wage fixing, but also in the area of equal pay. An ERP, to provide guidance to the parties on this matter, would not need to be at the expense of required flexibility in the tribunal's approach to equal remuneration, nor antithetical to the efficient conduct of equal remuneration proceedings. This said, one of the beneficial features of the approaches in New South Wales and Queensland has been the explicit guidance provided to the industrial parties, a guidance that recognises the contested and protracted nature of pay equity claims, and the shortcomings in recent pay equity regulation. Additionally it can be argued that the approach adopted in New South Wales and Queensland, with their focus on undervaluation, has facilitated both the onset of equal remuneration applications and the outcomes that have been achieved. The approach taken by way of the ERPs in these jurisdictions has elevated the objective of equal remuneration and addressed some of the inertia in gender pay equity that had been apparent after the immediate breakthroughs of the 1969 and 1972 equal pay cases.

This was a matter explicitly considered by the New South Wales Industrial Relations Commission when considering whether an explicit ERP was required, given that the parties had recourse to Special Case and Work Value principles. The New South Wales Commission determined that a new principle was required, assessing that the Commission's 1973 Equal Pay Principle had been largely overlooked, and that that an updated principle was required 'rather than leaving undervaluation claims to be processed under the Special Case principle' (*Re Equal Remuneration Principle* (2000) 97 IR 177 at [62]). The Commission addressed also the capacity of the existing Work Value Principle to address claims for equal remuneration. It was firmly of the view that this Principle was not suitable, given that it imposed requirements concerning a change in work value and time limits to date and limit the period of change. It accepted (at [144]) that 'those requirements might work an injustice because, for instance, no work value assessments had been conducted prior to the relevant dates'.

Additional guidance in a new federal ERP on what comprises gender-based undervaluation would ideally direct parties to the type of evidence that may signal potential gender-based undervaluation, but note that claims still need to be assessed on a case by case basis. In its first decision in the federal SACS case, the Full Bench indicated its concerns about what it termed an 'indicia' approach to demonstrating undervaluation. It rejected an approach whereby applications would simply rest on demonstrating that the work featured in the application shared or paralleled the dimensions of undervaluation featured in the Queensland ERP.

Nevertheless, what the SACS case Full Bench described as a 'framework' for undervaluation rather than a 'prescriptive formula' may still be a basis for any potential principle. Indeed the Full Bench clearly relied on some of the dimensions outlined in the Queensland ERP to reach a view that the work in the SACS industry was undervalued on a gender basis. The key features here, as noted above, were the feminised nature of the industry, the female characterisation of the caring work in the industry, and the low incidence of enterprise bargaining. This would indicate that even if not formulated into a principle or framework these dimensions remain relevant in the conduct of equal remuneration proceedings. The benefit of a framework approach is the guidance given to the

parties. Dimensions included in the framework would represent an acknowledgement of factors that have been accepted in previous inquiries and tribunal decisions as shaping the undervaluation of feminised work. These dimensions may not be apposite or determinative in all cases, but either singly or more likely collectively, they may provide guidance as to whether the work under review has been undervalued on a gender basis.

6.6.2 What should a federal ERP look like?

Our view is that if the Commission were to adopt an ERP, the principle should provide a clear statement indicating that applications are to be assessed on the basis of historical and contemporary gender-based undervaluation, without the requirement to establish discrimination. Likewise, the principle should expressly state that an application need not be underpinned by reference to a male comparator. As an example, the Queensland ERP (see section B.3.2) states that gender discrimination is not required to establish undervaluation, and nor are comparisons within or between occupations and industries.

Any new federal ERP should be clear as to where it applies and provide guidance on how work is to be assessed, including by setting out a non-exhaustive list of matters that may guide the Commission in its consideration of whether past assessments of the work and its remuneration have been affected by the gender of the workers. Put simply, the ERP should at least suggest the steps required to demonstrate that undervaluation was gendered or had a gender-associated cause.

These matters could be identified as a framework rather than as a prescriptive formula and contain appropriate safeguards, including a direction that claims are to be assessed on a case by case basis. As discussed, the Queensland ERP carries explicit guidance as to the matters that may be considered in assessing undervaluation. These marker points have been referenced by the Queensland Commission in its application of the Principle. Such marker points include, 'whether the work has been characterised as "female", whether the skills of female workers have been undervalued and ... whether sufficient weight has been placed on the typical work, skills and responsibilities exercised by women, working conditions and other relevant work features' (*Re Equal Remuneration Principle* (2000) 97 IR 177). It recognises also that the different starting points of men and women in the labour market may have shaped the value of feminised work. The Queensland ERP, in particular, notes that aspects of women's labour market participation may have influenced the valuation of their work. These include the degree of occupational segregation, the disproportionate representation of women in part-time or casual work, women's low rates of unionisation and their low representation in workplaces covered by formal or informal work agreements. The latter consideration has facilitated the Commission's use of equal remuneration components to remedy undervaluation.

There should also be specific guidance concerning assumptions about the merit or otherwise of prior work value assessments, and an emphasis on the importance of new assessments of work value. As an example both the New South Wales and Queensland ERPs facilitate the possibility that current rates of pay are not properly set but do not require a comparator based-methodology to demonstrate this outcome. Undervaluation can be demonstrated by showing that current rates of pay are not in accord with the tribunal's current assessment of the value of work.

The principle should provide clarity about its reliance on the construct of work value, in addition to other relevant work value features as a means of assessing the value of work. The principle should also underpin the importance of gender-neutral determinations of work value in ensuring that rates

of pay are properly set. As explained in Chapter 2, the ILO's Equal Remuneration Convention underlines the importance of objective appraisals of work. The concept of 'equal value' requires a method of measuring and comparing the relative value of different jobs. The Convention provides for the promotion of objective job appraisal on the basis of the work to be performed, where this will assist in giving effect to the provisions of the Convention. Recognising different contexts, the Convention provides for flexibility in the appraisal methods that can be used. In Australia, work value has been and should continue to be the method relied upon by industrial tribunals.

As noted earlier, we do not regard the Fair Work Act as precluding the Commission from considering in Part 2-7 proceedings whether work performed by female or mostly female workers has been properly valued, despite the availability of a separate process for work value adjustment.

Work value determinations made by tribunals may also be informed by external and internal assessments of job value, including those provided by an analytical job evaluation scheme. It may be the case that analytical job evaluation approaches have more direct application in proceedings that concern a claim confined to a single workplace or organisation. The clear objective is that the assessment of work value addresses, without gender bias, all factors relevant to the work. The Commission may wish to utilise measures that are taken up in international jurisdictions. This could include the use of tribunal-appointed expert panels or a requirement for parties to agree on experts to undertake a work value assessment, using an analytical job evaluation process to value the work cited in the application and any comparator(s). The role of the Commission could be to oversee that an objective appraisal processes free of gender bias was used by the experts and correctly applied, and on the basis of this and other evidence make work value assessments.

It is possible also for the Commission to build safeguards into the principle. For example, the New South Wales Commission consciously built some of the safeguards from the New South Wales Work Value Principle into its ERP (see section B.2.2). This can be seen, for example in the requirement that alterations to wage relativities be based on the work, skill and responsibility required, including the conditions under which the work is performed (para (g)); in the guidance as to how any undervaluation is to be addressed (para (h)); in the care to be taken against 'double counting' (para (j)); and in the interpretation of the phrase 'conditions under which the work is performed' (para (l)).

6.7 Evidence in equal remuneration proceedings

Both the equal remuneration proceedings in New South Wales and Queensland surveyed in Appendix B, and the SACS case in the federal jurisdiction, provide some guidance on the type of evidence germane to considerations of undervaluation. We note that in the New South Wales and Queensland proceedings the parties' evidence was shaped by the terms of the ERPs in those jurisdictions. In some of those cases, the tribunal's work was assisted by the parties submitting an agreed statement of facts.

In previous proceedings the evidence has primarily been directed to demonstrating the undervaluation or otherwise of the work central to the application, including linking the undervaluation to gender or a gender associated cause. It is likely that the types of evidence outlined below may not be considered not only in isolation, but in a cumulative way, as the research reviewed in Chapter 5 indicates that multiple, reinforcing and intersecting factors impact on the GPG. As an example the undervaluation of the skills/qualifications, effort (physical, mental or psychosocial), responsibilities and working conditions (physical and psychological aspects)

associated with feminised work, may be reinforced by differences in the types of jobs held by men and women and the method of setting pay for those jobs.

Provided below is a discussion of what we consider to be a helpful approach to evidence in equal remuneration proceedings, based on the material gathered in earlier chapters.

6.7.1 Award history

Compilation of an *award history* can, in our view, provide a foundation for reviewing the assessment of work value for the relevant areas of work. This should include an account of the timing and scope of any work value assessments made by previous industrial tribunals. If there were work value assessments, it should be indicated what classifications were involved, what criteria were applied, what evidence was considered, and what were the key outcomes. A further consideration includes the use, if any, of benchmark relativities. It may be the case that there has been an absence of work value assessments. Equally those assessments that were conducted may not have assessed the value of the work correctly, and the work may have been inadequately or incorrectly described. A key feature of the approaches in New South Wales and Queensland has been their recognition of this possibility, particularly concerning the work performed by women. Alternatively parties may rely on evidence which indicates that work value assessments already undertaken have assessed the value of the work correctly. Award histories may also involve the construction of timelines on the movement of rates for key classifications, and assessing changes in the relativities between classifications. A key focus would be examining whether the description of the work and the classification structure encompasses the scope of the work as practised, including all of the factors comprised by the work. An area for consideration may be skills identified through a skills assessment (see section 6.8.2) or that the ILO has identified as typically excluded or underestimated in the valuation of work (see Oelz et al 2013: 38–47). These are summarised in Table 6.1.

Table 6.1 Frequently overlooked skills

<i>Skills</i>	<p>Knowing emergency procedures when caring for people</p> <p>Using a number of computer software and database formats</p> <p>Operating and maintaining different types of office, manufacturing, treatment, diagnosis or monitoring equipment</p> <p>Manual dexterity in giving injections, typing or graphic arts</p> <p>Writing correspondence for others, minute taking, proof reading and editing other's work</p> <p>Handling complaints</p> <p>Innovating – developing new procedures, solutions or products</p> <p>Establishing and maintaining manual and automated filing or records management and disposal</p> <p>Training and orientating new staff</p> <p>Dispensing medication to patients</p> <p>Continuing reordering and reprioritizing tasks to meet external demands</p> <p>Interpersonal skills – including non-verbal communication, knowing how to create the right atmosphere, counselling someone through a crisis</p> <p>Gathering and providing information for people at all levels in the organization</p>
<i>Physical and emotional demands</i>	<p>Adjusting to rapid changes in office or plant technology</p> <p>Concentrating for long periods – computers or manufacturing equipment</p> <p>Performing complex sequences of hand eye coordination in industrial jobs</p> <p>Providing a service to several people or departments while working under a number of simultaneous deadlines</p> <p>Frequent bending or lifting – including adults or children</p> <p>Regular light lifting</p> <p>Restricted movement, awkward positions</p> <p>Providing caring and emotional support to individuals (e.g. children or those in institutions)</p> <p>Dealing with upset, injured, irate, hostile or irrational people</p> <p>Dealing with death and dying</p> <p>Exposure to corrosive substances or materials e.g. skin irritations from cleaning</p>
<i>Responsibility</i>	<p>Acting on behalf of absentee supervisors</p> <p>Representing the organization through communication with clients and the public</p> <p>Supervising staff</p> <p>Shouldering the consequences of errors to the organization</p> <p>Managing petty cash</p> <p>Keeping public areas such as waiting rooms and offices organized</p> <p>Preventing possible damage to equipment</p> <p>Coordination of schedules for a number of people</p> <p>Developing work schedules</p> <p>Product quality</p>
<i>Working conditions</i>	<p>Stress from noise in open spaces, crowded conditions and production noise</p> <p>Exposure to disease</p> <p>Cleaning offices, stores, machinery or hospital wards</p> <p>Long periods of travel and/or isolation</p> <p>Stress from dealing with complaints</p>

Source: Oelz et al 2013: 40–1

If there have been changes in work requirements, for example increased or altered regulatory requirements, it should be indicated whether these are recognised in classification structures. An additional consideration is the role of the award in the regulation of occupational entry points and whether particular classifications require a specific qualification. This analysis may be accompanied by reviewing the training and credentialing frameworks that operate within the occupation/industry and their history. Also relevant to the assessment of the description of the work is whether it has

been characterised in an explicitly or implicitly gendered way, or features skills and knowledge that may not have been assessed or valued properly.

The history needs to deal with how the traditional criteria of work value – especially skill, qualifications, and working conditions – have been approached by industrial parties and tribunals. Showing undervaluation requires demonstrating that significant elements of work value have not been taken into account nor given enough weight in evaluating the work. The use of this type of evidence in the recourse to undervaluation would be to identify failures in the prior assessment, characterisation or valuation of feminised work.

It is also of course open to the parties, if they are relying on a single comparator or a range of comparators, to assess the pattern of work description, rate of pay, and work value considerations for those comparators as well.

6.7.2 Evidence to assist an assessment of the work

It is open to the parties to prepare other material that may inform the assessments of the value of the work, including whether it is undervalued, or alternatively, valued correctly. This evidence may supplement or complement the work that is prepared as part of the award history. It may include:

- *Witness statements*, or material that assists to identify all the components of work that is required in particular positions, and within the occupation or industry concerned. This would include attention to components of work value – the skills and knowledge required to complete the work and the conditions under which it is performed.
- Material to support a contention that there has been a *change in work value*, for example altered compliance or regulatory requirements, that is not presently recognised in classification descriptions.

It is open also to the parties to present the results of objective assessments of indicative work that fall within the application. These assessments may be sourced from *independent job assessment experts*.

There are newly developed resources available to the parties to assess whether previous job evaluations and any resultant grading that they rely upon are free from gender-bias. As an example, the *Gender-inclusive Job Evaluation and Grading Standard* is a voluntary standard developed by Standards Australia through a Standards Development Committee. The Committee comprised job evaluation and grading specialists, equity specialists, and representatives from the Australian Human Resources Institute, employer groups and unions. It is a standard that has particular application to analytical job evaluation approaches, setting out requirements about how job evaluation and grading can be done free of any effects of gender. It describes the use of analytical job evaluation as well as approaches to the use of role profiles, slotting and grading techniques, depending on the nature of the job evaluation required.

To assist in its use, the Workplace Gender Equality Agency (WGEA) has produced a guide to the Standard which can be used in conjunction with it (WGEA 2013b). The main requirements of the Standard relate to ensuring that (WGEA 2013b: 7):

- The plan for the job evaluation and grading project includes how the gender equity objectives will be met;

- Committee or group members are selected on a fair and clearly stated basis appropriate for the coverage of the project;
- Participants in the project, including internal and external job evaluation and grading practitioners, and members of committees (job evaluation and grading committees, reference panels, steering committees) have appropriate education and training for their roles. The training needs to cover the job evaluation and grading system, its implementation and its gender equity objectives;
- The job evaluation and grading system selected (including its factors or elements, and their weighting) can fully and fairly measure the significant components of all jobs being evaluated, without gender bias;
- The benchmark sample for evaluation and grading is sufficiently representative of the range and distribution of all the jobs being evaluated and graded;
- The job information used in job evaluation and grading is relevant and sufficient for job evaluation and grading free of gender bias;
- The job evaluation and grading process consistently applies the job evaluation and grading system without gender bias;
- The outcomes of evaluation and grading (factor by factor and overall rank order) are checked for consistency, and validated by the organisation;
- Appropriate appeal processes enable testing and redress of any gender bias in evaluation and grading, including processes for checking how the appeals process is working;
- Slotting of jobs not fully evaluated is conducted analytically, systematically and appropriately;
- Job descriptions and evaluations are kept current; and
- Grading structures and systems are soundly based, and consistently applied, free of gender bias.

A further example is a *skill recognition tool*, Spotlight, which was developed by the New Zealand Department of Labour and has also been taken up in Australia. The tool featured in a pilot project by the EOWA⁴⁰ to assess classification descriptors in Australia's modern awards. The project explored the potential contribution of the skills identification framework and job skills analysis tool provided by Spotlight in developing and promoting more gender-inclusive ways of defining, classifying and grading jobs (Junor et al 2012).⁴¹ Such products are designed as an aid to naming and classifying skills that are required to carry out work activities effectively, but that are hard to describe and easy to overlook. These skills have been identified by research as being historically poorly described, such as social and organisational skills. They involve shaping and sharing awareness, interacting and relating, integrating action and reflection, and coordinating activities at a point in time and over time. Different levels of these skills are required in different jobs, but the levels do not always neatly match formal qualifications. The Spotlight tool offers a methodology for identifying these skills so as to enhance existing skills recognition approaches, including job evaluation (New Zealand Department of Labour 2009: 5). This tool may assist the parties identify,

⁴⁰ Now the Workplace Gender Equality Agency.

⁴¹ The tool was relied upon by the applicants in the federal SACS case; see also witness statement of Dr Anne Junor, 16 June 2010.

describe and classify skills that may have been excluded from classification description structures and descriptors, and so inform an assessment that all elements of the work have not been considered in work value assessments.

Additionally, the many guidelines and toolkits which have been developed in a number of the countries covered in this report, through either equal pay commissions, human rights commissions or labour departments, can assist with the process of guiding employers, workers and also tribunals with some of the features which should be taken into account when assessing whether work is of equal value and in particular whether the work of women has been accorded its proper value.

6.7.3 Labour market profile and earnings data

Occupational and industry data disaggregated by gender may provide some guidance on employment patterns. This may include the degree to which relevant occupations are either feminised or masculinised, in addition to patterns of vertical and horizontal segregation by gender within the occupation or industry. This data may include patterns of full-time and part-time employment, including areas of concentration of part-time employment and the degree of unionisation. As noted in Chapter 5, however, this data may be at an aggregate level and may not always align neatly to the scope of the work in the application for an equal remuneration order.

To this data, parties may add additional material that would assist the Commission's understanding of the sector. Further labour market profile data may include the duration of paid and unpaid overtime, employees by age group, qualifications attained and data on workforce shortages. Additional material may also address the overview, history and profile of the sector, its economic contribution, the breakdown by employment size of organisations in the sector, and any particular funding arrangements.

Wage patterns and methods of pay setting disaggregated by gender may provide some guidance on the degree of award reliance, and the extent of enterprise bargaining for those areas of work that fall within the application. It is likely that initially this data will be drawn from sources such as the ABS or the HILDA Survey. But in time data may also be drawn from information collected either for or by the WGEA, under the new reporting requirements set out in the Workplace Gender Equality Act 2012 (see section A.7). In its comments on the draft version of this report, the WGEA (2013a: 2) noted that any data it collects will be aggregated and no individual or individual business will be able to be identified.⁴² The WGEA noted further that 'the current reporting matters do not address these issues'.

It is open to the parties to bring forward additional evidence, including from labour economic studies, with a view to drawing conclusions about the factors that contribute to the gender wage gap, and submitting that the portents of undervaluation are in evidence or not evident. This material may also draw on material concerning wage patterns and methods of wage setting in addition to occupational and industry data. As discussed in Chapter 5 these studies frequently rely on aggregate data sets that, in all probability, will not parallel the scope and incidence of the award or agreement cited in the application for equal remuneration orders.

⁴² See Workplace Gender Equality Act 2012 s 14.

6.7.4 Applications concerning a single workplace

In applications for equal remuneration orders that are confined to a *single workplace or organisation*, it is likely that evidence similar to that outlined above will be presented but localised to the particular organisation or workplace. In this instance it may be possible to utilise material submitted by the organisation to the WGEA, including an analysis of earnings that provides a level and breakdown of different components of wages (base pay, over-award or over-agreement pay, bonuses and so on), by factors including occupation, gender and hours of work. Additional material may include: an organisation's remuneration policy or strategy; the gender pay equity objectives, if any, which are included in the remuneration policy or strategy; whether any gender remuneration gap analysis has been undertaken and, if so, when; and the actions taken, if any, as a result of a gender remuneration pay analysis.

As the WGEA (2013a: 2) has noted, any personal information (including salary data) collected by it is subject to privacy and confidentiality restrictions.⁴³ Clearly, the WGEA cannot undertake to provide data relating to the remuneration of individual employees to the Commission, or to parties involved in proceedings before the Commission. Nor is the WGEA permitted to release private information relating to a particular employer, without that employer's consent. But in our view there would be nothing to prevent an employer involved in equal remuneration proceedings from choosing to defend an application by relying on material that it has prepared for submissions to the WGEA, provided that no employee is identified. Nor should there be any problem in another party being able to use material of this kind that an employer has chosen to make public.

6.8 Concluding comments

The material reviewed for this report indicates that the objective of equal remuneration for men and women workers for work of equal or comparable value poses a series of complex challenges for policy makers, industrial parties, courts and tribunals.

Central to this challenge have been the difficulties in addressing and assessing the concept of equal or comparable value, in addition to understanding and accepting how gender has shaped a wide range of intersecting institutional and social processes, such that women were not receiving equal remuneration for work of equal or comparable value.

6.8.1 National and international dimensions

Our review demonstrates that the objective of equal remuneration is approached in diverse ways around the developed world. This diversity is not contrary to ILO Convention No 100 on Equal Remuneration, Article 2 of which emphasises that countries may support the objective of equal remuneration 'by means appropriate to the methods in operation for determining rates of remuneration'. Equally, while Article 3 of the Convention emphasises the importance of the 'objective appraisal of jobs on the basis of the work to be performed', the methods of job appraisal 'may be decided upon by the authorities responsible for the determination of rates of remuneration'.

The legal, social and political context in each country, including its approach to wage determination, will inevitably influence the nature and scope of equal remuneration claims. Compared to the international jurisdictions reviewed in Chapter 2 and Appendix C, it is far more

⁴³ See in particular Workplace Gender Equality Act 2012 ss 13C, 14, 14A; and 32.

likely that claims for equal remuneration orders in Australia will have application to an industry, and thus to multiple workplaces. In contrast, cases concerning equal remuneration in most international jurisdictions are more likely to concern a single workplace or organisation. This is not to suggest, however, that applications in Australia cannot be confined to a single workplace and concern, for example, the rates of pay in an enterprise agreement. There is nothing to prevent the Commission or the parties from referring to, considering, or finding some guidance or confirmation from practices evident in international jurisdictions; but clearly this examination needs to be tempered by an appreciation that these approaches may be shaped by the different regulatory apparatus evident in those jurisdictions.

Differences in the institutions and policy frameworks established to address equal remuneration also influence the scope of the matters that fall to be considered and decided. It is likely that Australian tribunals, in addressing claims for equal remuneration, will not just assess the contemporary value of the work in question, but consider the factors that have contributed to the undervaluation (if any) of that work cited in the application and determine an appropriate remedy. Tribunals or authorities established to address equal remuneration in other countries may not have so broad a responsibility or jurisdiction.

6.8.2 Relevance of the State jurisdictions

Historically, attempts to address gender pay equity issues, both locally and internationally, have enjoyed only partial success. In relation to Australia, the material reviewed for the report showed that at a federal level, the 1972 principle of equal pay for work of equal value was not applied in full, while the impact of the 1993 equal remuneration legislation was limited by the requirement for applicants to demonstrate that earnings differences were a result of sex discrimination. These limitations are important to understanding the emergence of undervaluation as an approach utilised by industrial tribunals to hear applications for equal remuneration orders, to ensure that the objective of equal remuneration for men and women workers for work of equal or comparable value is met.

The emergence of new equal remuneration principles in the New South Wales and Queensland jurisdictions, founded on the concept of undervaluation, has inevitably influenced discussion of the most effective forms of federal equal remuneration regulation. A key similarity between the three regimes lies in the governing concept of equal remuneration for work of 'equal or comparable value'. Yet the regulatory frameworks in New South Wales and Queensland are not identical, and there are differences between these frameworks and that provided in the Fair Work Act.

The first key difference concerns the discretionary nature of the Commission's power to issue equal remuneration orders under Part 2-7 of the Fair Work Act. In New South Wales and Queensland, the relevant tribunals are required to *ensure* equal remuneration. As noted in section 3.4.3, there is no such imperative in the Fair Work Act. Thus in contrast to the provisions in New South Wales and Queensland, the objective of equal remuneration in the Fair Work Act is simply one of a number of factors to which the Commission must have regard in setting and adjusting minimum rates of pay.

A second potential area of difference concerns the capacity for applicants to pursue simultaneous claims for both equal remuneration orders and 'work value' wage adjustments. In the SACS case the Full Bench of FWA pointed out that the equal remuneration provisions in the Fair Work Act 'are directed not at undervaluation itself, but at undervaluation which is gender-based' (*ER Case No 1* at [266]). As noted in section 3.4.5, this conclusion supports the view that the two types of claim are not to be regarded as 'commensurate' in nature. On this reasoning the bare possibility of a work

value claim should not be treated under section 721 as barring an application for an equal remuneration order. However given the different (and lower) standard required under section 724, which precludes the pursuit of 'alternative' remedies in relation to equal remuneration, it does not necessarily follow that an applicant could *simultaneously* pursue both types of claim before the Commission, as has generally been done in the New South Wales and Queensland pay equity proceedings.⁴⁴

A third area of difference concerns the understanding of 'remuneration'. An order under Part 2-7 of the Fair Work Act is evidently to be directed to rates of 'remuneration', and can, subject to the Commission's discretion, stipulate rates that are higher than the minimum rates set by a relevant award for the same employees. In other words, and just as with the Queensland provisions, but in contrast to the provisions in New South Wales, the Commission can regulate over-award payments. This is apparent, for reasons recently discussed, not only from the fact that the equal remuneration order provisions are separated from those relating to minimum rates of pay in Part 2-6 of the Fair Work Act, but from the confirmation in section 306 that an order can override the terms of an otherwise applicable enterprise agreement.

A final point of distinction between the provisions in State jurisdictions and those available under the Fair Work Act concerns the regulatory provisions for the making of policy or principles. In Queensland section 288 of the Industrial Relations Act 1999 provides that the QIRC may make a statement of policy about an industrial matter, whether or not a matter is before it. Arguably this capacity facilitated the determination of the Queensland ERP, directly following the Queensland Pay Equity Inquiry and legislative amendments in that jurisdiction. This is not to suggest that there are impediments to the making of principles in New South Wales, or under the Fair Work Act, but simply to note that the process for the making of the ERP in Queensland differed from that in New South Wales.

6.8.3 Discretionary considerations under the Fair Work Act

In determining whether to make an equal remuneration order under Part 2-7 of the Fair Work Act, the Commission must give due consideration to the objects of the Act. This was a matter raised by a number of employer organisations in their responses to the draft version of this report (AFEI 2013: 11; ACCI et al 2013: 8–9; Livingstones 2013: 2–3).

As detailed in section 3.4.3, the Commission is obliged by section 302(4), in determining whether or not to make an equal remuneration order, to have regard to any reasons given by the Commission's Expert Panel in conducting its annual reviews of minimum wage rates. By contrast, it is not constrained by either the modern awards objective set out in section 134 or the minimum wages objective in section 284, since neither of those provisions applies in its terms to an exercise of power under Part 2-7 (see also *ER Case No 1* at [229]). Additionally the Commission need not conceive of an equal remuneration order as being *part* of the 'safety net' of minimum terms and conditions under the Fair Work Act. That safety net, as section 3(b) makes clear, is provided by the NES, modern awards and national minimum wage orders. On the other hand, the Commission must balance the requirement to perform its functions in relation to equal remuneration under Part

⁴⁴ It may be noted that section 66 of the Industrial Relations Act 1999 (Qld) is cast in similar terms to section 724 of the Fair Work Act. But the QIRC does not appear to have considered whether this would preclude simultaneous claims of the type advanced in cases such as *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19.

2-7 against the need to have regard to the general objects set out in section 3 of the Act. These objects are broad-ranging but encompass the need to maintain a 'fair, relevant and enforceable' safety net, an emphasis on enterprise-level bargaining, protections against unfair treatment and discrimination, and a direction towards economic prosperity and social inclusion.

In our opinion, the approach to Part 2-7 adopted by the Commission in the *SACS* case was consistent with those objects. So too would be the development of an ERP of the type we have recommended. But we also acknowledge that there is scope for a range of different views about how the Commission should exercise its discretion under Part 2-7.

In particular, Vice President Watson's dissenting judgment in the *SACS* case raised a number of issues about the interpretation of Part 2-7 that may be taken up in future proceedings. A key feature of his decision was the conclusion that the applicants had failed to demonstrate that any undervaluation of work in the *SACS* sector was gender-based. On this point he drew specific attention to what he termed a 'legitimate comparator', and noted that the applicants had 'not sought to make comparisons between women's pay and men's pay'. The Vice President was concerned also about the applicants' reliance on comparisons with the public sector. He linked his interpretation to the approaches used in other countries, which (as noted above in section 6.8.1) generally do not feature industry-based applications. Vice President's Watson's approach plainly differs from that evident in New South Wales and Queensland, where tribunals have taken the view that gender-based binary comparisons are not required to make a finding of gender-based undervaluation.

The reasoning relied on by Vice President Watson raises a broader point about the use of comparators in Part 2-7 proceedings. As noted by the Chamber of Commerce and Industry of Western Australia (2013: 1) in its comments on the draft version of this report, the Full Bench in the *SACS* case 'did not indicate that it was unnecessary for an applicant to identify any comparator whatsoever'; it merely highlighted the absence of a requirement for applicants to utilise a valid *male* comparator group. In its response to the draft report, Local Government NSW (2013: 1) pressed its case that 'reliable comparators are essential to the exercise of power found in Part 2-7 of the Fair Work Act'. This issue of whether there are any constraints on the type of comparisons applicants might rely upon is a matter to which the Commission may return in future proceedings. The same can be said of whether the Commission decides that comparator reference points (whether broad or more specific) are necessary to a finding of, and remedy for, gender-based undervaluation.

A further issue raised by Vice President Watson in his dissenting judgment concerned what he assessed to be a tension between the type of wage increases provided by the equal remuneration order in the *SACS* case and the Commission's obligations under the enterprise bargaining provisions of the Fair Work Act. Once again, this is a matter that will fall to the discretion of the Commission in its assessment of any application before it. If the Commission believes that enterprise-level bargaining is likely to be dissuaded by the making of an equal remuneration order, that will no doubt be an important factor to be considered. Of course, much may turn in that regard on how widespread such bargaining has been in practice in the relevant sector or enterprise(s), or is likely to be in the future.⁴⁵

⁴⁵ Compare in this regard the evidence as to the barriers to enterprise bargaining in the *SACS* sector: see eg *ER Case No 1* at [170]–[174].

An additional matter for assessment concerning the Commission's interpretation of Part 2-7 is whether the SACS case embodied a particular set of circumstances that may not be repeated in future proceedings. A particular feature of that case was the Commonwealth's decision to fund a substantial part of the cost of any wage increases awarded by the Commission. The Commonwealth government's funding announcement did not figure in the Full Bench's finding that there was gender-based undervaluation, but did feature in the majority's decision concerning remedy. The majority noted the importance of the announcement, but also that there were parts of the industry that were not government funded. With this in mind the majority determined an eight rather than six year implementation period for the awarded increases (*ER Case No 2* at [65], [67]). Rather than seeing the funding announcement as setting the SACS case apart from other types of proceedings, however, it is perhaps more pertinent to observe that the financial impact of any wage increases, whether through an equal remuneration order or through other means, is a matter to which the Commission has historically given weight, and which will inevitably influence the exercise of its discretion.

A further distinct feature of the SACS case concerned the methodology relied upon by the applicants to demonstrate the extent of undervaluation that was gender-based. As explained in section 4.6.1, this was a proxy methodology, whereby the applicants relied on a study that assessed the degree of care work at each level of the modern award classification scale and used 'caring work' as a proxy for gender-based undervaluation. Critical here was the centrality of caring work to the Full Bench's May 2011 decision that work in the SACS industry was undervalued.

Whether this type of approach will be applicable to all proceedings, or relied upon by all future applicants, will depend on whether the Commission continues to direct parties to this form of empiricism. Another factor for consideration is whether it is practically possible for applicants to replicate the proxy of 'caring work' in the application concerned, or to establish another proxy that is linked to a finding of gender-based undervaluation in a way analogous to the Full Bench's conclusions about caring work in the SACS case. These are challenges that the Commission will no doubt need to consider carefully, especially if it chooses (as we have suggested) to establish an ERP.

6.8.4 A matter for the Commission

The preceding discussion has highlighted the fact that addressing and resolving matters of gender-based undervaluation, within the framework of the Fair Work Act, is neither automatic nor straightforward. Yet the capacity for equal remuneration orders, together with the development in regulation provided by the undervaluation approach, contributes to a changed regulatory framework to address equal remuneration. Australia is in a unique position by reason of its award structures to address gender pay equity, although the objective of equal remuneration is by no means confined to award-reliant workers. Award rates of pay can also have an influence on other wage outcomes given the role of the award safety net in influencing over-award payments or collectively bargained rates (Pointon et al 2012: 4). Equally, measures to address gender pay equity and gender equality more generally are not confined to those available under the Fair Work Act, and include, as an example, reporting under the Workplace Gender Equality Act 2012 (see section A.7).

In this chapter we have assessed the emergence of key concepts in the development of recent equal remuneration regulation, and also highlighted an approach that we assess would facilitate the conduct of proceedings under Part 2-7 of the Fair Work Act. In doing so we acknowledge that

Part 2-7 carries the potential to be interpreted and applied in different ways to those that we have suggested in this report. It is for the Commission to decide how the Act should be interpreted, and how applications for equal remuneration orders should be handled. But we hope that the data and analysis presented in this report may inform parties to future proceedings about frameworks (be they an ERP or otherwise) which could lay down clear markers for the task of establishing (or refuting) gender based undervaluation.

Appendix A: Development of equal remuneration regulation in the federal jurisdiction

This Appendix provides a general review of the treatment of equal remuneration in the federal jurisdiction in Australia prior to the enactment of Part 2-7 of the Fair Work Act 2009 (Cth). In broad terms, five stages of development can be identified:

- the ‘breadwinner’ model of wage determination;
- measures shaped by wartime labour shortages;
- the 1969 equal pay for equal work principle;
- the 1972 equal pay for work of equal value principle; and
- the introduction in 1993 of a statutory right to seek equal remuneration orders, including subsequent amendments in 1996 and 2005.

This review assists in understanding the development of principles of equal pay and equal remuneration and places the current provisions in Part 2-7 of the Fair Work Act in their proper historical context. The material identifies the types of evidence and submissions that tribunals have considered in their assessment of equal remuneration matters, and identifies the rationale for shifts in their approach to equal remuneration. Where available, the review identifies research that assesses the utility of particular approaches to pay equity regulation. At the end of the Appendix, brief mention is made of two other regulatory regimes with the potential to impact upon pay equity: sex discrimination laws and affirmative action legislation. A timeline of federal equal remuneration regulation which identifies key developments and cases reviewed in this Appendix is located in section A.8.

This Appendix relies extensively on, and reproduces material contained in, an earlier report on equal remuneration principles (Romeyn et al 2011: 3–24).⁴⁶

A.1. The breadwinner model of wage determination

For most of the twentieth century the issue of equal remuneration was addressed, if at all, through the general process of wage fixation. Under the Conciliation and Arbitration Act 1904 (Cth), a Commonwealth Court of Conciliation and Arbitration was established to deal with industrial disputes that extended beyond the limits of any one State. Where such a dispute concerned the wages or other conditions to be afforded to a group of employees, the Court could resolve the dispute by making an award, a legally binding instrument that stipulated what were usually regarded as minimum entitlements. Over time, a network of such awards was created, some operating across whole industries or occupations, others confined to a single enterprise. These awards did not cover all Australian employees. Managerial and professional employees were generally excluded, at least in the private sector, leaving their wages to be set by private contract. Furthermore, many trade unions were content to operate within the parallel conciliation and arbitration (or wages board) systems that operated in each of the States, rather than creating the ‘interstate’ disputes necessary to attract the federal tribunal’s jurisdiction. Indeed until the Victorian arbitration system was dismantled by the Kennett Government in the 1990s, State awards covered

⁴⁶ In particular, in sections A.3, A.4.1, A.4.2, A.5.1, A.5.2, A.5.3, A.5.4, A.5.5 and A.5.6 below.

more employees in total than the federal system. But as the twentieth century wore on, it was the federal tribunal that came to be treated as the predominant regulator of minimum wages.

The wage fixing process that emerged under the federal arbitration system had a number of distinctive features. One was a willingness to set not just a single minimum wage, of the type found in other countries, but thousands of different wage rates, for different jobs in different industries. Besides basic wage rates, there were also special loadings, allowances and penalty rates for work performed in various conditions, or at certain times of the day or week, or in a particular capacity (for instance as a casual or a shiftworker). Another feature was the practice of having a regular test case – usually once a year – to review wage rates in selected awards and determine whether to grant any generalised wage increase. In these national wage cases, the tribunal would establish and if necessary revise a set of ‘wage fixing principles’ that would guide the resolution of future applications to set or vary minimum wage rates.

Early wage fixation was explicitly gendered. The pay received by men and women in the paid workforce was treated differently, reflecting wider social conceptions of men working full-time as family ‘bread winners’ (Ryan & Conlon 1975: 90–3). The initial construction of the minimum or basic wage in 1907, which was the first concrete expression of a ‘living wage’ in federal wage fixing, was based on the average weekly expenditure of an unskilled male worker with a wife and three children (Buchanan et al 2004: 123). When Justice Higgins established the basic wage in the *Harvester* decision of 1907 (*Ex Parte H V McKay* (1907) 2 CAR 1), he based his calculations on what it would cost for a working man to support his wife and a family of three children. The basic wage was predicated on a ‘needs’ basis which Higgins famously described as ‘the normal needs of the average employee regarded as a human being living in a civilized community’. Men were expected to support the family and separate arrangements to ensure that a woman could and might have to maintain her income from her paid work were not contemplated. This was a construct that effectively erected a barrier between men’s and women’s work (Macintyre 1985: 57).

The *Fruit Pickers Case* of 1912 (*Rural Workers’ Union v Mildura Branch of the Australian Dried Fruits Association* (1912) 6 CAR 61) was the first to examine the principle of equal work for equal pay and the value of work performed by women. In this case, Justice Higgins rejected the unions’ demand for equal pay for equal work. He explained that the minimum wage was premised on a consideration that an average employee with a wife and children had a legal obligation to provide for his family, whereas a woman had no such obligation. Consequently Justice Higgins established wage setting principles that resulted in two streams of female rates. The first stream applied where cheaper female labour could be deemed to place male jobs at risk. In these circumstances, Justice Higgins determined that women should be paid the same rates as men to avoid displacing men from employment. The second stream operated where women’s work could not be deemed to place male labour at risk (because of gendered labour market segmentation). Here women were granted a proportion of the male rate, because it was presumed that they did not need to support a family.

In the *Theatrical Case* (1917) 11 CAR 133, Justice Powers determined a living wage for females and reinforced Justice Higgins’ view that the wage should be assessed on the basis of the assumed needs of the sexes, rather than by reference to their productivity or other factors. In 1919 the female basic wage was set at 54 per cent of the male basic wage: see *Federated Clothing Trades of the Commonwealth of Australia v Archer* (1919) 13 CAR 647 at 709; Thornton 1981: 469. Following the depression this ratio was maintained, even though the criterion of ‘capacity to pay’

rather than 'needs' came to dominate the approach of the Conciliation and Arbitration Court in assessing the male basic wage.

The basic wage was set by reference to the needs of unskilled labour and was incorporated into awards either as the unskilled labourers' wage or as a component of the wage set for a skilled worker. The amounts in excess of the basic wage were 'margins' or 'margins for skill' (Hancock 2013: 243–62). In some industries women earned the same margins for skill as men, while in others they earned varying percentages of the male skilled rate, with no consistent pattern prevailing. General increases in margins came to be determined by test cases undertaken under the Metal Trades Award, which became a reference point for marginal rates in other awards (Hawke 1969).

The rate of 54 per cent was for a considerable period the predominant benchmark for women, although female process workers were granted 66 per cent of the male rate Hancock 2013: 326–7). The application of these principles resulted in three models of female wages: jobs where equal pay was granted as male employment would be under threat by women earning lower wages; jobs where women earned between 54 and 75 per cent of the male rate on both the basic wage and the skill margin, where a margin applied; and jobs where women earned the same skill margin as men, but (based on the concept of the family wage) a lower basic wage (Short 1986: 316).

A.2. The impact of wartime labour shortages

The issue of gender pay equity came under scrutiny during the Second World War due to the impact of labour shortages. In 1941 the Curtin Government established the Women's Employment Board to overcome labour shortages and set women's wage rates where women were performing traditional male work. The Women's Employment Board was required to set these rates at between 60 to 100 per cent of the male rate (Butlin & Schedvin 1977: 33).

The operation of the Board came under challenge both from the Senate of the Australian Parliament and employers and resulted in anomalies between those women in paid work who fell under the Board's jurisdiction and those that remained outside it. The basis of wage determination also carried some distinctive features, including an emphasis on the productivity and efficiency of women's work relative to that of men's work, with application to both basic wages and margins (Ryan & Conlon 1975: 125). The Board ultimately made 299 decisions on 548 applications and set proportionate rates between 75 per cent and 100 per cent (Ryan & Conlon 1975: 136–7).

In July 1944 the federal government passed the National Security (Female Minimum Wage) Regulations, which extended the jurisdiction of the Commonwealth Arbitration Court in fixing basic wages in industries considered vital in wartime (Ryan & Conlon 1975: 133). Following a review completed in February 1945, the Court determined that women's pay was not unnecessarily low, a measure of the dependency of wartime industries on cheap female labour. The legislature intervened in the form of new national security regulations and determined that women working in required vital industries would receive no less than 75 per cent of the male minimum (Curthoys 1975: 94; Ryan & Conlon 1975: 134). The effect of this series of institutional arrangements was that it dictated uneven wage arrangements for women in paid work (Baldock 1988: 37–8).

Following the special arrangements of the war years, the full powers of the Commonwealth Arbitration Court were restored. Given the circumstances of wage determination during the war, the 1949–50 Basic Wage Inquiry was faced with an uneven pattern of wage determination. Evidence presented to the Inquiry noted that many women were already being paid more than the traditional

54 per cent of the male rate and that there was a shortage of labour (Short 1986: 317). In these circumstances, the Court decided to increase the female basic wage for all jobs to 75 per cent of the male basic wage: *Basic Wage Inquiry, 1949–50* (1950) 68 CAR 735. Marginal payments followed the same pattern and rose to 75 per cent of the male margin (although the proportion of the margin for skill that was paid to women continued to vary across awards and jurisdictions). For some women doing previously male work this meant a decrease from their wartime rates and some industrial unrest resulted. For other women, however, it meant increased rates (Ryan & Conlon 1975: 140–1; Short 1986: 317).

Notwithstanding wartime measures the next significant impetus to gender pay equity measures was provided by the decision of the ILO in 1951 to adopt the Equal Remuneration Convention. Following this measure, unions lodged a further equal pay claim in 1952 with the Conciliation and Arbitration Court. This was countered by employer claims for a 44-hour week, a lower basic wage and for women to receive 60 per cent of the male rate. In its decision the federal tribunal maintained its reliance on the needs principle as justifying the difference between male and female basic wages, although it rejected the employer's claim for a reduction in the basic wage, on the basis that the existing rate of 75 per cent had not contributed to increased unemployment or significantly higher wage costs: *Basic Wage and Standard Hours Inquiry 1952–1953* (1953) 77 CAR 477; Curthoys 1988: 138.

A.3. The 1969 Equal Pay Case

In the 1967 *National Wage Case* (1967) 118 CAR 655, the Commonwealth Conciliation and Arbitration Commission (a body which had replaced the Court in 1956) abandoned the practice of awarding separate increases to the basic wage and margins in separate proceedings and introduced the concept of a 'total wage'. This meant that increases to wage rates that were based on economic reasons would be applied to the whole wage in national wage cases. References to the basic wage were to be deleted from awards and award rates were to be expressed as a single figure 'total wage'. Awarding a male total wage that incorporated both the basic wage with its needs component and the skill margin provided a reference point for assessing the value of women's work, based solely on work value criteria. The Commission also decided to award the same general wage increase to both men and women. In its reasons for awarding the same increase for men and women, the Commission referred to changing social attitudes to women in the workplace and society's acceptance of sexual equality. The Commission also suggested (at 660) that the concept of equal pay for equal work was one that required thorough investigation and debate, 'in which a policy of gradual implementation could be considered'.

The introduction of the total wage and the Commission's remarks in the case helped to set the stage for the 1969 *Equal Pay Case* (1969) 127 CAR 1142. Additional developments that provided significant impetus to that case included growing public opinion in support of the principle of equal pay; and the urgency and impetus given to the campaign for equal pay by feminists in the late 1960s and 1970s (Smith 2010: 4–5; Sheridan & Stretton 2008: 150–1).

In 1969, a Full Bench of the Commission heard an application, lodged by unions, to increase female wages to eliminate the difference between male and female wage rates irrespective of the work they performed. The ACTU argued that the needs method of wage determination was anachronistic, as was the practice of unequal pay given women's growing labour market participation. The ACTU also submitted that capacity to pay arguments, which it anticipated forming a key element in employer submissions, were no longer relevant given the climate of economic

prosperity and relatively low levels of unemployment. Women's organisations also intervened to support the union submissions and emphasised the changing status and role of women and the need to remove gender based discrimination. Employer groups argued that the differences between male and female wage rates were not solely based on sex discrimination, but on men's more significant family and social responsibilities. The Commonwealth stated that it supported the principle of equal pay, provided that four conditions were met: the work performed by females should be the same or substantially the same as that performed by males under the same award; females must perform the same range and volume of work as males; females must perform the work under the same conditions as males; and the work must not be work essentially or usually performed by females.

The Commission found that the concept of equal pay was difficult to define and apply with precision. It noted that, although the international conventions referred to by the parties represented international thinking on the matter, the conventions had not been ratified by Australia and their meaning in an Australian context was by no means clear. It acknowledged that these conventions should carry significant weight in a general way, but stated that they must be considered within the Australian context of wage fixation. The Commission indicated that it was influenced by the position of the States, which had been implementing the principle of equal pay progressively since 1958 through equal pay legislation (see section B.1), and the fact that the majority of women were covered by State awards.

The Commission rejected the union's application to increase all female wages in line with male wage rates, stating that before rates could be increased the equality of the work must first be determined and that no increase should be awarded without an examination of the work done. The Commission also found that gradual implementation would address economic concerns. It established principles to be applied in deciding future applications, which revealed a number of points of similarity with the Commonwealth's position.

These principles (see *Equal Pay Case* (1969) 127 CAR 1142 at 1158–9) included:

1. the male and female employees concerned, who must be adults, should be working under the same determination or award;
2. it should be established that certain work covered by the determination or award is performed by both males and females;
3. the work performed by both the males and the females under such determination or award should be the same or a like nature and of equal value, but mere similarity in name of male and female classifications may not be enough to establish that males and females do work of a like nature;
4. for the purpose of determining whether the female employees are performing work of the same or a like nature and of equal value as the male employees the Arbitrator or the Commissioner, as the case may be, should in addition to any other relevant matter, take into consideration whether the female employees are performing the same work or work of a like nature as male employees and doing the same range and volume of work as male employees under the same conditions;
5. consideration should be restricted to work performed under the determination or award concerned;
6. in cases where males and females are doing work of the same or a like nature and of equal value, there may be no appropriate classifications for that work. In such a case, appropriate classifications should be established for the work which is performed by both males and females and rates of pay established for that work. The classifications should not be of a generic nature covering a wide variety of work;

7. in considering whether males and females are performing work of the same or like nature and of equal value, consideration should not be restricted to the situation in one establishment but should extend to the general situation under the determination or award concerned, unless the award or determination applies to one establishment;
8. the expression of 'equal value' should not be construed as meaning 'of equal value to the employer' but as of equal value or at least of equal value from the point of view of wage or salary assessment;
9. notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed.

The Commission also provided that any pay increases were to be phased in over four years.

A.4. The equal pay for work of equal value principle

A.4.1. The 1972 Equal Pay Case

In 1972 a Full Bench of the Commonwealth Conciliation and Arbitration Commission was asked to consider whether the male minimum wage should apply to females and to formulate new principles in relation to equal pay for equal work: see *National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172.

A key impetus for the 1972 proceedings arose from the limited impact of the 1969 equal pay principle. This limitation was evident because the principles allowed parties to apply to vary award rates only on the basis of comparisons made within an award, and only where it could be shown that women were performing the same work as men, and did not extend to awards where work was performed predominantly by women. This construction limited the remedies that flowed from the decision to women who worked in identical jobs to men where there were separate and disparate male and female rates of pay. Only 18 per cent of women covered by federal awards had received wage increases and pay parity with male workers as a result of the 1969 decision.

The Commission rejected the claim for a single minimum wage on the basis that the minimum wage was determined on factors unrelated to the work performed and included a family component; a concept which had previously been accepted by all parties and advanced by the unions in previous wage cases. The Commission noted the limited application of the 1969 decision, amendments since 1969 to legislation in State jurisdictions, as well as legislative developments in the United Kingdom and New Zealand which marked changed approaches towards equal pay for females. It also noted the Commonwealth Government's support for the concept of equal pay for work of equal value and concluded that the 1969 concept of equal pay for equal work was too narrow and required expansion in light of changing social circumstances ((1972) 147 CAR 172 at 178):

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

The Commission also rejected the idea of creating a general principle for conducting work value reviews, on the basis that this approach would be 'unwieldy'. It concluded that a general principle applied by individual Commissioners was likely to obtain better results. In addressing the likely cost of the implementation of equal pay for work of equal value, the Commission acknowledged that there would be a substantial increase in total wages bills, but suggested that the community was

prepared to accept these costs and that they could be reduced by phasing in over a period of two and a half years (at 178):

We recognise ... that the increase in the total wages bill as a result of our decision will be substantial but its effect will be minimised by the method of implementation which we have adopted. In our view the community is prepared to accept the concept of equal pay for females and should therefore be prepared to accept the economic consequences of this decision.

The Commission did not rescind the 1969 principles, which it said would continue to apply in appropriate cases. However, it developed a new principle of equal pay for work of equal value which was based on work value comparisons being performed to determine the value of the work 'without regard to the sex of the employees concerned'. For the purpose of assessing the value of the work, comparisons could be made between male and female classifications within an award. However, where such comparisons were unavailable or inconclusive, for example where the work was performed exclusively by females, the principle allowed comparisons to be made between female classifications within the award or in different awards. It also acknowledged that in some cases comparisons with male classifications in other awards might be necessary and that problems might be encountered, particularly where cross-award comparisons were involved.

The principle was stated as follows (at 179–80):

1. The principle of 'equal pay for work of equal value' will be applied to all awards of the Commission. By 'equal pay for work of equal value' we mean the fixation of award rates by a consideration of the work performed irrespective of the sex of the worker. The principle will apply to both adults and juniors. Because the male minimum wage takes into account family consideration it will not apply to females.
2. Adoption of the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned. Differentiations between male rates in awards of the Commission have traditionally been founded on work value investigations of various occupational groups or classifications. The gap between the level of male and female rates in awards generally is greater than the gap, if any, in the comparative value of work performed by the two sexes because rates for female classifications in the same award have generally been fixed without a comparative evaluation of the work performed by males and females.
3. The new principle may be applied by agreement or arbitration. The eventual outcome should be a single rate for an occupational group of classification which rate is payable to the employee performing the work whether the employee be male or female. Existing geographical differences between rates will not be affected by this decision.
4. Implementation of the new principle by arbitration will call for the exercise of the broad judgement which has characterised work value enquiries. Different criteria will continue to apply from case to case and may vary from one class of work to another. However, work value inquiries which are concerned with comparisons of work and fixation of award rates irrespective of the sex of employees may encounter unfamiliar issues. In so far as those issues have been raised we will comment on them. Other issues which may arise will be resolved in the context of the particular work value inquiry with which the arbitration is concerned.
5. We now deal with issues which have arisen from the material and argument placed before us and which call for comment or decision.
 - a. The automatic application of any formula which seeks to by-pass a consideration of the work performed is, in our view, inappropriate to the implementation of the principle we have adopted. However, pre-existing award relativities may be a relevant factor in appropriate cases.

- b. Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and /or comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary.
- c. The value of the work refers to worth in terms of award wage or salary fixation, not worth to the employer.
- d. Although a similarity in name may indicate a similarity of work, it may be found on closer examination that the same name has been given to different work. In particular this situation may arise with respect to junior employees. Whether in such circumstances it is appropriate to establish new classifications or categories will be a matter for the arbitrator.
- e. In consonance with normal work value practice it will be for the arbitrator to determine whether differences in the work performed are sufficiently significant to warrant a differentiation in rate and if so what differentiation is appropriate. It will also be for the arbitrator to determine whether restrictions on the performance of work by females under a particular award warrant any differentiation in rate based on the relative value of the work. We should, however, indicate that claims for differentiation based on labour turnover or absenteeism should be rejected.
- f. The new principle will have no application to the minimum wage for adult males which is determined on factors unrelated to the nature of the work performed.

A.4.2. Implementation and assessment of the 1972 *Equal Pay Case*

The equal pay decisions of the late 1960s and early 1970s had a significant impact on women's wages and contributed to a narrowing of the GPG. The 1972 principles remedied key deficiencies of the 1969 case and provided the opportunity for the Commonwealth Conciliation and Arbitration Commission to make comparisons between different classifications of work within and across awards. From 1969 to 1977, average minimum wages for female employees rose from 72 to 92 per cent of the average minimum award wages for male employees (Eastough & Miller 2004: 258). The gender pay equity ratio increased from 64 per cent in 1967 to 80.1 per cent in 1980—an increase of 16.1 percentage points over a 13 year period (Smith 2009: 653). Analysts have suggested that changes of this magnitude could not be explained by market factors related to supply and demand or human capital improvements, and must be attributed in large part to the institutional developments (Gregory & Duncan 1981: 426; Gregory 1999: 277; Whitehouse 2001: 66).

However, a number of commentators have argued that the 1972 principles failed to achieve their full potential, pointing to the plateau in gender pay equity ratios following the anticipated surge in women's wages in the wake of the 1972 decision (Kidd & Meng 1995: 25). Contributing factors identified in these analyses include:

- limited attempts to address work value issues (Short 1986: 325);
- barriers to properly establishing the value of feminised occupations, continuing a long history of assumptions of women's work being semi-skilled or unskilled and the difficulty that industrial tribunals have had in properly valuing the 'skills, exhibited, acquired and used by women in traditional occupations' (Scutt 1992: 282);
- the significant number of cases where the 1972 principle was applied through award variations by consent without substantive work value inquiries (Thornton 1981: 473, 477–80; Bennett 1988: 540–1; Rafferty 1994: 453–4; Smith 2009: 655).

Central to these analyses were the difficulties endemic in any approach based on 'work value'. These difficulties were reflected in the limited work value applications lodged by unions in the wake of the 1972 decision, where women's work was routinely compared against male dominated classifications or benchmarks. Such a strategy did not address the segregated nature of the labour market and was incapable of addressing the subtle, structural barriers to the industrial recognition of work value. It excluded consideration of problems concerning the reward of skill and career progression in feminised industries and jobs, and the effects of maternity and parenting on labour market participation. The remedy provided by such strategies all too often focused on women gaining equality through matching the ideals and attributes of a masculinist standard (Phillips 1987: 19).

A.4.3. The 1974 National Wage Case

The 1972 decision was followed in 1974 by one which extended the concept of the male minimum wage to women. In the *National Wage Case 1974* (1974) 157 CAR 293, the Australian Conciliation and Arbitration Commission (as the federal tribunal was now known) decided to establish one minimum wage for adults, replacing the separate minimum adult male and female rates. The Commission specified a female minimum wage in the 1974 case, though only for the purpose of it being phased out.

The concept of a male minimum wage had its origins in 1966 and had been further enshrined in 1967 when (as we have seen) the federal tribunal abandoned the practice of basic wages and margins and introduced the total wage. In 1966 the Commonwealth Conciliation and Arbitration Commission introduced a minimum wage that was higher than the basic wage for males in order to raise the wages of the low paid in circumstances where no one could be found who was still being paid the basic wage (Short 1986: 320). The abandonment of gender-related assumptions regarding workers' needs and the introduction of one minimum wage for adults provided a firmer basis for assessing women's work based on work value criteria (Short 1986: 320).

A.4.4. The 1986 Comparable Worth Case

The period preceding the 1986 *Comparable Worth Case* was characterised by significant change in Australian wage fixing arrangements. The operation of the Salaries and Wages Pause Act 1982 (Cth) had inhibited the pursuit of wage claims. This situation laid the groundwork for a Prices and Incomes Accord (the Accord) between the Australian Council of Trade Unions (ACTU) and the Labor Government, an agreement which at that stage addressed the return of centralised wage fixing, the implementation of nominated features of the social wage, and a no extra claims commitment on the part of unions. Following the Accord, the Australian Conciliation and Arbitration Commission in the *National Wage Case October 1983* (1983) 4 IR 429 lifted the wage freeze and established a set of wage fixing principles that provided explicit criteria for wage increases outside of indexation.

The 1986 *Comparable Worth Case (Re Private Hospitals and Doctors Nurses (ACT) Award 1972* (1986) 13 IR 108) arose from an application for wage increases for nurses employed under the *Private Hospitals' and Doctors' Nurses (ACT) Award 1972*. The applicant unions, the Royal Australian Nursing Federation (RANF) and the Hospital Employees' Federation of Australia (HEF), supported by the ACTU, sought a series of rulings from the Commission. The RANF sought the variation on the basis that the 1972 equal work for equal pay principle had not been implemented for nurses. The Council of Action for Equal Pay argued that the Commission should adopt the principle of 'comparable worth' (a concept then part of the equal pay debate in the United States)

as a wage fixing principle which would allow for the rates of women in predominantly female occupations to be reassessed on a case-by-case basis. The Commonwealth and employers emphasised the distinctions between approaches based on comparable worth and the concept of work valuation traditionally applied by the Commission, and argued that the claim should be pursued through the anomalies and inequities provision of the wage fixing principles.

In its decision the Commission rejected the use of comparable worth as a means of applying the 1972 equal pay for work of equal value principle. In affirming the continued availability of the 1972 principle, the Commission rejected the ACTU's submissions as to the method of processing the claims. In this regard the Commission's regard for the current wage fixing principles was paramount. It drew attention to that part of the 1983 principles which noted that all increases in wages, other than those for prices and productivity movements, should be in accordance with those principles. In rejecting the argument that the concept of comparable worth should be used to implement the 1972 equal pay principles, the Commission indicated its unease with the concept and concern that its acceptance as a wage fixing principle would open a floodgate of applications in other areas, which could undermine centralised wage fixation ((1986) 13 IR 108 at 113):

It is clear that comparable worth and related concepts, on the limited material before us, have been applied differently in a number of countries. At its widest, comparable worth is capable of being applied to any classification regarded as having been improperly valued, without limitation on the kind of classification to which it is applied, with no requirement that the work performed is related or similar. It is capable of being applied to work which is essentially or usually performed by males as well as to work which is essentially or usually performed by females. Such an approach would strike at the heart of long accepted methods of wage fixation in this country and be particularly destructive of the present Wage Fixing Principles.

The Commission also observed that on introduction of the Equal Pay Principle in 1972, it had specifically rejected in its wage setting principles assessing equal pay for work of equal value on the basis of 'worth to the employer' (Principle 5(c)).

Although the Commission rejected the arguments for implementing comparable worth, it advised the parties that the equal pay for equal work principle remained available to awards which had not implemented the principle, and could be accessed through the anomalies and inequities principle of the then wage fixing principles. The wage fixing principles defined a limited range of bases which could be used to justify wage increases other than by indexation. The unions subsequently pursued their claims through this mechanism (*Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972* (1987) 20 IR 420) and this was also a route utilised in equal pay cases in the public sector (Rafferty 1994).

A.5. A legislative entitlement to equal remuneration

A.5.1. The 1993 and 1996 provisions

The issues left unresolved by the comparable worth proceedings came under direct policy focus in 1993–94 when the Industrial Relations Act 1988, which had replaced the Conciliation and Arbitration Act 1904 as the main federal industrial law, was amended to enshrine the objective of equal remuneration for men and women. These amendments were enacted through the Keating Government's Industrial Relations (Reform) Act 1993. In addition to equal remuneration the legislation marked a significant change in Australian industrial relations. It was intended to focus the industrial relations system on collective bargaining at the workplace or enterprise level as the

primary method of determining wages and employment conditions, although awards were still retained as a 'safety net'. The Commonwealth also used its constitutional power over 'external affairs' to establish new minimum entitlements based on ILO standards (Pittard 1994). The point of using the external affairs power, rather than the conciliation and arbitration power on which federal industrial laws had traditionally been based, was to permit conditions to be set directly for workers, without any link to the presence or threat of an industrial dispute.

In relation to equal remuneration, the changes involved the inclusion of a new Division 2 of Part VIA, titled 'Equal Remuneration for Work of Equal Value', in the Industrial Relations Act 1988. According to section 170BA, the stated object of the Division was to give effect to the 'Anti-Discrimination Conventions' (a term defined to include the Equal Remuneration Convention), as well as the ILO's Equal Remuneration Recommendation (No 90) and Discrimination (Employment and Occupation) Recommendation (No 111). However, to guard against the possibility of a challenge to the validity of Division 2 under the external affairs power, the Division was given an additional operation by s 170BI, allowing it to apply in circumstances where there was a potential industrial dispute over the issue of equal remuneration. As it transpired, in *Victoria v Commonwealth* (1996) 187 CLR 416 the High Court upheld the validity of Division 2 under both the external affairs *and* conciliation and arbitration powers.

Division 2 empowered the Australian Industrial Relations Commission (as the federal tribunal had now become) to issue equal remuneration orders – effectively increases in pay – if an order was necessary to secure 'equal remuneration for work of equal value'. Importantly, definitions were covered in section 170BB which provided:

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

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

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

Orders could only be made under section 170BC if the Commission was satisfied that:

- the employees to be covered by the order did not have equal remuneration for work of equal value (section 170BC(3)(a));
- making such an order would give effect to one or more of the Anti-Discrimination Conventions or ILO Recommendation No 111 (section 170BC(3)(b));
- the application had been made by an employee or trade union entitled to represent the interests of the employees to be covered by the order, or by the Sex Discrimination Commissioner (section 170BD; and
- no adequate alternative remedy was available under a State or Territory law (section 170BE(a) and (b)).

In 1996, the Howard Government's *Workplace Relations and Other Legislation Amendment Act 1996* substantially amended the *Industrial Relations Act 1988*, renaming it as the WR Act. However, the equal remuneration provisions were retained with only minor changes.

Following their proclamation in March 1994, there were only 18 applications in total under the new equal remuneration provisions, four of which arose from claims for equal remuneration at HPM

Industries and David Syme & Co. Only one claim was arbitrated and no equal remuneration orders were made by the Commission (Smith 2009: 658; 2010: 11). The key cases are outlined in the sections that follow.

A.5.2. The first HPM case

In the first *HPM* case (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (1998) 94 IR 129), the Australian Manufacturing Workers' Union (AMWU) made an application to the Australian Industrial Relations Commission for equal remuneration on behalf of the process and packer workers of HPM industries at its Darlinghurst site in Sydney. The employees concerned were employed under the Metal Industry Award 1984. A Full Bench was constituted to hear the matter, but following submissions from the Metal Trades Industry Association that the power to refer matters to a Full Bench was confined to matters involving an industrial dispute, the Full Bench decided it could not hear the matter. The matter was referred to a Commissioner for hearings and, in late 1997, proceeded to arbitration. The matter was considered a test case and, in addition to the submissions of the parties, there were submissions from a number of intervening parties.

The union argued that the majority of process and packer workers were women who performed work of equal value to work performed by the general hands store persons at HPM, who were all men. In support of its claim that the work of process workers was equal to that of general hands, and the work of packers was equal to that of general hands and store persons, the union sought to rely on the competency standards process in the award. It argued that, even though the store persons and general hands were classified at C14 and C13 in the award, their rates of pay exceeded that of women process workers and general packers who had been assessed at higher competency levels within the award. The union claimed that this difference in remuneration occurred because over-award payments were made to male general hands and store persons, which were not available to women process workers.

HPM contended that the nature of the work of process workers and packers was substantially different from that of store hands and general store persons and that high staff turnover of general hands and store persons had been alleviated by higher rates of pay for the general hands. The employer also argued that using the award classifications and competency standards as the only measure of work value failed to consider other elements which determined wage rates, such as work intensity, the heavier nature of the work and need for product knowledge. HPM claimed that the competency standards were not designed to be used for work value comparisons and could not account for over-award payments.

In assessing what was required of applicants, Commissioner Simmonds noted that the legislation required the Commission to be satisfied, as a 'first step' to making an order, that the relevant rates of remuneration were established 'without discrimination based on sex' – the test enshrined in Article 1 of the Equal Remuneration Convention ((1998) 94 IR 129 at 159). The Commissioner considered the definition of discrimination that should be applied for this purpose and decided that it would be undesirable for the Commission to follow two different definitions of discrimination; one for its award making functions and another for the purpose of equal remuneration orders. The Commissioner therefore decided (at 159) to adopt the definition of discrimination adopted by a Full Bench of the Commission in the *Third Safety Net Adjustment and Section 150A Review, October 1995* (1995) 61 IR 236, rather than the definition contained in the Sex Discrimination Act 1984. The Full Bench's definition distinguished direct and indirect discrimination and provided that (at 247–8):

Direct discrimination occurs when a person is treated less favourably in the same circumstances than someone of a different race, colour, sex, sexual preference, age, marital status, religion, political opinion, national extraction or social origin would be; or is treated differently in relation to pregnancy or physical or mental disability or family responsibilities.

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

To determine whether there had been different treatment of men and women in the same circumstances—and, therefore, direct discrimination—the Commissioner considered whether, on the basis of the information before the Commission, the work in question was of equal value. On this point, the Commissioner decided that there was no agreement between the parties to the use of competency standards as a method of determining the equivalence of the work. Further, in the absence of agreement about the equivalence of the work, the Commissioner considered that the competency standards process was not appropriate to establish equivalence. While the Commissioner found that the competency standards provided ‘an objective and gender neutral mechanism for measuring the relative competencies’, they were found not to provide a means for assessing other attributes, such as ‘elements of responsibility that are not skill-related, the nature of the work and the conditions under which the work is performed’ ((1998) 94 IR 129 at 159).

In his decision Commissioner Simmonds found that the Equal Remuneration Convention required that the methods relied upon by individual signatories to the Conventions be appropriate to local, national methods applicable for determining rates of remuneration. Given this direction, Commissioner Simmonds determined that the appropriate authority remained the 1972 *Equal Pay Case*. The principle adopted in that case explicitly required the Commission to use work value inquiries to determine application that sought equal pay orders. Commissioner Simmonds defined work value in terms of the wage fixing principles in place at the time of the case, namely ‘the nature of the work, skill and responsibility required or the conditions under which the work is performed’. The Commissioner noted that it was not appropriate for a single commissioner to establish a new method of work value evaluation applying award competencies in place of the Commission’s established work value principles (at 161).

The Commissioner also noted that there were difficulties involved in valuing and comparing over-award payments, as considerations with regard to such payments ‘may justifiably go beyond the work itself and include the individual circumstances of the worker’. In dealing with such payments, the Commissioner suggested that ‘any agreement between the parties about an appropriate method of job appraisal will be highly persuasive, if not determinative where those over award payments are the result of collective agreements’ (at 161).

Having decided that he was not satisfied that the evidence presented in the case had established direct discrimination, the Commissioner considered whether indirect discrimination had been established. The Commissioner did not consider that the reversal of onus provisions in the *Sex Discrimination Act 1984* had been imported into the WR Act, but in any event found that the evidence that HPM had indirectly discriminated against its female employees was inconclusive (at 164).

The Commissioner dismissed the union’s application on the basis that he was not satisfied on the evidence and arguments presented that the different remuneration paid to process workers and

packers by comparison to that paid to general hands and store persons arose in circumstances that were sufficiently similar as to amount to discrimination based on sex (at 162).

A.5.3. The second *HPM* case

In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (Australian Industrial Relations Commission, Print Q1002, 19 May 1998) the AMWU lodged a second application for equal remuneration for female process workers and packers at HPM's Sydney site and sought a retrospective application of any order made dating back to 1985. The matter was settled by the parties in late 1998 by making an enterprise agreement after more than three years of proceedings before the Commission. Prior to the settlement, however, Justice Munro made a number of observations about the 1993 provisions, particularly concerning the equivalence of work.

While noting that the Commission's established work value principles and practice should be a primary source of guidance, Justice Munro suggested (at [18]) that a number of evaluation techniques could be applied:

As Simmonds C stated in his decision on 4 March 1998, the Commission's principles and practice related to work value comparison and changes are a primary source of guidance about what factors and considerations are of accepted relevance to such evaluation. However, experience of work value cases suggests that work value equivalence is a relative measure, sometimes dependent up an exercise of judgment. A history of such cases would disclose that a number of evaluation techniques have been applied for various purposes and with various outcomes from time to time.

However, Justice Munro noted the necessity, and the difficulty involved, in establishing equivalence of the work in order to establish direct discrimination (at [17]):

[T]here must at least be a clear and relatively complete depiction and hopefully finding about both the 'work' of the employee(s) to be subject to the order, and the 'comparator' work of equal value. Upon the relevant two sets of work content being established, the valuation and relative equivalence of them will need to be established. That forensic task involves a requirement to persuade the Commission of both the validity of an evaluation principle to be used and of the equivalence of the work resulting from the application of it.

A.5.4. The first *Age* case

In *Automotive, Food, Metals Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (1999) 97 IR 374, the AMWU made an application to the Australian Industrial Relations Commission for an equal remuneration order to the Commission for female clerical employees at The Age newspaper to be paid the same rates as male employees paid at level 4 in the publishing department and level 3 machine room operator in the machine department. The claim formed the basis of two applications.

In the first application the AMWU sought an order for female clerical employees. David Syme (the publisher of The Age) made four jurisdictional objections to the claim: the first related to the 'alternative remedy' provision of the legislation; the second claimed that if the application were granted it would create an inequity between male and female clerical employees; the third related to legislative restrictions on the exercise of the Commission's arbitral powers; and the fourth claimed that the application was uncertain and ambiguous.

Vice President Ross (as he then was) ruled in the company's favour on the issue of an alternative remedy – finding that the Commission could not determine applications made simultaneously under the 'primary' operation of Division 2 (under the external affairs power) and its 'secondary' operation under section 170BI in respect of a potential industrial dispute. On the inequity issue, he found that the Commission needed to be satisfied that there was not, at present, equal remuneration for work of equal value. Following the original *HPM* decision, he asserted that the first step in the determination of an equal remuneration application was an assessment of whether the rates in question had been established without discrimination based on sex ((1999) 97 IR 374 at 380):

In this case the AMWU would need to show that the rates of pay for the relevant clerical employees were established having regard to the gender of the employees concerned or at least a large proportion of those employees ... It follows that there is no impediment to the application referring to all clerical employees as the central issue is not the gender of the employees but whether their remuneration was 'established without discrimination based on sex'.

In relation to the claimed restrictions on the Commission's arbitral powers, Vice President Ross found that section 170N, on which the company relied, concerned matters under Part VI (the dispute prevention and settlement part of the WR Act) and did not affect Part VIA, in which Division 2 was located. He did not rule on the matter of ambiguity given the conclusions he had reached on the other jurisdictional matters, but noted that the application contained a number of ambiguities. The application was struck out and it was suggested that any further application would need to address the observations concerning the inequity submissions (at 381–4).

A.5.5. The second Age case

In its second application in the David Syme matter the AMWU sought an order applicable to all clerical workers employed by the company: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (Australian Industrial Relations Commission, Print R5199, 26 May 1999). The company again raised a number of jurisdictional matters as threshold issues, including in relation to the Commission's jurisdiction to issue a summons for the production of documents. In responding to these submissions, Commissioner Whelan considered the matters required to make out the successful elements for an equal remuneration order. Referring to Justice Munro's comments in the second *HPM* case, she agreed that 'considerable uncertainty exists about the elements necessary to make out a proper case' (at [20]). She also observed (at [28]) that in determining whether there is equal remuneration for work of equal value:

The words of the [Equal Remuneration] Convention do not suggest that the only comparisons acceptable are those which compare the work being performed by males with that being performed by females. Indeed, it is clear that the issue is not who performs the work but the basis upon which the rates have been established.

Commissioner Whelan referred to the decisions of Justice Munro and Commissioner Simmonds in the *HPM* cases, noting that both had discussed the use of the Commission's principles and practices in relation to work value change and evaluation to provide guidance as to what factors are relevant in evaluating whether work of an equivalent value. She determined that it would be wrong to pre-empt the parameters of sections 170BC (a) and 170BC (b) due to the absence of advice on the evidence that the applicant sought to present and rejected the submission that the application was without foundation. The Commissioner considered that the request for documents as contained in a summons issued by the Commission was not oppressive and that evidence relevant to the application was likely to be held by the company (at [34]).

David Syme appealed against Commissioner Whelan's decision. Following the failure to obtain a stay of the decision pending an appeal (see *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (Australian Industrial Relations Commission, Print R5856, 10 June 1999)), proceedings resumed before Commissioner Whelan, who issued further directions in June and August 1999. The matter was ultimately settled by consent (URCOT 2005: 144).

A.5.6. The Gunn and Taylor case

Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor (Australian Industrial Relations Commission, Print PR914868, 1 March 2002) concerned a graphic design company which employed four plate makers, one of whom was female. All the plate makers were qualified trades persons and all had different rates of pay. The female employee had a similar length of service to the longest serving male employee, but received the lowest rate of pay. In this case the AMWU made an application for equal remuneration for female plate makers in the company. The union argued that the employee in question should be paid at the highest rate in the plate making department.

The company objected to the application on the basis that a suitable alternative remedy existed under sex discrimination laws, as the matter could be dealt with as a sex discrimination matter relating to an individual employee, rather than as an application for equal remuneration. The company also argued that the award and an enterprise flexibility agreement that applied to it did not discriminate against men and women in classifications of pay and, therefore, there was no discriminatory treatment. They added that to pay the female plate maker at the highest rate of pay would be to discriminate against male plate makers who received lower rates.

The matter was initially heard by Commissioner Whelan, who found that over-award pay set by an industrial instrument was within the definition of 'remuneration' for the purposes of the Act. Commissioner Whelan also rejected the company's submission regarding an alternative remedy, as she was not satisfied that an individual anti-discrimination application would provide a satisfactory remedy for the union's claim (at [33]):

To the extent that the union seeks an order of general application I am not satisfied that the Sex Discrimination Act or the Equal Opportunity Act meet the requirements of section 170BE in that they are not able to ensure equal remuneration for work of equal value for female employees employed, or who may be employed, as graphic reproducers in the plate making department of the company's business.

The company appealed the decision to a Full Bench of the Commission: *Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor* (2002) 115 IR 358. While the Full Bench found that a number of issues remained open to evidence and argument, in relation to the alternative remedy issue, the Full Bench upheld Commissioner Whelan's decision, noting (at [23]) that even though the order may affect only one employee, the remedy sought was of broader application:

We think it is appropriate that we note ... that we agree with Commissioner Whelan's conclusion that neither the Sex Discrimination Act 1984 (Commonwealth) nor the Equal Opportunity Act 1995 (Victoria) provides a remedy which would ensure equal remuneration for work of equal value and which would be of general application. We add this qualification. In the submissions made to us there was no exploration of the possibility of a class action under the Commonwealth Acts. Nor was there any debate concerning the power to make prospective orders under those laws in the circumstances of this case. Despite this, it

is clear that the provisions of Division 2 of the WR Act are designed to provide a remedy of general application. We are unconvinced that even if a remedy of general application were available elsewhere it would be an adequate alternative for the purposes of section 170BE of the WR Act.

A.5.7. Assessments of the 1993 federal equal remuneration provisions

A notable feature of the 1993 equal remuneration provisions was the relatively small number of applications made under them, the uncertainties and limitations associated with their interpretation and application and, as a result, their failure to make a significant contribution to achieving gender pay equity (URCOT 2005: 144–7).

On their face, the 1993 legislative provisions offered considerable promise in that they attempted to widen the concept of ‘equal pay’ embedded in the 1972 principle to include ‘equal remuneration’, which enabled consideration of over-award earnings (Smith 2009: 658–60; Smith 2010: 11–16). Additionally there were clear linkages to the relevant international instruments, and no explicit restriction on the type of work value comparisons that could be made (Smith 2010: 12).

Yet the lived experience of the provisions suggests that important features and limitations of the provisions also need to be recognised. In particular, although the right to equal remuneration was embodied in Australia’s principal instrument of labour law, ‘the right was far more external to the system of wage determination and industrial awards than that provided in 1969 and 1972’ (Smith 2010: 12). The legal hurdles associated with the provisions meant that, in practice, it favoured prosecution at the level of the individual worker or workplace, rather than providing the broader, award-based solutions of the 1969 and 1972 cases (Smith 2010: 16; URCOT 2005: 148).

Additionally there were important limitations in the 1993 provisions that restricted their impact. One was the foundation of the provisions on the external affairs power, which compromised their relationship with other key sections of the legislation. For example, this limited the capacity of the Full Bench to hear applications under the provisions, constrained the parties from using the provisions as the basis for variation to a multi-employer award and meant that there were only a narrow range of opportunities through which the Commission could hear equal remuneration applications (Smith 2010: 13; URCOT 2005: 145).

The second limitation was the requirement to demonstrate a sex-based discriminatory cause for earnings disparities. The use of the term ‘without discrimination’ in the Equal Remuneration Convention was interpreted by the Commission to require the applicants to demonstrate that disparities in earnings had a discriminatory cause. This requirement tightened the grounds on which equal remuneration claims could be heard, presented a difficult threshold for applicants and impeded investigation of the differences in the work and wage structures. Lack of clarity around the meaning of the term ‘discrimination’ and difficulty in applying the test of discrimination added to the difficulties associated with the provisions (Smith 2010: 14–15; Smith 2009: 659–60). As will be seen in sections B.2.2, B.3.2, some of the State industrial tribunals have interpreted the requirements of the Equal Remuneration Convention differently, concluding that the Convention requires the establishment of equal remuneration to be free of discrimination based on sex, but not erecting as a governing criterion the establishment of discrimination per se. Principles developed in some States have also avoided some of the uncertainties and limitations of the federal provisions (URCOT 2005: 133, 145).

The cases arising from the 1993 provisions consistently support the use of work value to assess whether different work was of equal value. Work value has a particular place in Australian labour

law and is typically defined to include examination of the nature of the work, the skill and responsibility required and the conditions under which the work is performed. Work value has been identified explicitly as a particular foundation of wage determination for industrial tribunals (*Crown Employees' (Scientific Officers – Division of Science Services, Department of Agriculture) Award* (1962) AR 250 at 278):

The function, truly understood, is to consider all the relevant features of the work, to take into account all relevant material, including such as will furnish a guide to fair valuation, to bear in mind the contentions of the parties to the arbitration and, in the light of these things, to fix amounts which the tribunal itself deems to be just and reasonable to meet the circumstances of the case. The amount so fixed will represent the tribunal's view of the value of the work.

At times, the Commission has identified the type of factors that it relies on in reaching determinations of work value. These lists are not necessarily binding or determinative and work value criteria has been historically malleable (Bennett 1988: 537–8). Justice Munro's decision in the second *HPM* case indicated that it was open to the Commission to adopt any of a range of evaluation techniques for that purpose indicating that parties were not bound to use a specific mechanism to establish work value. That the choice of the method of demonstrating that work was of equal value falls to the applicant was confirmed in the second *HPM* application and the second *Age* case (Smith 2010: 15–16; URCOT 2005: 145–6). While this suggests that work value equivalence is a relative measure that includes the exercise of judgement by the Commission, there is considerable debate as to whether the application of work value has been sufficiently inclusive of feminised work. This is a matter that was taken up by the New South Wales Pay Equity Inquiry: see section 2.1.

Our analysis here has been confined to applications for equal remuneration orders heard under the legislative provisions introduced in 1993, whether in their original form or as subsequently amended. This is not to suggest that these were the only proceedings over this period in which the federal tribunal was asked to consider the valuation of feminised work. An obvious example is provided by the 2005 proceedings in the childcare industry, which involved claims for wage increases based on changes in work value: see eg *Australian Liquor, Hospitality and Miscellaneous Union, re Child Care Industry (Australian Capital Territory) Award 1998*, Australian Industrial Relations Commission, Print PR954938, 13 January 2005; Print PR957259, 13 April 2005; Print PR57914, 10 May 2005.

A.5.8. The Work Choices amendments

The *Workplace Relations Amendment (Work Choices) Act 2005* introduced amendments to the *Workplace Relations 1996* which came into effect in March 2006 and significantly altered the industrial relations framework and minimum wages setting. Importantly, the amendments sought to widen the federal jurisdiction by relying on the corporations power of the Constitution, in addition to a number of other constitutional powers. Their effect was to ensure that employers of a certain type, notably 'constitutional corporations' (that is, trading, financial or foreign corporations), could no longer be covered by State awards or industrial laws.

The amendments created the Australian Fair Pay Commission (AFPC) as the federal body responsible for the setting and adjusting of minimum wages. The legislation removed rates of pay from awards and created Australian Pay and Classification Scales (APCSs) which contained

wages and certain other provisions (see section 208 of the amended WR Act). The AFPC became the body responsible for adjusting the rates in APCSSs, as well as creating and adjusting Federal Minimum Wages for award-free employees. In discharging these functions, it was required to apply the principle that men and women should receive equal remuneration for work of equal value in exercising any of its powers (WR Act section 222(a)). The AFPC informed itself on wage-setting matters through commissioned research, stakeholder consultation and public submissions.

The equal remuneration provisions (Division 3 of Part 12 of the amended WR Act) were retained, but also amended to:

- explicitly require applicants to make reference to a comparator group of employees (section 622); and
- exclude the Commission from hearing applications if the effect of the order sought would be to vary a minimum pay rate set under Division 2 of Part 7 of the Act.

In addition, section 16(1)(c) of the amended Act excluded the operation of 'a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value'. This provision and the expansion of the federal system effectively limited the application of approaches to equal remuneration that had begun to develop at the State level (Smith 2009: 662; Smith 2010: 15; Smith & Lyons 2007: 30; Baird & Williamson 2009: 335).

During its operation, from 2006 to 2009, the AFPC did not make, adjust or vary any pay scales for reasons relating to equal remuneration, on the basis that it did not receive any submissions claiming that specific pay scales did not provide equal remuneration: see *Wage Setting Decision July 2008* (2008) 172 IR 119 at 194; *Wage Setting Decision July 2009* (2009) 183 IR 1 at 11. The Australian Industrial Relations Commission remained responsible for hearing equal remuneration matters outside minimum wage setting. However, from 2005 to 2009 no equal remuneration applications were made.

A.6 Sex discrimination laws

While the Australian state has exercised its most direct influence on gender pay equity through industrial relations legislation and industrial tribunals, there are other laws that can potentially be brought to bear on the subject. These include the laws introduced from the 1970s onwards that allow women to complain of discrimination in the workplace. At the federal level, the principal statute of this kind is the *Sex Discrimination Act 1984* (Cth). Similar provisions exist at State and Territory level, though as part of more general measures dealing with equal opportunity and discrimination, such as the *Anti-Discrimination Act 1977* (NSW) or the *Equal Opportunity Act 2010* (Vic).

Sex discrimination laws encompass both direct and indirect discrimination on the ground of gender. Direct discrimination provisions, such as section 5(1) of the *Sex Discrimination Act*, prohibit employers from 'treating any person less favourably than in the same or similar circumstances they treat or would treat a person of the opposite sex' (Hunter 1992: 4). Indirect discrimination measures, by contrast, address more structural forms of discrimination that arise because 'organisational norms rules and procedures, used to determine the allocation of positions and benefits, have generally been designed whether deliberately or unreflectively, around the behaviour patterns and attributes of the historically dominant group in public life' (Hunter 1992: 5–6). They are concerned with policies or approaches that are neutral on their face, yet nonetheless have the

effect of discriminating against those with a particular characteristic. Hence section 5(2) of the Sex Discrimination Act prohibits the imposition of 'a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person'. Under section 7B, however, a defendant may escape liability by establishing that the relevant condition, requirement or practice is 'reasonable in the circumstances'.

Until 1993, industrial awards and agreements were exempt from the provisions of federal sex discrimination legislation (Hunter 2002: 55). However, sections 153 and 194–195 of the Fair Work Act now prohibit awards or agreements from containing terms that discriminate against an employee by reason of their sex, except where the reason for the discrimination lies in the 'inherent requirements' of the employee's position.⁴⁷ Section 46PW of the Australian Human Rights Commission Act 1986 (Cth) also provides that if the President of the Australian Human Rights Commission receives a complaint to the effect that an industrial instrument is discriminatory, they may refer the matter to the FWC. The FWC may in turn take action to vary the award or agreement in question (Fair Work Act ss 161, 218).

Section 351(1) of the Fair Work Act also contains a more general prohibition on an employer taking 'adverse action' against an employee because of their sex. Unlike most anti-discrimination laws, this provision does not distinguish between direct and indirect discrimination. But its scope is narrowed by being subject to various exceptions. Besides an 'inherent requirements' defence (s 351(2)(b)), an employer may not be liable for any action that is 'not unlawful under any anti-discrimination law in force in the place where the action is taken' (s 351(2)(a)).

In theory, it is possible for individual complainants to use sex discrimination laws to complain of a lack of equal remuneration, and potentially even secure changes to instruments that affect a group of employees. But in practice they have not been used this way. The Sex Discrimination Act, for instance, 'has played almost no role in addressing gender pay inequity' (Macdonald & Charlesworth 2013: 567). Given that Part 2-7 of the Fair Work Act now offers broader and more flexible relief, without the need to establish discrimination as such (see section 3.4.2), it seems unlikely that this will change.

A.7. Affirmative action

Another form of equal opportunities legislation is concerned with imposing positive obligations on employers to promote employment opportunities for types of workers who have historically been disadvantaged in the labour market. In Australia, such 'affirmative action' laws have generally been confined to requiring employers to adopt processes that can identify and eliminate barriers to the employment or advancement of members of the chosen group, rather than setting hard quotas. This is true of the principal measure adopted in relation to women, a federal statute originally enacted as the Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth).

In its original form, the Act applied to private sector employers with over 100 employees and all higher education institutions. Organisations falling within the scope of the legislation were required to report annually to a statutory authority, the Affirmative Action Agency. The basis of the report was the implementation and progress of an affirmative action program. This had to be designed to ensure that appropriate action was taken both to eliminate discrimination by the relevant employer

⁴⁷ There is also an exception for employment conditions at religious institutions, where those conditions are imposed in order to avoid injury to 'religious susceptibilities'.

against women, and to promote equal opportunity for women in relation to employment matters. Further direction as to the requirements of a program was provided by the Agency, which provided an eight-step process for complying organisations to follow. In 1992 the scope of the legislation was widened to include community organisations, non-government schools, unions and group training companies with 100 employees or more. Legislative change at this time also provided that the Director of the Affirmative Action Agency had the discretion to waive particular reporting requirements for those organisations that had achieved a particular standard in the quality of their programs and reports.

The legislation was reviewed by the Howard Government in 1998 to examine the costs of the legislation to business and the community (Sinclair 2000). The review resulted in a weakening of the reporting process, a diminution of the compliance requirements and a focus on individual business requirements (Andrades 2000: 175). The legislation was renamed the Equal Opportunity for Women in the Workplace Act 1999, while the administering agency became known as the Equal Opportunity for Women in the Workplace Agency. The Agency itself reported that such changes had not diminished its capacity to effectively resource organisations to address pay equity, pointing specifically to its development of an online pay equity tool that assisted organisations to identify gender pay inequity within their workplace (EOWA 2005: 8).

Over the past year, the legislation has once again been amended and renamed (see Sutherland 2013). It is now known as the *Workplace Gender Equality Act 2012*. From 2014, the focus of reports by employers to what is now called the Workplace Gender Equality Agency (WGEA) will shift from processes to outcomes, as measured against a set of standardised 'gender equality indicators'. These are specifically defined by section 3 to include 'equal remuneration between women and men'. Section 19 also permits the relevant Minister to prescribe 'minimum standards', which can be either general or industry-specific, and which may stipulate quantitative targets for particular indicators; though these will not apply until the 2014–15 reporting period.

An employer will be non-compliant under the new regime if it fails to submit its required report, or supplies false or misleading information. It will also be in breach if it does not meet a minimum standard or at least show improvements against that standard within two further reporting periods. The consequences of non compliance with the Act are limited. The Agency may 'name' a non-compliant employer in a report to the Minister or by electronic or other means. Such an employer may also not be eligible to tender for contracts under the Commonwealth and some State procurement frameworks, or to receive certain Commonwealth grants or other financial assistance.⁴⁸ However, the sanction concerning the ineligibility for federal government contracts is 'believed never to have been invoked in its 20 year life' (Thornton 2012: 290).⁴⁹ It remains to be seen whether there is any greater willingness under the new regime to apply the sanction.

The specific matters on which employers must report are detailed in the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No 1)*, a regulation issued by the federal government in February 2013.⁵⁰ In relation to 'Gender Equality Indicator 3 – equal remuneration between women and men', for 2013–14 employers are required to report on

⁴⁸ Further details are available on the WGEA website at www.wgea.com.au/report/compliance.

⁴⁹ See also Macdonald & Charlesworth 2013: 568–71, expressing scepticism (for this and other reasons) as to the potential for the Workplace Gender Equality Act 2012 to have any great impact on the GPG.

⁵⁰ Further details as to the reporting regime are available on the WGEA website at www.wgea.gov.au.

remuneration data disaggregated by gender and by workplace profile categories. The data requirements included annualised average full-time equivalent base salary; and annualised average full-time equivalent total remuneration. From 2014–15, employers must also report on the individual components of annualised average full-time equivalent total remuneration. The components in question include base pay, superannuation, bonus payments or performance pay, discretionary pay, overtime, and other allowances.

Employers will also be required to report on:

- the existence of a remuneration policy or strategy;
- the gender pay equity objectives, if any, which are included in the remuneration policy or strategy;
- whether any gender remuneration gap analysis has been undertaken and, if so, when; and
- the actions taken, if any, as a result of a gender remuneration pay gap analysis.

One of the anticipated benefits of the new reporting requirements is that they will establish a comprehensive and long term data set for organisations about the gender profile of their workplaces. The data collected under the reporting matters will also inform the development of the minimum standards and standardised gender equality benchmarks against which business can monitor their outcomes and practice over time and in relation to their industry peers.

A.8 Timeline of federal equal remuneration developments

This review has highlighted key phases in the development of federal equal remuneration regulation. Table A.1 draws together particularly significant cases and legislation and places them in a timeline of federal equal remuneration regulation.

Table A.1: Significant cases in federal equal remuneration regulation, 1907–2012

<i>Year and development</i>	<i>Cases</i>
1907 – <i>Harvester</i> decision – construction of the living wage	<i>Ex Parte H V McKay</i> (1907) 2 CAR 1
1912 – rejection of the principle of equal pay for equal work	<i>Rural Workers' Union v Mildura Branch of the Australian Dried Fruits Association</i> (1912) 6 CAR 61
1919 – female wage set at 54 per cent of the male rate	<i>Federated Clothing Trades of the Commonwealth of Australia v Archer</i> (1919) 13 CAR 647
1950 - female wage set at 75 per cent of the male rate	<i>Basic Wage Inquiry, 1949–50</i> (1950) 68 CAR 735
1967 – concept of basic wage and skill margin abandoned in favour of a total wage	<i>National Wage Case</i> (1967) 118 CAR 655
1969 – introduction of the equal pay for equal work principle	<i>Equal Pay Case</i> (1969) 127 CAR 1142
1972 – introduction of the equal pay for work of equal value principle	<i>National Wage and Equal Pay Case 1972</i> (1972) 147 CAR 172
1974 – concept of the male minimum wage extended to women	<i>National Wage Case 1974</i> (1974) 157 CAR 293
1986 – testing of the 1972 principle by way of the concept of comparable worth	<i>RE Private Hospitals and Doctors Nurses (ACT) Award 1972</i> (1986) 13 IR 108
1993 – introduction of a statutory right to seek equal remuneration orders by way of amendment to the Industrial Relations Act 1988 (Cth)	<i>Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries</i> (1998) 94 IR 129 (the first HPM case)
	<i>Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries</i> (Australian Industrial Relations Commission, Print Q1002, 19 May 1998) (the second HPM case)
	<i>Automotive, Food, Metals Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd</i> (1999) 97 IR 374 (the first Age case)
	<i>Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd</i> (Australian Industrial Relations Commission, Print R5199, 26 May 1999) (the second Age case)
	<i>Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor</i> (Australian Industrial Relations Commission, Print PR914868, 1 March 2002)
2009 – introduction of new equal remuneration provisions in the Fair Work Act 2009 (Cth)	<i>Re Equal Remuneration Case</i> (2011) 208 IR 345 (the first SACS case)
	<i>Re Equal Remuneration Case</i> (2012) 208 IR 4465 (the second SACS case)

Appendix B: Development of equal remuneration regulation in the State jurisdictions

This appendix provides an overview of the treatment of equal pay and equal remuneration decisions in State jurisdictions in Australia. Following a brief look at the State wage fixing systems, the focus shifts to recent developments, including a series of government-initiated pay equity inquiries. In the three States in which these inquiries were conducted through industrial tribunals (New South Wales, Queensland and Tasmania), the outcome was the establishment of a set of 'equal remuneration principles'. In New South Wales and Queensland these principles look to undervaluation, rather than discrimination, as a means of assessing whether the objective of equal remuneration has been met. The following sections examine the inquiries and cases that developed the principles, and the key cases that have applied them. Material introduced through the pay equity inquiries is also canvassed in Chapter 5 which discusses factors that contribute to the GPG. A timeline of State equal remuneration regulation which identifies key developments and cases reviewed in this Appendix is located in section A.5.

This Appendix relies extensively on, and reproduces material contained in, an earlier report on equal remuneration principles (Romeyn et al 2011: 24–41).⁵¹

B.1 Wage determination and State responses to the ILO Equal Remuneration Convention

As was the case in the federal jurisdiction, wage fixing under the State arbitration or wages board systems reflected a breadwinner model of wage determination. Wages were determined on the assumed needs of men and women. Equal pay mechanisms were available, but only in severely limited circumstances. In the New South Wales jurisdiction, for example, legislative amendments in 1926 expanded the term 'industrial matters' – which largely governed the power to make awards or deal with a dispute – to include 'any claim that the same wages shall be paid to persons of either sex performing the same work or producing the same return of profit or value to their employer'. However the New South Wales Industrial Commission later noted that this provision was invoked only on rare occasions (*Re Clerks (State) Award and Other Awards* (1959) 58 AR 470 at 474).

The application of a principle providing for equal reward of comparative skill did not disturb the disparate rates of pay within basic wages. In 1929, in setting rates for female hairdressers, the New South Wales Commission reiterated that the delineation of separate male and female basic wages did not apply to the setting of skill margins (*Re Hairdressers etc, Females (State) Award* (1929) 28 AR (NSW) 39 at 44):

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

Even within the same jurisdiction such templates were not always observed in practice. The New South Wales Commission noted in 1957 that whatever the theory concerning equal margins might have been, the practice had developed along different lines; some awards provided for equal

⁵¹ In particular, in sections B.2.1, B.2.2, B.2.3, B.3.2, B.3.3, B.3.4, B.3.5, B.3.6 and B.3.7 below.

margins between male and female workers, whilst others provided higher male margins than female margins (*Re Paint and Varnish Makers etc (State) Award (1957)* 56 AR (NSW) 87 at 108).

This unevenness in practice by State tribunals was not confined to New South Wales (Hancock 2013: 169–70). Even so, disparate wages between women and men ‘was the norm, reflecting several factors: custom and practice, a perception that women needed less than men because of their different family obligations, and resistance to any notion that women and men ordinarily performed work of equal value’ (Hancock 2013: 171).

In response to the adoption in 1951 of the Equal Remuneration Convention, a number of States amended their industrial legislation to provide for equal pay. New South Wales was the first to pass legislation, with the Female Rates (Amendment) Act 1958 (NSW) requiring the Industrial Commission and conciliation committees, in certain specified circumstances, to insert provisions for equal pay as between the sexes into awards and industrial agreements. Other States followed, although not in quick succession. Western Australia did not pass legislation until 1968 and Victoria left it until 1969, although by that stage particular wages boards had already moved to implement equal pay (Short 1986: 318).

The passage of the 1958 legislative amendments in New South Wales led a number of unions to file applications to vary awards. A Full Bench of the Industrial Commission was convened to hear applications specifically relating to a number of clerical awards, but also to provide clear direction on the interpretation of the 1958 legislation. Central to the position of the employer groups was the contention that the ambit of comparisons of work be tightly restricted and limited to work at a single workplace, and that ‘value’ be held to mean value to the employer. The Commission held that the ‘specified circumstances’ nominated by the legislation meant that work be of a similar or like nature, be of equal value and be work for which rates were fixed by a particular award or agreement. ‘Value’ was interpreted as being the value of the work as determined by tribunals, as opposed to that which the employer placed on the work (*Re Clerks (State) Award and Other Awards (1959)* 58 AR 470 at 470–1). The contention that the term ‘work’ refer to particular work done at a particular establishment, an argument submitted by employer organisations, was also specifically rejected (at 494). The narrow interpretation of the legislative provisions was sharpened further through the scope of the work value comparisons that the tribunal determined were enabled by the provisions. The type of comparisons accepted by the Commission were restricted to ‘a comparison of the work performed by a group of female employees for whom an award or industrial agreement fixes rates with the work performed by a group of male employees for whom that award or industrial agreement fixes rates’ (at 494).

The wider ambit of the 1972 federal equal pay for work of equal value decision was soon to have application for workers covered by State awards. For example, the New South Wales Commission adopted without amendment the federal principle of ‘equal pay for work of equal value’ (see section A.4.1) in 1973. The proceedings in the State arena differed a little from their federal counterpart, as the tribunal was required to consider the application of the principle against the scope of the existing equal remuneration provisions in the relevant statute (Industrial Arbitration Act 1940 (NSW) s 88D). Additionally, the Commission was required to consider the application of the principle to the system of basic wages and skill margins still operational within the New South Wales jurisdiction at that time. It in fact held that the principle applied only to basic wages. The tribunal acknowledged that the application of equal margins had been uneven, but effectively assumed that existing skill margins represented the true value of the work, having being fixed without regard to sex. However,

it was open to the parties to demonstrate that margins had not been so determined (*State Equal Pay Case* (1973) 73 AR 425).

B.2. Pay equity in New South Wales: the current framework

Turning to more contemporary regulatory frameworks, a number of provisions of the Industrial Relations Act 1996 (NSW) require the State's Industrial Relations Commission to consider the principle of equal remuneration when determining or reviewing award rates. Specifically, the basis for dealing with equal remuneration applications is to be found in sections 19, 21 and 23 of the Industrial Relations Act 1996 (NSW). Section 3(f) also makes it an object of the Act to 'to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value'.

Section 21 provides that the Commission must, on application, make an award setting certain conditions of employment. The list that follows includes '(b) equal remuneration and other conditions for men and women doing work of equal or comparable value'. Section 23 goes on to provide that: 'Whenever the Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.'

Section 19 also provides for a three yearly review of all awards. Subsection (3) directs the Commission to take into account a range of matters, including '(e) any issue of discrimination under the awards, including pay equity'. 'Pay equity' is defined in the Dictionary of the Act as meaning 'equal remuneration for men and women doing work of equal or comparable value'.

These provisions were considered by the Commission in *Re Equal Remuneration Principle* (2000) 97 IR 177, a decision that is reviewed below. It held that the operation of section 23 is confined to wage rates set by awards. It does not allow the Commission to examine over-award payments (at [95]). Nor, in the Commission's view, do sections 21 and 23 permit a wide ranging investigation as to whether the rates and conditions set by an award involve the undervaluation of a particular class of work (at [110], [119]).

Nevertheless, if the Commission finds that a particular instrument does not fix 'fair and reasonable' conditions of employment, as required by section 10, it may act to rectify that problem (at [130]). This accords with the objects of the Act, which include in section 3(f) 'to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value' (at [102]).

B.2.1. The 1998 Pay Equity Inquiry

In 1996, the New South Wales Government established a Pay Equity Taskforce as part of its commitment to addressing pay equity. The taskforce was required to examine the way in which State and federal laws, and arrangements in selected international countries, promoted or impeded pay equity outcomes and the implications for the labour market. As part of its investigations, it commissioned case studies to examine wage inequities in female dominated industries (Shaw 1996). The taskforce recommended, amongst other things, that there was a need for an inquiry into work value to be undertaken by the Industrial Relations Commission. Subsequently, the Minister for Industrial Relations developed terms of reference for the inquiry, which included consideration of: whether work in female dominated occupations and industries was undervalued in terms of remuneration relative to work in comparable male dominated occupations and industries; the

adequacy of tests and mechanisms for ascertaining the value of work; the extent to which, if at all, those tests and mechanisms were inequitable on the basis of gender; and any necessary remedial measures. The Minister referred the inquiry to the Commission. The inquiry was undertaken by Justice Glynn between December 1997 and July 1998, and a three volume report was presented to the Minister (Glynn 1998; Hall 1999).

The Inquiry considered a wide range of evidence, including the history of equal pay cases at the federal and State level and case studies selected to enable assessment of female dominated and male dominated industries and occupations. The case studies included comparison of:

- private sector childcare workers and engineering associates in the metals industry;
- seafood processors and seafood butchers;
- public sector librarians and public sector geoscientists;
- private sector clerical workers and tradespersons in the metal industry;
- hairdressers and beauty therapists, and motor mechanics;
- public hospital nurses and coal miners; and
- clothing industry outworkers and metal machinists.

The case studies were selected to provide a cross section of professional, para-professional, skilled, unskilled, trades and non-trades positions in the public and private sectors.

The term 'undervaluation' emerged as a key construct through the Inquiry, having already gained some currency in previous New South Wales policy documents. At this point the term was not identified explicitly as a future core concept in gender pay regulation, but framed simply either as an a priori assumption (that feminised work is undervalued), or as a question warranting investigation – is feminised work undervalued? Examples included the government's pay equity strategy, which identified five key areas of government action including 'redressing the undervaluing of women's skills and occupational segregation by providing access to other forms of remuneration' (New South Wales Department of Industrial Relations – Women's Equity Bureau 1996) and the report of the New South Wales tripartite Pay Equity Taskforce (New South Wales Pay Equity Taskforce 1996). Additionally, the Pay Equity Inquiry's terms of reference specifically included the investigation of undervaluation. Through the course of the Inquiry the concept of 'undervaluation simpliciter' was raised, in terms of whether it might be appropriate to remedy undervaluation for feminised comparisons without recourse to male comparators. For example, an issues paper prepared by counsel assisting the inquiry posed the following question (Glynn 1998: vol 3, App 16, para 36):

[D]o the Terms of Reference permit the examination of the valuation of female dominated industries and occupations *per se* such that the Commission may examine whether the work in a female occupation has been inappropriately or inadequately valued simpliciter?

The evidence considered by Justice Glynn revealed significant issues about undervaluation of female work – leading to the conclusion that despite the introduction of the principle of equal pay for equal work over 30 years previously, undervaluation remained. In particular, on the basis of the case studies, Justice Glynn found that there was evidence of undervaluation of childcare workers, hairdressers and beauty therapists, outworkers, trimmers undertaking seafood processing and

librarians. However, she found that there was insufficient evidence to make findings for nurses and clerical employees. She also noted that comparisons with male comparators did not always add to an understanding of the dimensions of undervaluation (Glynn 1998: vol 1, 380–647).

The Inquiry found that undervaluation of women's work could occur for a number of reasons, including as a result of gendered assumptions in work value assessments and occupational segregation (or female domination of an occupation). A range of other factors (such as low rates of unionisation and high rates of part time and casual employment) were also found to be important. These factors impacted on the bargaining position of female dominated occupations and industries and resulted in a high incidence of variations to awards by consent, absence of work value assessments and a low incidence of over-award payments (Glynn 1998: vol 2, 174, 179, 273–4).

A 'profile of undervaluation' was developed which included the following indicators:

- female characterisation of work;
- female dominated occupation or industry;
- no work value exercises conducted by the Commission;
- inadequate application of equal pay principles;
- weak union or few union members;
- consent awards/agreements;
- large component of part time and casual workers;
- lack or, or inadequate recognition of qualifications (including misalignment of qualifications);
- limited access to training or career paths;
- small workplaces;
- new industry or occupation;
- service industry; and
- home-based occupations.

The Inquiry found that not all indicators would necessarily be present in every case, but it was likely that most cases of undervaluation would contain some of them (Glynn, 1998: vol 1, 45–6). The reliance on undervaluation drew inspiration from the Inquiry's review of the inadequacies of the then discrimination test in federal legislation (see section A.5), and the experience of the comparable worth proceedings (see section A.4.4) (Glynn 1998: vol 2, 61–3, 121–3) (Hunter 2000: 16-17). Undervaluation was advanced by the Inquiry as the threshold for establishing whether there was the basis for an equal remuneration claim. It rejected the requirement for a discrimination test, concluding that cases should not require the existence of, or proof of, gender causation. It also rejected any requirement for a causal connection between the rates of pay and some pre-existing circumstance connected to the gender of the workers concerned (Glynn 1998: vol 2, 157).

Justice Glynn concluded that the establishment of an equal remuneration principle within the context of the New South Wales industrial system and the use of non gender-biased work value assessments offered the best means of redressing pay inequity (Glynn 1998: vol 2, 244).

Individual, court-based and rights based remedies, such as those contained in anti-discrimination legislation, were seen as incapable of rectifying undervaluation relating to whole occupations and industries or the systemic issues concerned with undervaluation (Glynn 1998: vol 2, 149, 153). In general terms, the provisions of the Industrial Relations Act and industrial principles of the Commission were considered capable of addressing equal remuneration issues, with some minor modification. Justice Glynn considered the meaning of the words 'comparable value' in the definition of 'pay equity' in the Industrial Relations Act and said:

In my view the inclusion of the words 'comparable value' serves two purposes in the legislation. The first purpose is to make plain that the legislation is directed to the comparison of value and not the identification of equivalent job content. Thus the word 'comparable' indicates that the Commission is required to make assessments of comparisons of 'value'. Secondly, the word 'comparable' makes it clear that the assessment may include a comparison of dissimilar work as well as similar work. Thus, the reference to 'comparable' is not to indicate that that a likeness of value was required but that a comparison of the value of work there may be found sufficient basis to establish inequality of remuneration (Glynn 1998: vol 2 129).

In her report, Justice Glynn proposed that the ILO's Equal Remuneration Convention should be the foundation for a legislative scheme to address pay inequity and recommended that the Industrial Relations Act be amended to clarify the distinction between undervaluation and discrimination, distinguish discrimination from equal remuneration and ensure the Commission considered pay equity in all its deliberations (Glynn 1998: vol 2, 110, 135–6, 151, 154, 165).

The report recommended that the proposed equal remuneration principle be developed through a State decision to guide the case-by-case identification of undervaluation and assessment of the 'true' value of the work in question. Elements to be included in the equal remuneration principle were outlined in the recommendations. These elements included that it no longer be presumed that rates of remuneration had been properly assessed in female dominated industries in the past or that processes such as structural efficiency or minimum rates adjustment had been correctly or fully applied. In assessing whether work had been undervalued, comparisons were considered to be useful as a guide to the reliability of rates of remuneration, but it was not recommended that they be a requirement. When comparisons were used, it was necessary to establish that there was a proper basis for the comparison. Assessments of undervaluation were recommended to take a broad approach; having regard to the history of the award, whether there had been any assessments made of the work in the past and whether the rates had been assessed on the basis of the sex of the worker. In considering the latter, it was recommended that regard be paid to the range of factors identified in the report that could lead to undervaluation. Assessment of work value was to occur through the application of an objective, transparent and non-discriminatory assessment of the true value of the work – not merely whether there had been changes in the work. The report also underlined the need for gender neutral assessment of traditionally female work to give adequate weight to factors such as 'dexterity, nurturing, inter-personal skills and service delivery'.

In outlining the essential elements of the new equal remuneration principle, the report explicitly stated that it was not necessary to find causation by sex discrimination in order to make findings of gender-related undervaluation (Glynn 1998: vol 2, 88–96, 150–60, 174). On this point, Justice Glynn's interpretation of the requirements of the Equal Remuneration Convention was that it (Glynn 1998: vol 2, 89):

requires the establishment of equal remuneration being the provision of equal remuneration for work of equal value with such establishment to be free of discrimination based on sex. It does not erect as the governing criteria discrimination *per se*.

In considering the economic impact of the recommended approach, Justice Glynn observed that much of the economic evidence presented at the Inquiry that predicted adverse economic impacts lacked foundation and overstated the effects. The report noted that women's employment had been 'remarkably unresponsive' to the 1969 and 1972 equal pay decisions. It also noted that gender discrimination represented a sub-optimal allocation of resources and that changes in the composition of employment because of pay equity could represent an improvement in economic efficiency and resource allocation and higher levels of productivity. In relation to outworkers in particular, Justice Glynn considered that there was a real possibility that a degree of monopsony existed, the removal of which would not have negative economic impacts. An evolutionary, case-by-case approach was also endorsed as a means of moderating any economic impact. Other positive impacts were also identified, such as improvements in opportunities and choices for women by providing economic independence, reduced reliance on welfare or income support and more transparent award structures (Glynn 1998: vol 2, 357–72).

An important finding of the Inquiry was that the Industrial Relations Commission should itself consider whether there was undervaluation when it reviewed an award, irrespective of whether the industrial parties made submissions on the matter. This was considered important to redress undervaluation in circumstances where unionisation was low, unions were unable or unwilling to take equal remuneration cases and consent arrangements had resulted in undervaluation. The possibility of Commission-initiated reviews was significant, given the resource demands of work value and equal remuneration cases (Hall 1999: 48).

B.2.2. The 2000 Equal Remuneration Principle

The legislative amendments recommended by Justice Glynn were not made to the Industrial Relations Act 1996. However, the New South Wales Industrial Relations Commission developed and adopted an Equal Remuneration Principle which essentially followed Justice Glynn's recommended elements, following extensive discussion with representatives of employers, unions and government (*Re Equal Remuneration Principle* (2000) 97 IR 177).

In its decision, the Full Bench noted that the Report of the Pay Equity Inquiry contained a wealth of information, material and recommendations that provided an appropriate starting point for its considerations. However, the Full Bench concluded that while it was entitled to have regard to the report, it was not bound by its findings (at [65]).

In considering the need for a new principle, the Full Bench noted that the right of women to equal remuneration irrespective of their gender had been recognised by the United Nations and the ILO and enshrined in State legislation. It also noted that there was general agreement between the parties and interveners before it that an Equal Remuneration Principle should be included in the State Wage Case Principles. The focus was not on whether there should be such a principle, but what should be the terms of the principle. The Full Bench was also influenced by the general view expressed by the parties that the existing equal pay principle had been 'virtually forgotten' and needed to be updated and elevated in status. In the circumstances, the Commission decided it was appropriate to adopt the consent of the parties and develop a new principle that would be part of the Commission's wage fixing principles (at [43]–[64]).

In general terms, the Commission considered that the new principle needed to be (at [71]):

designed to ensure there are no artificial barriers created to a proper assessment of the wages on a gender neutral basis. We consider this will be achieved if the only criterion for a revaluation of the work and its work value is that it be demonstrated the rate of payment hitherto fixed does not represent a proper valuation of the work and that any failure is related to factors associated with the sex of those performing the work.

The Commission considered the legislative framework, noting that the parties had been 'at significant odds with each other' as to the proper construction of the legislative provisions, particularly sections 19, 21 and 23 (at [71]). It first dealt with the meaning of 'pay equity' and 'equal remuneration' within the Act. It noted that 'pay equity' was defined in the Act, but that 'remuneration' and 'equal remuneration' were not. After considering the decision of another Full Bench which had considered the word 'remuneration', the use of the word within sections 19, 21 and 23 and the definition of 'remuneration' within ILO Convention 100, the Commission concluded that (at [94]–[95]):

[T]he term 'equal remuneration' is not used in the Act in the same way that the word remuneration and equal remuneration are defined in the Convention.

What necessarily follows is the conclusion that the word 'remuneration', where it appears in the Act in terms such as 'equal remuneration and other conditions of employment', may be understood as being used, pertinently in this case, as not including overaward payment.

The Full Bench rejected submissions that it was required, when exercising its powers under sections 19, 21 or 23, to conduct a wide ranging investigation or inquiry into the question of whether pay equity had been achieved in the award by reference not only to the work to which the award applied, but also to the work of comparable occupations covered by other awards, industrial instruments or common law contracts. It concluded that the new principle would permit gender undervaluation applications to be advanced and considered separate from the existing 'special case principle', and separate too from the requirement for there to be a change in work value as emphasised in the 'work value principle'. Additionally the Full Bench emphasised that section 10 of the Industrial Relations Act required the Commission to make awards that fixed 'fair and reasonable' conditions of employment – enabling the Commission to rectify any demonstrated undervaluation (at [101]–[131]).

The Full Bench considered economic outcomes, but found that (at [137]):

Claims that there may be negative employment effects cannot ... provide a proper basis for refusal of pay equity adjustments where it has been established that men and women are not being equally remunerated for work of equal or comparable value.

It also noted that (at [142]):

[A]ll of the expert witnesses seemed unanimous that if genuine cases of such inequity were corrected by the Commission the effects on the labour market would be positive.

The principle determined by the Full Bench did provide for the pursuit of claims of gender-based undervaluation. In this respect the Full Bench followed the recommendation of the Inquiry that undervaluation and not discrimination was the key determinant. In framing the Equal Remuneration Principle, the Full Bench rejected the submission of the Employers' Federation that the principle should be confined to claims of discrimination, stating (at [7]):

Claims of undervaluation may be based on identification of discriminatory matters. However, if it can be demonstrated that particular work is undervalued an appropriate adjustment to the applicable award rate should follow, without the necessity of establishing also that the undervaluation flowed from a particular act of discrimination.

In contrast to the recommendations of the Inquiry, the principle provided little further guidance as to what might be appropriate areas for consideration in an equal remuneration claim. The Full Bench noted that the principle permitted that appropriate comparisons can be drawn but were not required for a finding of undervaluation (at [8]). The decision affirmed work value as the means of assessing the proper valuation of the work but noted that the Commission was to be guided by both internal and external award relativities (at [145]):

An assessment of the value of any work to which an award applies is not conducted in a vacuum but in a particular context, dealt with in the work value principle itself in para 6(c), namely in the context of other work to which the award applies and the work of any related classifications in other awards.

The Equal Remuneration Principle was incorporated into the Commission's wage fixing principles and has remained a part of those principles. The principles, as most recently stated in the *State Wage Case 2010 (No 2)* (2011) 206 IR 218, are as follows:

12. Equal Remuneration and Other Conditions

12.1 Claims may be made in accordance with the requirements of this Principle for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required, or the conditions under which the work is performed, have been undervalued on a gender basis.

12.2 The assessment of the work, skill and responsibility required under this Principle is to be approached on a gender neutral basis and in the absence of assumptions based on gender.

12.3 Where the under-valuation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.

12.4 The application of any formula, which is inconsistent with proper consideration of the value of the work performed, is inappropriate to the implementation of this Principle.

12.5 The assessment of wage rates and other conditions of employment under this Principle is to have regard to the history of the award concerned.

12.6 Any change in wage relativities which may result from any adjustments under this Principle, not only within the award in question but also against external classifications to which the award structure is related, must occur in such a way as to ensure there is no likelihood of wage leapfrogging arising out of changes in relative positions.

12.7 In applying this Principle, the Commission will ensure that any alternative to wage relativities is based upon the work, skill and responsibility required, including the conditions under which the work is performed.

12.8 Where the requirements of this principle have been satisfied, an assessment shall be made as to how the undervaluation should be addressed in money terms or by other changes in conditions of employment, such as reclassification of the work, establishment of new career paths or changes in

incremental scales. Such assessments will reflect the wages and conditions of employment previously fixed for the work and the nature and extent of the undervaluation established.

12.9 Any changes made to the award as a result of this assessment may be phased in and any increase in wages may be absorbed in individual employees' overaward payments.

12.10 Care should be taken to ensure that work, skill and responsibility which have been taken into account in any previous work value adjustments or structural efficiency exercises are not again considered under this Principle, except to the extent of any undervaluation established.

12.11 Where undervaluation is established only in respect of some persons covered by a particular classification, the undervaluation may be addressed by the creation of a new classification and not by increasing the rates for the classification as a whole.

12.12 The expression '*the conditions under which the work is performed*' has the same meaning as in Principle 8.2, Work Value Considerations.

12.13 The Commission will guard against contrived classification and overclassification of jobs. It will also consider:

- (a) the state of the economy of New South Wales and the likely effect of its decision on the economy;
- (b) the likely effect of its decision on the industry and/or the employers affected by the decision; and
- (c) the likely effect of its decision on employment.

12.14 Claims under this Principle will be processed before a Full Bench of the Commission, unless otherwise allocated by the President.

12.15 Equal remuneration shall not be achieved by reducing any current wage rates or other conditions of employment.

12.16 In arbitrating an application made under this Principle, the Commission is required to determine whether or not future State Wage Case general increases will apply to the award.

B.2.3. Applying the Equal Remuneration Principle – the *Crown Librarians* case

The newly determined Equal Remuneration Principle has only been tested in a limited number of cases – not least because, as noted in section 3.1, New South Wales industrial laws have been precluded from applying to constitutional corporations since March 2006, and to all other private sector employers since July 2009. The Principle has, however, been cited in various proceedings where applicants lodged their application under different provisions of the legislation or with recourse to a different wage fixing principle. These proceedings illustrate the potential for the Principle to shape tribunal practice in a wider variety of proceedings than those that explicitly concern equal remuneration.⁵²

⁵² See eg *Health and Community Psychologists (State) Award* (2001) 109 IR 458; *Re Teachers (Non-Government Pre Schools) State Award 2001* (2001) 120 IR 3; *Re Public Hospitals (State) Award* (2002) 115 IR 183; *Re Local Government (State) Award 2001* (2004) 132 IR 357; *Crown Employees' (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (2000) 102 IR 202; *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (2002) 116 IR 361; *Health Employees Pharmacists (State) Award* (2003) 132 IR 244; *Re Crown Employees (Police Officers – 2009 Award)* (2012) 220 IR 1.

Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle (2002) 111 IR 48 was the first matter heard under the New South Wales Equal Remuneration Principle. While undervaluation was not contested by the parties, the Commission considered a range of evidence, including a case study that had been presented to Justice Glynn as part of the Inquiry into Pay Equity, which compared the work of librarians and geologists. The case study included points/factor job evaluation of the two occupations as part of evidence about the value of the work. The inquiry also undertook inspections of relevant workplaces, heard evidence from witnesses and received extensive documentary evidence. The Full Bench accepted that the work of librarians had been undervalued on a gender basis, the main indicia being (at [28]–[29]):

- the findings of the case study, together with Justice Glynn’s findings in the Pay Equity Inquiry;
- the consensus amongst the parties that the work was undervalued;
- the fact that the occupation of librarian in the public sector was female dominated;
- that librarians were found to be persons engaged in a profession – they exercised skills based on theoretical knowledge, were required to have tertiary qualifications, were eligible for membership of independent, professional associations, were subject to standards of competence and were required to follow ethical codes of conduct – yet they received lower pay rates than other professional groups in the New South Wales public service that exhibited similar characteristics; and
- the absence of any concluded work value inquiry (while this was not of itself evidence of undervaluation, the absence of an independent assessment of the work served to strengthen the inference that the work had been undervalued).

The work of archivists was not considered in the Pay Equity Inquiry. Nevertheless, the Full Bench found that archivists were also engaged in a profession and shared a number of similarities with librarians. The close nexus which had existed between librarians and archivists, including in relation to alignment of rates of pay, and the absence of any concluded work value inquiry, suggested that the work of archivists had also been undervalued (at [32]–[33]). Library technicians were likewise found to be undervalued by comparison with other para-professional groups in the public service. The occupation was female dominated, and at no stage had their work been the subject of a work value inquiry, despite significant change in the 1980s with the onset of automated systems (at [32]–[34]). The Full Bench concluded that the evidence established a career industry where qualifications, knowledge and responsibilities increased as the individual gained experience in performing the various functions at the various levels.

Given that the issue of whether the work was undervalued was not contested between the parties, the Full Bench was not required to provide further guidance than that available in the decision that determined the Equal Remuneration Principle as to what was required to establish gender-related undervaluation. It was accepted that it was appropriate to compare the work of librarians with other public sector-based professions and it was relevant that librarians were paid less than other professions where work value had been assessed by the Commission in setting rates. Relevant factors in the comparison were the requirement for a bachelor’s degree or equivalent for entry and career progression based on experience and merit-based appointment for promotion. The case involved direct inspections by the Commission at several worksites.

In these circumstances, to remedy the identified undervaluation the Commission decided to increase wage rates and adopt incremental scales for library staff – an approach similar to that which had been adopted for public sector psychologists (*Re Health and Community Employees Psychologists (State) Award* (2001) 109 IR 458 at [60-61]). The Commission ordered the creation of a new interim award and requested the parties to confer on the terms of a new award to replace the interim award – in particular, addressing issues such as the form and content of classification descriptors. Wage increases of up to 25 per cent (and on average 16 per cent) resulted and the new award formalised the professional status of librarians and library technicians (at [148]–[155]).

B.2.4 The *Child Care* case

In 2006, a Full Bench of the New South Wales Commission considered the first contested matter heard under the State's Equal Remuneration Principle (*Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290).

The Liquor, Hospitality and Miscellaneous Union (LHMU) sought a new award with appropriate career paths and increased remuneration to address claimed historical inequities, undervaluation and work value change. The award was sought to cover primary contact staff, other than teachers, employed at pre-school, long day care and out of school hour childcare centres, as well as non-contact staff, such as cooks and cleaners. In support of its claims for undervaluation, the union presented evidence on: the female domination of the industry; its 'charitable and philanthropic origins'; the history of establishment of award rates by consent and the absence of a work value examination; and the changing nature of the work and quality of the service which had resulted from changed regulatory arrangements. The union also argued that the skills involved in childcare were not 'innate' but 'learned skills, which did not come naturally to either sex', and claimed that 'soft skills', including interpersonal and communication skills and teamwork had been undervalued in setting rates in the industry (at [2]–[3], [16]–[23], [101]–[107]).

Employers First (on behalf of the childcare industry employers) argued that even if there had been an historical undervaluation of the rates of pay under the award as a result of the charitable origins of the industry, appropriate rates of pay had been established when the award had been aligned with that of other awards, in particular the metal industry award, as part of the minimum rates adjustment process in 1991, and by union and employer review and consent variation in 1997. The employers also argued that substantial decreases in wages were warranted for some staff employed in pre-schools and that any wage increase would result in increased childcare fees which would affect the viability of childcare centres and would be a cost worn directly by the public (at [24]–[31]).

The Commission conducted inspections and heard an extensive range of evidence relating to the industry, its regulation, funding, profitability and affordability, the history of the industry's award regulation, the nature of the workforce, the skills and responsibilities required of the work and changes that had impacted on childcare work over time. The evidence included that of expert witnesses as well as the report of the Pay Equity Inquiry. Amongst other things, Justice Glynn had suggested in her report that the minimum rates adjustment process had not been correctly applied and subsequent consent award adjustments had failed to properly value the qualifications of childcare workers. She had noted that pay rates for such workers were below those of unskilled occupations such as shop assistants and car park attendants and had suggested that increased regulation had resulted in childcare work evolving in a similar way to the work of teachers (at [139]).

The Commission stated that the starting point for its consideration of the parties' competing cases was the requirement imposed by section 10 of the Industrial Relations Act that the Commission make awards setting 'fair and reasonable conditions of employment'. It found that in cases where significant alterations were sought to existing consent arrangements, the onus fell on the applicant to demonstrate that the award no longer provided fair and reasonable conditions of employment (at [160]–[161]). Considering all the evidence, the Commission concluded that 'the evidence overwhelmingly showed that the rates of pay for childcare workers to whom the award applies, are too low' (at [163]).

The Commission rejected employers' submissions that some rates under the award should be reduced, and found that both undervaluation and work value change supported the case for improved remuneration (at [169]):

We are satisfied that no evidentiary basis for any reduction in the rates of any of those employed in preschools was made out ... we are well satisfied that as far as both qualified and unqualified child care workers are concerned, a case of both undervaluation and work value change was made out in the evidence.

The Commission overviewed the changes in work requirements that it considered sufficient to satisfy the requirements of the Work Value Principle. The changes affected childcare workers and co-ordinators and arose, in particular, from significant and ongoing changes in the regulatory environment (at [184]–[197]). The Commission then outlined the basis for its acceptance of the case for undervaluation of childcare workers, co-ordinators and authorised supervisors, stating that (at [200]):

The evidence showed that the vast preponderance of views expressed over some years as the result of various investigations, surveys and considerations conducted by Federal and State government bodies and forums, as well as in academic research, was that the work of child care workers is undervalued. Even some employer witnesses in these proceedings accepted those views, albeit only in relation to qualified staff. Child care workers are generally perceived to have low pay and low status, with the result that few males are employed in the industry. One result is that there are difficulties in the attraction and retention of such staff, more in some areas than others, notwithstanding that the cost of the service provided by these centres is underwritten by Federal and State government financial support, as well as fees paid by parents.

The Commission found that the award parties, through agreements which they had made and the Commission had ratified, had failed to ensure that the award rates properly reflected the value of the work, and that this situation had been compounded by the inability of childcare workers to negotiate on an over-award basis. The Commission noted that, generally speaking, it may be difficult to detect gender based undervaluation. However, it found that, in the childcare workers' case, there was no evidence to suggest that the conclusions reached by Justice Glynn in the Pay Equity Inquiry had been erroneous, and there was 'no other explanation for the obvious undervaluation of childcare workers' (at [210]–[211]).

The Commission found that there were 'serious difficulties' in drawing comparisons between the work of childcare workers and those employed in male dominated industries, but agreed with Justice Glynn that comparisons could usefully be made between teachers and childcare workers. The Commission found that childcare work had evolved in a way similar to the work of teachers and noted that childcare experience was recognised in teaching awards as a factor to be considered in classification matters. However, the Commission noted that there were differences in

the quality of the work and the similarities were less significant for non-qualified staff (at [214]–[217]).

In fixing fair and reasonable rates as required under section 10, the Commission also took into account the difference in the hours worked by childcare workers in pre-schools as opposed to long day care centres (at [231]–[232]). Further, in balancing ‘widely held concerns’ for the undervaluation of pay rates and employer concerns for employment and the viability of the industry, the Commission decided to phase in the award increases over a two year period (at [341]–[348]). The Full Bench noted also that rectifying undervaluation may require reassessing relativities with minimum rates in key benchmark awards such as the Metal Industry Award. In doing so the Full Bench assessed that it was not limited by the Commission’s Minimum Rates Adjustment Principle. The Full Bench noted that to do so would introduce ‘an artificial consideration into an assessment of the proper rates for childcare workers’ and to do so ‘would elevate the Minimum Rates Adjustment principle to an overriding principle, imposing a limitation upon the proper assessment of the value of work, even when it has changed or when it has been undervalued’ (at [242]).

Some of the significant features of the decision were that the applicant was not required to make a comparison with a male dominated industry, although teaching was ultimately accepted as an appropriate comparator. The Full Bench also asserted that there was no requirement to assign a precise weighting to gender based undervaluation, It was simply a question of taking into account the evidence concerning whether the work was properly valued. Equally significant, arguments that a remedy for childcare workers was not in the ‘public interest’ were able to be rejected because the Commission accepted that the work they performed was of importance to the community and to government, as evidenced by the regulation and funding of the industry (Smith & Lyons 2007: 60–1).

B.3 Pay equity in Queensland

B.3.1 The Queensland Pay Equity Inquiry

In September 2000, the Queensland Minister for Employment, Training and Industrial Relations directed the QIRC to conduct an inquiry into pay equity in Queensland. The Inquiry was conducted by Commissioner Glenys Fisher, reporting in March 2001. The Inquiry’s terms of reference specifically required it to assess the application of the findings of the investigations in New South Wales to the Queensland jurisdiction. It was obliged to consider, amongst other things, the extent of pay inequity in Queensland and the adequacy of the (then) Queensland legislation for achieving pay equity, and to develop a draft pay equity principle that might be adopted in Queensland.

The Inquiry chose to conduct a case study on the work of dental assistants, with a twofold objective: to create an opportunity to analyse, assess and work value in a gender neutral way by unpacking the skills of a female-dominated occupation; and to provide interested parties with the opportunity to comment on the elements of a draft pay equity principle (Fisher 2001: 103). This procedural framework assisted in refining the principle ultimately recommended by the Commissioner in her final report, while the Inquiry found that its investigation of the work of dental assistants was assisted by an analytical framework that comprised the identification of the so-called ‘softer skills’ associated with feminised work; the history of wage determination and work value assessment; the level of union activity; and forms of employment within the sector.

The Queensland Inquiry accepted that a complex range of factors contributed to cause pay inequity, such as the concentration of women in low-paid work and precarious employment. It also

found that the profile of undervaluation indicators developed by the New South Wales Pay Equity Inquiry was relevant to Queensland. The final report recommended both legislative amendments and the introduction of a new principle to be effected through the industrial system. The report adopted the position of Justice Glynn in recommending that the most effective means of reform would be by way of labour law rather through the claims lodged under anti-discrimination legislation.

The Queensland parliament passed legislative amendments to the Industrial Relations Act 1999 (Qld) in line with a recommendation of the Inquiry, to the effect that the QIRC must ensure that all awards and agreements provide equal remuneration for men and women workers. The legislative changes also addressed the meaning to be afforded to 'remuneration', defining it in Schedule 5 as 'the wage or salary payable to an employee', together with 'amounts payable or other benefits made available to an employee under a contract of service'. Hence the term is not for this purpose confined to minimum award rates.

Section 60 of the Industrial Relations Act now provides that the QIRC may make any order it considers appropriate to ensure that employees covered by the order receive equal remuneration for work of equal or comparable value. The discretion to make such orders is not constrained by the existence or otherwise of an industrial instrument covering the affected employees. The Commission may be precluded from making an order if an alternative remedy has been pursued under the same or another Act (s 66).

Besides the power to make specific orders, section 126(e) stipulates that the QIRC must ensure that each award provides for equal remuneration for men and women employees for work of equal or comparable value. In addition, it must refuse to approve any certified agreement unless satisfied that the agreement provides for equal remuneration of this kind (sections 156(1)(l),(m), 193(b), 203(7)). Section 3(d) also provides that 'ensuring equal remuneration for men and women employees for work of equal or comparable value' is to be regarded as a principal object of the Act.

B.3.2 The 2002 Equal Remuneration Principle

An Equal Remuneration Principle was introduced in April 2002 following hearings before a Full Bench of the QIRC, which arrived at the terms of the principle by consent. The Full Bench adopted, with only minor amendment, the draft principle recommended by the report of the 2001 Inquiry. The QIRC declared the principle by issuing a statement of policy (*Equal Remuneration Principle* (2002) 114 IR 305). A grants program was also created to provide funding assistance to organisations involved in pay equity cases under the Principle.

The terms of the principle oblige the QIRC to assess the value of work performed under any award, or in workplace agreements in female dominated industries, having regard to traditional work value factors such as the nature of work, skill and responsibility and the conditions under which the work is performed (para 2). Assessment of work must be 'transparent, objective, non-discriminatory and free of assumptions based on gender' (para 3). The principle does not require a change in work value to be established (para 4).

In assessing the value of work, the QIRC is to have regard to the history of any award, including whether there have been any work value assessments in the past and whether remuneration has been affected by the gender of the workers (para 6). The principle specifically identifies the features of an occupation or industry that might have contributed to undervaluation:

- whether the work has been characterised as 'female';

- whether the skills of female workers have been undervalued;
- whether there has been undervaluation due to women being over-represented in lower-paid areas of an industry or occupation (occupational segregation or segmentation);
- whether features of the industry or occupation (for example, occupational segregation, over-representation of women in part-time or casual work, low rates of unionisation and a lack of ability for workers to bargain with their employer) have influenced the value of the work; and
- whether sufficient weight has been placed on the typical work, skills and responsibilities exercised by women, working conditions and other relevant work features.

The principle specifically states that it is not necessary to establish that female workers have been discriminated against to establish undervaluation of work (para 7). Nor does it require comparisons of any particular industry or occupation with any other (para 8), although it allows comparisons to be used for guidance in ascertaining appropriate remuneration (para 9). If the assessment shows that the work performed by female workers has been undervalued, the QIRC is obliged to take steps to ensure equal remuneration is provided to both female and male workers through means such as reclassification of the work, establishment of new career paths, changes to incremental scales, wage increases, new allowances and reassessment of definitions and descriptions of work to properly reflect their value (para. 10). It must do so without reducing existing wages or other conditions (para 14) and there must be no wage leapfrogging as a result of changes in relativities (para 11). Provision is included for phasing in any decisions under the principle (para 15).

Four substantive applications have been brought under Queensland's Equal Remuneration Principle since its inception. Each is discussed below.

B.3.3 The Dental Assistants case

In 2003, the LHMU brought a case on behalf of private sector dental assistants (DAs) employed under the Dental Assistants' (Private Practice) Award – State: see *Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch)* (2005) 180 QGIG 187.

The QIRC considered a range of evidence, including a survey of the working conditions of DAs, work inspections, a case study of the work of dental assistants published in the report of the Queensland Pay Equity Inquiry, analysis of the award history, classification structure and qualifications, and information about the remuneration of comparable groups, both within Queensland and interstate. This evidence revealed a female dominated occupation, with low levels of unionisation, predominantly employed in small workplaces, with a high level of casual engagement – despite employees remaining in the occupation for long periods. There was an absence of certified workplace agreements, but some evidence that certain dental assistants received informal over-award payments. Consent arrangements characterised changes to the award and the QIRC found that no work value case had been conducted in the past for DAs in either the public or private sector (at [48], [51], [63], [162]).

It also found that DAs had been disadvantaged by the incomplete or inappropriate application of wage adjustment processes, such as the structural efficiency, award restructuring and minimum rates adjustment processes. The case for undervaluation was also supported by consideration of evidence relating to training and qualifications, inadequate recognition of 'soft skills', responsibility (including delegated responsibility for infection control), and the conditions under which the work

was performed. After considering all the evidence, the QIRC accepted that undervaluation of work had occurred and that the work of DAs who possessed Certificate III qualifications were equal to those of tradespersons (at [63], [84], [128]–[153], [155]).

The QIRC then considered how it should redress the undervaluation and, in particular, whether and to what extent wage rates from certified agreements that applied to predominantly male occupations should be incorporated into the DAs' award. It noted relevant provisions of the Industrial Relations Act, including section 129, which provides that the Commission may include in an award provisions that are based on a certified agreement if such inclusions are consistent with principles established by the Full Bench and not contrary to the public interest. In considering the public interest, the QIRC stated that (at [181]):

In our view the public interest is to ensure that the Award provides for equal remuneration by having regard to a number of factors including ensuring that relativities are properly set within and between awards; whether despite relativities being properly set, unequal remuneration still occurs either in respect of wage rates or more generally; and by consideration of rates paid to comparable occupations under awards and enterprise bargaining.

The QIRC concluded that (at [183]):

The evidence is overwhelming that DAs do not benefit from enterprise bargaining. It is this lack of access to, or participation in, enterprise bargaining that we consider the single biggest contributing factor to pay inequity for DAs.

The QIRC found that lack of access to enterprise bargaining resulted from the small, non-corporate, non-unionised workplaces in which DAs were found and the overwhelmingly female composition of the occupation. In deciding whether to take into account certified agreement rates, the tribunal also took into account Justice Glynn's consideration of objections to the use of enterprise bargaining rates in the New South Wales Pay Equity Inquiry (at [185]–[187], [192]). It noted that Justice Glynn considered that enterprise agreements were appropriate for consideration in a pay equity context because they were:

- subject to regulation and are institutionally based and therefore represent a more reliable and stable reference point than discretionary payments;
- formalised and more likely to be transparent than over-award payments and more likely to demonstrate different classifications and definitions; and
- subject to regulation by the QIRC so that the equal remuneration principle would be directly applicable to both awards and agreements.

The QIRC concluded (at [188]) that it agreed with Justice Glynn's reasoning and found that pay equity would not be achieved by merely setting appropriate relativities for DAs by reference to comparable classifications in the Engineering Award, without any adjustment to compensate for rates in certified agreements. It also noted that section 266 of the Industrial Relations Act indicated that 'where pay inequity is found it must be rectified' and that its rectification will generally require a 'unique response' (at [193]).

To redress the undervaluation, the QIRC applied a two-part increase to the basic pay rates as specified in the award. The first reflected the tribunal's view that the work of DAs be aligned with the tradesperson rate in the Metal Industry Award. The second element reflected its concerns that wage increases of this magnitude (\$63.60 per week or about 11 per cent) would not remedy pay

inequity for DAs due to their lack of access to, or participation in, enterprise bargaining. To this end it determined an Equal Remuneration Component, set at 1.25% of the base rate per annum. A small part of this Component was said to compensate for disabilities in the way in which work was performed, such as dealing with human waste, exposure to chemicals and noise. The QIRC attempted to limit the opportunities for flow-on claims by observing that a claim for equal remuneration would be determined with regard to its own circumstances and if inequity was established 'its rectification will require a unique response' (at [192]–[197]).

The case also resulted in a number of award amendments. The classification structure was altered to recognise the natural career path of DAs and the role of practice managers. Relativities were aligned with the Engineering Award – State (the traditional benchmark for award wages in Queensland). Other improvements to conditions included a new right for regular and systematic casual employees to become permanent after six months, requirements for employer contributions to professional development costs, a first aid allowance and a requirement that ordinary hours only be worked on five consecutive days out of seven.

In their analysis of the *Dental Assistants* case, Whitehouse and Rooney (2007: 88) argue that because equal remuneration was identified in the principal objects of the Industrial Relations Act (section 3) as an outcome to be pursued by the QIRC, pay equity became a priority in itself and constitutive of the 'public interest', rather than simply something to be balanced against other considerations. They also suggest that (2007: 99):

... the case provides an illustration of one of the most effective strategies to address gender pay inequity under the prevailing system of 'enterprise bargaining' – that is, to recognise the gendered distribution of premiums won through enterprise agreements and make appropriate corrections to awards covering female-dominated occupational groups with limited access to bargaining. As such it reflects a number of strengths of the Queensland system that bolster its ERP [Equal Remuneration Principle], such as the prioritisation of pay equity in the Act and the enhanced capacity to interpret public interest in more than simplistic economic terms.

On the other hand, Whitehouse and Rooney note that in spite of the gains that the private sector DAs made, the case still left them well below the actual earnings of many male-dominated trades occupations and also below the rates for public sector DAs. They also argued that further rounds of bargaining in the public sector would likely increase the gap before the phasing in of the private sector DAs' increases were completed. This led them to raise questions about the most effective way to construct comparisons for undervaluation cases and whether opportunities under the Equal Remuneration Principle were fully exploited in this case (Whitehouse & Rooney 2007: 99). This analysis has recently been extended to cover the period since the commencement of the Fair Work Act with the more recent work including child care workers who were also the gained wage increases through proceedings under the Queensland ERP (see section B.3.4). The analysis highlights the benefits of industrial awards for the carriage of pay equity claims but also highlights the vulnerability of pay equity gains to erosion and fragmentation (Connelly et al 2012: 127).

B.3.4 The Children's Services Workers case

A further attempt to apply the Equal Remuneration Principle arose in December 2003. It involved an application by the LHMU to vary the Queensland Child Care Industry Award – State 2003: see *Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Queensland Union of Employers* (2006) 181 QGIG 568 (interim decision); *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association* (2006) 182 QGIG 318

(final decision). The grounds were similar to that filed in New South Wales (see section B.2.4) and included that the occupation of childcare fits the profile that indicates undervaluation. The union noted that childcare work is characterised as female and carried out in small workplaces. The wage rates in the award reflected the lack of effective work-value outcomes and that childcare qualifications were inadequately recognised because childcare was a new industry with new occupations involving 'soft' – traditionally female – skills which had not been properly valued.

A range of factors prolonged the proceedings and the QIRC did not hand down an interim decision until March 24, 2006 and a final decision on 27 June 2006. This time span was not only a result of the contentious nature of the claims. The proceedings were required to move past challenges to each member of the constituted member of the Full Bench, as well as changes to the Full Bench caused by changes in administrative responsibilities within the Commission.

The QIRC found the work performed by childcare workers had been historically undervalued based on the gender of those workers. It held that the conditions under which the work was performed had not been adequately taken into account in the past when the value of the work was assessed. It reviewed the award history and found that when the award had first been made, the work was characterised as 'female', the wage rates were set by reference to other female wage rates and the skills necessary to perform the work were not identified. Subsequent adjustments had not remedied this position (at 357).

The Commission concluded that childcare work involved high level duties or care, including high physical and mental demands. Many of the skills of childcare workers, such as communication, multi-tasking, teamwork and developing and implementing programs, had never been properly valued. Limited attention had also been given to work conditions, for example, lifting children, dealing with human waste and work intensity, and other relevant features of the work such as attending meetings out of normal hours, limited access to breaks and unpaid and self-funded training requirements. Following on from the *Dental Assistants* case, the QIRC established that a Certificate III gained for a predominantly female occupation had the same value as a Certificate III gained for a predominantly male occupation. Possession of such a certificate was to attract payment of the 100 per cent rate (C10) in the Engineering Award. The Commission said that the critical issue was not the length of time the qualification takes to achieve, but the equivalence of accountability and responsibility required for each level of qualification. However, the Commission also noted that other factors, such as the conditions under which the work was performed, or additional work requirements, could be relevant to the assignment of an occupation to the classification structure.

The wage increases granted by the QIRC were similar to the award wage increases granted by the Australian Industrial Relations Commission in federal work value proceedings (*Re Child Care Industry (Australian Capital Territory) Award 1998* (Australian Industrial Relations Commission, PR954938, 13 January 2005)), though below the wage increases granted by its New South Wales counterpart (see section B.2.4). The Queensland tribunal offered three reasons for this departure. The first was that two year trained teaching rates, relied upon in New South Wales, was not an extant classification in Queensland teaching awards. On this point the Queensland tribunal did not address a broader point made in proceedings in New South Wales, that the appropriate nexus was relativity with teaching work, rather than work in the metal industry. The second was that the LHMU claim did not address the absence of over-award payments received by childcare employees; in the eyes of the tribunal there was no evidentiary basis to grant an Equal Remuneration Component as was the case in the dental assistants proceedings. The third reason rested on the weight given

to the Commission to competing considerations. It held that achieving pay equity needed to be balanced against the interest of ensuring children's services are affordable and accessible to parents. Consequently, the Commission rejected the applicant's wage claim as being 'excessive' for it would 'put at risk the public interest consideration' (at 353–62). Increased pay rates were awarded and phased in over a period of two and a half years. For employees holding the appropriate academic or vocational qualifications, the pay increases ranged from 14 per cent to 29 per cent. Some improvements to conditions were also awarded and the Award was renamed the Children's Services Award – State 2006 to better describe the range of services provided to children and their parents by childcare workers.

B.3.5 The Social and Community Services workers case

The Queensland Services Union applied for a new award covering community services and crisis assistance workers in April 2008: see *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19. The first stage of the application resulted in the creation of the Queensland Community Services and Crisis Assistance Award – State 2008, by consent, in September 2008. The new award incorporated the wages and classifications of the federal Social and Community Services (Queensland) Award 2001, and the Crisis Assistance Supported Housing (Queensland) Award 1999.

The second stage of the application sought increased pay rates for workers covered by the new award, to correct historical undervaluation, as well as a 1.25 per cent Equal Remuneration Component to maintain ongoing wage parity because of a lack of enterprise bargaining in the sector. As in the previous applications under the Equal Remuneration Principle, evidence focused on the features of the industry, indicators of undervaluation, the award history, consideration of work value and comparisons with other occupations and industries.

In its decision the QIRC drew specific guidance from the terms of the Queensland Equal Remuneration Principle, including the marker points of undervaluation provided in that principle. Relevant material considered in the proceedings included an agreed statement of facts between the parties and focused on:

- female domination of the industry;
- the middle class, charitable origins of the community services sector;
- cultural devaluation of 'care work' as 'women's work' and associated undervaluation of 'soft skills'(such as active listening, problem solving and negotiating);
- the lack of any work value exercise to review rates, except for an adjustment to the four year graduate entry rate;
- industry features such as small workplaces and low levels of unionisation;
- the fact that award rates and descriptors had predominantly set by consent;
- the failure to define career paths in the previous award;
- the prevalence of part-time positions, largely driven by funding;
- industrial issues resulting in barriers to bargaining and a general lack of over-award payments; and
- reliance on, and the nature of, government funding models.

Commissioner Fisher, who heard the matter, assessed that factors that contributed to the undervaluation of the work included the female characterisation of that work. Specifically, the nature of the work in the community services sector was considered to be an extension of work undertaken by women in the domestic sphere, including the caring and nurturing of dependants. This characterisation had impeded industrial recognition of the work and there had been an absence of work value investigations in the award. In consequence, the prevailing classification structure and wage rates failed to recognise post-school qualifications held by employees in the sector. Funding of the sector was consistent with award rather than bargained rates of pay. In considering the contribution of gender to undervaluation, Commissioner Fisher concluded that these factors had a 'gender or gender associated cause. When considered as a whole a pattern emerges that gender is at the core of present work value of the community services sector' (at 40).

Commissioner Fisher concluded that the existing relativities understated the nature of the work, skill and responsibilities at particular levels of the award, and then proceeded to consider the work, skill and responsibility and the conditions under which the work was performed to assess its appropriate value. In considering the rates to be applied in the new award, the Commissioner was guided by the rates in a number of different industrial instruments in local government and the Queensland Public Service. A key feature of these proceedings was that this spectrum of rates included bargained outcomes, including the State Government Departments Certified Agreement 2006. The Commissioner found that this Agreement provided a useful point of comparison, because a criterion for its certification was that the rates provided equal remuneration for men and women employees for work of equal or comparable value. The Commissioner agreed that it was appropriate to use certified agreement rates as a guide to ascertaining appropriate rates, on the basis that this was consistent with an overriding public interest objective of ensuring that employees in the community services sector were remunerated commensurate with their work value (at 46–9).

An Equal Remuneration Component of 1 per cent was awarded in recognition that the relevant employees had experienced a low level of access to the higher wage rates that were available by way of enterprise bargaining. The tribunal placed some limitations on this aspect of the decision, making it applicable only until 2015. The Commissioner's reasoning was that although the evidence clearly established the low incidence of enterprise bargaining and over-award payments in the sector, there was encouragement elsewhere in the legislation for parties to engage in enterprise bargaining. The limitation to the Component would allow funding bodies to consider the broader public sector model of paying enterprise bargaining rates. In addition, if it became evident that enterprise bargaining was becoming a common feature of the industry, an application could be made for the earlier removal of the Equal Remuneration Component.

B.3.6 The Disability Support Workers case

Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc (2009) 192 QGIG 46 is the most recent case in the Queensland jurisdiction. It concerned an application by the Australian Workers' Union to increase the rates of pay in the Disability Support Workers Award – State 2003, applicable to disability support workers in the community (non-government) sector. The union and the respondent Queensland Community Services Employers' Association tendered an agreed statement of facts, demonstrating consensus that the work of employees covered by the Disability Support Workers Award had been historically undervalued for similar reasons to community services workers, and consistent with the indicators of undervaluation identified in the New South Wales Pay Equity Inquiry.

Factors identified as contributing to undervaluation in the agreed statement of facts included:

- female domination of the industry;
- the industry's connection with voluntarism and unpaid work;
- the significance of part-time and casual employment;
- government funding models;
- low levels of unionisation;
- impediments to bargaining (for example arising from low levels of unionisation, the large number of small organisations, the lack of dedicated human resource services, funding arrangements and cultural factors);
- 'care work' and the 'soft skills' involved in such work (such as emotional intelligence and communication skills) having been undervalued; and
- inadequate recognition of changes to the nature of the work resulting from de-institutionalisation of the sector and changing work expectations and requirements.

The agreed statement of facts also indicated that undervaluation had raised public interest concerns, including difficulty in attracting and retaining suitable staff, and a high level of staff turnover. In its decision of September 2009, the QIRC agreed, and awarded pay increases to employees at every level. In deciding new pay rates, the QIRC gave consideration to two relevant comparators: the newly created Queensland Community Services and Crisis Assistance Award – State 2008, and the State Government Departments Certified Agreement 2006. It noted that much of the work performed in the community sector was very similar to that performed by Queensland Government services. The increase was phased in over five adjustments.

B.3.7 Pay Equity: Time to Act

A second inquiry into pay equity was undertaken by the QIRC in 2007. The terms of reference included evaluating the effectiveness of the outcomes of the QIRC's 2000–01 inquiry in advancing pay equity and examining the impact of the 2005 federal legislative amendments on pay equity in Queensland. As noted at section 3.1, a key component of the federal legislation was that it excluded the operation of 'a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value' for employees who fell within the federal jurisdiction. In this respect the Inquiry observed the impact of the federal legislative amendments on the cases involving dental assistants and childcare workers.

In September 2007, the QIRC delivered the inquiry report, *Pay Equity: Time to Act* (Fisher2007). The report found that the Equal Remuneration Principle provided a useful analytical framework for the consideration of pay equity. In the context of the *Dental Assistants* and *Children's Services* cases, it discussed the usefulness of the principle in redressing the traditional undervaluation of the work performed in these predominantly female occupations. The report also emphasised that the principle had been valuable in educating the tribunal and industrial parties about pay equity. A funding program available in Queensland to support cases conducted under the principle was found to be important in addressing concerns about the resource-intensive nature of conducting cases (Queensland Department of Justice and Attorney-General 2010).

The Inquiry noted, however, that the widened scope of federal industrial law had curtailed the capacity of State industrial jurisdictions to provide an industrial response to the issue of pay equity.

Given this finding the Inquiry canvassed the policy and legislative action that the Queensland government could take to exercise an impact on gender pay equity for employees of constitutional corporations. The Inquiry recommended that new legislation be passed which would require all employers in Queensland with fifteen or more employees to submit pay equity plans. The Inquiry tailored its recommendation in this regard to what was identified as the most viable aspects of the pay equity model used in Quebec, Canada (Fisher 2007: 99–111). This proposal was not, however, taken up by the government.

B.4 The position in the other States

The following sections detail the recent treatment of gender pay equity in Victoria, Western Australia, South Australia and Tasmania.

B.4.1 Victoria

A Victorian Pay Equity Inquiry, announced in March 2004, confronted a different set of circumstances from that of other State inquiries. In 1996 the Victorian Parliament had referred its industrial powers to the Commonwealth, by way of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic). This brought all Victorian employees within the coverage of what was then the WR Act. It also meant left the Australian Industrial Relations Commission (as it then was) as the only body with power to prescribe pay and conditions for workers in Victoria – including by making equal remuneration orders under the provisions outlined in section A.5 (URCOT 2005: 16, 67).

In June 2004 a tripartite Working Party chaired by Commissioner Whelan of the Australian Industrial Relations Commission was established to oversee the Inquiry, which reported to the Victorian Government in March 2005. Among a series of recommendations the Working Party recommended that the Victorian Government should advocate a review of the equal remuneration provisions in the WR Act to identify provisions which required clarification or amendment and to advance a more effective legislative model for equal remuneration for Victorian workers. The initiatives proposed by the Working Party included a newly established Pay Equity Unit to commission a series of case studies designed to identify the determinants of gender pay inequity in Victoria. In identifying industry and occupational areas for investigation the Working Party recommended that regard should be had to the New South Wales Pay Equity Inquiry's observations concerning the contributing factors to undervaluation. The Working Party also recommended that the Pay Equity Unit develop a model for workplace gender pay audits. Mindful of the international evidence concerning voluntary pay equity audits, the Working Party recommended that the government should assess how effective voluntary pay equity audits had been and examine whether a system of proactive and mandatory gender pay audits for Victorian workplaces is required (Victorian Pay Equity Working Party 2005: 11–25).

Advice to the parties concerning gender pay equity audits formed the focus of State government initiatives in the wake of the Inquiry. Although the Pay Equity Unit was not established, financial assistance in the form of research and administrative support was provided to industrial parties in the finance sector to conduct a pay equity audit. The results of this audit were published to provide details of methodologies and the strategies relied on by the parties (Industrial Relations Victoria 2007).

B.4.2 Western Australia

A Western Australian Pay Equity Inquiry was announced in April 2004, with its final report tabled in November 2004. Unlike the pay equity inquiries in other States, the Inquiry was not conducted through the Western Australian Industrial Relations Commission, but through academic researchers at the University of Western Australia (Todd & Eveline 2004). The report contained recommendations which focused on three areas; regulation, voluntary strategies, and training. The report noted that women in Western Australia were, on average, paid less than men in Western Australia and less than women elsewhere in Australia (Todd & Eveline 2004: 18). The report noted that multiple factors contributed to the pay gap, hence the remedies identified by the Inquiry extended beyond the industrial relations system.

The recommendations identified the need for amendments to the *Industrial Relations Act 1979* (WA) to establish equal remuneration provisions to be applied in assessing undervaluation on a gender basis. The recommendations provided that the provisions have effect in relation to the making of awards and orders and the registration of industrial agreements, in addition to other applications brought by the parties or by the Western Australian Commission on its own motion (Todd & Eveline 2004: 55). The recommendations also asserted the need for legislative provisions which made it clear that equal remuneration provisions were not restricted by the operation of wage fixing principles and which would negate any assumption that previous applications of the wage fixing principles had been free of assumptions based on gender (Todd & Eveline 2004: 61). The report recommended the establishment of a fund to assist organisations making or responding to cases taken under the new equal remuneration provisions (Todd & Eveline 2004: 8, 33). The recommendations also making workplace gender pay audits mandatory in the public sector and voluntary in the private sector (Todd & Eveline 2004: 49–53).

Following consideration of the report, in February 2006 the Western Australian government established a Pay Equity Unit in the Labour Relations Division of what was then the Department of Consumer and Employment Protection. The unit was charged with the responsibility for implementing selected recommendations of the 2004 review, including the development of resources to raise awareness of gender pay equity and to assist its identification. These resources were to include advice on how to conduct gender pay equity audits, and post-audit plans, the latter being directed to initiatives to remedy any gender pay inequities identified by the audit (Western Australia Department of Consumer and Employment Protection 2006). However, no legislative changes were ever made.

As the *Industrial Relations Act 1979* stands, section 6(ac) makes it a 'principal object' of the statute to 'promote equal remuneration for men and women for work of equal value'. Section 50A(3)(vii) also requires the Industrial Relations Commission to take into consideration 'the need to provide equal remuneration for men and women for work of equal or comparable value' when making State wage orders or adjusting awards. The Commission has in recent years noted evidence that Western Australia has a higher gender gap in earnings than other States, but expressed doubt about its capacity to remedy that situation. For example, in *2012 State Wage Order Pursuant to Section 50A of the Act* [2012] WAIRC 00346 at [54] it observed that:

The gender pay gap is calculated by reference to all industries in WA, however we do not set a minimum wage which applies across all industries in WA. The State Wage order can apply only to the small minority of the private sector workforce in WA. The lack of any measurable reduction in the gender pay gap in WA following the \$29.00 per week increase to the minimum wage we ordered in 2008 leads inevitably to the conclusion that the gender pay gap in WA is unlikely to be reduced by any order which

can issue from these proceedings: the overriding effect of the FW Act makes it likely that the coverage of the State Wage order is insignificant for this purpose. There is nothing to suggest that the gender pay gap for the small minority of employees in WA who are covered by the State industrial relations system is significantly different from the gender pay gap for the majority of employees in WA who are covered by the national industrial relations system.

The Commission also noted (at [56]) that the evidence before it suggested that ‘gender pay ratios differ significantly by industry or industry sector’, but were lower in some of the low paid sectors most likely to be affected by the adjustment of minimum wage rates. On the other hand, it expressed confidence (at [64]) that ‘an increase to the minimum wage has the potential to assist in providing equal remuneration for men and women for work of equal or comparable value’. In its most recent wage ruling, *2013 State Wage Order Pursuant to Section 50A of the Act* [2013] WAIRC 00347 at [51], it reiterated that view.

B.4.3 South Australia

Section 3(1)(n) of *the Fair Work Act 1994* (SA) makes it an object of the Act to ‘ensure equal remuneration for men and women doing work of equal or comparable value’. Although there is no provision for the making of equal remuneration orders, section 69(2) provides that any ‘rate of remuneration’ fixed by a contract of employment, an award or an enterprise agreement must be ‘consistent with’ the ILO’s Equal Remuneration Convention, which is reproduced in Schedule 6 of the Act. Section 90A also provides that in making an award regulating remuneration, the Industrial Relations Commission must ‘take all reasonable steps to ensure that the principle of equal remuneration for men and women doing work of equal or comparable value is applied (insofar as may be relevant)’.

Although wage-fixing principles adopted by the Commission in the past have made mention of equal remuneration (see eg *State Wage Case, July 2005* [2005] SAIRCComm 29), the Commission ‘s current role leaves little scope for the adoption of such principles. This is partly because there are a few award-reliant employees left within its jurisdiction, but also because the only mention now of wage-fixing principles in the 1994 Act involves the Commission choosing or being asked to adopt principles formulated by the federal tribunal: see s 100; and see eg *2013 State Wage Case and Minimum Standard for Remuneration* [2013] SAIRCComm 13.

B.4.4 Tasmania

Guided by the developments in New South Wales, the Tasmanian government established a Women in Paid Work Taskforce in December 1999. The Taskforce was governed by terms of reference that went beyond gender pay equity, but appointed Commissioner Patricia Leary to examine the application of labour law developments in New South Wales to Tasmania. The Taskforce duly adopted a key finding from the New South Wales Pay Equity Inquiry – that the existing industrial system, modified to allow the identification and rectification of undervaluation, would provide the most effective means of rectifying gender pay inequity. The Taskforce recommended that the Tasmanian Industrial Commission issue an equal remuneration principle to provide a mechanism for working women to find an adequate remedy for the undervaluation of their work (Tasmania Department of Premier and Cabinet 2000: 47–8).

Submissions on a new equal remuneration principle were made to the review of wage fixing principles that commenced as a result of the *State Wage Case 1999* (Tasmanian Industrial Commission, 6 July 2000). In July 2000 the Tasmanian Industrial Commission subsequently

included an equal remuneration principle in the State's new wage fixing principles. The principle, while not restricted by the operation of other wage fixing principles, only applied to applications for the making or varying of an award and provided an extremely limited scope for the investigation of overaward payments. The principle focused on the proper valuation of the work and provided for the consideration by the Commission of whether the past valuation of the work had been affected by the gender of the workers. Prior assessments of the value of the work undertaken by the Tasmanian Industrial Commission were not to be assumed to have been unaffected by gender bias. Work value principles were to be used in determining appropriate rates; taking into account the nature of the work, skill, responsibility and qualifications required and the conditions under which the work is performed.

No cases have been brought under the Tasmanian principle. In the *State Wage Case 2009* (Tasmanian Industrial Commission, T13471 of 2009, 27 July 2009) the Commission agreed to abolish most of its wage fixing principles, on the basis that they 'no longer have a relevant purpose and should be retired' (at [92]). Nevertheless, it elected to retain a pay equity principle, as follows (at [96]–[100]):

In this Principle 'pay equity' means equal remuneration for men and women doing work of equal value.

Applications may be made for making or varying an award in order to implement pay equity. Such applications will be dealt with according to this principle.

Pay equity applications will require an assessment of the value of work performed in the industry or occupation the subject of the application, irrespective of the gender of the relevant worker. The requirement is to ascertain the value of the work rather than whether there have been changes in the value of the work. The Commission may take into account the nature of the work, the skill, responsibility and qualifications required by the work and the conditions under which the work is performed.

A prior assessment by the Commission (or its predecessors) of the value of the work the subject of the application, and/or the prior setting of rates for such work, does not mean that it shall be presumed that the rates of pay applying to the work are unaffected by the gender of the relevant employees. The history of the establishment of rates in the award the subject of the application will be a consideration. The Commission shall broadly assess whether the past valuation of the work has been affected by the gender of the workers.

In approaching its task, the Commission will have regard to the public interest requirements of Section 36 of the Act.

Although adopted by the Industrial Commission as a principle for dealing with awards, the issue of pay equity is not explicitly addressed in the Industrial Relations Act 1984 (Tas) itself.

B.5 Timeline of State equal remuneration regulation

This review has highlighted key phases in the development of State equal remuneration regulation, with a particular focus on developments in New South Wales and (more recently) Queensland. Table B.1 draws together particularly significant cases and inquiries and places them in a timeline of State equal remuneration regulation.

Table B.1: Significant cases and inquiries in State equal remuneration regulation, 1929–2009

<i>Year and development</i>	<i>Cases/inquiries</i>
1929 - Industrial Commission of NSW determined that the delineation of separate basic wages for women and men did not apply to the setting of skill margins	<i>Re Hairdressers etc, Females (State) Award</i> (1929) 28 AR (NSW) 39
1957 – observation by the Industrial Commission of NSW that the principle of equal skill margins for men and women did not apply in practice	<i>Re Paint and Varnish Makers etc (State) Award</i> (1957) 56 AR (NSW) 87
1958 - Female Rates (Amendment) Act 1958 (NSW), introduced in response to ILO Equal Remuneration Convention to provide equal pay between the sexes in specified circumstances	<i>Re Clerks (State) Award and Other Awards</i> (1959) 58 AR 470
1973 – introduction of the equal pay for work of equal value principle in NSW	<i>State Equal Pay Case</i> (1973) 73 AR 425
1998 – NSW Pay Equity Inquiry	Glynn, L. (1998), <i>The pay equity inquiry</i> , NSW Government Printer, Sydney
2000 – NSW Equal Remuneration Principle	<i>Re Equal Remuneration Principle</i> (2000) 97 IR 177 <i>Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle</i> (2002) 111 IR 48 <i>Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award</i> (2006) 150 IR 290
2001 – Queensland Pay Equity Inquiry	Fisher, G. (2001), <i>Worth valuing: report of the pay equity inquiry</i> , Queensland Industrial Relations Commission, Brisbane
2002 – Queensland Equal Remuneration Principle	<i>Equal Remuneration Principle</i> (2002) 114 IR 305 <i>Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch)</i> (2005) 180 QGIG 187. <i>Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Queensland Union of Employers</i> (2006) 181 QGIG 568 (interim decision in Queensland child care case) <i>Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association</i> (2006) 182 QGIG 318 (final decision in Queensland child care case) <i>Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd</i> (2009) 191 QGIG 19 <i>Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc</i> (2009) 192 QGIG 46

Appendix C: Equal remuneration in other jurisdictions

C.1 European Union

C.1.1 Legislation

C.1.1.1 Article 119 TEEC

Equal pay for equal work has been one of the most basic principles of the European Union (EU) since its foundation. Article 119 of the Treaty Establishing the European Economic Community (TEEC), which was signed in Rome in 1957, provided that:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

Article 119 was the only provision in the TEEC aimed at combating gender discrimination. It did not follow the wording used in the ILO's Equal Remuneration Convention (see section 2.2) and the background to the provision was purely economic. Some member states, in particular France, wanted to eliminate distortions in competition between undertakings established in different states.⁵³ Article 119 should have been implemented before 1 January 1962, but as member states were unable or unwilling to do so, it was not transposed into national law (Burri & Prechal 2010: 2).

The implementation of the principle of equal pay became one of the priorities of the social programme agreed upon in 1974 and the EU states eventually decided to adopt a new directive on equal pay.⁵⁴ 1975 saw the issue of Council Directive 75/117/EEC, which broadened the principle of equal pay for men and women as outlined in Article 119 of the TEEC. Article 1 of the Directive defined it to mean 'for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration'.

The move away from equal pay being regarded in purely economic terms was given further impetus in 1976 by the European Court of Justice (ECJ).⁵⁵ The Court ruled that Article 119 had a social as well as an economic aim, and consequently must be interpreted to contribute to social progress and the improvement of living and working conditions: *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455 (*Defrenne*) at [10]–[12]. Later, the ECJ ruled that the economic aim is secondary to the social aim and held that the principle of equal pay is an expression of a fundamental human right: *Deutsche Telekom AG v Schröder* [2000] ECR I-743 at [57].

Since 1975, several cases have been brought before the ECJ in which the Court has decided that individuals may rely on Article 119 of the TEEC before the national courts of member states in

⁵³ France had adopted provisions on equal pay for men and women much earlier and it feared that cheap female labour in other member states would put French undertakings and the economy at a disadvantage (Burri & Prechal 2010: 2).

⁵⁴ European Commission, Council Resolution of 21 January 1974 concerning a social action programme, OJ 1974, C 13/1.

⁵⁵ Following the implementation of the Treaty of Lisbon on 1 December 2009, the European Court for Justice was renamed the 'Court of Justice for the European Union'.

order to receive equal pay for equal work or work of equal value, without discrimination on the basis of gender.⁵⁶

Between 1999 and 2009, Article 119 of the TEEC was amended and renumbered,⁵⁷ eventually becoming Article 157 of the Treaty on the Functioning of the European Union (TFEU), which was signed in Lisbon in 2007 and entered into force on 1 December 2009.

C.1.1.2 Article 157 TFEU: interpretation and case law

Article 157 of the TFEU is one of the most important pieces of EU legislation that provides for equal pay between male and female workers. It provides:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

The ECJ in *Defrenne* [1976] ECR 455 held that Article 157 is directly effective in both vertical (private person versus public authority) and horizontal (private person versus private person) relations.⁵⁸ The courts of member states are therefore obliged to recognize and enforce the provisions of Article 157 when interpreting their own domestic equal pay legislation (Foubert et al 2010: 1).

Several of the terms used in Article 157 have been addressed by the ECJ. For example, the concept of a 'worker' has a broad meaning and it cannot be interpreted more restrictively in national law (Burri & Prechal 2010: 5). According to the ECJ, a worker is a person who, for a certain period of time, performs services for and under the direction of another person in return for which he or she receives remuneration (*Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121 at [17]). The concept of a worker does not include independent service providers who are not subordinates of the person receiving the services. But once a person can be considered as a 'worker' for the purposes of Article 157, the nature of their legal relationship with the employer is not relevant to the application of that Article. For example, even when a person is considered as being self-employed under national law, Article 157 must nevertheless be applied: *Allonby v Accrington & Rossendale College, Education Lecturing Services* [2004] ECR I-873 at [65]–[71].

⁵⁶ See eg Case 14/83 *von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891 (*Von Colson*); Case 109/88 *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 03199 (*Danfoss*); Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian Republic* [1991] ECR I-05357 (*Francovich*); Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *R v Secretary of State for Transport, ex parte: Factortame Ltd* [1996] ECR I-01029 (*Brasserie du Pêcheur*).

⁵⁷ It was amended and renamed Article 141 of the Treaty of Amsterdam in 1999.

⁵⁸ In *Defrenne*, the principle of equal pay for equal work was successfully invoked to defend Gabrielle Defrenne, who was an air hostess working for the Belgian national airline.

As for 'pay', this has been treated by the ECJ as having a very broad definition, which includes not only basic remuneration but also:

- overtime payments (*Voß v Land Berlin* [2007] ECR 2000);
- bonuses (*Lewen v Lothar Denda* [1999] ECR 7243);
- travel expenses/ allowance (*Garland v British Rail Engineering Ltd* [1982] ECR 359);
- compensation for attending training courses and other self-education expenses (*Arbeiterwohlfahrt der Stadt Berlin eV v Bötzel* [1992] ECR I-35890);
- termination/redundancy payments (*Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591; and
- pensions (*Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607).

In *Brunnhöfer v Bank der Österreichischen Postsparkasse AG* [2001] ECR I-4961 (*Brunnhöfer*), the ECJ provided guidance as to the broad scope of the concept of 'equal pay'. It held that (at [80]):

Equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees, but also in the light of each aspect of pay taken in isolation.

In determining the difference in pay received by a female worker and a male worker, the ECJ has stressed the need for genuine transparency, which may only be achieved if the principle of equal pay is observed in respect of each of the elements of remuneration granted to men and women. Comprehensive or global comparisons of all the considerations granted to men and women are not allowed: *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 at [33]–[34]. This implies that often a comparison should be made between the work performed and the salary received by male and female workers (Burri & Prechal 2010: 5).

In *Kenny v Minister for Justice, Equality and Law Reform* [2013] C-427/11 (*Kenny*) at [53], the ECJ further held that the application of the principle of equal pay must be interpreted as follows:

[E]mployees perform the same work or work to which equal value can be attributed if, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation, which it is a matter for the national court to ascertain.

In *Worringham v Lloyds Bank Ltd* [1981] ECR 767 at [21], the ECJ stated that the concept of 'same work' in Article 119 of the TEEC (now Article 157 of the TFEU) included work to which equal value could be attributed. Furthermore, the principle of equal pay applies not only to work of equal value, but also to work of higher value. In *Murphy v An Bord Telecom Eireann* [1988] ECR 673 at [10], the ECJ adopted this view, stating that otherwise 'the employer would easily be able to circumvent the principle [of equal pay] by assigning additional or more onerous duties to workers of a particular sex, who could then be paid a lower wage'.

C.1.1.3 The Recast Directive 2006/54/EC

In 2006 a new directive was issued. The provisions of three different gender equality directives⁵⁹ were merged into Directive 2006/54/EC on the implementation of the principle of equal

⁵⁹ The three Directives incorporated into the Recast Directive are: Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and

opportunities and equal treatment of men and women in matters of employment and occupation, which is referred to as the 'Recast Directive'.

The aim of the Recast Directive is to clarify and consolidate in a single text the main gender equality provisions regarding access to employment, vocational training, and working conditions, including pay and occupational social security schemes, as well as to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Article 1).

The Recast Directive is comprehensive and is divided into four titles. Title I concerns general provisions and sets out the aim of the Directive, as well as definitions of different concepts such as direct and indirect discrimination, harassment and sexual harassment. Title II includes provisions on equal pay (Chapter 1), equal treatment in occupational and social security schemes (Chapter 2) and equal treatment with regards access to employment, vocational training and promotion and working conditions (Chapter 3). Title III concerns remedies and penalties, the burden of proof, victimisation, the promotion of equal treatment through equality bodies, social dialogue and dialogue with NGOs. Finally, Title IV contains provisions on reporting, reviewing, implementation and entry into force.

The Recast Directive was required to have been transposed into the domestic legislation of the EU member states by 15 August 2008 (Article 33) and has also been incorporated in the Agreement on the European Economic Area (EEA) and therefore applies to Iceland, Liechtenstein and Norway.⁶⁰

There are two specific Articles relevant to equal pay. Article 4 prohibits 'discrimination' in respect of 'equal pay' and provides:

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Article 14(1)(c) prohibits direct or indirect discrimination on grounds of sex in the public or private sectors, in relation to employment and working conditions, as well as pay, as provided for in Article 141 of the TEEC (now Article 157 of the TFEU).

C.1.2 Processes of achieving equal pay

The Preamble to the Recast Directive recalls the principles that are set out in the number of earlier directives and also the principles settled in case law by the ECJ. In particular in relation to the principle of equal pay for equal work, specific reference is made in preamble paragraphs (8) to (14) which includes enjoining member states to continue to address the problem of continuing gender-based wage differentials.

women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, and working conditions; and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

⁶⁰ The EEA consists of the 27 EU Member States, as well as Norway, Iceland and Liechtenstein. The non-EU EEA members adopt almost all EU legislation related to the single market.

Titles II and III of the Recast Directive go to require all member states to ensure the enforcement of remedies and penalties, the promotion of equal treatment through equality bodies and social dialogue, as well as reporting and reviewing mechanisms on implementation of the Recast Directive.

The equal pay provisions in the TFEU and the Recast Directives have significant influence on the EU member states, as well as the three other EEA members (Iceland, Liechtenstein and Norway), in the way in which they legislate, interpret and promote equal pay in their respective countries. Due to the supremacy of EU law, member states must interpret their domestic laws in accordance with EU law. Further, these provisions prevail in the case of a conflict between domestic and EU law. The provisions have direct effect, which means that they can be relied upon in litigation before national courts and applied by such courts in any proceedings.

C.1.2.1 Burden of proof

An important influence on the member states is the burden of proof provision set out in Article 19(1) of the Recast Directive, which states that:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

There is no definition of the principle of 'equal treatment' set out in the Recast Directive. However there is case law, which assists in the approach to be taken with regard to the burden of proof.

In *Brunnhofer* [2001] ECR I-4961 at [80], the ECJ held that:

[I]t is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay.

Therefore in its practical application it is for the employee to adduce evidence that the pay she receives from her employer is less than that of her chosen comparator, and she does the same work or work of equal value, comparable to that performed by her comparator (*Brunnhofer* [2001] ECR I-4961 at [58]; *Kenny* [2013] C-427/11 at [19]). Such evidence would amount to a *prima facie* case of discrimination on the basis of sex. It would then be for the employer to prove that there was no breach of the principle of equal treatment in relation to pay (*Brunnhofer* [2001] ECR I-4961 at [60]). The employer by way of defence could either:

- deny that the conditions for the application of the equal pay principle were met, for example by establishing that the activities actually performed by the two employees were not in fact comparable: or
- justify the difference in pay by objective factors unrelated to any discrimination based on sex, by proving that there was a difference, unrelated to sex, to explain the payment of a higher monthly supplement to the chosen comparator (*Brunnhofer* [2001] ECR I-4961 at [59]–[62]; *Kenny* [2013] C-427/11 at [20]).

C.1.2.2 Defences and objective justification

The ECJ has also developed principles with regards defences to allegations of unequal pay, including the provision of objective justification.

Importantly in *Danfoss* [1989] ECR 03199 the ECJ held that where an employer applies a system of pay which is lacking in transparency, it is open to a female worker to establish on a *prima facie* basis, in relation to a relatively large number of employees, that the average pay for women is less than that for men. If so, it is then for the employer to prove that its practice in the matter of wages is not discriminatory. While allowing that recourse to the criterion of length of service may involve less advantageous treatment of women than of men, the ECJ went on to hold that the employer does not have to provide special justification for such an approach (at [24]–[25]). By adopting that position, the ECJ acknowledged that rewarding accumulated experience which enables a worker to perform their duties better constitutes a legitimate objective of pay policy.

In *Cadman* [2006] ECR I-9583 at [35]–[36], the ECJ further held that:

As a general rule, recourse to the criterion of length of service is appropriate to attain that objective. Length of service goes hand in hand with experience, and experience generally enables the worker to perform his duties better.

The employer is therefore free to reward length of service without having to establish the importance it has in the performance of specific tasks entrusted to the employee.

It may be noted, however, that such an approach could potentially have adverse effects for women who have interrupted service and lack experience by reason of opportunities not available to them or alternatively as a consequence of childbearing.

Another objective justification which is commonly relied upon by employers is training or professional qualifications. The ECJ has repeatedly held that, in order to determine whether employees perform the same work or work of equal value, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation: *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse* [1999] ECR I-2865 (*Wiener Gebietskrankenkasse*) at [17]; *Brunnhöfer* [2001] ECR I-4961 at [43]; *Kenny* [2013] C-427/11 at [27]). Consequently, where seemingly identical tasks are performed by different groups of persons who do not have the same training or professional qualifications for the practice of their profession, it is necessary to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training requirements for performance of those tasks and the working conditions under which they are performed, the different groups in fact do the same work within the meaning of Article 157 (*Wiener Gebietskrankenkasse* [1999] ECR I-2865 at [18]; *Kenny* [2013] C-427/11 at [28]).

C.1.2.3 Remedies

Sanctions, which may comprise the payment of compensation to the victim, must be 'effective, proportionate and dissuasive' (Recast Directive, Article 25). Where there has been a breach of the principle of equal pay for equal work or work of equal value, member states are obliged to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation (Article 18). The ECJ has further noted that national law may

not preclude the award of interest (*Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR 1-04367).

C.1.2.4 Promotion of equal pay

In addition to these legislative approaches, closing the GPG through non-legislative measures is also a core objective of the European Commission. The European Commission's 'Strategy for equality between women and men (2010–2015)' highlights five areas of action, one of which is specifically on equal pay. The strategy notes that there are many causes of this pay gap, in particular, segregation in education and in the labour market (European Commission 2010). In order to contribute towards eliminating unequal pay, pursuant to the Strategy the Commission will:

- explore with social partners possible ways to improve the transparency of pay;
- support equal pay initiatives in the workplace such as equality labels, 'charters' and awards;
- institute a European Equal Pay Day; and
- seek to encourage women to enter non-traditional professions, for example in the 'green' and innovative sectors.

In addition, the publication 'Progress on equality between women and men in 2012 – A Europe 2020 initiative' assesses the situation as at 2012 and cites good practices from many of the member states (European Commission 2013b). Further, the European Commission published 'Tackling the Gender Pay Gap in the European Union' in 2013, suggesting many strategies and again highlighting good practice in each of the member states (European Commission 2013a). Those good practices include annual reports made by member states on the gender gap; examples of plans and audits to enable employers to measure progress in implementing gender equality and gender pay; and in some cases mandatory legislative requirements for their provision. Further reference is made to the importance of introducing pay transparency and the report also provides examples of implementing equal pay tools.

C.1.3 Summary and future directions for good practice in the EU

National instruments to address the GPG are very diverse. Still, many national experts have concluded that their respective governments are not doing enough (Foubert et al 2010: 29).

With this in mind, a resolution of the European Parliament made on 24 May 2012 called on the European Commission to review the Recast Directive 2006/54/EC and suggested a series of amendments. The members of the European Parliament noted that: 'Despite the significant body of legislation in force for almost 40 years and the actions taken and resources spent on trying to reduce the gap – progress is extremely slow and in some member states the gap has even widened' (European Parliament 2012).

The Parliament then set out each of the elements which are needed to address the pay gap and called for a Europe-wide strategy to implement it with the support of the member states and the social partners. The strategies which the European Parliament called on the member states and the Commission to implement included taking action to:

- foster closer coordination among member states for research, analysis and best-practice sharing;
- oppose inequality in pay in all relevant EU policies and national programmes;

- revise the Council directive concerning the Framework Agreement on part-time work, with the aim of closing the GPG;
- encourage the social partners to create a more gender-equal wage structure;
- provide for collective redress against violations of the equal pay principle by enabling individuals or representative bodies to bring a case for others;
- continue with awareness-raising campaigns, including information on the burden of proof;
- determine objectives, strategies and time limits for reducing the GPG and equalising equal pay for the same work and work of the same value; and
- promote further research on 'flexicurity' strategies in order to assess their impact on the GPG and determine how these strategies can help tackle gender discrimination.

In particular, the members of the European Parliament (2012: rec 4) have noted that:

Article 20 of [the Recast Directive] should be revised so as to enhance the bodies' mandate by: (i) supporting and advising victims of pay discrimination; (ii) providing independent surveys concerning the pay gap; (iii) publishing independent reports and making recommendations on any issue relating to pay discrimination; (iv) legal powers to initiate their own investigation; (v) legal powers to impose sanctions in cases of breaching the principle of equal pay for equal work and/or to bring wage discrimination cases to court.

However, despite these calls from the European Parliament, the European Commission does not seem to have commenced drafting a directive to replace the Recast Directive. On 12 September 2013, the European Parliament passed a resolution on the application of the principle of equal pay for male and female workers for equal work or work of equal value.⁶¹ This resolution set out seven points aimed at closing the GPG. It reiterated that the Recast Directive, in its current form, is not sufficiently effective to tackle the GPG and achieve the objective of gender equality in employment and occupation. It also requested the European Commission to support member states in reducing the GPG by at least five percentage points annually with the aim of eliminating the GPG by 2020.

C.2 Belgium

C.2.1 Legislation and cases

Belgium has a three tiered system of government, comprising a federal tier in addition to regional and language community tiers.⁶² As a result there is both federal legislation and regional and language-speaking community legislation.

At the federal level, the *Gender Act* of 10 May 2007 (Gender Act) abrogated and replaced the previous *Equal Treatment Act* of 7 May 1999. The Gender Act is 'aimed at combating discrimination between women and men' and purports to implement all EU gender directives

⁶¹ European Parliament resolution of 12 September 2013 on the application of the principle of equal pay for male and female workers for equal work or work of equal value (2013/2678(RSP). Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0375&format=XML&language=EN> (accessed 15 September 2013).

⁶² There are three regions and three language speaking communities: the Flemish Region (which includes the Flemish-speaking community); the Brussels Capital Region; the Walloon Region; the German-speaking community; and, the French-speaking community.

(although Directive 2006/54 is not mentioned) (Jacqmain 2010: 43). It also deals with 'equal pay' and includes a wide definition of pay, but it does not explicitly mention 'work of same value' as required by Article 157(1) of the TFEU. However, relevant Belgian case law reveals that the principle of application to work of same value is not disputed (Jacqmain 2010: 43). It applies to all work situations in the private sector, and in those sections of the public sector which fall within the federal jurisdiction (Jacqmain 2010: 43). Equal pay in the remainder of the public sector is regulated by various instruments, which the federal authorities had to adopt in order to implement EU non-discrimination law within their respective jurisdictions (Jacqmain 2010: 43).⁶³

The Gender Act applies to working conditions, including pay (Articles 5, 6). It deals with certain aspects of access to employment (for example in the federal public services, or uniform conditions of access to the professions), but other aspects fall within the jurisdiction of the federal authorities (for instance in their own public services, or management of the labour market); and vocational training is almost entirely a Community matter (Jacqmain 2009: 12).

The Gender Act adequately transposes the Recast Directive, except for the explicit reference to 'work of the same value' (Article 6(2)). However, a new Collective Agreement struck in 2008 includes explicit reference to work of the same value (Jacqmain 2009: 12). Equal pay is therefore guaranteed both by Collective Agreement No. 25 of the National Labour Council (only applicable to the private sector) and by the Gender Act (which includes the public sector, but with the restriction explained above). Taken together, both instruments cover all the aspects of the notion of pay within the scope of EU law (Prechal & Burri 2009:10).

C.2.2 Process to attain equal pay

In considering equal pay in Belgium, a significant feature is the high level of centralised collective bargaining and wage setting. This circumstance, together with policy and promotional approaches, help to explain the limited recourse to courts on equal remuneration.

Collective bargaining in Belgium is highly structured. It takes place at three main levels: national, sectoral and company. Collective bargaining covers over 90 per cent of employees and the proportion of employees involved in unions is 50 per cent. The Law on Collective Agreements and Joint Committees of 5 December 1968 defines a strict hierarchy of legal sources and determines that a norm set at a lower level cannot, in principle, contradict norms set at a higher level (Keune 2011: 1–2).⁶⁴

At the national level, two types of agreements are relevant. One is the inter-professional agreements concluded every two years between the 10 main trade unions and employer representatives, called the 'group of 10', which covers the private sector. These are not formal collective agreements but set a framework for bargaining at other levels, including a minimum wage. The other is the intersectoral collective agreement covering all sectors nationally, concluded in the National Labour Council, which comprises the most representative interoccupational employers and workers' organisations. The State appears to play a major role at this national level.

⁶³ Flemish Community and Region: *decreet* of 8 May 2002; German-speaking Community: *Dekret* of 17 May 2004; Region of Brussels Capital: *ordonnance/ordonnantie* of 4 September 2008; Walloon Region: *décret* of 6 November 2008, amended by the *décret* of 19 March 2009; and French-speaking Community: *décret* of 12 December 2008.

⁶⁴ See further European Trade Union Institute, <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Belgium/Collective-Bargaining> (accessed 3 October 2013).

A 1996 law (Law of 26 July 1996 on Promotion of Employment and Preventative Safeguarding of Competitiveness) links pay increases to the forecast pay trends in Belgium's neighbours, Germany, France and the Netherlands in order to maintain the country's competitiveness. The national level negotiations take place in the context of an official technical report that sets out this forecast and the government has the power to intervene if the two sides cannot agree on a figure within that limit.

The second tier is industrial level collective bargaining covering specific industrial sectors.⁶⁵ At the sectoral level, joint committees (or subcommittees or regional committees) with equal representation of employers and unions bargain on sectoral (or sub sectoral or regional sectoral) collective agreements within the framework of the interprofessional agreements. These agreements require consensus and can be made legally binding for all companies and employees in the sector by royal decree, upon the request of the relevant joint committee. They define job classifications for the sectors and determine wage increases that are implemented.

The third tier is the company level negotiations. At the company level, collective agreements can be concluded between one or more representative trade unions and the employer. They then are legally binding and apply to all employees of the contracting employer. This level of negotiation only takes place within some companies, although the number of companies has increased in recent years and around a third have their own agreements (Keune 2011: 1). In the public sector the collective bargaining results in 'protocols' which although not legally binding have a moral or political force.

C.2.2.1 Enforcement

The process to enforce equal pay in Belgium is through court proceedings. Pursuant to the Gender Act, any person claiming to be a victim of gender discrimination may bring an action in the Labour Courts. Furthermore, there is a gender equality body, the Institute for Equality of Women and Men, which is endowed with the power to commence proceedings.

There has been limited case law, with only one reported recent case of pay discrimination. In this case the Labour Court of Appeal in Brussels found in favour of the claimant through simply relying on the ECJ's decision in *Danfoss* [1989] ECR 03199. The claimant had no difficulty in demonstrating that she had been denied a pay increment which had been granted to male colleagues (Jacqmain 2010: 46).

Article 33 of the Gender Act transposes Article 9 of the Recast Directive regarding the burden of proof, and obliges a claimant to present a *prima facie* case, after which the defendant must demonstrate that there is no discrimination. A *prima facie* case is established by producing 'elementary statistical material which reveals an unfavourable treatment' (Article 33(3)). However, the common rules on proof in litigation (Belgian Judicial Code 1998, Articles 870–871) empower a court to order each party to produce any evidence on an element relevant to the case, including details of wages paid within a company (Jacqmain 2010: 46).

⁶⁵ Industrial level negotiations are carried on by the unions and employers' federations meeting in joint committees. They cover the whole of the private sector with subcommittees for smaller industrial groupings. At the beginning of 2012 there were 101 joint committees and 70 subcommittees. The agreements reached are binding on all employers in the industries they cover.

Article 15 of the *Employment Contracts Act* of 3 July 1978 imposes a double limitation period: five years after the alleged discriminatory act and, in any case, one year after the effective termination of the contract. For tenured staff members in the public services, the limit is five years after the alleged discriminatory act. Those limits also apply to an employee challenging gender discrimination in pay. However, relying on the *Protection of Remuneration Act* of 12 April 1965, it may also be possible to claim compensation for discrimination evident during the whole period of employment, whatever the duration (Jacqmain 2010: 46). Article 23 of the Gender Act provides that the victim of discrimination in working conditions may apply either for fixed damages equal to six months' pay, or for compensation for the actual damage, the extent of which the victim must substantiate (Foubert et al 2010: 46). There is, however, no case law related to this provision (Jacqmain 2010: 46). The Gender Act also enables the Courts to issue injunctions to put an end to discriminatory conduct.

C.2.2.2 Promotion

Belgium has directed significant policy attention to the promotion of gender pay equity. In 2001, while Belgium held the Presidency of the European Union, the European Council approved a set of indicators designed to provide an accurate picture of the pay gap between women and men. Since 2007 the Belgian government has published the annual report 'The Gender Wage Gap in Belgium', produced by the Institute for Equality between Women and Men and the Federal Public Administration for Employment. The data is aligned with official European indicators (European Commission 2013: 18).

Each new report builds on seven quantitative indicators in relation to the GPG. The indicators cover the following:

- gender pay ratios for all employees;
- part-time work;
- age;
- level of education;
- segregation in the labour market;
- personal features such as civil status, household composition or nationality; and
- the factors contributing to inequality as defined by the Oaxaca-Blinder decomposition technique (European Commission 2013: 13).

These are linked to the Structure of Earnings Survey established in 2001. The report provides a reliable, global measurement tool across different data sets. 'The Gender Pay Gap' report has become a reliable reference tool and the data is widely used in trade union campaigns (Belgium Institute for Equality of Men and Women 2010: 13–14). Furthermore, the Collective Agreement on Wage Equality Between Male and Female Workers (1975) has been amended since the publication of the Gender Pay Gap Report so that job functions are revised to exclude any gender bias. Further to this measure, the social partners drew up a new inter-professional agreement in 2010. Under this agreement, the social partners must be able to guarantee the gender neutrality of classifications in all sectors in order to reduce the pay gap by 2016 (Belgium Institute for Equality of Men and Women 2010: 13–14).

In April 2012, Belgium adopted a new measure on reducing the GPG. Through annual audits, companies are obliged to outline differences in pay and labour costs between men and women. These annual audits are publicly available. Every two years companies with over 50 workers must undertake a comparative analysis of the wage structure of female and male employees. If this analysis shows that women earn less than men, the company is obliged to produce an action plan. If pay discrimination is suspected, women can request an assessment through their employer's mediator, and where required the mediator is required to mediate an outcome with the employer (European Commission 2013: 18–19).

Finally, Belgium was the first country in Europe to organise an Equal Pay Day in 2005 to draw attention to the issue of equal pay (European Commission 2013: 20). The campaign aims to raise the public's awareness on this issue, to make 'wages' a more acceptable item for discussion and to encourage policy reform. According to the Belgium Institute for Equality of Men and Women (2010: 72), the main results of the campaign have been:

- an increased awareness of the GPG;
- publication of the first Belgian official report on the GPG in 2007 and annual updates of the report;
- an understanding that social partners will address the collective agreement on equal pay for men and women, the minimum wage, job classification systems, improved working conditions for part-time workers, and sectoral studies of the GPG; and
- increased commitment among trade unions to reduce the GPG, including improvements in training, and increased campaigns to raise awareness about the effects of the gap.

C.2.3 Conclusion

The Gender Act is an ambitious attempt to construct a comprehensive equal pay system. This Act, in combination with promotional and policy activities and the centralised collective bargaining system, does provide a platform upon which to achieve equal remuneration across a broad employment spectrum. At the present time the GPG in Belgium, as discussed in Chapter 2, stands at 10.2 per cent which is significantly below the EU average of 16.2 per cent.

C.3 Ireland

C.3.1 Legislation and case law

The prohibition of gender pay discrimination was initially addressed in the Anti-Discrimination (Pay) Act 1974. This Act has since been repealed and replaced by sections 18, 19 and 20 and 22 of the *Employment Equality Acts 1998* (Employment Equality Acts).

Within the Employment Equality Acts the provisions with greatest application to gender pay discrimination are sections 18–20. By way of introduction, section 18(1)(a) stipulates that for the 'purposes of this Part, "A" and "B" represent 2 persons of opposite sex so that, where "A" is a woman, "B" is a man, and *vice versa*'. Section 19(1), which addresses remuneration, provides that 'it shall be a term of the contract under which A is employed that ... A shall at any time be entitled to the same rate of remuneration for the work which A is employed to do as B who, at that or any

other relevant time, is employed to do like work by the same or an associated employer'.⁶⁶ This wording limits claims to comparisons between female and male employees in the same employment or associated employment. It does not permit comparisons with other employees doing like work for other employers. The wording of the section also limits comparisons to 'like work', which is more limited than the time 'work of equal value'.

There is however a qualification in section 19(3), which provides that if B's employer is an 'associated employer', 'like work' requires 'the same or reasonably comparable terms and conditions of employment'. Even with this qualification, both expressions are more limited than the expression, 'work of equal value'. Section 19(4) concerns indirect discrimination, where an apparently neutral provision puts persons of a particular gender at a particular disadvantage in respect of remuneration compared with other employees of their employer. Section 19(5) provides that, subject to subsection (4), 'nothing in this Part shall prevent an employer from paying, on grounds other than the gender ground, different rates of remuneration to different employees'.⁶⁷

These provisions within the Employment Equality Acts have been the subject of a decision of the ECJ in *Kenny* [2013] C-427/11. The case concerned women who were predominantly employed and assigned to 'clerical duties' in the police force. The women claimed indirect gender discrimination in their pay by comparison to male employees who were employed and assigned in 'designated posts' in the police force. The case was instituted in the Equality Tribunal and the unsuccessful women appealed to the Labour Court. Before the appeal was conducted, there was an agreement between the parties that the female police and the chosen male comparators were engaged in 'like work'. The key question for the Labour Court to decide was whether there was 'objective justification of the *prime facie* case of indirect pay discrimination'. On the basis of that assumption, the Labour Court required the Minister to prove 'objective justification' for the differences in pay. The Labour Court then upheld the Minister's argument that there was 'objective justification' for the pay differential. That decision was then the subject of appeal to the High Court, which in turn sought preliminary rulings from the ECJ concerning the burden of proof and also the concept of 'same work or work for equal value'.

Notwithstanding the apparently narrow wording of the Employment Equality Acts, which refer to 'like work', the ECJ appeared to treat the Irish legislation as requiring equal pay for the 'same work or work of equal value' (at [18], [20]). In reaching its determination the Court drew attention to the fact that the Labour Court had made a presumption of indirect gender discrimination in pay based only upon the difference in pay for the work done by the two groups, without ruling on whether the jobs in question were 'equivalent'.⁶⁸ The Court made it clear that the principle of equal pay presupposes that the men and women to whom it applies are in identical or comparable situations, and that it must be ascertained whether the employees concerned performed the same work or work for which equal value may be attributed. The Court stated that 'it is for the National Court, which alone has jurisdiction to find and assess the facts, to make the necessary determination whether, in the light of the actual nature of the activities carried out by those concerned, the workers in question perform the same work or worked which each will equal value can be

⁶⁶ Section 20 implies such a term if there is no express term in a contract.

⁶⁷ This provision seeks to transpose Article 141 of the TEEC and the EC Directive 75/117 into Irish law and also adopts wording taken from the European Committees (Burden of Proof in Gender Discrimination Cases) Regulations 2001 S.I. No.337 of 2001.

⁶⁸ Contrary to the case of *Enderby v Frenchay Health Authority* [1993] ECR I-5535 at [11].

attributed' (at [26]). The Court went on to refer to a number of factors which were relevant to that determination (at [27]–[29]). These included: the nature of the work; the training requirements; the working conditions; and requirements in respect of professional training and qualifications. The Court concluded that this assessment and determination needed to be done by the referring court. In answering the particular questions referred to it, the Court observed that in considering what 'objective justification' was required by the employer, it was not a question of objective justification of the *rate* of remuneration, but rather it was one of justifying the *difference* in the remuneration. There were further observations made as to statistics and also the type of justifications which may be relied upon by an employer.

The Labour Court of Ireland has also assessed the relative weight of historical and contemporary disadvantage. In *HSE v Buckley* [2010] AED/10/2 No. EDA 113 the Court reinforced the need for claimants to establish that a particular disadvantage compared with persons of the other sex existed as at the time of the making of the complaint and was not reliant only on historical information. The Court clarified that while the historic origin of the salary scale may be an important factor in explaining the background of the particular case, nonetheless the disadvantage must be assessed at the time the complaint is submitted.

C.3.2 Process of achieving equal pay

A key institution established by the Employment Equality Acts is the Equality Authority. Complaints can be made directly to the Equality Tribunal. However, a claim on the basis of gender, which includes a claim for equal pay, can be dealt with by either the Circuit Court or the Labour Court without first claiming to the Equality Tribunal. The Tribunal can order arrears of pay up to a maximum of three years. The Equality Authority has an inhouse legal service that may, at its discretion, provide free legal assistance to those making complaints of discrimination. Assistance is only given in a small percentage of cases and claims for assistance are assessed against established criteria.

The Authority is responsible for research and for the promotion of equality, but its responsibilities do not extend to monitoring and implementation. The Equality Authority has, for example, produced a plain English guide to the Employment Equality Acts (Equality Authority 2011b). It is also responsible, through various subcommittees, for the production of detailed guidance on employment equality issues for employers (Equality Authority 2011a). It also works with the European Social Fund and has produced two significant publications, the most recent being 'Gender Pay Reviews – A template for examination of gender pay and organisations' (Equality Authority 2013). This document includes a number of different job evaluation methodologies, some of which are 'market-based'. An earlier publication examines the gender wage gap in Ireland (Equality Authority 2009).

Through some of its promotional work, the Authority advocates an approach that is more expansive than the legislation. In its Guidelines for Employment Equality Policies in Enterprises, for example, the Authority makes reference in its discussion of gender pay discrimination to work which is 'similar' or 'involve(s) work of equal value', where the legislation is confined to 'like work'. The Guidelines also identify external benchmarking using a 'marketplace' as a weakness: 'because gender bias may already exist in certain sectors, there is a danger that external benchmarking may inadvertently perpetuate gender discrimination' (Equality Authority 2013: 6,11).

C.3.3 Summary

In their current form, Irish regulatory provisions concerning gender pay discrimination have a restricted scope given they are confined largely to single workplaces or organisations and to 'like work'. There is also very little assistance available for complainants who wish to take their case to court. With the assistance of the European Social Fund, Ireland has followed the general direction provided by the EU and developed detailed assistance for employers to encourage objective remuneration review processes with a view to preventing possible future gender pay inequity. At present, however, there is no evidence of strategic approaches to monitor the process taken by employers or to require employers to collect relevant data concerning their earnings distribution.

C.4 Finland

C.4.1 Legislation

Section 6(4) in Chapter 2 of the Constitution of Finland provides that 'equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act'. The constitutional reference is to the 1986 Act on Equality between Women and Men. The Act on Equality has several provisions on discrimination. Section 7 defines discrimination in general, while section 8(1)(3) defines discrimination in employment, which occurs where an employer 'applies pay or other terms of employment so that an employee or employees are more disadvantaged on the basis of sex than one or several other employees employed by the same employer' (see Nousiainen 2010: 89). Under section 8(1)(3), an employer who applies pay or other terms of the employment contract, so that it results in one or several employees being in a less advantageous position than another employee or employees working for the same employer, violates the prohibition on pay discrimination. Thus, in relation to gender pay discrimination, the focus of the discrimination is on 'pay' and is based on comparative disadvantage between employees of different sexes.

As a concept, 'pay' is not defined in legislation. The absence of a definition has been an issue in Finland in relation to performance based results and bonuses. In 2013, the CEACR referred to report by one of the major Finnish unions which noted that while only 11 per cent of their total membership received a performance bonus in 2010, 27 per cent of their male membership were in receipt of such a bonus. The CEACR further noted that the Finnish Parliament's Employment and Equality Committee expressed the view that the Act on Equality should define remuneration to include various additional forms of payment. The CEACR endorsed this view (ILO 2013: 464).

There is no system in Finland for setting a single national minimum wage, but section 7 of the Employment Contract Act 2001 has a general application to collective agreements. Pay rates set out in legally binding industry level collective agreements fix the minimum rates for each industry. A term of an employment contract that is in conflict with an equivalent term in the applicable industry collective agreement is void.

C.4.2 Process to attain equal pay

As with other EU countries, the collective bargaining system is highly relevant to the attainment of equal pay. In Finland collective bargaining has historically been highly centralised, with a national agreement which sets the framework for pay increases and collective bargaining at the industry and company levels. In 2007, however, the private sector employers association EK refused to negotiate a new national agreement. It was not until October 2011 that a national framework

agreement was again signed, signalling a return to more centralised bargaining. This framework agreement sets guidelines for industry level negotiators to follow. Unlike the earlier framework which covered all workers, the 2011 framework agreement only applies to industries with existing collective agreements. The agreement was for 25 months and is therefore to be renegotiated in 2013. It is estimated that more than 90 per cent of all employees are covered by collective agreements. The generally applicable collective agreements are listed within the electronic Finnish law reference system (Finlex) (Nousiainen 2010: 89).⁶⁹

Industry level negotiations set rates and basic conditions for each industry and are mostly binding on all employers in that industry, whether they are members of the employers' organisation or not. An independent commission decides whether an agreement should be generally binding, based on whether it covers more than half the employees in the industry. Disputes on this issue can also be taken to the Labour Court (Nousiainen 2010: 89). Below the industry level there are company negotiations which have become increasingly important. In particular, employers have pressed for greater flexibility. In the 2010 round of settlements, some individual companies successfully sought wage adjustments reflecting their own financial circumstances which were different than that provided in the industry framework industry agreements.

There is also a collective agreement for government employees. In 2010–2012, the Government reported to the ILO that it was agreed that a 0.2 per cent equal pay allowance would be added to the pay rates in a specific target sector, to improve pay equality. For example in 2010, the target was sectors predominantly occupied by women and requiring highly educated workers.⁷⁰

The gender pay differentials in Finland are above the average in the OECD countries, and have remained so to the present time. The present gap is 18.2 per cent, when the EU average is 16.2 per cent. The GPG has been discussed in Finland's reports on international human rights instruments, such as the ILO Equal Remuneration Convention and the UN's CEDAW, and in reports to the UN Human Rights Council. The national report to the UN Human Rights Council in 2008 admitted that women faced continuous discrimination in working life and that pay differentials continued to place women in an unequal position. The pay differentials were seen to be mainly due to gender-based segregation in the labour market (Nousiainen 2010: 88).

On average, Finnish women have a higher level of education than Finnish men. Nevertheless, women's work is, in terms of pay, underrated. The labour market is also highly segregated. Finnish women and men work in different sectors doing different occupations and even within the same sector they may have different jobs or tasks (Belgium Institute for Equality of Men and Women 2010: 20). Only 15 per cent of wage earners work in occupational areas where men and women are represented in roughly equal numbers. Although women's careers tend to be nearly as long as of those of men, women take more career breaks that often last longer. Studies indicate that parental leave has a negative effect on women's earnings (Belgium Institute for Equality of Men and Women 2010: 20).

It has been established, by a number of studies, that gender pay differentials in the Finnish labour market cannot be explained by characteristics such as differences in education or labour market

⁶⁹ See further European Trade Union Institute, <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Finland/Collective-Bargaining> (accessed 3 October 2013).

⁷⁰ See http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100_COMMENT_ID:3056843 (accessed 3 October 2013).

experience. The social partners agree that gender segregation of the labour market is a major cause of pay differentials, but there is disagreement about whether pay differentials are discriminatory (Nousiainen 2010: 88).

C.4.2.1 Enforcement

Claims under the Act on Equality are brought to the ordinary courts. The Equality Ombudsman has the competence to assist a party in a case involving compensation when the case is of general interest; however, commentators suggest that in practice this does not happen (Prechal & Burri 2009: 45). The Labour Court decides all cases involving collective agreements, but individual claimants have no direct access to the Labour Court as only social partners can commence proceedings in this Court. Finnish labour law gives prominence to the social partners as the partners are represented on the Labour Court and the Equality Board. Additionally as parties they may seek to bring cases before these bodies. In contrast, NGOs representing equality or gender interests have no access to these bodies, and nor do they have a part in representing or assisting victims of discrimination (Nousiainen 2010: 93).

Remedies for victims of pay discrimination are complicated. There is no access to mediation or another less burdensome procedure than the ordinary courts. The Ombudsman for Equality and the Equality Board, the bodies that supervise the implementation of the Act on Equality, mainly act in a consultative and supervisory capacity; they lack the jurisdiction to prohibit the continuation of a discriminatory practice.

The burden of proof in pay discrimination cases in Finland is divided between the alleged victim and the defendant, so that the victim must substantiate on a *prima facie* basis an allegation of pay discrimination. The onus then shifts to the defendant to show that there has been no violation. In order to ascertain whether the employer applies less advantageous pay conditions, the employee alleging pay discrimination must be able to ascertain the terms applied to the comparator.

Pursuant to section 10(3) of the Act on Equality, the employer is required to give the employee information 'on the grounds of pay and other necessary information concerning the employee' that show whether the prohibition against pay discrimination has been violated. However, under section 10(4), the employee is not entitled to require information on the pay of other employees. A union or other representative of the employees may receive information on another employee, but only with the consent of that other employee. If the comparator refuses to allow the use of the details of their pay, the person alleging pay discrimination or the representative of the employees would need to seek the relevant information through the Equality Ombudsman, which may demand the relevant information under section 17(3) of the Act on Equality. Thus, in practice, assessing remedy pay discrimination can be protracted due to difficulties in accessing relevant comparator information (Nousiainen 2010: 93). The number of pay discrimination cases in Finnish courts is low. According to a recent study, pay discrimination cases numbered 0 in 2005, 1 in 2006, 6 in 2007, and 0 in 2008 in courts of first instance (Nousiainen 2010: 93).

Compensation for victims of pay discrimination depends in each case on the nature of the violation. Compensation can be reduced or waived due to the offender's financial situation or other circumstances of the case (Nousiainen 2010: 93). Furthermore, employers offer many types of justifications for gender pay differentials, such as education, personal performance, experience and personal qualifications. Personal performance is a valid justification only if substantiated by an assessment (Nousiainen 2010: 93).

C.4.2.2 Promotion

The Act on Equality also contains several provisions on positive action. Section 6 contains a positive obligation for all employers to promote gender equality and equality planning. Pursuant to section 6(2)(3), the employer has an obligation to promote equality between women and men as regards terms of employment, especially concerning pay. The duty is further specified to include a duty to encourage both men and women to apply for jobs, that men and women have equal opportunities for promotion, that men and women have equal employment conditions (especially as to pay) and that attention is paid to reconciling work and family life (especially concerning working hours).

Section 6a of the Act on Equality contains a positive duty for employers with 30 or more employees to prepare an equality plan, together with representatives of the employees. The plan is required to map gender equality at the workplace, identifying the different earnings positions of women and men, and the measures needed to achieve equality and equal pay. The plan must be reviewed annually, or if so agreed between the employer and the employees' representatives, once every three years (Nousiainen 2009: 32).

The lack of progress in obtaining any real changes to the GPG, has led to the development of a tripartite 'Equal Pay Program for 2006–2015'. The government has also initiated a number of studies in order to assess and find solutions to the problem. The research project 'Equal pay, equality and new pay systems' (SATU), analysed the impact of new pay systems on women's and men's pay in the private and public sectors. The Labour Institute for Economic Research undertook the project in cooperation with the Research Institute of the Finnish Economy (ETLA) and Statistics Finland. It completed its work at the end of 2010. The government in its report to the ILO, indicated that the introduction of a new form of pay and reward (cited as 'new pay' in the report), comprising job assessment, performance assessment and result-based pay, provided only limited opportunities for reducing the GPG. The new systems of pay and reward had narrowed the GPG among employees who earn the highest wages or who work in the highest positions, however no similar narrowing had yet appeared among the employees who earn low wages or work in lower level positions. Furthermore, the impact of these new systems of pay and reward was more prominent within the public and municipal sectors than in the private sector.⁷¹

In relation to equality plans, a survey conducted by the government in 2008–2009 indicated that compliance with the statutory requirements required 'considerable improvement'. The survey revealed that only 17 per cent of the workplaces had conducted comparisons of wages of men and women across the boundaries set by the collective agreements (ILO 2013: 464). The government has reported to the ILO that a tripartite working group has been appointed to examine the functionality and development needs of pay surveys and that this working group completed its work in June 2012. The working group proposed updating the training on equality plans and pay surveys. The government also reported that Parliament had placed an emphasis on securing employee representatives' right to access to information in connection with pay reviews (ILO 2013: 464).

The Equal Pay Programme for 2006-2015 aims to reduce the gender gap to 15 per cent by 2015 and to implement the principle of 'equal pay for work of equal value'. The programme includes

⁷¹ See http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3056843 (accessed 3 October 2013).

actions on desegregation, the development of pay systems, measures to support women's careers, and calls for the social partners to establish agreements to reduce the pay gap (European Commission 2013:19). The nine goals of the Equal Pay Programme include (Belgium Institute for Equality of Men and Women 2010: 21):

- developing pay statistics so that they are sector- and gender-specific by 2010;
- increasing the use of paternity leave;
- reducing the GPG to 15 per cent by 2015;
- improving the quantity and quality of gender equality plans and pay surveys;
- developing pay schemes;
- alleviating gender-based segregation in the labour market;
- enhancing the prospects for women's career advancement;
- reducing unjustified fixed-term employment contracts; and
- incorporating equality and equal pay in the corporate social responsibility programmes of companies and organisations.

In relation to this Program, it would appear that the goal of reducing the GPG to 15 per cent by 2015 is unlikely to be achieved, bearing in mind the present gap. It has also been observed by a major union that there is little likelihood of meeting another objective – to increase the number of people employed in 'gender-equal job positions' (where the share of both women and men is between 40 and 59 per cent) to one fifth of the workforce (Belgium Institute for Equality of Men and Women 2010: 64).

C.4.3 Conclusion

There are many measures required to attain the goals set out in the Equal Pay Program. An important step is attention to the definition of remuneration in the Act on Equality. Additional claims for equal pay are thwarted by the difficulties in accessing earnings data and information about comparator positions, particularly if the jobs to be compared are under different collective agreements. Increased access to information is therefore vital. Furthermore, the remedy system for gender pay discrimination under Finnish law could be less complicated and allow more room for associations and other stakeholders to assist complainants.

In relation to the pay plan mapping which is required of employers pursuant to the Act, there needs to be a more efficient monitoring of pay plans. The resources of the Equality Ombudsman, which monitors the provision under section 19(3) of the Act on Equality, are quite limited and should be increased (Nousiainen 2009: 93). This is also echoed by a major union which indicated that due to insufficient resources, efficient and systematic law enforcement was hampered.⁷²

Although there is a centralised system for collective bargaining which could facilitate a broad-based approach to equal remuneration, there are insufficient mechanisms in place to facilitate this objective. There has not been the same attention to gender-neutral job or classification analysis, or

⁷² See http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3056843 (accessed 3 October 2013).

the same commitment to the development of pay equity plans, as evident in other jurisdictions. An additional requirement would be sufficient support for the effective monitoring of pay equity plans.

C.5 The Netherlands

C.5.1 Legislation and cases

Unequal pay on the ground of gender was government policy in the Netherlands between 1945 and 1965. During this period, women were remunerated at the same rate as youths and were seen to not require a 'full wage' (that is, a bread winner wage). This policy rested on the logic that women, unlike men, were not required to support a family. If women were unmarried and had no dependants, their income needs extended only to their own cost of living and thus a full wage was not required (Holtmaat 2010: 183). Until the mid-1960s, government decrees regarding the minimum wage explicitly established that women and youths were allowed to earn a certain percentage of the wages of adult men for the same work, mostly fixed at 60–70 per cent.

In 1975, the Equal Pay Act was passed, which was aimed at complying with the Netherlands' obligations to transpose European Council Directive 75/117/EEC concerning the application of the principle of equal pay for men and women.

The principle of equal treatment was first introduced into the Constitution in 1983 (Dierx & Rodrigues 2003). According to Article 1 of the Constitution, all persons in the Netherlands should be treated equally in equal circumstances, and distinctions on grounds of religion, belief, political opinion, race, sex, or any other grounds, are prohibited. However, the principle of equal treatment and non-discrimination only applies to the relationship between the state and the individual. Article 1 of the Constitution is not directly applicable in lawsuits between private individuals. Pursuant to Article 94 of the Constitution, however, the judiciary must interpret national law in accordance with binding international law. This 'horizontal effect' covers direct and indirect unequal treatment based on religion or belief, political orientation, race, gender, nationality, sexual orientation, and marital status.

Equal pay is governed in the Netherlands by three pieces of legislation:

- Book 7 of the Civil Code;
- *General Equal Treatment Act (GETA)*; and
- *Equal Treatment of Men and Women in Employment Act (ETA)*.

The Government's view is that transposition of Directive 2006/54/EC (the Recast Directive) is not necessary, as these pieces of legislation already cover the provisions of the Recast Directive in substantive law (Holtmaat 2009: 74). Book 7 of the Dutch Civil Code prohibits employers from discriminating between men and women in hiring and promotion practices. It also prohibits discrimination on the grounds of working hours. This is relevant to women given the disproportionate representation of women, relative to men, in part-time work. The norm of equality of pay between men and women is laid down in article 646 of Book 7, which states that 'the employer is not allowed to differentiate between men and women as regards ... working conditions'. 'Pay' is defined as one of the applicable working conditions.

The GETA contains general rules to provide protection against discrimination on broad grounds, one of which is sex. Section 1 prohibits both direct and indirect discrimination and specifically states that 'direct discrimination on the grounds of sex includes discrimination on the grounds of

pregnancy, childbirth and maternity'. The prohibition of sex discrimination does not apply when the protection of women is concerned, specifically in pregnancy and maternity cases, and when the aim of the measure is to place women in a privileged position in order to eliminate or reduce existing inequalities and the discrimination is reasonably proportional to the intended effect (section 2(2)).

The equal pay principle is further defined in Division 2 of the ETA; sections 7 to 12 specifically concern 'Equal pay for work of equal value'. The ETA contains special rules on the definition of pay, on jobs comparison and evaluation (including in cases of part-time work), and on non-monetary forms of pay. The main provision is section 7, which provides:

- (1) For the purposes of article 646, Book 7 of the Civil Code, the basis for comparing the terms and conditions of employment referred to in that article shall be, as far as pay is concerned, the pay normally received by a worker of the other sex for work of equal value or, in the absence of such work, for work of approximately equal value, in the undertaking where the worker on whose behalf the comparison is made is employed.
- (2) Pay as referred to in subsection 1 means the remuneration payable by the employer to the employee for the work performed by the latter.

The concept of pay, as defined in the ETA and applied by the Dutch courts, is in line with the wide interpretation given by the ECJ (Sjerps 2007: 68).⁷³ It includes occupational pensions as well as a wide range of 'benefits' that flow from the employment relationship. For example, section 9(2) sets out that, for the purposes of section 7, 'non-cash salary components shall be taken into account as pay at the market value that can be assigned to them'. Section 8 of the ETA provides that work shall be assessed in accordance with a 'reliable system of job evaluation, adhering as far as possible to the system customary at the undertaking where the employee concerned works'. However, in the absence of such a system, the work shall be fairly assessed in the light of the available information. Furthermore, section 9 of the ETA establishes that the pay received by the employee concerned shall be 'deemed to be equal to the pay that a worker of the other sex normally receives for work of equal value if it is calculated on the basis of equivalent criteria'. The ETA provides also for certain specific exceptions to the rule of equal treatment with regard to employment. An important exception concerns preferential treatment (affirmative action) on grounds of gender. Preferential treatment of women is permitted, provided that the aim is to eliminate or reduce de facto inequalities and the regulations are proportionate to that aim (section 2(3)).

C.5.2 Process to attain equal pay

C.5.2.1 Enforcement

The GETA provides for the establishment of an Equal Treatment Commission (ETC). Its task is to hear complaints (from individuals and organisations) and give non-binding opinions about discrimination, to give advice to organisations which want to revise their policies, and through monitoring to advise the Government with respect to the implementation and potential review of the

⁷³ See also ECJ rulings in *Kalanke* C-450/93, [1995], ECR I-3051; *Marshall* C-409/95, [1997] ECR I-6363; *Badeck*, C-158/97, [2000] ECR I-01875, and *Abrahamsson*, C-407/98, [2000] ECR I-05539.

legislation (Prechal & Burri 2009: 125). It is vested with powers to investigate, mediate, and adjudicate allegations of discrimination (GETA, section 11).

Proceedings before the ETC are free; legal assistance is neither required nor necessary, because the ETC itself plays an active role in the investigation of complaints. Furthermore, failure to cooperate with an ETC investigation constitutes a criminal offence (GETA, section 19). Consistent with section 12 of the GETA, the ETC may, upon request, conduct an investigation to determine whether discrimination as referred to in the GETA, ETA or section 646 of Book 7 of the Civil Code has taken or is taking place, and may publish its findings. The ETC may also conduct an investigation on its own initiative to determine whether such discrimination is systematically taking place and publish its findings.

Under section 12(2), a request for an investigation may be submitted by a very broad range of stakeholders:

- a person who believes that they have suffered discrimination;
- a natural or legal person or competent authority wishing to know whether they are guilty of discrimination;
- a person responsible for deciding on disputes concerning discrimination;
- a works council, which believes that discrimination as referred to in the GETA, ETA or article 646 of Book 7 of the Civil Code is taking place in the company for which it was appointed, or a representative advisory organ similar to that works council, which believes that discrimination is taking place in the organ for which it was appointed; or
- a legal person with full legal powers which, in accordance with its constitution or statutes, represents the interests of those whose protection is the objective of the GETA, ETA or article 646 of Book 7 of the Civil Code.

Once such a request in writing has been submitted, the ETC must 'institute an investigation and shall forward its findings, in writing and with reasons, to the petitioner, the person said to be guilty of discrimination and, if relevant, the victim of discrimination' (GETA, section 13). Furthermore, the ETC may also make recommendations when forwarding its findings to a person said to be guilty of discrimination.

Through the course of an investigation of alleged discrimination, the parties are invited to make submissions in writing. The ETC has the right to direct the employer to release sufficient pay information, so as to enable an employee to bring an equal pay claim. The ETC may also direct the employer to disclose all necessary pay information as soon as an employee has brought a claim (Foubert et al 2010: 14). When the ETC considers that it has collected sufficient information, hearings are conducted. If necessary, the ETC can direct parties to be present and give oral evidence at the hearing. Witnesses can also be invited or summoned to attend the hearing, both by the parties and the ETC. Commentators suggest that the ETC places great value on hearings, since they provide an opportunity for discussion, in addition to an explanation of the scope and relevance of anti-discrimination law (Dierx & Rodrigues 2003). After the hearing, the ETC discusses the case in a closed meeting and delivers its decision within 8 weeks.

The ETC will refuse to institute an investigation if:

- the request referred to in section 12, is 'manifestly unfounded';

- the interest of the petitioner or the importance of the behaviour concerned is ‘manifestly insufficient’; or
- the period of time which has elapsed since the discrimination referred to in section 12 took place is such that an investigation can ‘no longer reasonably be conducted’.

The GETA does not oblige applicants to approach the ETC before filing a lawsuit with the Dutch courts, nor do proceedings before the ETC prevent court action. According to the GETA and the ETA, discriminatory dismissals and victimisation dismissals can be ruled to be void. The employee can ask the court to invalidate the termination of the contract, whereby an employee can claim wages and seek reinstatement. Alternatively, the employee can claim pecuniary damages before the courts under the system of sanctions in general administrative law, contract law and/or tort law (Prechal & Burri 2009: 124). Furthermore, pursuant to section 15 of the GETA, the ETC itself may bring legal action before the courts with a view to obtaining a ruling that conduct contrary to the GETA, ETA or article 646 of Book 7 of the Civil Code is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.

The GETA and ETA also make reference to additional sanctions. Sanctions under these laws are imposed by the ETC, not by the courts. Under Article 13(2) of the GETA, the ETC may make recommendations to the party found to have made an unlawful distinction. Article 13(3) permits the ETC to forward its findings in an ‘Advice to the Ministers concerned’, and to organisations of employers, employees, professionals, public servants and relevant consultative bodies. Under Article 15(1), the ETC may bring legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.

The GETA does not contain provisions concerning the burden of proof, but the ETC applies the burden in line with the Recast Directive, which places the evidentiary burden on the respondent to prove that the alleged discrimination did not take place. For example, if the plaintiff alleges that her gender is the reason why she has been remunerated at a rate lower than that paid for equal work or work of equal value, and she can prove that her credentials and experience were sufficient to meet the requirements of the job, the defendant has to provide evidence establishing that there have been other relevant reasons that justified the lower rate of remuneration. If the employer cannot clarify its decisions in an adequate manner, a violation of the law will be established. The right to bring a matter before the ETC, or to take legal action before the courts to claim pay under the GETA, lapses two years after the date on which payment should have been made (GETA, section 11).

C.5.2.2 Promotion

In 2000, the national representatives of the social partners, the government and the ETC introduced a pay equity action plan. A ‘10-point pay equity checklist’ was developed to help the social partners and human resource development managers identify potential discrimination in pay systems (van Hoogstraten & Van Embden 2002). The content of the checklist was informed by the discrimination cases handled by the ETC and are considered appropriate for analysing pay discrimination (Dierx et al 2004). The checklist includes the following ten questions:

1. Does the pay system discriminate between employees on the basis of working hours or type of contract?
2. Are the criteria used to rank employees in the pay scale non-sexist?

3. In practice, does the pay system guarantee equal pay for men and women?
4. Are pay increases for equal jobs equal?
5. Are men and women equally eligible for social benefits?
6. Are men and women equally eligible for retirement benefits?
7. Are men and women equally eligible for incidental supplements, allowances or bonuses?
8. Are pay systems that incorporate an element of variable remuneration offered to all employees, regardless of sex?
9. Do all employees, regardless of sex, benefit from the same elements of a 'cafeteria'⁷⁴ scheme, when the latter is in place?
10. Do mergers, fusions and the like give rise to lasting pay discrimination?

Although fairly exhaustive in the analysis of both the content and structure of pay systems, Chicha's observation is that 'this list nonetheless fails to address more specific aspects that lead to pay equity; most notably it fails to estimate discriminatory pay differentials' (Chicha 2006: 18).

The Netherlands also has 'Equal Pay Quick Scan', a software program developed by the ETC. It analyses company pay data to determine if an investigation into its remuneration system is required. It was applied by the Labour Inspectorate in an investigation of several sectors in 2005. A simplified version was also developed in 2008 for the use of individual employers (Foubert et al 2010: 17).

Another promotional practice used in the Netherlands is the 'Wage Indicator' (Loonwijzer), which is an internet tool developed by the University of Amsterdam. Individual men and women can use this indicator to compare their salaries to higher, lower or equivalent others in the same field, the same job level and with the same education and years of experience (Holtmaat 2010: 188).

C.5.3 Conclusion

The enforcement and promotional practices of the Netherlands are extensive, with the ETC supported by checklists, software programs and web-based tools to scrutinise pay and evaluation for compliance with the equal pay principle. Yet the GPG stands at 17.9 per cent and is reportedly widening (Foubert et al 2010: 2).

A contributory factor may be that the checklists, software programs and web-based tools are voluntary requirements. There is no mandatory requirement for employers to implement them. There does not appear to be a systematic process, as evident in the Canadian provinces (see section C.9), for equity plans or annual audits. Additionally it would appear that information is only provided by employers following the commencement of an action before the ETC (Holtmaat 2010: 189).

Even if someone has indications that they are paid less than a colleague for the same work, it will be difficult to establish this to the required standard. Many factors, unknown to the claimant, may justify the difference in pay (for instance, the number of years of experience or some extra training

⁷⁴ In a 'cafeteria' scheme, employees can choose from an established list of social benefits based on their needs.

or education of the colleague). Also, workers fear that the relationship with their colleague or employer may become troubled as a result of such a claim. Individual employees also may also find it difficult to assess whether their concern about the pay they receive is a case of indirect discrimination, given the complexities involved in this standard.

Nonetheless, the continued development of the promotional tools appear well directed to good practice by employers and also helpful for employees to make enquires as to whether to initiate an equal pay claim. The wide range of stakeholders who can request and initiate an equal pay investigation by the ETC, can also have broad impact, if effectively utilised.

C.6 Norway

C.6.1 Legislation

The right to equal pay is established by section 5 of the Gender Equality Act 2005 (GEA). The European Economic Area (EEA) Committee made Directive 2006/54/EC (the Recast Directive) part of the EEA Agreement by its decision of 14 March 2008. The Norwegian Ministry of Children and Equality conducted an evaluation and concluded that Norwegian legislation was already in line with the requirements of the Recast Directive and adequately incorporated the Directive's equal pay requirements (Burri & Prechal 2009: 77).

The GEA promotes gender equality and prohibits gender discrimination. When the GEA was originally passed in 1978, section 5 provided that 'women and men shall have equal pay for the same work or work of equal value'. There was a concern that the term 'work of equal value' was given too narrow a meaning and the value of work could not be compared meaningfully across trades and professions (Holst 2012: 2–3). Section 5 of the GEA was subsequently amended in 2002. It now provides that 'women and men in the same enterprise shall have equal pay for the same work or work of equal value' and that this 'shall apply regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective wage agreements'. In addition, section 5 states that work of equal value is to be determined 'after an overall assessment in which importance is attached to the expertise that is necessary to perform the work and other relevant factors, such as effort, responsibility and working conditions'. The definition is an inclusive one and allows other factors to be taken into account, such as market conditions.

Pay is defined as 'ordinary remuneration for work as well as all other supplements or advantages or other benefits provided by the employer'. The right to equal pay is limited by section 5 to the same enterprise, which means that the equal pay requirement cannot be based on comparisons between employees in different enterprises, even if the enterprises are operated and owned by the same physical or legal entity (Equal Pay Commission 2008: 6).

Section 16 of the GEA concerns the burden of proof. It is a distinct provision providing that 'if there are circumstances that give reason to believe that there has been direct or indirect differential treatment ... such differential treatment shall be assumed to have taken place unless the person responsible proves on the balance of probabilities that such differential treatment nonetheless did not take place'.⁷⁵ Broadly interpreted, this provision requires an employer to prove, on the balance

⁷⁵ Section 3 of the Act defines direct and indirect differential treatment. In relation to indirect differential treatment, as it is a generalised statute it lacks clarity as to how it should be applied in relation to equal pay. For example the legislation states

of probabilities, that differential treatment did not take place. A *prime facie* case is required, however, before the burden shifts to the employer (Equal Pay Commission 2008: 6).

C.6.2 Overview of the process for achieving equal pay

C.6.2.1 Enforcement

The enforcement of the GEA, including equal pay, is primarily through the Gender Equality and Anti-Discrimination Ombudsman (Ombud) and the Gender Equality and Anti-Discrimination Tribunal (Tribunal). Both are independent bodies.

A complaint concerning unequal pay can be made directly to the Ombud. The Ombud investigates the complaint by requesting information and documentation from the employer. Following investigations, the Ombud may make a recommendation or statement. If the Ombud concludes that there has been a breach of the law, the party responsible is obliged to rectify their conduct in accordance with the Ombud's statement. The statement is not legally binding, but in most cases employers will follow the Ombud's recommendation.

If one of the parties disputes a recommendation, then an appeal to the Tribunal may be made by either party or referred by the Ombud directly. The Tribunal may only hear the case after the Ombud has made a recommendation. The Tribunal will then decide whether or not the GEA has been violated and can decide that the discriminating actions must come to an end (Foubert 2010: 195). The Tribunal does not have the power to award damages or compensation, or impose sanctions, a situation which has been the subject of criticism (Equal Pay Commission 2008; Equality Commission 2011; Equality and Anti-discrimination Ombudsman 2011:16). The rulings of the Tribunal are administratively binding, but may be overruled by a court on appeal. Where a party does not pay compensation voluntarily, the victim can only obtain a remedy through the courts (Foubert et al 2010: 195).

If a complaint is made against municipal or state institutions, the powers of the Tribunal are limited to making recommendations. Also, the Tribunal may not hand down rulings that affect collective wage agreements (Equal Pay Commission 2008: 7). The Tribunal has the right to give an opinion on such cases, but its opinion is not legally binding. Therefore the competence of the Tribunal in determining disputes, which may involve collective wage agreements, is limited. The time period between the initiation of a complaint and a decision by the Ombud may vary, but it is not uncommon for this period to be up to 12 months. A complaint for the Tribunal may add another 6 to 12 months to this process. If the Tribunal's decision is disputed and presented to court, a further 6 to 12 months may elapse before a judgment is provided (Foubert et al 2010: 196).

An order for compensation for a breach of the GEA can only be made by a court. Section 17 of the GEA provides that an employee may 'demand compensation and redress regardless of the fault of the employer'. Compensation is fixed at the amount that is reasonable, having regard to the financial loss, the situation of the employer and the employee or job seeker, and all other circumstances. The courts will grant compensation from the date of the claim and in general the limitation period for claims is three years (Norwegian Limitation Act 1979, sections 3, 9).

that indirect differential treatment is permitted 'if the action has an objective purpose that is independent of gender and the means that is chosen is suitable, necessary and not disproportional intervention in relation to the said purpose'.

The Labour Court's jurisdiction in the area of equal pay primarily concerns collective agreements. An employee organisation may file a complaint before the Labour Court regarding the interpretation, existence and validity of a collective agreement. Whilst a collective wage agreement may not be entered into if it contravenes the GEA, only the Labour Court is competent rule on this and only the parties to a collective wage agreement can bring this type of action. If a provision of a collective agreement is found to be in violation of the GEA, it will be declared null and void by the Labour Court so that the compensation to be paid is retrospectively dated back to the moment that the invalid provision was put into force.

A review of appeal cases relating to equal pay indicates that the Ombud receives many cases relating to discrimination in employment, but that relatively few are dealt with by the Tribunal and even fewer appeals are upheld. Appeals made to the Tribunal are very rarely upheld in cases where the basis of the appeal is that the Ombud took insufficient account of the work value across occupational and collective wage agreement borders. An additional factor that explains the limited number of successful appeal cases is that the Ombud is permitted to give consideration to market value as a justification for differentiated pay. Further, appeals can only be initiated by an individual and individual employees face significant barriers in obtaining information about their colleagues' pay. Very few equal pay cases have been dealt with by the ordinary courts. During the period 1999–2005, 95 cases concerning wages were handled by the Ombudsman (Foubert et al 2010: 196), while the Tribunal dealt with only 17 cases concerning equal pay between 2002 and 2008 (Equal Pay Commission 2008: 7).

C.6.2.2 Promotion

The GEA also addresses promotion of gender equality. Section 1a establishes that an employer has a positive obligation to promote gender equality. As such, employers in the public and private sectors must make active, targeted and systematic efforts to promote gender equality in their enterprises. In their annual reports or annual budgets they must give an account of the actual state of affairs as regards gender equality and the measures that are planned in order to promote gender equality and to prevent differential treatment in contravention of the GEA. The monitoring and supervision of these mandatory requirements lies with the Ombud.

In 2006, the Norwegian Cabinet appointed an Equal Pay Commission to provide an overview of the differences between women's and men's pay and consider measures to reduce pay differences. It was established as a committee of experts, comprising researchers from different disciplines together with a reference group of employers and employees organisations. In 2008 the Commission produced its first report on gender and pay (Equal Pay Commission 2008). The Commission also undertook an assessment, in 2010 and 2011, of the effectiveness of the Ombud's equal pay monitoring. The Commission, apart from commenting on some uncertainty as to the enterprises who were subject to the requirement to produce an annual report, noted deficiencies in relation to monitoring of the reporting requirements of private enterprises. The conclusion was that the administrative structure for implementing an equality policy by the Ombud was too weak to realise the equality policy ambitions (Equal Pay Commission 2008: 13).

In its 2008 report, the Commission made seven specific recommendations to promote equal remuneration for women and men (Equal Pay Commission 2008: 15–16). The first concerned strengthening the enforcement of the duty to promote gender equality under the GEA. The second was to implement pay increases for selected female-dominated occupations in the public sector.

The third was that social partners involved in private sector collective bargaining allocate funds to areas of low pay and feminised work.

These three recommendations were set against the stagnant nature of Norway's GPG which has remained around 15 per cent since the mid-1980s. Although Norwegian women take part in working life to almost the same extent as men, they work shorter hours and they do not work in the same occupations, industries or sectors as men. Nor do they have an equal position in the job hierarchy. Commentators suggest that Norway has one of the most gender-segregated labour markets in the industrialised world (Equal Pay Commission 2008: 2). The labour market is divided by gender along horizontal and vertical lines. Horizontal segregation of the labour market indicates that women and men are concentrated in different occupations, industries and sectors. The gender differences largely correspond to the division between the public and private sectors. Women account for approximately 70 per cent of employees in the public sector, while there are more men in the private sector (63 per cent). The salaries within the private sector are higher than the salaries within the public sector and the pay gap between women and men is higher within the private sector, than within the public sector (Malmberg-Heimonen 2011: 2). Vertical segregation indicates that women and men are segregated in terms of their position in the job hierarchy, even within the same occupation or profession. Only one in three managers in Norway is a woman (Malmberg-Heimonen 2011: 2).

An additional matter of debate in Norway concerns the use of job evaluation as the basis of successful claims for wage adjustments. The Commission observed that practice in Norway did not match that evident internationally. While there were only limited impediments to using job evaluation to measure the value of work on the principle of job requirements, problems and conflicts occurred at the next phase, where this measurement was linked to a claim for pay adjustments and new pay relationships between occupational groups. Additionally job evaluation within enterprises has little effect on the pay gap because the greatest pay differences in Norway are due to the gender-segregated labour market, where men and women are divided between different industries, sectors and workplaces. A compounding factor is the limitation of equal pay legislation; the scope of the equal pay provisions is limited to the 'same enterprise' (Equal Pay Commission 2008: 13–14). The Ombud has also observed that work assessment tools to facilitate comparison of the work of men and women across sectors and across occupations were underutilised. The Ombud observed that these tools could be an important means of preventing pay being determined on the basis of stereotypical ideas about the value of women's work, particularly in local and central government sectors which are highly feminised (Equality and Anti-discrimination Ombudsman 2012: 8).

In 2011, the ILO's CEACR requested the Norwegian Government to provide information on any measures it had taken to overcome the obstacles relating to job evaluation. In particular it requested the government to provide information on measures taken in cooperation with the social partners to address pay differences between men and women beyond the enterprise level, examining in particular the remuneration levels in female-dominated and male-dominated occupations where the work is of equal value (ILO 2011: 484).

C.6.3 Summary

Norway has a number of impediments to improving the GPG. Legislation is limited to gender pay discrimination within an enterprise, there is no requirement for an employer to disclose information about the pay of other employees within an enterprise and no effective remedies which can apply

across occupational and collective wage agreement borders. The enforcement provisions of the GEA are limited also, as complainants are unable to obtain compensation, other than by pursuing remedies through an ordinary court. More broadly, the GEA provides limited clarity as to how equal pay for work of equal value is to be applied in practice. The objective of equal pay is hampered also by ineffective equality promotion and there is deficient monitoring of the mandatory requirements of gender equality reporting required of enterprises and public authorities.

C.7 Sweden

C.7.1 Legislation and case law

Legislation to promote equal rights for women and men in the workplace, including provisions on equal pay, was first adopted in Sweden in 1979 and has been updated several times over the years, most notably with the Equal Opportunities Act of 1991 and the Discrimination Act of 2009. The Discrimination Act combined seven Swedish anti-discrimination laws, including the Equal Opportunities Act, into one Act and established the Equality Ombudsman to supervise compliance with the Discrimination Act.⁷⁶

The purpose of the Discrimination Act is to ‘combat discrimination and in other ways promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age’ (section 1). Chapter 3 of the Discrimination Act covers ‘working life’ and is organised into the following categories:

- cooperation between employer and employees;
- goal-orientated work;
- working conditions;
- recruitment;
- matters of pay; and
- gender equality plan.

Employers and employees are to cooperate on active measures to bring about equal rights and opportunities in working life, regardless of sex, ethnicity, religion or other belief, and in particular to combat discrimination in working life on such grounds. Section 2 of Chapter 3 sets out that employers and employees are to endeavour to equalise and prevent differences in pay and other terms of employment between women and men who perform work which is to be regarded as equal or of equal value. They are also to promote equal pay growth opportunities for women and men. Work is to be regarded as of equal value with other work if, on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work is to take into account criteria such as knowledge and

⁷⁶ These are the Equal Opportunities Act (Swedish Code of Statutes 1991: 433); the Act on Measures against Discrimination in Working Life on Grounds of Ethnic Origin, Religion or Other Religious Faith (Swedish Code of Statutes 1999: 130); the Prohibition of Discrimination in Working Life on Grounds of Disability Act (Swedish Code of Statutes 1999: 132); the Prohibition of Discrimination in Working Life on Grounds of Sexual Orientation Act (Swedish Code of Statutes 1999: 133); the Equal Treatment of Students at Universities Act (Swedish Code of Statutes 2001: 1286); the Prohibition of Discrimination Act (Swedish Code of Statutes 2003: 307); and the Act Prohibiting Discriminatory and Other Degrading Treatment of Children and School Students (Swedish Code of Statutes 2006: 67).

skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions.

The Discrimination Act contains further rules monitoring equal pay practices. In order to detect, remedy and prevent unjustified differences in pay and other conditions of employment, section 10 of Chapter 3 provides that each employer must undertake a pay survey and analyse every three years:

- provisions and practices regarding pay and other terms of employment that are used at the employer's establishment;
- pay differences between women and men performing work regarded as equal or of equal value;
- whether pay differences between women and men performing the same work are based on gender or on other factors; and
- groups of employees performing work generally dominated by women, comparing that to work being performed of equal value but not dominated by women.

According to section 11, employers with 25 or more employees are required to draw up an action plan for equal pay every three years that:

- provides employees' organisations, with which they have a collective bargaining agreement, information to cooperate in the survey, analysis, and drawing up of the plan (taking into consideration confidentiality);
- details pay adjustments and measures necessary to be taken by the employer;
- includes a cost estimate and implementation schedule; and
- provides an account of how planned measures have been implemented.

Such an action plan must report the results of the employer obligations to survey and analyse pay practices, from a gender perspective, and indicate 'the pay adjustments and other measures that need to be taken to bring about equal pay for work that is to be regarded as equal or of equal value'. The plan must include a cost estimate and a time plan not exceeding three years, and, subsequently, report on the implementation and results. Furthermore, there is a right for employee organisations bound by a collective agreement to obtain the information needed for the organisations to be able to cooperate in the survey, analysis and drawing up of an action plan for equal pay. If related to an individual employee, such information is confidential (section 12).

C.7.2 Process of achieving equal pay

C.7.2.1 Enforcement

The enforcement of the equal pay principle in Sweden is an individual and complaint-based structure (Numhauser-Henning 2010: 239). The equal pay provisions in the Discrimination Act are enforced by the Equality Ombudsman. An individual employee (or various employees) must be identified as potentially discriminated against, which requires a relevant comparator of the opposite sex. Such a comparator must be found at the same employer, otherwise there is no comparable situation (*Allonby v Accrington & Rossendale College* [2004] ECR I-873).

Complaints about unequal pay are investigated by the Ombudsman's case officers. An individual complainant can turn to their trade union or to the Equality Ombudsman for assistance. If the investigation shows discrimination or unfair treatment with regards to pay, the Ombudsman will first try to negotiate a voluntary agreement or settlement between the employer and the employee. Should the employee and employer fail to reach a settlement, the Ombudsman can take the matter to the Labour Court, where the trade union has a right to represent a member.

Should a case of pay discrimination be proven, there is a right to both punitive and economic damages. The time limits for presenting a pay discrimination claim are regulated in section 4 of Chapter 6 of the Discrimination Act. These rules are quite complex, regulating time limits for negotiations and legal proceedings in the case of an individual claimant being represented by a trade union and complementary rules when this is not the case. A request for negotiations for damages must be made within four months of discovering the discriminatory act and within a maximum of two years of the act itself. However, pay (which by its nature is recurrent) is a 'continuously' committed act of discrimination. An action must then be brought to court within three months of finalising the negotiations. If the trade union does not call for negotiations or bring the claim to court, there is an additional time limit of one month for the employee or Equality Ombudsman to do so.

The Equality Ombudsman has a general duty to monitor compliance with the Discrimination Act. Furthermore, there is an obligation on any natural or legal person to provide any information required by the Equality Ombudsman. Should such a person not fulfil the obligations concerning active measures under Chapter 3, that person may be ordered to fulfil them subject to a financial penalty, which is issued by a special 'Board against Discrimination' on application from the Equality Ombudsman. A trade union may also approach the Board regarding a lack of compliance of the active measures. The Ombudsman investigates complaints based on the law's prohibition of discrimination and harassment, and can represent victims in court free of charge.

C.7.2.2 Promotion

Other than the provisions set out in the Discrimination Act, Sweden has also developed other methods to promote equal pay. One example is the 'Steps to Pay Equity method', which was developed by the Equality Ombudsman to facilitate pay equity (Harriman & Holm 2001; Katz & Baitsch 1996; Hastings 2003). According to Oelz et al (2013: 42), it 'is a quick and easy method for determining the demands and degree of difficulty associated with particular jobs ... [and] can ascertain whether differentials in men's and women's wages are due to sex discrimination'. The method can be used for different purposes, such as determining work of equal value in connection with wage surveys required under the law, ranking and comparing different jobs, and determining whether a job evaluation is required (Oelz et al 2013: 42). The Office of the Equality Ombudsman has also published a brochure on pay surveys, explaining the difference between equal work and work of equal value, and setting out the steps to be taken for pay surveys and analysis (Oelz et al 2013: 74; Equality Ombudsman 2009). In response to data that sectors with the lowest minimum wage were also the most highly feminised, the social partners agreed to increase the minimum wage through collective bargaining (Oelz et al 2013: 62; ILO 2011).

For International Women's Day 2012, the Swedish Women's Lobby initiated an extensive campaign to raise awareness on the current GPG. The campaign involved a large number of unions, political parties and women's rights organisations. The message: 'After 15:51 women work

for free – every day. It is time for pay all day’, was circulated throughout a wide range of Internet and social media outlets.⁷⁷

C.7.3 Conclusion

The Discrimination Act’s provisions on active measures, in particular those concerning the mandatory requirement for employers to draw up action plans and report on measures needed or taken to achieve equal remuneration pay, are an example of good practice. This, taken together with the Equality Ombudsman’s powers, processes of investigation and ability to assist complainants before the Labour Court (if required), also amounts to good practice. However, between 2000 and 2012, the GPG in Sweden continued to rise and is now above 15 per cent. Contributory factors may include the legislative limitation that provides that comparators be drawn from the same employer. A further contributing factor may be issues as to the effectiveness of the supervisory powers of the Equality Ombudsman in relation to systematic monitoring and assessment.

C.8 United Kingdom

C.8.1 Legislation

The Equality Act 2010 (UK) gives women and men the right to equal pay for equal work. Section 65 provides that work is ‘equal’ if it is ‘like work’, ‘work rated as equivalent’ or ‘work of equal value’. These terms are further expanded upon in the Equality Act 2010 Code of Practice, published by the Equality and Human Rights Commission (EHRC). Under section 14 of the Equality Act, this Code was approved by the Secretary of State and laid before Parliament. The Code does not itself impose legal obligations, but it explains the legal obligations under the Act and also states that when considering an equal pay claim, tribunals and courts are obliged to take into account any part of the Code that appears relevant to the proceedings. The Equal Pay (Amendment) Regulations 1983 provide for a woman to seek equal pay with an unnamed male comparator. It is important to note that the Equality Act does not give women the right to ‘fair’ pay, instead it gives the more limited right to have equal pay when all other circumstances are the same or similar.

Paragraph 34 of the Code of Practice further explains particular terms. It indicates that the Equality Act postulates a claimant of a particular gender and a comparator of the opposite gender. It can apply both to male and female. ‘Like work’ refers to the same or broadly similar work, provided that where there are any differences in the work these are not of practical importance. ‘Work related as equivalent’ refers to different work which is rated under the same job evaluation scheme as being ‘work of equal value’. ‘Work of equal value’ refers to different work of equal value in terms of factors such as effort, skill and decision-making. A comparator is also required to be in the ‘same employment’ as the claimant. Section 79 of the Equality Act amplifies the meaning of this phrase. It is also noted that European Union law allows a woman to compare herself to a man who is not in the same employment, where the difference in pay is attributable to ‘a single source’ which has the power to rectify the difference. If the outcome is different from the ‘same employment’ test under English domestic law, European Union law may be applied to produce a remedy. For example in *Levez v TH Jennings (Harlow Pools) Ltd (No 2)* [1999] IRLR 764 the EAT ruled that the two-year limit on back pay in section 2(5) of what was then the Equal Pay Act 1970 contravened Article 119

⁷⁷ Available at <http://sverigeskvinnolobby.se/> (accessed 21 September 2013).

(now Article 141) of the EC Treaty and was thus unenforceable. Successful equal pay complainants can claim back pay for up to six years from the date proceedings were commenced.

As a matter of practice, a woman and her comparator whose pay can be equalised by a single source are likely to be in the same employment: see *Lawrence v Regent Office Care Ltd* [2003] ICR 1092. It is noted in the Code that the selected comparator could be either a 'representative of a group of workers' or be the only person doing a particular type of job (para 58). It is also noted that it may be prudent for a woman to select more than one comparator and that multiple comparators may be necessary for a term-by-term comparison of a woman's contract. It is further noted that if a woman claims gender pay on the basis of direct sex discrimination in relation to her contractual pay, but there is no actual comparator doing equal work so that a sex equality clause cannot operate, she can claim sex discrimination based on a hypothetical comparator (para 61).

C.8.2 Overview of the process for achieving equal pay

There are three processes which can be used to obtain equal pay. The two major approaches are through the EHRC and the Employment Tribunal. The approaches taken by each body are very different.

The EHRC has powers to carry out enquiries, for example into the extent and causes of pay gaps in particular sectors, and also to conduct investigations of an employer it suspects of having unlawfully discriminatory pay practices. The EHRC uses its powers of investigation and enquiry to strategically promote equality and human rights, and to tackle entrenched discrimination and pay inequality. An example of the use of its powers is the Financial Services Enquiry (Code of Practice paras 3–6).

The approach taken under Part II of the Equality Act encourages employers to carry out regular equal pay audits and the Commission recommends this approach. It is not mandatory. However in order to promote equal pay in the private sector, section 77 prevents the enforcement of so called 'pay secrecy' clauses in employment contracts and also empowers regulations to be made requiring employers to disclose information about GPGs. Where a pay system lacks transparency the employer must be able to prove there is no discrimination behind the pay differential (Code of Practice paras 102, 162).⁷⁸ The Commission provides a model for carrying out an equal pay audit with a five-step equal pay audit process which is detailed in the Commission's Equal Pay Resources and Audit Toolkit.⁷⁹

The second major approach to obtaining equal pay is the complaints system or grievance procedure before the Employment Tribunal. An important adjunct to this complaint mechanism is the assistance provided by the Advisory Conciliation and Arbitration Service (ACAS). ACAS is a body set up pursuant to section 247 of the Trade Union and Labour Relations (Consolidation) Act 1992. ACAS has published a Code of Practice on disciplinary and grievance procedures, which provides guidance for employees and employers when dealing with complaints about pay. If Employment Tribunal proceedings are commenced and there has been an unreasonable failure by either party to adhere to the ACAS Code, this could affect any compensation awarded (Trade

⁷⁸ See also *Handels og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1989] IRLR 532; [1991] ICR 74; *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205.

⁷⁹ Available at <http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/> (accessed 15 September 2013). See Code of Practice paras 164–185.

Union and Labour Relations (Consolidation) Act 1992 section 207A). ACAS provides a booklet on *Job evaluation: consideration and risks* (ACAS 2011) and may also assist parties in relation to any grievance claim.

When an equal pay claim is filed with the Employment Tribunal, it will assess the evidence about the work done by the complainant and comparator. It will also look at: the application and validity of any job evaluation study if the claim is for equivalent work; the value placed on the work if the claim is for work of equal value; the pay and other contract terms of the complainant and comparator and how they are determined; and the reasons for the difference in pay if the employer raises a 'material factor' defence under section 69 of the Equality Act.

An important aspect of the Tribunal process is that where a question arises as to whether a person's work is of equal value to another's, the Tribunal may before determining the question, require a member of the panel of independent experts to prepare a report on the question (Equality Act 2010 section 131(2)). A panel of experts is then designated by the ACAS. There are special Tribunal procedures for work of equal value claims, as contained in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and Schedule 3 of the Employment Tribunals (Equal Value) Rules of Procedure. Schedule 3 sets out the process which applies to proceedings involving an equal value claim based on either the Tribunal itself deciding equal value, or alternatively requiring an independent expert to prepare a report.

There is a tight schedule starting from the time of the claim to the time of the hearing, which, in the absence of there being an appointment of an independent expert, is 27 weeks. In the case of the appointment of an independent expert, the period is 37 weeks. The process includes a claim; a response; a stage one and stage two equal value hearing; the appointment of an independent expert (something which may happen at any time during the proceedings), resulting in a report based on either on facts agreed between the parties, or determined by the tribunal; and, then, a hearing commencing before the Tribunal. There are very detailed provisions regarding the requirements of an independent expert contained within Schedule 3.

A third potential remedy for achieving equal pay is by instituting proceedings in a civil court, although the court may still elect to refer the matter to the Employment Tribunal by reason of its special expertise.

In July 2012, a report was undertaken on behalf of the Government Equalities Office on equal pay cases and pay audits, looking at claims for equal pay and of sex discrimination related to pay that were made during the previous eight years (Incomes Data Services 2012). The aim of the research was to provide a context for proposed legislation which would require employers who lost an equal pay case, or a sex discrimination case related to pay, to conduct a pay audit ordered by the Tribunal. A summary of relevant cases was attached and positive findings were made in support of such proposed legislation, with the proviso that the Tribunal should not be able to order an audit where the employer can show it would not be productive. This approach would extend potential remedies to workers more broadly and not simply rely on individual case law.

C.8.3 Summary

It can be seen that the United Kingdom is moving towards self-assessment models which, although not a mandatory requirement, are recommended and promoted by the EHRC. The EHRC is increasingly seeking to influence better pay equity in the private sector and its ability to conduct enquiries may assist in approaching pay equity in a broader based manner. There is also an effort

to streamline equal pay cases before the Tribunal and to use independent experts appointed by the Tribunal to enhance that process. There is much online support for methodologies for undertaking equal pay evaluation through ACAS, which provides information, advice and training, and stresses the importance of transparency to obtain better outcomes.

C.9 Canada

Canada has a federal system of government, with both federal and provincial legislation. Like Australia, it has a combination of human rights legislation which prohibits discrimination on the grounds of gender, as well as labour laws which deal with the issue of gender pay equity. Although the legislative provisions between Canada and Australia are very different, there are lessons to be learned, both positive and negative, from the Canadian experience. This section will provide an overview of the federal legislation and practice, and a brief overview of some of the provinces, with a particular focus on two examples of good practice in Québec and Ontario.

C.9.1 Federal legislation and case law

A clear overview and appraisal of the federal legislation is conveniently set out in the final report of the Canadian Pay Equity Task Force (2004). Although the federal model in Canada is undergoing some development (ILO 2013: 436), the analysis contained in the Task Force report appears still to be relevant.

Pay equity is dealt with in section 11 of the *Canadian Human Rights Act 1985* (CHRA), together with the supporting Equal Wages Guidelines 1986, issued pursuant to section 11 of the CHRA. In addition, the Canada Labour Code, RSC 1985 also provides for equal pay for work of equal value.

Section 11(1) of the CHRA states that it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value. The section applies to all employers, but it is limited to employees employed in the same 'establishment', as discussed below. Section 11(2) of the CHRA sets out the criteria to be applied in assessing the value of work. It specifically refers to it being a composite of skill, effort, responsibility and working conditions. These four criteria are further amplified in the Guidelines. Section 11(4) refers to the 'reasonable factors' which are considered to be a legitimate basis for differences. Finally, section 11(7) of the CHRA outlines the components which are to be included as wages, which is comprehensive and extends beyond salaries.

The Guidelines elaborate on these legislative provisions. They expand the four elements of the criteria and there is recognition of the differing features of work done by men and by women. For example, section 5 of the Guidelines requires that intellectual as well as physical effort be taken into account, while section 8 indicates that both physical and psychological features of working conditions must be considered. Section 9 of the Guidelines provides that when an employer relies on a system in assessing the value of work, then that system shall be used in the investigation of any complaint alleging a difference in wages, provided it fulfils certain criteria. These criteria are that there is no sexual bias, that the system is capable of measuring the relative value of work in all jobs in the establishment, and that it assesses that value according to the four criteria.

In 2009 a *Public Sector Equitable Compensation Act* (PSECA) was adopted, but not all of the provisions have yet come into effect and regulations require enactment (ILO 2013: 436). PSECA requires workplace parties to bargain as part of the regular collective bargaining process, imposing

accountability on both workers and employers to put 'equitable compensation' into workplaces. Distinctions are drawn between accountability and complaint mechanisms, depending on whether employees are or are not represented by unions. Both represented and unrepresented workers may send a complaint to the Canadian Human Rights Commission (CHRC), as described below, but in addition, unionised employees may complain to the Public Service Labour Relations Board where they have access to other dispute resolution mechanisms such as arbitration and conciliation.

C.9.2 Processes for achieving equal pay

The CHRC is an independent agency reporting to Parliament and has a general statutory responsibility of pursuing and promoting the goals set out in the CHRA. Its mandate has a number of components. In contrast to legislation in other Canadian jurisdictions, the CHRA does not provide for a separate administrative system dedicated to the pursuit of pay equity. Instead, the process for ensuring compliance with the pay equity provisions in section 11 of the CHRA is the same as that used to enforce the rest of the CHRA (Canadian Pay Equity Task Force 2004: ch 3).

In relation to pay equity, either individuals or groups may file complaints with the CHRC under section 11 of the CHRA. Sections 11 to 15 of the Guidelines describe the processing and determination of claims. Section 11(1) of the Guidelines provides that the gender composition of an occupational group is a relevant consideration in determining the complaint of a member of that group. Section 13 of the Guidelines sets out a sliding scale which defines 'gender predominance', depending on the size of the employer. 70 per cent is required of an occupational group in which the employer has less than 100 members; 60 per cent is between 100 and 500 members; and 55 per cent if more than 500 members.

The CHRC has established a dedicated Pay Equity Branch, which examines complaints and assists the parties in attempting to attain pay equity. In addition to having this advocacy role, the CHRC decides whether the Canadian Human Rights Tribunal should adjudicate a complaint, and it may also pursue the issue as a party in those proceedings. The issue of the independence of the Canadian Human Rights Tribunal as a consequence of the advocacy role of the CHRC was one of the issues addressed by the Supreme Court of Canada in *Bell Canada v Canadian Telephone Employees' Association* [2003] SCC 36, which concluded that the functions of the CHRC did not constitute an infringement of the independence of the Tribunal.

The CHRC has issued a number of publications related to pay equity including a Guide to Pay Equity and Job Evaluation, as well as other materials directed specifically at employees and employers.⁸⁰

In relation to the Canada Labour Code, section 182 links the workplace inspection system to the pay equity provisions of section 11 of the CHRA, and permits Human Resources Development Canada to monitor compliance with section 11 of the CHRA, as it is also required to monitor the other provisions of the Labour Code.

Pursuant to the Labour Code, an Equal Pay Program was established. Over the years the Program has included educational and promotional activities as well as facilitating development of five

⁸⁰ Available at <http://www.chrc-ccdp.ca>.

sectoral initiatives (Canadian Pay Equity Task Force 2004: ch 3).⁸¹ An audit program has also been implemented to more systematically monitor progress of employers in achieving pay equity. The emphasis has been on assisting employers to understand their nature of their obligation in relation to pay equity. The program includes onsite inspections. In the event of employer 'recalcitrance', a case may be referred to the CHRC or a complaint may be filed.

Numerous criticisms have been made of the combination of the CHRA, the Guidelines and the complaint process, as well as PSECA. The complaint based approach has been criticised because of its limited effectiveness in achieving the stated objective. The Task Force recommended that new and more comprehensive federal pay equity legislation be framed with clear standards and criteria. There is concern about the general and open-ended language of the Guidelines, including the lack of an authoritative definition of the term 'establishment' (Canadian Pay Equity Task Force 2004: ch 3). Because of their generality and lack of clarity, the Guidelines have been dependent upon successive interpretations of Tribunals and this has led to an adversarial climate. Cases are complicated and take many years and expert witnesses have given testimony for weeks or even months: see eg *Attorney General of Canada v Public Service Alliance of Canada* (1999) 180 DLR (4th) 95.

The Public Service Alliance of Canada has been highly critical of the PESCA and the Public Service Labour Relations Board complaint mechanism.⁸² The ILO's CEACR has also been critical of PESCA in respect of the provisions for equitable compensation of female dominated job groups or 'job classes'. The CEACR noted that 'job classes' is defined in section 2 of the PESCA to mean 'two or more positions in the same job group that have similar duties and responsibilities, require similar qualifications ... and are within the same range of salary rates'. The point made by the CEACR is that the ILO's Equal Remuneration Convention provides for comparisons to be made not only between jobs that have 'similar' duties, but also between jobs that are entirely different in nature (ILO 2013: 436). The CEACR also noted recommendations made by the Canadian Pay Equity Task Force and by the Parliamentary Standing Committee on the Status of Women in a June 2009 report. Further criticisms made by those bodies included that the application of 'market forces' as a standard by which to assess the value of work can be inherently gender-biased and may not adequately ensure non-discriminatory assessment. There has also been concern over the high threshold for finding a 'female dominated group' (ILO 2013: 436).

The limitations of the federal system are particularly revealed in the recent case of *Public Service Alliance of Canada v Canada Post Corporation* [2011] 3 SCR 572. The case concerned the interpretation of the CHRA as well as the Guidelines. A union filed a pay equity claim on behalf of a predominantly female clerical and regulatory occupational group of employees within the Canada Post Corporation under the CHRA. The CHRC referred the complaint to the Canada Human Rights Tribunal for adjudication. The Tribunal hearing went for more than 400 days and its decision was then the subject of an appeal to the Federal Court. The Federal Court set aside the Tribunal decision and later a majority of the Federal Court of Appeal dismissed an appeal from the Court decision, with Justice Evans dissenting: *Public Service Alliance of Canada v Canada Post Corporation* [2011] 2 FCR 221. That dissenting opinion was subsequently upheld in its entirety by

⁸¹ The sectors included those covered by the Canadian Trucking Alliance, the Air Transport Association and the Canadian Association of Broadcasters.

⁸² See eg <http://psacunion.ca/pay-equity-new-law-compromises-equal-pay-women-federal-public-sector> (accessed 4 October 2013).

the Supreme Court of Canada, which thereby reinstated the decision of the Tribunal. Agreement as to the implementation of the Tribunal judgment was finally reached with Canada Post in June 2013 – some *thirty years* after the complaint was originally filed with the CHRC.⁸³

There were three primary issues raised on the appeal before the Federal Court and later before the Supreme Court. The first was whether, in a pay equity claim by a predominantly female occupational group, the Tribunal could select a predominantly male comparator group that included a significant number of relatively well paid women. The second was the standard of proof. The third concerned the findings that must be made after the jobs of members of the complainant and comparator groups have been evaluated, before their wages can be compared in order to determine if they are being paid differently for performing work of equal value.

In relation to these three issues, as a starting point, Justice Evans endorsed the conclusion of the Tribunal that on the balance of probabilities the members of the predominantly female occupational group were paid less than members of a comparator group for work of equal value. Justice Evans pertinently observed that ([2011] 2 FCR 221 at [165], [208]):

The resolution of pay Equity claims involves a mix of Art, science, human rights and labour relations. It can be difficult to fit multi-disciplinary enquiries of this nature within a legal framework: social scientists and management consultants do not always express themselves on the same terms as lawyers, on questions of evidence and proof, for example.

... Establishing the value or, more accurately perhaps, the relative value of work, is not a purely scientific exercise, admitting of a uniquely correct answer. It calls for the exercise of judgement; not all evaluators would necessarily adopt the same methodology for assessing work, or place the same value on given jobs. Those assessing the value of work must be afforded a margin of appreciation in applying the appropriate methodology to the job data.

The evidence as to value before the Tribunal was proffered by the complainant only.⁸⁴ The Tribunal, and Justice Evans on appeal, considered whether the evaluators had adopted a proper process in applying the methodology to the data.

Justice Evans, when considering the Guidelines, noted that they specifically contemplated the presence of women within a male-dominated comparator group, but not vice versa. The fact that some women at Canada Post were relatively well paid did not necessarily preclude the existence of systemic gender discrimination elsewhere in the Corporation. He observed that ([2011] 2 FCR 221 at [190]):

Systemic gender discrimination means that work performed by women tends to be undervalued, not that this is necessarily the case in every situation. The fact that [a particular level] has become gender – neutral, so that mail sorting has lost its character as ‘women’s work’, and is performed within a predominantly male occupational group, may well explain why women in the [a particular level] are relatively well paid.

⁸³ See <http://psacunion.ca/canada-post-pay-equity-timeline-thirty-years-fighting-pay-equity> (accessed 4 October 2013).

⁸⁴ Justice Evans noted that a tribunal would normally have before it job evaluations submitted on behalf of the parties as a result of a joint union-management study. However in this case the job evaluations were submitted on behalf of the complainants only, prepared by what was described as ‘the Professional Team’ ([2011] 2 FCR 221 at [198]).

With regard to the standard of proof when finding that members of the complainant and comparator groups were performing work of equal value, he concluded that the balance of probabilities was appropriate and added (at [198]):

Because it may be impractical to collect the necessary data for all the jobs performed by members of the groups, it is sufficient to evaluate the work performed by representative samples of the groups.

Finally, Justice Evans indicated that this case revealed that there was much to learn from the experience of provincial pay equity regimes within Canada, which did not seem to have been plagued with the same problems of protracted litigation as this federal scheme. Reference was also made to the recommendations of the Task Force report (Canadian Pay Equity Task Force 2004).

C.9.3 Provincial approaches

Unlike Australia, many of the Canadian provinces have specific statutes which give detailed attention to the need for, and the means to address, pay equity. The wording of the legislation does not necessarily use the language of the ILO Convention. For example, equal pay for the same or similar work is a requirement of employment standards legislation in Ontario, Manitoba, Saskatchewan, Yukon, Newfoundland and the Northern Territories (Ontario Pay Equity Commission 2011); whereas equal remuneration for work of equal value is legally required in legislation in Nova Scotia and New Brunswick, but is limited to the public sector and has not been extended to the private sector (ILO 2013: 437; Ontario Pay Equity Commission 2011).

Four of the provinces are referred to below, but the focus is predominantly on the legislation and practice in the provinces of Ontario and Québec. These appear to have the most developed systems, applicable to both the public and private employment sectors.

C.9.3.1 New Brunswick

The *New Brunswick Pay Equity Act 2009* entered into force in 2010 and applies to the public sector only. A Pay Equity Bureau provides information, assists in the implementation and maintenance of pay equity, monitors employer progress, and generally oversees the pay equity process. The obligation is on the employer to implement and maintain pay equity. The Pay Equity Bureau is not complaint driven. When workplace parties cannot agree on a pay equity process, an arbitrator may be appointed (Ontario Pay Equity Commission 2011). New Brunswick has also launched a 'Women leading Women' pilot program designed to develop female leaders and there is also a 'Five-Year Wage Action Plan' (ILO 2013: 437).

C.9.3.2 Nova Scotia

This province has a similar legislative and process approach as New Brunswick, with some further embellishments (Ontario Pay Equity Commission 2011). A pay equity plan is negotiated between the workplace parties. Once the pay equity process begins, the parties are required to agree on a gender-neutral job evaluation process and the definition of male and female dominated job classes. Pay equity is considered to have been achieved in a female dominated job class where the pay rate for the female dominated classes is equal to the pay rate of the male dominated class, which is performing work of equal value. There are other specific provisions under the Pay Equity Act for circumstances where, for example, the employer has two or more male dominated classes; or if there is no male dominated class that is performing work of equal value. In addition to this, a Pay Equity Commission is able to receive and investigate complaints and is authorised to make determinations (Ontario Pay Equity Commission 2011).

C.9.3.3 Québec

The *Pay Equity Act of 1996* requires equal remuneration for work of equal value and applies to both public and private sector employers with more than 10 employees. If there are more than 100 employees there is a requirement for the employer to develop a pay equity plan. This operates on the basis of members of a 'job class' and covers members who have 'similar duties, required qualifications and the same salary scale'. If a job class is 60 per cent male or female, it may be considered a male or female dominant job class for pay equity purposes. However there are other criteria for determining gender predominance and they include:

- if the work is 'commonly associated with men or women owing to gender-based stereotyping';
- the difference between the representation of women in the class and women in the labour market generally is considered significant; or
- the historical pattern of incumbency is predominantly one or other gender.

Value is determined by comparing jobs primarily held by women and those primarily held by men, to determine the value of these classes of jobs in a gender-neutral way. This is done by reference to four factors: qualifications, responsibilities, physical and mental effort, and working conditions.

An employer with between 50 and 99 employees may choose to set up a pay equity committee to determine value and wages. If there are less than 50 employees, a process is still required and one method which may be chosen is the creation of a pay equity plan.

The Pay Equity Act requires the establishment of sector-based pay equity committees to provide advice and help with the development of pay equity plans. Annual reporting is required of all legally registered employers with six or more employees, including a requirement to test for pay equity compliance. There is also an audit process which is the responsibility of the employer to be conducted every five years.

In addition to this mandatory pay equity process, there is a complaints mechanism through the Commission of Pay Equity (CES). The CES is composed of a Chair and two Commissioners, who may mediate, conciliate or arbitrate a dispute. Importantly the CES has authority to initiate an investigation on its own motion without receiving a complaint. It may also utilise selected experts to conduct investigations.

There are financial penalties and fines for non-compliance. Where wage compensation is allowed, the maximum period for the calculation of adjustment can be up to five years prior to the date when a complaint was filed.

C.9.3.4 Ontario

The *Pay Equity Act*, RSO 1990 defines pay equity as 'equal pay for work of equal value'. There are also other statutes which may offer remedies in respect of pay equity, including the Employment Standards Act 2000 and the Ontario Human Rights Code.

The Pay Equity Act is specifically aimed at redressing 'systemic gender discrimination in compensation for work performed by employees in female job classes' (section 4(1)). Pay equity under the Act requires that all employees, both men and women, in undervalued 'female job classes' should receive pay equity wage adjustments. The wages of employees in female job classes are required to be adjusted so that they are at least equal to the wages of employees in

male job classes found to be comparable in value. Value is determined on the four factors of skill, effort, responsibility and working conditions (section 5).

The Act prescribes that in deciding whether a job class is a female job class or a male job class, regard shall be had to three particular criteria, namely current incumbency, historical incumbency and 'gender stereotype' of the field of work (section 1(1), 1(5)). Pay equity is achieved by one of three forms of comparison of female job classes: a job-to-job method; a proportional value method of comparison; or a proxy method in the case of an employer in the public sector (section 5.1(1)).

The requirement for the job comparison process to be gender neutral was discussed in some detail in *Ontario Nurses' Association v Regional Municipality of Haldimand–Norfolk* [1992] CanLII 4705 (ON PEHT). Four components in the job comparison process were identified: (1) accurate collection of job class information;⁸⁵ (2) the mechanism or tool to determine the value of job classes;⁸⁶ (3) the application of the mechanism or tool to determine the value of the work; and (4) the comparison of job classes.⁸⁷ In addition, the case discussed five tests for determining whether the tool or mechanism used to value the work was applied in a gender neutral way.⁸⁸

The *job-to-job* method comparison involves asking whether 'the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value' (*Pay Equity Act 1990*, section 6(1)). The Act sets out a sequence of 'idem' approaches (section 6(1), 6(5)), depending on what comparators can be found within the establishment.⁸⁹ It commences with identification of a male job class of equal or comparable value and thereafter there is a sequence which includes the situations where more than one male comparator is found, or if no male job class is found of equal or comparable value. If after applying the sequence there are female job classes that do not have a male comparator, the employer is required to use the proportional value method to achieve pay equity.

The *proportional value* method indirectly compares female and male job classes by comparing the female job class with a 'representative' male job class or a 'representative' group of male job

⁸⁵ Job class information was further broken down by the tribunal into (1) the range of work performed in the establishment; (2) whether the system makes work, particularly women's work, visible in the workplace; (3) the information to accurately capture the skill, effort, responsibility and conditions for both female job classes and male job classes to be used as a comparator; and (4) whether the information has been collected accurately and consistently.

⁸⁶ The Ontario Pay Equity Commission (2012: 45) notes that there are several types of approach to value job classes. These include a simple ranking method, or classifications or grade descriptions that include the four required factors. A more detailed and common approach is the 'point factor method', which involves assigning points to sub factors and adding them to provide a score for the job class. The Pay Equity Office has developed materials and online resources in order to enable employers to use the 'point factor method'.

⁸⁷ A helpful note by the Ontario Pay Equity Commission (2012: 46) expands upon the job evaluation tool and the need for it to be gender bias free and in particular not developed with only men's jobs in mind. Further it is noted that the focus of the act is not on an evaluation of individual job classes, but instead on comparisons to be made between female job classes and male job classes.

⁸⁸ The tests were: (1) Is the valuing tool applied consistently without regard to the gender of the job class?; (2) If a committee is used to evaluate job classes, is the committee balancing the interests of the parties with duties and obligations under the Act? (3) Is such a committee sufficiently knowledgeable to allow the parties to meet their obligations? (4) Is the decision-making done in a manner free of gender bias? (5) Does the mechanism identify systemic wage discrimination?

⁸⁹ Comparisons also vary depending on whether unionisation is present within the job class. The distinction between unionised and non-unionised settings is a strong feature of the Act and in particular in relation to pay equity plans (Ontario Pay Equity Commission 2012).

classes (section 21.3(1)). Pay equity is achieved when the relationship between the value of the work performed in terms of compensation received is the same for both female and male job classes. This method is applied in establishments where male job classes are not available in large enough numbers, or else their job values are such that they cannot be used for direct comparisons.

Regarding the proportional value method and what is 'representative', the Tribunal in *Hudson v Hamilton Police Association* [2010] Can LII 61163 (ON PEHT) indicated that in the absence of a definition, the plain English meaning suggests that that it is not necessary to include every male job class in the proportional value analysis. Instead representative male job classes are those which will best reflect the value/compensation ratio at which male job classes in the group are compensated. The tribunal also referred to not including a class, which is paid at an anomalous rate because for example skills are in short supply.

The *proxy* method of comparison allows organisations in the broader public sector, which have mostly female job classes, to obtain and apply pay equity information from another public sector organisation. The definition of the method is set out in section 21.12, which although formally repealed in 1996 is still taken to operate by reason of an Ontario Court ruling. The provision only applies, however, to employers that had employees as at July 1993 (Ontario Pay Equity Commission 2012: 5, 86).

The proxy method allows eligible public sector organisations called 'seeking employers' to go to another public sector employer and borrow job and pay equity adjusted job rate information about similar female job classes from the 'proxy employer'. The proxy employer must already have identified pay equity wages, using either job-to-job proportional value comparison in relation to the female job classes. The seeking employer compares its female job classes to the proxy female job classes using a proportional value method and determines pay equity adjustments to enable its organisation to also achieve pay equity (Ontario Pay Equity Commission 2012: 86–92). Proxy employers are identified in a schedule to the Pay Equity Act, covering nine broad categories drawn from the care sector.

In addition to stating the four components for job comparison, section 8 of Ontario's Pay Equity Act expressly states that the Act does not apply to prevent differences in 'compensation' between a female job class and a male job class if the employer is able to show that the difference is the result of five named exceptions. In summary they are:

1. a formal seniority system that does not discriminate on the basis of gender;
2. a temporary employee training or development assignment that is equally available to male and female employees and that leads to career advancement for those involved in the program;
3. a merit compensation plan that is based on formal performance ratings that does not discriminate on the basis of gender;
4. the personal practice known as 'red-circling' where based on gender neutral re-evaluation process the value of a position has been downgraded. This exception has a detailed description
5. a skills shortage that is causing a temporary inflation in remuneration because the employer is encountering difficulties in recruiting employees with the record skills for positions in the job class.

Section 8(2) of the Pay Equity Act also states that the Act does not prevent differences in remuneration between female job classes and male job classes, if the employer can show that this is a result of differences in bargaining strength. A further exception is if an employer designates a position as being 'casual', but there are restrictions on the use of that term. A Guide to the Act prepared by the Ontario Pay Equity Commission (2012) makes the important point that it is the employer's responsibility to show that the wage difference is a result of a circumstance or pay practice described in the Act and that the exceptions will be narrowly defined: see *BICC Phillips Inc v Group of Employees* [1997] CanLII 1223; *Stevenson Memorial Hospital v Ontario Public Service Employees Union, Local 360* [2000 CanLII] 22419.

In relation to the exception of differences in bargaining strength, this is further amplified in the Guide and two cases are noted. First, the defence of bargaining strength cannot be raised to explain wage differences until the employer has achieved pay equity for all employees in the establishment (see *York Region Board of Education v York Region Women Teachers' Association* [1995] CanLII 7202). Second, the Pay Equity Hearings Tribunal has interpreted bargaining strength to mean the ability of a bargaining unit to exercise power on behalf of all of its members. It refers to differences between different bargaining units, as opposed to differences within the same unit.

The promotion, implementation and enforcement of the Pay Equity Act is achieved through the Pay Equity Commission, which is in turn composed of two separate and distinct bodies: the Pay Equity Office and the Pay Equity Hearings Tribunal. The [Pay Equity Office](#) is responsible for enforcing the Act and it investigates, attempts to settle, and resolves pay equity complaints and objections to pay equity plans by order or notice of decision. The Office also provides programs and services to help people understand and comply with the Pay Equity Act. A highly useful publication is the Guide to Interpreting Ontario's Pay Equity Act issued by the Office in May 2012 (Ontario Pay Equity Commission 2012). The Guide gives an overview of the minimum requirements of the Pay Equity Act with guiding principles for interpreting the Act derived from the provisions of the Act, Tribunal decisions and the Office's practical experience.⁹⁰ It is designed primarily to help employers understand their obligations. It does not replace the legal authority of the Act, and nor does it bind any tribunal.

The Guide describes the pay equity process in Ontario as either a self-managed process or a negotiated process in unionised work places, and remedies are not reliant on a complaint being made. The main purpose of the Act is the focus on gender neutrality, requiring employers to compare work in a gender neutral way so that the work done in female dominated job classes is made as visible as the work done in male dominated job classes and is compensated accordingly. The onus is placed on every employer, and pay equity is achieved when every job class in an establishment has been compared to a job class or job classes under one of the comparison methods described in the Act. Part II of the Act sets out specific requirements for private sector employers of 10 or more employees and also public sector employers. There are staged

⁹⁰ The practical illustrations in the Guide are invaluable. Taking one simple illustration, the Guide expands upon the meaning of 'gender stereotypes' referred to in the definition of job classes in section 1(5) of the Pay Equity Act. It describes what it is, how it is practically addressed and provides a case reference. The Guide indicates that in applying the criterion of gender stereotype, employers sometimes rely on statistical data, reports or information such as the gender breakdown of occupational classifications derived from Statistics Canada, graduation rates by gender in professional programmes all fields of study, or occupational data by gender from professional associations. The Guide indicates that statistical data is not necessarily the entire answer and it is important to look at the actual job characteristics and duties of the job class and whether those characteristics and duties are associated with or can be found in a typical female job or male job. A supporting case to which reference is made is *Association of Professional Student Services Personnel v Toronto Catholic District School Board* [2006] CanLII 61262 (ON PEHT).

mandatory implementation dates depending on the number of employees, which include pay equity plans to be drawn up and established.

In 2011, the Pay Equity Office launched the Wage Gap Program, designed to examine current compensation data and assess the likelihood of gender wage gaps for non-unionised employees in private sector workplaces of Ontario. The Wage Gap Program enables the Office to more accurately direct its efforts to support workplaces that appear to have pay equity gaps. Initially, the Office piloted the Program by obtaining compensation data from employers with over 500 employees. Workplaces with 250–499 employees are now being canvassed and the next bracket to be targeted are workplaces with 100–249 employees.

The Tribunal is responsible for adjudicating disputes that arise under the Act and has exclusive jurisdiction to determine all questions of fact or law that arise in any matter before it. The decisions of the Tribunal are final and conclusive for all purposes.

Part IV of the Act sets out the processes for making complaints and resolving disputes. There are no time limits on a complaint and it can be made for any period during which the Act has been in effect. A complaint may be made by an employer, a current or former employee, a group of employees or any bargaining agent representing employees. There are special provisions in relation to a negotiated pay equity plan on the bases upon which challenge can be made (Ontario Pay Equity Commission 2012: 94–5)

C.9.4 Overall summary

There are significant difficulties with the Canadian federal system, particularly by contrast to the more focused and proactive models which have been implemented in Québec and Ontario. These provincial models place the emphasis on the obligation of employers to implement and to achieve pay equity within their establishments by use of specified mandatory pay equity evaluation models. There is specific pay equity legislation, which does not simply form part of more generalised labour law or human rights law. This legislation sets out the mandatory obligations of employers to achieve pay equity through the development of pay equity plans, or by negotiation and the setting up of pay equity committees. Monitoring and auditing are part of the process. Complaint mechanisms are then focused on whether the evaluation process used within an establishment has appropriately evaluated and applied gender equity within the establishment. There are systematic monitoring and auditing processes conducted by a dedicated government department. Those same departments are also producing supportive material, mainly for employers in order to achieve gender pay equity. This material contains detailed information to assist employers, and of course employees, to undertake job evaluations which, are not gender biased. The complaint mechanism is regarded as a last resort where a compromise cannot be reached between employers and employees.

C.10 New Zealand

C.10.1 Legislation and case law

Labour relations history in New Zealand has been somewhat volatile over the last 30 years. It has moved from having a centralised arbitration and wage fixing system to a far more decentralised model which began in about 1987 and hastened with the passage of the *Employment Contracts Act 1991*. The process of decentralisation removed compulsory arbitration and it also moved away from national occupational awards towards industry and collective bargaining. Legislation was

sometimes short lived.⁹¹ Brief overviews and comments about of this history can be found in various publications (Hall 2007; Hyman 2004; Hyman 1994).

This section takes up the history from the time of the Commission of Enquiry into Equal Pay published in New Zealand in 1971.⁹² The following year, in 1972 the Equal Pay Act was passed. The *Equal Pay Act*, as amended, remains the most relevant piece of legislation and is the most important in respect of equal remuneration. Other relevant legislation includes the *Human Rights Act 1993* and the *Employment Relations Act 2000*.

The Equal Pay Act defines 'equal pay' to mean a 'rate of remuneration for work in which there is no element of differentiation between male employees and female employees based on the sex of the employees'. 'Remuneration' is also defined as meaning the salary or wages actually and legally payable and includes overtime bonuses, special payments and allowances, whether paid in money or not. Section 2A of the Act, inserted in 1991 and later amended in 1994, is headed 'unlawful discrimination'. This section provides that it is unlawful to refuse or omit to offer or afford any person 'the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description by reason of the sex of that person'.

The ILO has been commenting for a number of years on the fact that this provision, as well as similar provisions contained in the Human Rights Act, limits the requirement for equal remuneration in a manner that is more restrictive than the concept of 'equal value', because of the use of the words 'same or substantially similar'.

Section 3 of the Equal Pay Act provides the criteria to be applied in determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration of male and female employees for any work or class of work payable under any instrument. The provision distinguishes between work which is not 'exclusively or predominantly performed by female employees' and that which is.

A unique aspect is the role of the Employment Court, which is established pursuant to section 9 of the Equal Pay Act. This provides that 'the court shall have power from time to time, of its own motion or on the application of any organisation of the employers or employees, to state, for the guidance of parties in negotiations, the general principles to be observed for the implementation of equal pay in accordance with the provisions of sections 3 to 8'.

A recently decided case of the Employment Court is *Service and Food Workers Union NGA Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 ARC 63/12. The case was a joinder of two proceedings. The first was an application under the Equal Pay Act by the relevant employees' union and the second an individual claim by an employee named Kristine Bartlett, against the same defendant. The proceedings were referred to the Employment Court by the Employment Relations Authority. The case was a hearing of a preliminary point regarding the power of the Court to state principles pursuant to section 9 of the Equal Pay Act. Eight questions were postulated by the parties, all of which concerned the scope of the requirement for equal pay for the female employees for work exclusively or predominantly performed by them, and then how

⁹¹ For example the Employment Equity Act 1990 and the Employment Contracts Act 1991.

⁹² History of Pay and Employment Equity in New Zealand, available at <http://www.dol.govt.nz/services/PayAndEmploymentEquity> (Accessed 1 September 2013).

compliance with this requirement was to be assessed. It involved consideration of the scope of sections 3 and 9 of the Act.

The factual background is that the defendant operated rest homes in the residential aged care sector. There were predominantly female workers at the defendant's aged care centre, with 106 female and four male caregivers. They were all paid at the same rate, which was around \$13.75 to \$15 per hour, the minimum wage being \$13.75 per hour. The essence of the claim was that the female caregivers were being paid a lower rate of pay than they would be if the provision of aged care were not so substantially female dominated. While the claim was brought on behalf of a limited number of plaintiffs, it was noted that there were potentially broad implications not only within the residential aged care sector, but also more generally. A number of organisations sought to intervene.

The Court decided that section 3(1)(b) of the Act requires that equal pay for women for work predominantly or exclusively performed by women is to be determined by reference to what men would be paid to do the same work, abstracting from skills, responsibility, conditions and degree of effort, as well as from any systematic undervaluation of the work derived from the current, historical or structural gender discrimination. The Court also determined that when considering this issue it should have regard to what is paid to males in other industries, if enquiries of other employees of the same employer or of other employers in the same or similar enterprise or industry or sector would be an inappropriate comparator group.

This latter conclusion gives some scope for a broader range of comparators, but at the same time there is a limitation on the comparators by reason of the fact that the legislation is limited to work of 'the same or substantially similar skills', instead of work of 'equal value'.

The plaintiffs' submission was that male gardeners at the same establishment could be used as part of the consideration as a comparator. To this the Court responded (at [20]):

We do not need to, and cannot at this preliminary stage, decide which comparator is appropriate in the circumstances of this case. However, we note two things. First, it is unclear to us how a gardener can be said to have the same or substantially similar skills, responsibility and service as the plaintiff female employees of the defendant. In any event, and somewhat ironically, it appears that gardeners (who tend to be male) are generally remunerated at a higher rate (around \$16.56 per hour) than the plaintiff employees in this proceeding (around \$13.75–\$15 per hour).

This observation of the Court appears to illustrate gender stereotyping of jobs and how this impacts upon women's employment, but at the same time demonstrates the limitations of the scope of the legislation because of the wording.

C.10.2 Process for achieving equal pay

Section 2A(2) of the *Equal Pay Act 1972* provides for 'unlawful discrimination'. This is linked to section 145 of the *Human Rights Act 1993*, which prohibits both direct and indirect discrimination on the grounds of sex. An employee has an entitlement to make a complaint in respect of an allegation of discrimination either under the Human Rights Act or the Equal Pay Act. The employee must choose one of those entitlements, but not both.

A complaint may be made to the Employment Relations Authority for unlawful discrimination with respect to pay. The Authority has an unusually extensive jurisdiction under the Equal Pay Act 1972. This includes in section 12 the right to determine the classification of any work, any rate of remuneration that would represent equal pay, the minimum percentage for the adjustment, and any interim increase. It may also determine any question arising under sections 4 to 7 of the Equal Pay

Act and 'any question of law, including the interpretation of the Equal Pay Act 1972, in relation to any instrument arising out of this Act' that is referred to it by any party, or by an appropriate authority or an inspector. It has additional powers under section 240 of the Employment Relations Act.

The other alternative is to make a complaint under the Human Rights Act. In 2001, the Human Rights Act established the role of an Equal Employment Opportunities Commissioner and extended grounds for discrimination in relation to the public sector and with a revised complaints resolution process. In 2003 a Tripartite Pay and Employment Equity Task Force was established and its report outlined a five-year action plan on pay and employment equity, referred to as the Pay and Employment Equity Plan of Action. This was rolled out in the public service, public health and public education sectors. At the end of the five years in 2008, it was discontinued along with the relevant unit within the Department of Labour. Thereafter it appears that the responsibility for further research and policy work on gender pay and employment equity has been undertaken through the Ministry of Women's Affairs (ILO 2012a: 551).

The Department of Labour through the Ministry of Business, Innovation and Employment has developed a Gender-inclusive Job Evaluation Standard which is available on the Department of Labour website.⁹³ This website includes other support materials which include a four step Pay and Employment Equity Review Process, a Spotlight Skills Recognition Tool and general support for employers to apply a 'voluntary standard'. The rationale for requiring a standard is also set out. It makes reference to the Human Rights Act, the Employment Relations Act, the State Sector Act and the Crown Entities Act and includes requirements for public sector employers to be 'good employers' and meet equal employment opportunity requirements. The background and value of self-assessment skills tools for employers, so as to mainstream gender equity (including in the private sector), is discussed in a recent publication (Hampson & Smith 2009: 195–211).

C.10.3 Summary

In New Zealand, there is increasing proactive encouragement through the Department of Labour and the Ministry of Women to promote self-assessment models in the private sector, which are not mandatory. The resort made to the courts appears limited. There are very comprehensive assessment tools, which are available for employers, the process is voluntary and there does not appear to be any systematic formal follow-up or monitoring, which contrasts with the position in Canada. Complaints can be made either by unions or individuals but they are limited to an establishment. It was, however, noted in the recent *Service and Food Workers Union* case that the decision could have broader effect and hence the right to intervene was given to non-parties.

C.11 United States

C.11.1 Federal legislation

The *Equal Pay Act* was enacted in 1963 and forms part of the *Fair Labour Standards Act* of 1938. Since 1979, it has been administered and enforced by the Equal Employment Opportunity Commission (EEOC). Section 206(d) of the Equal Pay Act prohibits sex based wage discrimination by an employer in an establishment from paying wages to employees at a rate less than the rate it pays to employees of the opposite sex 'for equal work on jobs the performance of which requires

⁹³ Available at <http://www.dol.govt.nz/services/PayAndEmploymentEquity> (accessed 3 September 2013).

equal skill, effort, and responsibility and which are performed under similar working conditions.’ There are, however, four named exceptions: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; and 4) a differential based on any factor other than sex.

Title VII of the Civil Rights Act was passed in 1964. Section 703 of this Act prohibits employers with at least 15 workers from discriminating against employees on the basis of sex in relation to the compensation, terms and conditions of employment, which includes payment of wages and benefits.⁹⁴ Section 703(k)(1)(A) refers to the burden of proof in unlawful employment practices based on ‘disparate impact’. This section is confusingly worded; the consequence is that the plaintiff has the burden of persuading the fact-finder that the employment practice used by the employer adversely affects the employment opportunities of a Title VII protected class (which includes sex). If the plaintiff fails to meet this burden, the court must dismiss the action under Rule 41(b) of the Federal Rules of Civil Procedure.

In *Griggs v. Duke Power Co* (1971) 401 US 424 the Supreme Court explained what is meant by the concept of the ‘disparate impact’ and set out a three-step model of proof that the plaintiff and defendant must use in presenting their cases. The Court stated that Title VII ‘proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation’. In the three-step model the plaintiff must first prove that a specific employment practice adversely affects the employment opportunities of Title VII protected classes. If the plaintiff can establish a disparate impact, the employer must demonstrate that the challenged practice is justified by ‘business necessity’ or that the practice is ‘manifestly related’ to job duties. If the employer does not meet the burden of production and persuasion in proving business necessity, the plaintiff prevails. However, if the employer does meet these burdens, the third step requires the plaintiff to demonstrate that alternative practices exist that would meet the business needs of the employer which would not have a discriminatory effect.

In 1981, in *County of Washington v Gunther* (1981) 452 US 161 the Supreme Court ruled that Title VII of the Civil Rights Act was not limited by the equal work standard set out in the Act and could be established even when men and women were in different jobs and are not performing ‘equal work’. The Court recognized the broad remedial scope of Title VII and considered that it extended beyond the narrow confines of the Equal Pay Act. Commentators suggest that this interpretation has opened a door for pay equity for different jobs (Figart & Kahn 1997: 58). Furthermore, the Court’s expansion of Title VII to allow for sex-based wage discrimination claims beyond the scope of the Equal Pay Act’s limited ‘equal work’ requirement has substantially enhanced the potential availability of relief for victims of employment discrimination. Employees who present direct evidence of their employer’s intentional discrimination, but who are unable to show that a member of the opposite sex is receiving higher wages for performing substantially identical work, may now seek relief. Thus, women in traditionally female jobs and unique positions, as well as those deliberately segregated into lower paying jobs, will be afforded the opportunity to prove sex-based wage discrimination under Title VII (Saltoun 1983).

The wording of section 206(d) of the Equal Pay Act also does not conform to the wording of ILO Convention 100. It is limited by being confined to ‘equal work’, which requires ‘equal skill, effort, and responsibility’. Before an employer is required to proffer an affirmative defence based on the

⁹⁴ Section 703 also contains the four exemptions referred to in the Equal Pay Act.

four exceptions, a plaintiff must make a *prima facie* case showing wage discrimination. The plaintiff, usually female, must then identify a comparable (male) employee who makes more money for performing 'substantially equal' work, which requires equal skill, effort, and responsibility under similar working conditions. The term 'substantially equal' was coined by the United States Court of Appeals for the Third Circuit in *Shultz v Wheaton Glass Co* (1970) 421 F 2d 259, which involved female 'selector-packers' who were paid less than the male 'selector-packer-stackers'. The Court decided that the Equal Pay Act only required jobs to be 'substantially equal', not identical. Even with this broadened interpretation, however, there is still only a narrow base for a comparator. If a plaintiff fails to make such a *prima facie* case, then the employer need not offer any defence at all (*Miranda v BB Cash Grocery Store Inc* (1992) 957 F 2d 1518 at 1526)

Furthermore, if a plaintiff successfully makes out a *prima facie* case, an employer may justify a wage disparity even where there is substantially equal work being done. The fourth of the defences listed in the Equal Pay Act has been especially problematic, in spite of the precedent provided by the 1974 Supreme Court decision in *Corning Glass Works v Brennan* (1974) 417 US 188. In that case, Corning Glass Works created a nightshift inspector position at a time when New York and Pennsylvania prohibited female employees from working at night. The employer argued that male employees would not perform inspection work unless they received more money than the daytime female inspectors. In other words, the pay differential was not based on sex but on the company's need to accommodate the male nightshift workers. The Court rejected this reasoning, recognising that the company's decision to pay the women less for the same work that the men performed 'took advantage' of the market and as a consequence was prohibited by the Equal Pay Act. The Court rejected the argument that 'market forces' can constitute a 'factor other than sex', as sex is precisely the factor upon which those forces were based.

Despite this unequivocal ruling, employers have continued to argue, and courts have continued to accept, a 'market forces' theory to justify pay differentials. Moreover, some courts have applied a 'factor other than sex' in a way that is unrelated to the qualifications, skills or experience needed to perform the job, which undermines the principles of the Equal Pay Act. For example, in a 2008 case, a New York Federal District Court dismissed the plaintiff's Equal Pay Act claim, holding that 'salary matching'⁹⁵ is permitted under the Equal Pay Act because 'it allows an employer to reward prior experience and to lure talented people from other settings' (*Sparrock v NYP Holdings, Inc* (2008) No. 06 Civ. 1776, 2008 WL 744733 at [16]). The Court came to this conclusion despite the fact that the men and women had similar experience and qualifications for the position.

Following some recent high profile cases in the Supreme Court, an enquiry was conducted in 2009 by the Committee on the Judiciary of the United States Senate. The purpose of the enquiry was to examine the impact of the Supreme Court's decision in *Ledbetter v Goodyear Tire and Rubber Co Inc* (2007) 127 S Ct 2162. In that case, Ms Ledbetter worked as a manager at a tyre company and for almost two decades was paid less than her 15 male colleagues. She sued under the Equal Pay Act and a jury ruled in her favour. There was an appeal to the Supreme Court, which did not find that she had failed to prove her case, rather it barred her claims because it found that she had not sued quickly enough. Under Title VII of the Civil Rights Act 1964, an employee has 180 days after a discriminatory act to file a claim. Prior to the Supreme Court's decision, a majority of the Federal Circuit Courts recognised the 'pay check accrual rule' in employment discrimination cases, which

⁹⁵ That is, for example, raising a salary to match or exceed a salary that a person was previously earning or may be available in the market place.

refers to the recognition by courts that each new discriminatory payment amounted to a separate discriminatory act. This meant that employees were able to claim as long as they could show they had been paid on a discriminatory basis within the 180 day limitation period. The Supreme Court overturned the previous court decisions on this point. This was in spite of the fact that Ms Ledbetter was unaware of the date the pay discrimination began and the employer prevented her from gathering information that would have been necessary to file a complaint within the limitation period. Supreme Court Justice Ruth Bader Ginsburg was the sole dissenting judge on the case.

In response to the Supreme Court's decision, Congress introduced the 'Lilly Ledbetter Fair Pay Act', which specifically addressed the Court's decision. President Obama signed the Bill into law in January 2009. Subsequently, a further Bill was introduced into the House of Representatives called the 'Paycheck Fairness Act' which, amongst other things, would have required employers to show that pay disparity is truly related to job performance and requirements and not to gender. It also sought to strengthen remedies for pay discrimination. After having passed in the House in January 2009 with bipartisan majority, the Bill was defeated in the Senate in November 2010. It was reintroduced again on 12 April 2011 but in 2012 was again voted for in the House and defeated on a procedural vote in the Senate. The Bill was reintroduced in January 2013 in both chambers of the new Congress, but as at October 2013 it has still not been passed.

Another high-profile case was that of *Wal-Mart Stores Inc v Dukes* (2011)131 S Ct 2541, which involved a claim made by one and a half million plaintiffs who were current and former female employees of Wal-Mart. They alleged that the discretion exercised by their local supervisors over pay and promotion discriminated against them in violation of Title VII of the Equal Pay Act. The District Court and the Court of Appeal had previously approved the certification of the class action. This was then the subject of an appeal and the Supreme Court dismissed the claim on the basis that it should not have been certified as a class action. Although the Wal-Mart delegation of discretion over pay and promotions was a uniform policy throughout the stores, the very nature of discretion was such that managers could exercise it in various ways. Hence the case would be dependent on individual circumstances and remedies, which were unique to each employee.

C.11.2 Overview of the process of achieving equal pay

There are many legal challenges in the United States for women seeking to bring claims involving discrimination on the basis of pay gaps. The process for alleging equal pay discrimination depends on whether a person is employed within the public or private sectors.

In the private sector, there are two possible approaches. A person can file a charge of discrimination with the EEOC, or alternatively take a job discrimination lawsuit directly to the courts. If the charge is filed with the EEOC, there is a progressive process of resolution, commencing with mediation and then an investigation. If an EEOC investigation finds no violation, then a Notice of Right to Sue gives permission to the person to file a suit in the courts. If a violation is found, then an attempt is made to reach a voluntary settlement through the EEOC. If that is not achieved a case will be referred to the EEOC legal team or the Department of Justice, who decide whether or not they will file a lawsuit on behalf of the complainant. Not all claims receive such assistance. If there is a decision not to file a lawsuit, then again a Notice of Right to Sue is issued and the complainant may proceed without EEOC assistance.

Any court claim must be filed within two years from the day the discrimination took place. There are advantages of pursuing a claim at least initially through the EEOC, as the case may be taken up and resolved through that process. EEOC statistics reveal that some 1082 charges were filed with

the EEOC in the 2012 financial year. While 59.1 per cent were assessed as having no reasonable cause, the combination of successful settlements and conciliations resulted in \$9.9 million of benefits for claimants (US Equal Employment Opportunity Commission 2012).

Federal government employees must contact an EEOC Counsellor within 45 days from the date of the alleged discrimination. Once contact has been made, the next step is either counselling or an alternative dispute resolution process such as mediation. If the dispute is not settled by mediation, the complaint can go through an investigation process and ultimately to a hearing before an EEOC administration judge, which can then be the subject of appeal or challenge in a Federal District Court.

In relation to programs for assistance for employers to address the problem of equal pay discrimination, little overt assistance is given online through the EEOC. The situation appears dramatically different from the programs and toolkits available in Canada (see section C.9). In a speech commemorating the 50th Anniversary of the Equal Pay Act, President Obama referred to the establishment of a National Equal Pay Task Force 'to help crack down on violations of equal pay laws' and to do so through education and outreach. A recent publication by the National Equal Pay Task Force published in June 2013 and titled '50 Years after the Equal Pay Act' (National Pay Equity Task Force 2013) provides a comprehensive background and information about the equal pay gap, as well as promotional material as to the work of the Task Force. Included in this is a reference to collaboration with other agencies, such as the Women's Bureau, which has instituted 'An Employer's Guide to Equal Pay'. However, the Task Force appears to be a work in progress.

C.11.3 State approaches

Given the context of this project, this section will give simply a thumbnail sketch of the approaches taken by States of the United States in relation to equal pay. The literature and information on the topic is vast, but not necessarily up to date.

Legislation varies considerably across the 50 States. The National Conference of State Legislation provides a chart of references to legislation and citations for States as at May 2013, but only limited detail is given as to the content of the provisions. The chart indicates that there is no legislation on equal pay in Alabama, Mississippi, Utah, Vermont or Wisconsin.⁹⁶

In broad terms, the legislation in many States uses the same or similar wording as that set out in section 206(d) of the Equal Pay Act. They refer to 'equal work' requiring 'equal skill, effort and responsibility ... under similar working conditions' (California, Cal Labor Code 1197.5; Rhode Island, Gen Laws 1956 28-6-18; Minnesota, MSA 181.67; New York, Labor Law 194). Sometimes the legislation refers to 'equal work or work on the same operations' (Rhode Island, Gen Laws 1956 28-6-18). The legislation is limited to individual employers and frequently only to the public sector employers. In Washington State (Washington, RCWA 49.12. 175), the legislation prohibits wage discrimination 'as between sexes or who shall pay any female a less wage, be it time or piece work, or salary, than is being paid to males similarly employed, or in any employment formerly performed by males'.

Another common formulation used in State legislation relates to the exceptions that allow for the variation of wages between the sexes by reason of seniority, a merit which measures earnings by

⁹⁶ Available at <http://www.ncsl.org/> (accessed 17 September 2013).

quantity or quality of production, or a catchall 'differential based on any other factor other than sex' (Minnesota, MSA 181.67; New York, Labor Law 194; California, Cal Labor Code 1197.5). The broadest formulation of exceptions is set out in the legislation of Rhode Island (Rhode Island, Gen Laws 1956 28-6-18), which permits differences based on seniority, experience, training, skill, or ability; duties and services performed, either regularly or occasionally; the shift or time of day worked; or availability for other operations or any other reasonable differentiation except difference in sex.

Examples of States which provide for comparable work or comparable worth appear limited, but include Alaska (Alaska, RCW 18.20.270) and Montana. For example, Montana's equal pay legislation provides (Montana, MCA 2-18-208):

Comparable worth. The department of administration shall, in its continuous efforts to enhance the current classification plan and pay schedules, work toward the goal of establishing a standard of equal pay for comparable worth. This standard for the classification plan shall be reached by:

- 1) eliminating, in the classification of positions, the use of judgments and factors that contain inherent biases based on sex; and
- 2) comparing, in the classification of positions, the factors for determining job worth across occupational groups whenever those groups are dominated by males or females.

As can be seen from this formulation, comparable worth is a goal to be achieved by the department.

When discussing and analysing 'comparable worth' or 'pay equity', care needs to be taken as to how those two terms are referred to in the literature. 'Comparable worth' has been described as deriving essentially from a basic notion, which is that jobs of the same worth should receive the same pay (Killingsworth 1990: 1). For example, Killingsworth (1990: 176) states that:

The term 'comparable worth' is shorthand for the proposition that an employer should award 'equal pay for jobs of 'comparable worth,' and for the corollary proposition that one contest for discrimination by an employer by investigating whether differences in pay for jobs of comparable worth exist and are related to the sex composition of the incumbents in those jobs.

Killingsworth (1990: 176, 184–185) also notes that so far as he is aware, no comparable worth proponent has ever suggested comparing the worth in pay of jobs at different employers (for example, determining whether the worth of the job at one employer is equal to the worth of the job at another employer)

Some commentators appear to regard 'pay equity' as synonymous with non-discrimination in pay and 'comparable worth' as a means to that end (Killingsworth 1990: 8). However, in the 1990s the term 'pay equity' gradually superseded the original term 'comparable worth' and pay equity advocates now appear to regard the two terms as equivalent and interchangeable (Killingsworth 2002: 185).

The magnitude of debate on comparable worth in courts, Congress, government agencies, the media, public forums and scholarly journals in the United States has been considerable (Killingsworth 1990: 6). Some illustration of this can be found in the many references included the following selected publications: Killingsworth 1990: 1–10; Libeson 1995; England 1992; Killingsworth 2002; Levine 2003. However, as Killingsworth (1990: 7) notes, much of the public debate has often been preoccupied with essential ideological and normative issues rather than

looking at means to redress the economic effects of discrimination or labour market segregation of women.

Although few States refer to the concept of comparable worth in their legislation, the National Committee on Pay Equity has identified 14 States as having made comparable worth and pay equity adjustments of some kind 'in selected occupations as a result of some type of study or negotiated process' (Killingsworth 2002: 178). These States are California, Connecticut, Florida, Hawaii, Illinois, Maine, Massachusetts, Michigan, New Jersey, New Mexico, Pennsylvania, Rhode Island, South Dakota, and Vermont. The National Committee on Pay Equity has also reported that an additional six States are deemed to have fully implemented pay equity, by assessing a broad range of jobs and making substantial pay adjustments accordingly (Killingsworth 2002: 178). Those States are Iowa, Minnesota, New York, Oregon, Washington and Wisconsin.

In relation to a combination of the legislative regimes and the practices of the 20 States identified as having implemented comparable worth in their civil services since 1989, the Institute for Women's Policy Research conclude that all increased their female to male wage ratios. Furthermore, statistical analysis undertaken in three of the States found that comparable worth was implemented without substantial negative ramifications, such as increased unemployment. The costs to States that have implemented comparable worth in their civil service range from 1 per cent to 11.8 per cent of the State's payroll, with the average at 4 per cent (Boushey 2000: 29–35).

Killingsworth (2002: 179), however, questions the claims about the extent to which States have adopted or implemented pay equity, citing authors who question whether adjustments have been motivated by pay equity. Instead it is suggested that the only States that appeared to have undertaken major pay equity initiatives that have been successful are Iowa, Minnesota, New York, Oregon, Washington and Wisconsin (Killingsworth 2002: 178).

What is apparent is that these successes have essentially been negotiated rather than as a consequence of court determination. At the federal level, the court decisions have been disappointing (Killingsworth 2002: 177) and the only real headway has been made in State and local governments (Levine 2003).

The National Committee on Pay Equity (undated) details pay adjustments which have been negotiated following pay equity studies undertaken in a number of States. These include a 'pay equalisation' contract in 1991 at the Southern California Gas company in Los Angeles; and, following a lawsuit by the Illinois Nurses Association and the American Nurses Association, a pay equity settlement using a pay equity evaluation study commissioned in 1983 by the Illinois Commission on the Status of Women.

There is considerable debate in the United States about whether comparable worth evaluations produce a significantly different result than would result from taking an alternative process of tackling discrimination (Killingsworth 2002: 184). Some also question the lack of analysis regarding the potential economic impact of comparable worth (Sorenson 1994; Levine 2003: 21–24), while others question the complexity of comparative job evaluation tools, as well as the questionable value to women if comparative worth policies are implemented (Levine 2003: 21–24). Differing views are boldly expressed. Killingsworth (1990: 283), an economist, ultimately expressed his view that 'adopting comparable worth as a solution to problems of discrimination is akin to adopting prohibition as a solution to the nation's problem with alcohol abuse'. On the other hand, proponents of comparable worth such as England observe, that whether one advocates for comparable worth depends to a large extent on that person's views as to whether there is sex discrimination implicit in

the economy or, as many economists argue, the big gaps in wages between men and women can be almost entirely explained by human capital requirements and varying amenities of different jobs (England 1999: 748). England (1999: 752) observes that job evaluation, if used properly, provides a tool for correcting discrimination while still allowing for markets to determine what characteristics of jobs have weight in setting pay. It is also suggested that some economists reject the very notion of comparable worth, relying on the premise that economic doctrines of supply and demand can define and conceptualise all factors that affect wages (England & Norris 1985: 630). There are many views in between and they are reflecting on legislation and practices which differ vastly from the centralised, award-based industrial relations structure which exists in Australia.

It is interesting to reflect at this point on the gender gap statistics in relation to the 50 States. Census Bureau data from 2012 conveniently published on the American Association of University Women (AAUW) website.⁹⁷ The data uses the State median annual earnings for males and females and calculates the earnings ratio for full-time, year-round workers, aged 16 and older, by gender. The data reveals that the United States' has an overall earnings ratio of 77 per cent, which means that women earn 77 per cent of the earnings of men (giving a GPG of 23 per cent). The 50 States have earnings ratios which vary with the lowest earnings ratio in Wyoming at 64 per cent (GPG 36 per cent) with the highest earnings ratio in Maryland, Nevada and Vermont of 85 per cent (GPG 15 per cent).

In relation to the 20 States that have implemented some pay equity in the public sector, all but Michigan are in the top 34 States for the highest earnings ratios, between 85 per cent and 77 per cent (that is, GPGs of 15 per cent to 23 per cent). On the other hand, the States which have no legislation and no comparable worth policies tend to have much higher GPGs.

Needless to say this is simply a broad-brush reflection and takes no account of the many variables, including the differing legal systems, practices, industrial sectors and general labour market situations in each of the States.

C.11.4 Summary

The United States has not yet legislated at a federal level to require employers to collect and provide data related to equal pay, so that a lack of transparency remains an issue. Furthermore, there does not appear to be a range of toolkits or assessment processes to aid employers in achieving equal pay. The Government does not have the proactive approach presently taking place in New Zealand and parts of Canada, although the rhetoric expresses a possible future plan on these matters. There are also legal limitations with respect to the scope of the complaints mechanism and difficulties with the remedies that can be sought through the court system. These appear to be areas of potential future progress under the National Equal Pay Task Force.

Regulation at State level is marked by divergent approaches, narrow legislative bases and limited application of comparative worth, which is predominantly confined to the public sector. Hence there is little there of direct relevance to Australian circumstances. However, some value may be found for applicants in the strategies and approaches adopted by US unions using comparable worth studies to underpin their negotiations.

⁹⁷ <http://www.aauw.org/resource/state-by-state-pay-gap-data-table/> (accessed 3 October 2013).

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