pay for equal work.

(b) The expression 'equal pay for work of equal value' is defined in principle 1 to mean the fixation of award wage rates by comparison of the work performed irrespective of the sex of the worker. In principle 2 this is said to be achieved by females rates being determined by work value comparisons without regard to the sex of the employees concerned (and will require a comparative value of the work).

(c) The essential distinction between the 1972 principle (described as 'Equal Pay for work of Equal Value' and the 1969 principle (described as 'Equal Pay for Equal Work') can be ascertained by comparing the definitions of those expressions in the principles (with particular reference to the evaluation of "work performed" of male and female workers). Paragraph 3 of the 1969 principle dictated that the principle would apply where the work performed by both male and females under an award was "of the same or a like nature and of equal value". It emphasis that no mere similarity of name was enough to establish that the work was of like nature. In contrast the assessment of "work performed" under the first paragraph of the 1972 principle was to be undertaken "irrespective of the sex of the worker" and for the ascertainment of whether or not the work was of "equal value". The 1972 principle eliminates the requirement to find that the work performed by female employees is the same or of a like nature when compared with male workers in order for the principle to operate. Under the 1972 principle it was enough to find that there was equal value between the work performed.

(d) The 1972 principle required a work value assessment to be undertaken in relation to the work performed. The comparisons were to be made where possible within an award under consideration but where such comparisons were unavailable or inconclusive (as may be the case where the work is performed exclusively by females), work value comparisons may be undertaken between female classifications within the award and/or comparisons of work value between female classifications in different awards)

(e) Of the work which is assessed, it is the worth in terms of the award wage and not the worth to the employer.

CROWN EMPLOYEES (LEGAL OFFICERS - CROWN SOLICITORS OFFICE) AWARD

77. This matter concerned an appeal by the Public Service Board from a decision an award made by Justice Sheldon fixing minimum salaries for certain legal officers employed by the Public Service Board in the offices

of the Crown Solicitor. Public Solicitor, the Clerk of the Peace, and the Parliamentary Council. ([1972] AR 376)

78. The appeal was ultimately upheld and the award made by His Honour varied. In the course of doing so the Commission in Court session (Beatty J, McEwan & Shepherd JJ) had course to reconsider the *Metalliferous Miners Case* and ultimately to modify the principles contained therein.

79. Of significance for the present Inquiry was the consideration by the Commission, in the application of the *Metalliferous Miners Case*, as to whether salaries could be assessed by making comparisons between employees carrying out dissimilar work. (In that case the work of solicitors and other professionals such as engineers). It must be noted that the decision concerned issues of principle in the broad and partly the particular application by Sheldon J. of the *Metalliferous Miners* Principle. The Commission in Court Session states the principle in the *Metalliferous Miners Case* ([1972] AR 376 at p386). The Commission indicates that Sheldon J was applying his decision in the *Electrical Engineers Case* (which as it finally appears is not applied by the Commission) ([1972] AR 376 at p387). The main point of objection is the approach proposed by Sheldon J of checking assessments made as between dissimilar classifications. (As set out in [1972] AR 376 at set out at p487). The Commission comes to the conclusion that this is not consistent with the *Metalliferous Miners* decision ([1972] AR 376 at p388).

80. However the Commission did come to the view that some revision of the *Metalliferous Miners* principle was required and the decision describes that modification as follows:

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

> Our conclusion that some modification of the Metalliferous Miners Case is called for stems from our consideration of material which was before Sheldon J concerns the salaries of professional engineers. We think that on grounds of logic this material ought to be regarded by us, as it was by His Honour, as relevant, but that the principle of the Metalliferous Miners Case would constrain us to regard it as irrelevant because the work of professional engineers is not similar to that of legal officers. The logical foundation for holding in a wage fixing case that certain material is relevant is that the material in question will be likely to furnish a guide of some reliability as to the proper rates to fix - see - Scientific Officers Case. We think that the material concerning the salaries of professional engineers qualifies as relevant on this test." ([1972] AR 376 at p388-389)

81. The balance of the judgment shows why a comparison can be made between legal officers and engineers. ([1972] AR 376 at p389) This is confirmed as being the cause of the approved historical relationship between the two classes of officers. ([1972] AR 376 at p391.8)

82. The position is different concerning scientists because their history does not disclose any identity or other definable relationship in grading and salaries of legal officers and scientific officers and there was no material allowing any comparison to be made as to the value of work of the two groups.

83. This decision of the Commission is particularly relevant because of the issues in this case which involve:

    (a) The comparison of different types of work;

    (b) The comparison being made in different award;

    (c) A reassessment of the work value principle amongst others in this review;

    (d) It should be emphasised of course that this case did not consider equal pay on a gender specific basis.

PRIVATE HOSPITALS NURSES (STATE) AWARD

84. *Re Private Hospital Nurses (State) Award* is a decision handed down by Cahill J in May 1972, in respect of classifications under the Private Hospitals Nurses (State) Award ([1972] AR 156). In March, 1971, by agreement ratified by the Full Bench, female nurses' in state public hospitals had received 95 per cent of male nurses' rates. The NSW Nurses' Association subsequently sought to have these provisions extended to nurses in private hospitals.

85. Of particular note, in terms of the development of jurisprudence as relating to equal pay, was His Honour's reliance on discretionary powers contained elsewhere in the Act, other than on s.88D. His Honour held that:

> "...while it is proper that very careful consideration should be given to the matter of wage rates in proceedings such as this to ensure that no more than "just and reasonable" rates are prescribed, it is equally important to ensure that the rates fixed are no less than "just and reasonable". ([1972] AR 156 at p156)

86. This case was *not* decided under s.88D as it was conceded by the Nurses' Association that the application of ss.88(9)(b) would preclude the success of the claim. Rather, it was held to be sufficient that the justice and reasonableness of equating the wage rates of nurses in private and public hospitals was a sufficient reason for acceding to the Nurses' Association's claims on this point. ([1972] AR 156 at p170-172)

87. These cases illustrate the difficulties faced by the parties in lodging claims likely to succeed under s.88D. It is to the *State Equal Pay Case* of 1973, that this analysis now turns.

1973 - THE STATE EQUAL PAY CASE

88. The case was a test case concerning the principles to be applied in making awards fixing wages for women workers ([1973] AR 425 at p429.8).

89. The case concerns an application by the Federated Clerks' Union to vary the *Clerks (State) Award* upon a principle that the rates fixed for women's work by award be undertaken having regard to the work performed irrespective of the sex of the worker.

90. Fundamentally the case concerned the application of the *National Wage and Equal Pay Case 1972* (1972) 147 CAR 172. There was no apparent disagreement about the adoption of the principle but significant disagreement about how the new principles should be implemented and it is this matter which concerned the Commission in its judgment ([1973] AR 425 at p430.8).

91. The State Commission concluded that the new principle adopted by the Commonwealth Commission appears to have been identical with the *"principle of equal remuneration for men and women workers for work of equal value referred to in Article 2 of the Equal Remuneration Convention number 100 adopted at the 1951 session of the International Labour Conference"* ([1973] AR 425 at p434.7).

92. The Commission adopted the finding of the 1959 case which had essentially said that it would be presumed that the Parliament did <u>not</u>

intend to bring about any change in the methods or principles which industrial tribunals in the State applied by the enactment of section 88D. ([1973] AR 425 at p435) Section 88D had not changed at the time of the 1973 *Equal Pay Case*.

93. The Commission did however conclude that if the principle of equal remuneration of men and women workers for work of equal value were introduced in the 1973 case the level of remuneration provided should be the same as required by section 88D, namely the male level of remuneration. ([1973] AR 425 at p435.4) More importantly the Commission adopted the principle confirming the 1959 decision that the adjustment which was required was to raise the level of women's wages to that of men's wages ([1973] AR 425 at p435.5).

94. The Commission considered that to maintain different basic wages for male and female workers was to discriminate on the basis of sex. The Commission considered that if it were to adopt the new Commonwealth principle the Commission would have to attempt to eliminate from its wage fixing system all traces of discrimination between men and women workers. To remove all traces of discrimination the basic wages should be equated ([1973] AR 425 at p435-436).

95. The conclusion the Commission reached as to "the basic wage" is expressed as follows:

> "In relation to basic wage matters it is our view that the Commission should announce that, from the end of the phasing in period, the Commission and the committees should not award any wage for an adult female employee at less than the basic wage for adult males." ([1973] AR 425 at p440).

96. The Commission sets out its conclusions and discusses the nature of the principle which it is about to adopt. ([1973] AR 425 at p438.5) It firstly confirms its understanding that the principle adopted by the Commonwealth Commission appears to be identical with the International Convention where equal remuneration is defined as rates of "rates of remuneration were established without discrimination based on sex". However it does note that the words used by the Federal Commission are "equal pay for work of equal value" which is defined by the Commonwealth Commission as meaning the fixation of award rates by consideration of work performed irrespective of the sex of the worker. The Commission considers this particular statement of the principle as follows:

> "As we understand the matter, the judgment adopts the convention principle but in a setting of a conciliation arbitration system. The passage which earlier we have quoted inextenso from the Commonwealth Commission's judgment makes it clear that the members of the bench in the case envisaged equal pay coming

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92. The Commission adopted the finding of the 1959 case which had essentially said that it would be presumed that the Parliament did <u>not</u>

p440) However, for the purposes of implementing the new principle to State awards, the Commission came to the view that it did not matter whether the margin fixed for a man doing particular work is the same or different from the margin of a woman doing the same work. The Commission stated the assumption that would apply to the application of the principle as follows:

> "The assumption should be made that both margins represent the true value of the secondary considerations and have been fixed without regard to sex. Where an award provides for one class of work equal margins for males and females, we think that it will be appropriate for the tribunals implementing the new principle to assume that the work of males and females is of equal value, but it should be open to either employers or employees to show that this is not so and that the margins for the females are either too low or too high. The determination of any such claim would require a work value inquiry. And, where an award provides for one class of work margins for males and females which are not equal, it will be proper in our view for the tribunals to assume that the margins correctly assessed the relative value of the work of males and females, but again it should be open to employers or employees to prove that this is not the case. And finally, where an award provides rates of wages only for females we believe that it will be proper for the tribunal to assume that the margins correctly assess the value of work on the basis of the male margins and female margins being assessed in the same way, but again there should be a rebuttable presumption" [emphasis added] ([1973] AR 425 at p440-441).

99. The new principle was to be phased in, introducing three equal instalments on 31 December 1973, 30 September 1974 and 30 June 1975 respectively.

100. It was also determined that where a challenge is made of the validity of the *prima facie* assumption the arbitrator should have a wide discretion. ([1973] AR 425 at p442).

101. The result of this decision was the prescription of a standard clause which provided for equal pay to be brought about by the addition to female wages of three instalments described as "equal pay loadings".

FURTHER CONSIDERATION OF THE 1972 PRINCIPLES

102. The principles enunciated in both the Commonwealth and State Equal pay cases of 1972 were re-examined in 1974 by both tribunals.

103. In this matter the Commission decided, *inter alia*, to award the same minimum wage to adult males and females. The Commission took into account a number of factors in coming to this conclusion:

about through the processes of a series of arbitration's involving inquiries into the value of the work concerned, although they recognise that equal pay could also come about by agreement. It would seem from the judgment that they were of the opinion that 'a consideration of the work performed irrespective of the sex of the worker' necessarily involved the conduct of such arbitration's, unless there was agreement."([1973] AR 425 at p 438).

97. In determining to follow the Commonwealth decision in substance, *Beattie P,* and *McKeon J* observed:

> "We believe that the time is opportune to introduce in New South Wales system the principle of equal remuneration for men and women workers for work of equal value, meaning thereby rates of remuneration established without discrimination based on sex. This, as we understand it, is the substance of the new Commonwealth Commission principle and the fact that that Commission has made its decision is an important factor which influences us. Another factor is that, at the Commonwealth hearing, the Australian Government supported the implementation of the principle, while in the case before us the Government of New South Wales opted not to make any submissions although the Public Service Board appeared and raised no objection. Finally the employers generally see the implementation of the new principle as a matter of social and industrial justice, although, as we have explained, they have pressed strongly for the new Commonwealth principle to be adopted without modification.
>
> The method by which the new principle should be implemented in this State should be determined, we think, after paying regard to the provisions of the Industrial Arbitration Act and, in particular, to the fact that under the Act the concepts of the basic wage and of marginal or secondary wages, which are the creatures of the statute, are still alive in our system despite their demise in the Commonwealth jurisdiction where the total wage concept was introduced in 1967. It is necessary, too, to pay regard to the principles that have been adopted, if not always consistently applied, by the industrial tribunals in this State as to the proper method of fixing marginal or secondary rates for both men and women." [Emphasis added] ([1973] AR 425 at p439)

98. The Commission considered the *Female Hairdressers Case* and noted that it had never been subsequently disapproved although in the *Paint and Varnish Makers Case* the Commission had noted that the theory of equal margins had been implemented in different ways. ([1973] AR 425 at

> minimum wage on a phasing-in basis (first phase $58.50 per week), (c) increases the adult male minimum wage by $8 per week to $68.80 per week in New South Wales, (d) indicates that the minimum wage will be reviewed in 6 months' time, (e) reaffirms that penalty rates are to be calculated on the basis of the relevant award rate, (f) retains the explanatory provision which had been affirmed to be of general application in the 1972-3 case. . .(g) retains the minimum wage concept as relating to payment for ordinary hours of work and including overaward payments in considering entitlement, (h) continues to regard movements in prices and wage levels as important considerations in fixing the appropriate amount. Thus the Commonwealth minimum wage has become a special concept with defined boundaries and purposes. It must be considered as a whole if it is to remain the minimum wage as formulated by the Australian Conciliation and Arbitration Commission." ([1974] AR 195 at p205)

108. Furthermore, the Bench observed that, up to this point, there had been no practical necessity to introduce the minimum wage into State awards. In considering the minimal impact the Commonwealth minimum wage had had in the State, it was said:

> ". . .there may be some areas where the minimum wage would have operated effectively. We say this because there have been (and are) some State awards where the lowest award wage has been (and is) less than the minimum wage and it is impossible for unions to trace overaward payments over all individual employers. There may well be some employers, particularly in country areas, who, in the absence of any obligation to do otherwise, are paying less than the minimum wage." ([1974] AR 195 at p206)

109. After hearing submissions going to these concerns, the Commission placed the "*formal stamp of its approval on the Commonwealth minimum wage*" as applicable to the State system. The effect that this was to have on the nature of the basic wage in New South Wales was stated as follows:

> "The basic wage appears prominently in our awards. This wage of course has become obsolete as an actual minimum wage for adults covered by award. Whether the time has arrived when a move should be made from the basic plus secondary wage structure to a total wage structure may have to be considered in due course elsewhere. But in any event the formal adoption by this Commission of the minimum wage concept certainly helps to make the appearance of things conform more to the reality. . .the

(a) It discarded the family component from the minimum wage concept arguing that the Commission was not a social welfare agency and that such considerations are the task of government ((1974) CAR 293 at p229.6)

(b) There is widespread and deep social support for the step ((1974) CAR 293 at p 299.7)

(c) the change is economically viable ((1974) CAR 293at p299.7)

104. There has been a substantial bridging of the gap between male and female workers as a result of the *1972 Equal Pay Case.* The Commission observed:

105. "The average Commonwealth award rate for adult females has risen from $50.29 in December 1972 to $62.17 in December 1973, an increase of 23.6%. The increase for adult males in the same period was 13.3%. In December 1973, female Commonwealth Award rates averaged 82% of male rates compared with 75% a year earlier. With the further phasing in of the equal pay provision since December, 1973, it would be reasonable to expect that the gap has narrowed further. The lowest rates applicable to adult females in most awards are now close to the present minimum wage. These developments make our proposal for the extension of the minimum wage to females economically feasible. We have, therefore, decided to award the same minimum wage to adult males and females." ((1974) CAR 293 at 299.7)

106. The Commission also held:

> We believe that this step is a logical extension of the equal pay principles which the Commission set in motion in 1972 and which will be fully applied by the middle of 1975. The Commission said in the 1972 decision that 'award rates for all work should be considered without regard to the sex of the employee'. We believe that the time has come for the same to be said about the minimum wage."((1974) CAR 293 at p300)

NEW SOUTH WALES: COUNTERPART OF FEDERAL 1974 DECISION: STATE WAGE CASE 1974

107. In the corresponding State Wage Case (*State Wage Case, 1974* [1974] AR 195), the majority of the Full Bench of the New South Wales Commission in Court Session summarised the primary outcomes of the Federal decision:

> "(a) discards the family component as an element in the minimum wage concept, (b) includes adult females in the

award although in rare cases it might apply to all classifications.

(b) Catch-up of community movements. As a result of a series of industry wage increases last year a firm base has been widely established with appropriate relativities between and within awards on which indexation can be applied. However, there may be some cases where awards have not been considered in the light of last year's community movements. These cases may be reviewed to determine whether for that reason they would qualify for a wage increase but care must be exercised to ensure that they are genuine catch-up cases and not leapfrogging. It will be clear that this catch-up problem is a passing one and should not occur under the orderly system of wage fixation we propose as the basis of indexation.

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

8. Any applications under paragraph 7 above whether by consent or otherwise will be tested against the principles we have laid down, and viewed in the context of the requirements for the success of indexation. This does not mean the frustration of the process of conciliation but it does mean that the Commission should guard against contrived work value agreements and other methods of circumventing our indexation plan. We draw attention to Section 4(1)(q) of the Act which says that the meaning of "industrial matters" includes "all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." ((1975) 167 CAR 18 at p37-38)

NATIONAL WAGE CASE SEPTEMBER 1975

114. In the decision the Commission decided to allow a further trial period to consider whether the packages announced in the April decision could be confirmed on a more permanent basis ((1975) 171 CAR 79 at p86).

115. Significantly the Commission recognised that the principles that it had introduced on 30 April affected "*a radical change in wage fixing principles and could have caused some problems of interpretation*" ((1975) 171

basic wage as an actual minimum standard for those covered by awards has become in a short period of years a meaningless anachronism. Of course the basic wage is still useful in wage-fixing mechanics as providing a convenient common starting point from which to fix equitable secondary or marginal rates as between classifications in an award in order to achieve the fundamental objective, just and reasonable total wages. This practice will not be affected by the adoption of the minimum wage, which, as the explanatory note indicates, operates independently of award wage assessments both as to amounts and methods." ([1974] AR 195 at p208-9)

WAGE INDEXATION AND CHANGES IN WORK VALUE PRINCIPLES

110. In the *National Wage Case April 1995* ((1975) 167 CAR 18) the Commission did not introduce a system of wage indexations *per se* but introduced a system of wage determination which provided for an adjustment to wages based on the Consumer Price Index and modified some existing principles.

111. In short the Commission took the view that it could not afford wage indexations at that time but instead laid the foundation for the introduction of the system stating that it was not prepared to adopt an integrated wage fixation package which included wages indexation ((1975) 167 CAR 18 at p35). This decision was reached in the light of the then current economic, social and industrial circumstances with the Commission indicating that it did not "operate in an institution vacuum" and that the outcome of the future of indexation would depend on the Commission's decisions and the actions of the industrial participants ((1975) 167 CAR 18 at p39).

112. What is significant about the development in wage fixation at this time is the revision of the wage fixing principles. It was made clear by the Australian Commission that wage increases other than those by way of quarterly indexations and national productivity would need to be small. The principles allowed for work value cases and increases related to special considerations but it was informed that these increases would be negligible. ((1975) 167 CAR 18 at p 32)

113. Outside of 'indexation' adjustments in wages could be obtained as follows:

> "7. In addition to the above increases, the only other grounds which would justify pay increases are: -
>
> (a) Changes in work value such as changes in the nature of work, skill and responsibility required, or the conditions under which the work is performed. This would normally apply to some classifications in an

> performed. We recognize that the application of the principles may result in the rejection of some claims already made based on the compression of relativities or the removal of anomalies." ([1975] AR 329 at p340)

120. Commenting specifically on equal pay loadings, in accordance with the original intent of the Commission in the 1973 and 1974 *State Wage Cases*, the Commission determined that:

> ". . .a 1st or 2nd equal pay loadings should be again adjusted. A 3rd equal pay loading should be of an amount necessary to bring about equal pay for male and female employees in the same classification." ([1975] AR 329 at 341-342)

ANOMALIES

121. In the *National Wage Case May 1976* ((1976) 177 CAR 335) the Australian Commission continued with the process of quarterly wage indexations (on a decision by decision approach). ((1976) 177 CAR 335 at p343)

122. Again, a change to work value principle was considered. ((1976) 177 CAR 335 at p346) The union pressed for a relaxation of the principle which was not granted. There was an adjustment to the datum point. It was made clear that not all changes in work value would be considered.

123. There was a new principle which incorporated a procedure for anomalies (Principle 7 (c)), and also established an anomalies conference ((1976) 177 CAR 335 at p347). The new principle was in the following terms:

> "Anomalies
>
> The resolution of anomalies and special and extraordinary problems by means of the conferences already established to deal with anomalies and in accordance with the procedures laid down for them.
>
> It is our intention that every claim arising out of the anomaly or special and extraordinary circumstances will be processed by the Anomalies Conference and not otherwise." ((1976) 177 CAR 335 at 348-349)

STATE WAGE CASE JUNE 1976

124. The NSW Commission adopted in their entirety the fixing principles laid down by the Australia Commission in its May 1976 *National Wage Case* decision. ((1976) 177 CAR 335 at p348-349)

125. Furthermore, the State tribunal, in addressing the subject of equal pay

CAR 79 at p83).

116. In particular in relation to Principle 7(a) (Work Value), the Commission made it clear that the operation of the principle was to be strictly applied and that the references to changes in work value such as the changes in the nature of the work, skill and responsibility required or the conditions under which workers performed were not merely illustrative. The Commission also imposed a datum point, and emphasised that there must be a significant addition to work requirements in order to attract the operation of the principle ((1975) 171 CAR 79 at p84).

117. The Commission also considered the introduced of an anomalies principle. Whilst the Commission recognised that there may be in existence anomalies, it was not prepared to add anything to the guidelines specifically dealing with those matters because this may create substantial difficulties and pressures for flow on. Rather, the Commission added a procedure for resolving wage inequities whilst ensuring that the correction of the particular inequities was confined. The procedure adopted was that the President would call a conference of all principal parties and he would furnish a report to the Bench as to an appropriate outcome. ((1975) 171 CAR 79 at p85)

NEW SOUTH WALES STATE WAGE CASE MAY 1975 [1975] AR3 29

118. The State Commission, in its *State Wage Case, May, 1975*, ([1975] AR 329) commented upon the intent of the Federal wage fixing principle:

> ". . .they are designed to make possible the fulfilment of a condition regarded by that Commission as essential to the success of indexation, namely, that regardless of the reasons for any increases in labour costs outside national productivity and indexation, their impact in money terms must be negligible. . . .The Commission has said further violation of the conditions which it has set down for indexation, even by a small section of industry whether in the award or non-award area, would put at risk the future of indexation for all." ([1975] AR 329 at p339)

119. Going to the effect of the principles in the State jurisdiction, the Commission stated:

> "The result of the application of principles 7 and 8 will be to limit wage increases other than from indexation or national productivity increase, to cases where a particular group of employees has not participated, or not participated fully, in the community-wide movement in wages and salary which took place in 1974, and cases where there have been changes in the nature of the work, skill and responsibility required of employees or in the conditions under which the work of particular classes of employees is

> difficult for a wage adjustment to be confined to a particular case. We do not intend that the doctrine of comparative wage justice - that universal test which means all things to all men - should be available to justify every wage increase wherever sought." ((1978) 211 CAR 268 at p296)

131. In this decision, the Commission re-emphasises the fundamental nature of wage restraint as expressed in the above passage to ensure that the system would retain its stability and its equitable operation. In altering the principle, the Australian Conciliation and Arbitration Commission adopted the proposal put forward by the State of New South Wales. This was addressed by the Federal tribunal as follows:

> "Under the proposal, anomalies would continue to be brought to the Anomalies Conference, but using its established procedures, the Conference would also review "inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason" and where justified those inequities would be resolved by the award of pay increases. This, of course, is the resolution of a problem which arises by a comparison of one class of work and its remuneration with similar work and its remuneration. . ." ((1978) 211 CAR 268 at p297)

132. The series of conditions to be satisfied by an applicant were laid down in substance as Principle 7(d) as follows:

> "Inequities
>
> (1) The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason. Such inequities shall be processed through the Anomalies Conference and not otherwise and shall be subject to all the following conditions:
>
> (i) The work in issue is similar to the other class or classes of work by reference to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed.
>
> (ii) The classes of work being compared are truly like with like as to all relevant matters and there is no good reason for dissimilar rates of pay.
>
> (iii) In addition to similarity of work, there exists

loadings, observed:

> ". . . under the [equal pay] principle, following a phasing in period...the rates for (such) employees would comprise the amount of the basic wage for adult males plus the margin specifically prescribed or ascertainable by calculation for work. It seemed to us that the time was opportune for action to be set in train in order to eliminate equal pay loadings from awards now that the purpose for which they were awarded has been achieved and, as stated in the announcement, the Commission proposes of its own motion to institute separate proceedings to deal with the question whether equal pay loadings in awards should be deleted and whether references in awards to the basic wage for adult females should be replaced by references to the basic wage for adult males." ([1976] AR 329 at p342)

126. On present research we have not been able to ascertain the existence of a hearing corresponding to this decision.

REVIEW OF PRINCIPLES - ANOMALIES AND INEQUITIES

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

128. Each of the wage fixing principal were considered in turn, although the principle focus, for current purposes, relates to the matters canvassed by principle 7.

129. Principles 7(a) and 7(b) relating to work value changes and catch-up community movements respectively, remained largely unaltered, although the Commonwealth Commission determined that applications under principle 7(b) should be lodged prior to 31 December 1978 and following this, the principle would be phased out. One notable change to principle 7(a) was the deletion of paragraph (v), relating to the wages of new awards being set by a "proper job evaluation". This was incorporated into a new principle, principle 9, which instead of placing reliance upon job evaluation, expressed preference for "the value of work already covered" and the "existing rates and conditions" covering those already previously covered by a State award. ((1978) 211 CAR 268 at 314)

130. As to principle "7(c) - Anomalies", the Australian Conciliation and Arbitration Commission adopted a statement made by the Full Bench in September 1975, as follows:

> "With a multiplicity of systems, organisations and arbitrators, the pressure of historical relationships and the use of the comparative wage justice concept it is extremely

only when change was an agreed objective of the employer and employees, and where the exercise was undertaken on a joint and co-operative basis, subject to the criteria of negligible cost and maintenance of standards of performance.

136. The Commission concluded:

> "In our opinion this constitutes the proper ambit in which proceedings of this nature should be considered. We warn against the danger of contrived arrangements which will not stand up to rigorous examination and we suggest that the Commission should monitor results for at least one year." ((1978) 211 CAR 268 at p308)

137. These principles, although abandoned in 1991, have been applied in a number of cases which form the basis of analysis in a later discussions separate from this paper.

EQUAL PAY - DIVERGENCE OF APPROACH

138. In *Re Water Resources Commission (Equal Pay) Award* ([1979] AR 321) considered the application of principles to a claim for implementation of equal pay principles.

139. The Public Service Association of New South Wales (PSA) had applied for an award to cover all clerical officers, male and female. No change was sought in the salaries of male officers, but the claims made for female officers, which if granted, in whole or in part, would have resulted in the salaries of female officers being increased. The union claimed that the female clerical officers were not receiving equal pay, and that there were separate salary and grading structures for male and female clerical officers. The union also argued that in order to achieve a fair application of the equal pay principles, it was essential that the salaries and gradings of the female officers be integrated onto the salaries and gradings structures of male employees.

140. The Commission in Court Session considered the following questions

> "(i) Whether the operation of the equal pay principles under the State Equal Pay Case 1973 with respect to the employees sought to be covered by the application is required to be determined on the basis that the applicant must establish that there is an anomaly, or a special and extraordinary problem or an inequity to which principle 7(c) or principle 7(d) of the principles of wage determination enunciated in the State Wage Case - June and September Quarters 1978 applies, and if so,

(ii) ether there does exist any such anomaly, special and extraordinary problem or inequity." [1979] AR 321 at p332)

141. The Commission considered the wage fixation principles established by the Australian Commission in the context of equal pay principles and came to the following conclusions:

> "The Commission's general principles relating to the making of awards conformed, as nearly as may be, to the principles of wage determination of the Australian Conciliation and Arbitration Commission announced on 14 September 19978. In that Commission's decision in the Wage Fixing Principles Case and reproduced as an appendix to this Commission's reasons for decision of 15 December 1978 in the State Wage Case - June and September quarters 1978. The principles make no mention of adjustments to wages to give effect to the principles determined by the Australian Commission in the National and Equal Pay Cases 1972 or by this Commission in the State Equal Pay Case 1973. Principles 1 to 5 provide for the adjustment of wages and salaries every six months in accordance with last two quarterly movements of the six capitals consumer price index. Principle 6 provides that the Australian Commission will consider each year what increase in total wage or conditions of employment should be awarded nationally on account of productivity. Principle 7 provides that, in addition to increases awarded pursuant to principles 1-6 "the only other grounds which would justify increases in wages or salaries are" as itemised under the headings "changes in work value", catch up of community movements, "anomalies" and "inequities". If the language used in Principle 7 is interpreted according to its ordinary meaning, an increase in the wages or salaries which would be justified by the application of the principles of the equal pay cases can be awarded only on the grounds of change in work value, catch up of community movements, anomaly or inequity."[emphasis added] ([1979] AR 321 at p322-323)

142. The Commission was then taken to a number of cases in which the Australian Commission ignored those wage indexations guidelines in awarding increases to females based on the equal pay principles. ([1979] AR 321 at p323-324).

143. The Commission concluded as follows:

> "The material before us shows us that during the currency of wage indexations eight cases concerning implementation of equal pay principles have been decided in the Australian Commission. It is probable that there have been other cases of which we are unaware. In none of the eight cases was the Commission constrained by the guidelines from awarding such sums that were necessary to implement equal pay, and a reference to the

> guidelines appeared in only two of the cases.....but in those two cases there was no suggestion that claims were being pursued within the guidelines on the basis of changes in work value, catch up with community movements, anomalies or special and extraordinary problems, and in our opinion, the statements that the proposed orders should not conflict with the guidelines is not to be understood as an expression of opinion that the guidelines are applicable to claims made on behalf of female employees for the implementation of equal pay principles. We think they probably mean no more than that there were no conflict because the guidelines were irrelevant ...
>
> In our opinion the conclusion is inescapable that the Australian Commission did not regard the indexation guidelines as constraining the tribunal from giving effect to the principles it announced in the National Wage and Equal Pay Case 1972." [emphasis added] ([1979] AR 321 at 325)

144. And further:

> "The Australian Commission's expectation thus was that its new equal pay principles would be generally implemented by 30 June 1975. Two months before that date that Commission introduced wage-indexation by its decision in the National Wage Case April 1975 [(1975) 167 CAR 18]. It seems not unlikely that the Commission has not applied the guidelines to equal pay cases because of the timetable which it had laid down for the implementation of its equal pay principles. Perhaps it was thought that the 1972 decision conferred on employees something in the nature of a vested right. But whatever the reason, the fact is that the Australian Commission has not regarded itself as constrained by the guidelines from implementing the equal pay principles in cases which have come before it in the advent of indexation. In introducing its modified principles in the National Wage Fixing Principles Case 1978, the Commission did not advert to equal pay, and we are quite unable to accept the argument advanced on behalf of the respondent that the new principles relating to inequities and service increments were designed to include the processing of equal pay claims. The decision referred to the new concepts as involving "a further relaxation of constraints", which would be a singularly inapt description if their introduction had the effect of applying guideline constraints to equal pay claims for the first time." ([1979] AR 321 at p326)

145. At page 326 of the decision the Commission considers a number of cases and significantly the decision of Justice Dey in *Motor Transport (Female*

Salaried Officers - Salaries) Award Case. This is a case in which Justice Day found that the employer had failed to implement the equal pay provisions. His Honour found that it was not a case concerning relativities or inequities but the proper application of the equal pay principles and noted interestingly that it was *"more analogous to the fixation of an appropriate rate in accordance with normal work valuation principles"* in a way in which the Australian Commission contemplates in its *National Wage Case September 1975* decision where, *"a fixation could take place with regard to new work for which there is no current rate"*. His Honour held that there was no barrier in the wage fixation principles to him reviewing the matter. ([1979] AR 321)

146. In finding that the general economic principles relating to the making of awards did not apply to claims to increase wages or salaries of female employees by the proper initial implementation of the principle of equal remuneration for work of equal value as enunciated in the *State Equal Pay Case* 1973, the Commission found:

> "The basic principle which the 1973 decision introduced was the principle of equal remuneration for men and women workers for work of equal value, meaning thereby remuneration established without discrimination based on sex - see Equal Pay Case [1973 AR at p.439]. The decision laid down a procedure as to how the principle was first to be applied by raising the level of women's wages for a particular class of work to the level of men's wages for that class of work and it contemplated that, once that had been done, the level of wages thereafter would be reviewed from time to time without discrimination based on sex. It is on that basis that every claim for an award fixing wages for male and female employees is to be determined." ([1979] AR 321 at p328)

INQUIRIES INTO WAGE FIXATION

147. On 9 January 1981, the Australian Conciliation and Arbitration Commission announced that the system of wage fixation and its Principles had broken down and called on participants in wage fixation to apply themselves to the task of finding another course which offered prospects for overcoming the various difficulties which had brought down the system. (Unreported decision of the Australian Conciliation and Arbitration Commission , 9 January 1981, Print E5000)

148. The scope of the Inquiry was summarised as follows

> "In essence, the issues to be resolved on the future of wage determination would be whether there should be a centralized or a decentralized system of wage determination, what the character of each system should

> be and what principles if any should apply to each." (Unreported decision of the Australian Conciliation and Arbitration Commission , 9 January 1981, Print E5000, at p10)

149. In the resultant decision of the Australian Conciliation and Arbitration Commission, delivered on 7 April, 1981, the Commission stated:

> "All parties and interveners support a centralized system of wage fixation operating on a set of principles with national wage adjustments as the main source of wage increases."(Decision: Inquiry into Wage Fixing Principles, Australian Conciliation and Arbitration Commission, Melbourne 7 April, 1981, at p3)

150. In accordance with this view, the continuance of a centralised system was approved and the system of wage indexation was abandoned completely. The wage fixation principles relating to the issues canvassed herein remained largely unchanged in substance, but were restructured and renumbered.

STATE WAGE CASE RE PRINCIPLES - DECEMBER 1980 AND MARCH 1981 QUARTERS

151. In light of the action taken by the Commonwealth tribunal, the State Commission in Court Session, in its *State Wage Case - December 1980 and March 1981 Quarters (Re Principles)* stated:

> "We agree with the approach unanimously taken by the parties and the Crown that the time is opportune to abolish those principles and we accordingly formally declare that the Commission's general economic principles relating to the making of awards at present in force should no longer apply." ([1981] AR 480 at p481)

152. There was some argument as to whether new, limited principles should be substituted for those abolished, although at p482, the Full Bench observed:

> "We have given consideration to this aspect of the matter and we have reached the firm view that it is neither necessary nor desirable to substitute any new or altered principles for those now abolished and we accordingly refrain from doing this.
>
> Our decision does not of course mean that the tribunals established under the Act will function in the absence of any principles at all. The provisions of the Act itself, and the principles expounded and developed by the

> Commission in cases before it over the years (other than the principles relating to the system of wage determination under indexation operative form May 1975 to the present time) will now be fully applicable." ([1981] AR 480)

153. This decision had the effect of rendering all future claims for wage increases in the state of New South Wales determinable via consideration, firstly of the provisions of the statute, and secondly of the application of the pre-existing principles at common law.

NATIONAL WAGE CASE 1983

154. The Federal Government initiated an National Economic Summit Conference, which was convened in April 1983. The Summit Conference Communique stated that all parties were agreed that a centralised approach to wage fixation was the most equitable means of ensuring wage justice, whilst ensuring that wage increases did not add impetus to inflation or unemployment.

155. The decision of the Full Bench of the Australian Arbitration Commission is particularly noteworthy in that it generated a new set of principles formulated on the premise that the great bulk of wage and salary movements would emanate from national adjustments. In the *National Wage Case 1983* ((1983) 291 CAR 3), in emphasising this approach the Commission stated:

> "The Commission will guard against any Principle other than Principles 1 and 2 being applied in such a way as to become a vehicle for general improvement in wages or conditions." ((1983) 291 CAR 3 at p51)

156. Principle 6(a), "Anomalies" could only be resolved in circumstances of a "*special and isolated nature*" and could not be established on the basis of comparative wage justice or the need to maintain relativities. Principle 6(b) permitted the "*resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason*", and further provided that the classes of work being compared should be "*truly like with like as to all relevant matters*".(1983) 291 CAR 3 at p36) The Commission made the following statement:

> "Thus, in our view, the term "class or classes of work" in the Principle should not be interpreted as allowing comparisons between employees who are not in the same occupation or profession." ((1983) 291 CAR 3 at p37)

157. Although some reservations were expressed concerning jurisdiction in certain limited contexts, a Full Bench of the Commission in Court Session adopted the eleven indexation principles of the Australian Conciliation and Arbitration Commission, in the *State Wage Case* 1983 ([1983] AR 805)

Principle 1 was altered only to allow for the State Commission to refer to s.57 of the *Industrial Arbitration Act* in making any determination.

FEDERAL EQUAL PAY DEVELOPMENTS: 1986 TO THE PRESENT

158. The significant developments and trends in equal pay at the Federal level in this period can be summarised as follows:

(a) First, the 1972 Equal Pay Principle remains the extant principle throughout the period.

(b) Second, the Federal tribunal expressly rejected the submission that the 1972 Equal Pay Principle encompasses a concept of comparable worth.

(c) Third, the Federal tribunal has required applications for implementation of the 1972 Equal Pay Principle to be brought within the Wage Fixing Principles, in particular through the Anomalies and Inequities process. With the deletion of the Anomalies and Inequities Principle from the National Principles, the Federal tribunal has indicated that such cases can be brought within the special case and other provisions of the Principles.

(d) Fourth, since the adoption of the Structural Efficiency Principle (SEP) and the MRA Principle into the National Principles, there have been no applications at the Federal level which have sought to apply the 1972 Equal Pay Principle. It appears from the cases that pay equity claims have instead been advanced through the SEP and the MRA Principle.

(e) Fifth, a statutory right to bring an application for equal remuneration for work of equal value has been introduced. This can be contrasted with equal pay developments to date, which have almost exclusively occurred through the decisions of industrial tribunals. The statutory right, pursuant to the *Workplace Relations Act* 1996 (Cth), is expressed in section 170BH of that Act not to be intended to limit the right that any person or trade union may otherwise have to secure equal remuneration for work of equal value. The statutory right thus runs in tandem with the 1972 Equal Pay Principle.

THE 1972 EQUAL PAY PRINCIPLE AND "COMPARABLE WORTH"

159. At the outset of the period from 1986 the Commission, while affirming the continued availability of the 1972 Equal Pay Principle, rejected the contention that the Principle was sufficiently broad to encompass a concept of comparable worth.

160. Matters in relation to the 1972 principles were revisited by a Full Bench of the Australian Conciliation and Arbitration Commission in *Re Private Hospitals' and Doctors' Nurses (ACT) Award* 1972, (known as the *Nurses' Comparable Worth Case)* handed down in February 1986 ((1984) 13 IR 189). The matter, heard as a test case on the issue of equal pay for work of equal value, was the first case to consider the doctrine of comparable worth, and serves as a significant guide to the application of principles at this time.

161. The applicants asked the Bench, by way of ruling on threshold matters, to reaffirm the 1972 Equal Pay decision which adopted the principle of equal pay for work of equal value, and that it was still available to be implemented. Further, it was submitted that the nurses as a group had not had applied to them the 1972 equal pay decision ((1972) 147 CAR 172).

162. It was argued in particular that the 1972 principle could be equated with a concept of "comparable worth" which exists in various forms in the jurisdictions of Canada, the UK and the USA.

163. The Bench held that the 1972 equal pay decision was indeed still available to be implemented in awards in which it had not yet been implemented, but rejected the argument that the 1972 Equal Pay Principle encompassed a concept of comparable worth.

164. It appears from the decision that the applicants did not clearly postulate the concept of comparable worth for which they contended. The Commission noted that the ACTU had not defined or explained the doctrine of comparable worth other than to say that it was a method of job evaluation used in the United States of America to implement equal pay legislation in that country (1986) 13 IR 108 at p191).

165. In addressing the "comparable worth" argument, the Commission stated that:

> "The 1972 Principle requires comparisons between male and female rates to be made firstly within an award. Where such comparisons are unavailable or are inconclusive as may be the case where the work is performed exclusively by females it allows for comparisons to be made with female classifications in other awards and in some cases comparisons with male classifications in other awards. It was contended that this allows for comparisons to be made with rates outside a particular occupation where such comparisons are not available within the occupation. Presumably it is on this basis that the 1972 Equal Pay Principle is said to equate to the doctrine of comparable worth" ((1986) 13 IR 108 at p110).

166. In rejecting the argument that the 1972 Equal Pay Principle could be equated with a concept of comparable worth, the Bench stated that:

"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 females. Such an approach would strike at the heart of long accepted methods of wage fixation in this country and would be particularly destructive of the present Wage Fixing Principles. The countries to which we were specifically referred in which the doctrine is applied, namely Canada, United States of America and the United Kingdom, have very different industrial relations backgrounds from our own. In addition, different approaches have been taken to the doctrine in each of these countries.

Moreover as explained to us by the Commonwealth, in the United States at least, the doctrine of comparable worth refers to the value of the work in terms of its worth to the employer. Quoting from a decision of the US 9th Circuit Court of Appeal in a case entitled American Federation of State, County and Municipal Employees v. The State of Washington the Commonwealth said:

"The comparable worth theory, as developed in the case before us, postulates that sex-based wage discrimination exists if employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar."

This is quite contrary to what the Full Bench of this Commission envisaged in the 1972 Equal Pay Principle. The Principle requires equal pay for work of equal value to be implemented by work value inquiries carried out in the normal manner in which such inquiries are conducted in our wage fixing environment. This is clear from the methods of comparison laid down in paragraph 5 specifically rejects the assessment of the work on the basis of its value to the employer, stating as it does that "The value of work refers to worth in terms of award wage or salary fixation, not worth to the employer."

In our view the use of the term "comparable worth" in the Australian context would lead to confusion, and in particular, we believe that it would be inappropriate and

confusing to equate the doctrine with the 1972 principle of equal pay for work of equal value. For all of these reasons we specifically reject the notion." ("1983) 13 IR 108 at p113)

167. It appears that there have been no further attempts at the Federal or indeed the NSW jurisdictions to expressly argue that the 1972 Equal Pay Principle encompasses or can be extrapolated to encompass a concept of "comparable worth", such as exists in other jurisdictions.

THE 1972 EQUAL PAY PRINCIPLE AND THE NATIONAL ANOMALIES AND INEQUITIES PRINCIPLE

168. The applicants in the *Nurses' Comparable Worth Case*, in addition to seeking a ruling that the 1972 Principle was still available for implementation, also sought a ruling that the application of the Principle was not affected by the Wage Fixing Principles.

169. The Commission ruled on this latter point that applications based on the 1972 Principle were to be processed through the Anomalies Conference, in accordance with the procedures laid down in Principle 6 of the 1983 Wage Fixing Principles. ("1983) 13 IR 108 at 195)

170. In so ruling, the Commission referred to the statement in the Wage Fixing Principles that all increases in wages other than those for prices and productivity movements, should be in accordance with National Wage Principles 4 through to 11. ('1983) 13 IR 108 at p195)

171. Principle 6 of the 1983 Wage Fixing Principles, dealing with Anomalies and Inequities, provided as follows:

> **"6. ANOMALIES AND INEQUITIES**
>
> **(a) Anomalies**
>
> (i) In the resolution of anomalies, the overriding concept is that the Commission must be satisfied that any claim under this Principle will not be a vehicle for general improvements in pay and conditions and that the circumstances warranting the improvements in pay and conditions are of a special and isolated nature.
>
> (ii) Decisions which are inconsistent with the Principles of the Commission applicable at the relevant time should not be followed.
>
> (iii) The doctrines of comparative wage justice and maintenance of relativities should not be relied upon to establish an anomaly because there is nothing rare or special in such situations and because resort to these concepts would destroy the overriding concept of this Principle.

(iv) The only exceptions to (iii) are that catch-up for the metal industry standard and teh4 adjustment of paid rates awards to establish an equitable base may be processed as anomalies. All such claims should be lodged by 31 December 1983.

(b) Inequities

(i) The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason. Such inequities shall be processed through the Anomalies Conference and not otherwise, and shall be subject to the following conditions:

(1) The work in issue is similar to the other class or classes of work by reference to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed.

(2) The classes of work being compared are truly like with like as to all relevant matters and there is no good reason for dissimilar rates of pay.

(3) In addition to similarity of work, there exists some other significant factor which makes the situation inequitable, An historical or geographical nexus between the similar classes of work may not of itself be such a factor.

(4) The rate of pay fixed for the class or classes of work being compared with the work in issue is a reasonable and proper rate of pay for the work and is not vitiated by any reason such as an increase obtained for reasons inconsistent with the Principles of the Commission applicable at the relevant time.

(5) Rates of pay in minimum rates awards are not to be compared with those in paid rates awards.

(ii) In dealing with inequities, the following overriding considerations shall apply:

(1) The pay increase sought must be justified on the merits.
(2) There must be no likelihood of flow-on
(3) The economic cost must be negligible.
(4) The increase must be a once only matter.

(c) Procedure

(i) An anomaly or inequity which is sought to be rectified must be

brought to the Anomalies Conference by the peak union councils, namely the ACTU, the CPA, or by any union affiliated with those bodies.

(ii) The matter is first discussed with the employers and other interested parties at the Conference.

(iii) The broad principles for processing the anomaly or inequity raised are:

(1) If there is complete agreement as to the existence of an anomaly or inequity and its resolution, and the President is of the opinion that there is a genuine anomaly or inequity, the President will make the appropriate order to rectify it.

(2) If there is no agreement at all, one of two situations can arise. Either the President will hold that there is no anomaly or inequity falling within the concept of the Conference which would mean an end of the matter as far as the Conference is concerned or on the other hand the President could hold that there was an arguable case which would then go to a Full Bench of the Commission for consideration.

(3) This procedure can be departed from by agreement and with the President's approval.

(4) In the case of matters in the Australian Public Service they may have to be dealt with somewhat differently in order to comply with the provisions of the Public Service Arbitration Act."

(National Wage Case, August 1983 (1983) 4 IR 429)

172. The Principle remained in substantially the same form, other than in relation to procedural matters, until it was abandoned in the *1991 National Wage Case*.

173. In accordance with the decision in the *Nurses Comparable Worth Case*, a claim was then brought in respect of the relevant nursing awards and determinations before the Anomalies Conference. At the conclusion of the Conference, the President, finding an arguable case existed, referred the awards and determinations to the Full Bench of the Commission. (*Re Private Hospitals' and Doctors' Nurses (ACT) Award 1972 & Other Awards* (1987) 20 IR 420)

174. In relation to the anomalies claim, the Commission found that the conditions for a wage rise had been met, in that there had been no application of the 1972 decision to the relevant awards and that wages were depressed because of the non-application of that decision.

175. In so finding, the Commission opined that "all that has happened is that differences between male and female rates within nurses awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains" and expressed the view

that the situation, as it applied to nurses "is a special and isolated factor as....it is unlikely that there are many occupations in which, in 1987, wages are still depressed because of the non-application of the 1987 decision." (*Re Private Hospitals' and Doctors' Nurses (ACT) Award 1972 & Other Awards* (1987) 20 IR 420 at p432)

176. The Commission stated that:

> "...we are satisfied that the RANF has made out its basic contention that the rates for Commonwealth nurses were assessed in 1970 prior to the 1972 Equal Pay decision on the basis that nursing is a predominantly female occupation; that this assessment has caused the rates to be depressed, and that there has been no subsequent adjustment to fully redress the situation." ((1987) 20 IR 420 at p.432)

177. As to a comparison with New South Wales, it was said

> "We appreciate the fact that movements in New South Wales nurses rates may have been an important element in assessing the wage settlements for Commonwealth nurses in the 1970s, and that pronouncements of the New South Wales Commission suggest that equal pay was fully implemented in that State. All of the indications however point to a situation of no positive application of the 1072 decision in any of the consent settlements in the Commonwealth area. An examination of wage rates within the ACT, for example, indicates no advance since 1972 by nurses as compared with male tradesmen. In our opinion all that has happened is that differences between male and female rates within nurses awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains." ((1987) 20 IR 420 at p432)

178. In noting the limited application of the inequities principle in any matter before a tribunal, the Commission stated:

> "The inequities principle is one of limited application and is subject to a number of very strict conditions. It involves a comparison of classes of work which must be truly like with like as to all relevant matters. There must be similarity in respect of the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed. Moreover the principle is subject to a number of overriding considerations, and we refer to two of these: namely that there must be no likelihood of flow on and the increase must be a once-only matter. Any

> purported resolution of an inequity which invites applications for pay increases by other workers is contrary to the principle. We emphasise that the principle deals with "The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason." It is inherent in the principle that resolution of the inequity must remove the dissimilarity in the rates of pay. Any purported resolution which fails to do this or which creates a further inequity is outside the terms of the principle." ((1987) 20 IR 420 at p438).

179. The Commission also concluded that inequities existed within the second limb of the Wage Fixing Principle in respect of certain of the awards under consideration, on the basis that the "like with like" situation existed in respect of those awards.

180. Finally, the Commission, noted that the main focus of the evidence was on work value changes ((1987) 20 IR 420). Seven factors were put forward for consideration in connection with work value, being the assessment of change for work value; new categories of work; revised career structure; transfer of education to colleges; the effect of shortages on the work value of nurses; the national character of nursing; and the need for in service and continuing education programs. ((1987) 20 IR 420 at p441)

181. The Commission found that there had been changes in the nature of the work, skill and responsibility of nurses which constituted a significant net addition to work requirements within the terms of Principle 4 of the Wage Fixing Principles. ((1987) 20 IR 420 at p443)

182. While the Full Bench granted claims for a wage increase under the anomalies and inequities and the work value principles, no further consideration was given to the scope of the 1972 Principle or to the comparable worth concept.

THE 1972 EQUAL PAY PRINCIPLE AND THE NATIONAL SPECIAL CASE PROVISIONS

183. The Anomalies and Inequities Principle was deleted from the Principles in the *National Wage Case April 1991*. ((1991) 36 IR 120) The Federal Tribunal indicated when it deleted the Principle that applications for the implementation of the 1972 Principle could be brought instead within other Wage Fixing Principles, including the special case provisions.

184. This was indicated by the Commission in the course of addressing submissions made by the Australian Foundation of Business and Professional Women. (AFBPW) ((1991) 36 IR 120 at p169-170) The AFBPW had submitted that the wage fixing system evaluates skills and job attributes in such a way that work typically performed by women tends

to be devalued relative to work typically performed by men. The body therefore sought such an inquiry into all aspects of skill evaluation, including those which had a bearing on the relative evaluation of male and female work.

185. In rejecting the call for such an inquiry, the AIRC stated that:

> "We do not consider that a general skills value inquiry is called for, Such an inquiry would, in our view, prove nebulous. The current principles (including the provision for special cases) already provide ample scope for the review of any specific instances where the work typically performed by females is alleged to be undervalued. We confirm the 1972 Equal Pay Principles of the Australian Conciliation and Arbitration Commission (1972) 147 CAR 172, continue to apply and would be a relevant consideration in any such case." ((1991) 36 IR 120 at p169

186. The Commission in the 1991 Case included special case provisions as part of the Wage Adjustments Principle in the following terms:

> "Any claim for increases in wages and salaries or improvements in conditions in minimum rates awards or paid rates awards which exceed those allowable under the National Wage case decisions of 7 August 1989 and 16 April 1991 will be processed as a special case and should be the subject of an application for reference pursuant to s.107 of the Act. A party making application for special consideration should be prepared to make, and justify, an application pursuant to s.107 of the Act." ((1991) 36 IR 120 at 178)

187. In stating the Principle, the Commission stated that:

> "We do not lay down criteria for determining all special cases. We indicate, however, that we would expect any application to be consistent with the general thrust of this decision." ((1991) 36 IR 120 at 174)

188. Special case provisions remain part of the Wage Fixing Principles in the following terms:

> "An application to make or vary an award for wages or conditions above or below the safety net will be referred to the President for consideration as a special case. Applications involving a consideration of ss 87A(7) or 95 are subject to this principle. A party seeking a special case must make an application pursuant to s.107 supported by material justifying the matter being dealt with as a special case. It will then be a matter for the President to decide whether it is to be dealt with by a Full Bench." (Safety Net Review, Wages, April 1997 (1997) 71 IR 1 at p77)

NATIONAL WAGE FIXING DEVELOPMENTS - 1987 to 1991

189. As described earlier, the Australian Commission required the equal pay claim made in the *Nurses' Comparable Worth Case* to be brought within the Anomalies Principle (as it then was), finding that the 1972 *Equal Pay Principle* was subject to the National Wage Fixing Principles.

190. Pay equity-related claims have since been brought before the Commission in accordance with the wage fixing principles as they have existed from time to time. Further, such claims have not been framed primarily as claims for implementation of the 1972 Principle.

191. It would appear that this trend in the industrial jurisprudence is a reflection of changes in the Wage Fixing Principles themselves, and that applicants have seen the Wage Fixing Principles as having greater potential than the 1972 Equal Pay Principle for achieving wage increases for female-dominated award classifications.

192. The case law reflects that it has been the Structural Efficiency Principle and the Minimum Rates Adjustment Principle which have been used to achieve wage increases in female- dominated award classifications. Both the SEP and the MRA continue as part of the Wage Fixing Principles, although they have been modified in national wage case decisions since they were first adopted.

193. It is useful therefore to briefly review the developments in the Wage Fixing Principles since 1987 which are relevant to pay equity claims.

194. The Commission in the *National Wage Case March 1987* effected a sea-change in wage fixing with the introduction of the restructuring and efficiency principle. The Commission stated that changes made in accordance with this principle were to be genuine, be designed to improve efficiency and enhance productivity and generally be consistent with the needs and requirements of the industry or enterprise concerned. ((1986) 17 IR 65 at p81)

195. In the *National Wage Case August 1988*, the Commission developed a new system of wage fixation, with a structural efficiency principle as the "key element" ((1988) 25 IR 170 at p175). The new structural efficiency principle built on steps already taken pursuant to the restructuring and efficiency principle introduced by the previous wage case. An element of the new principle, absent in the former principle, was the removal of award provisions which discriminate against sections of the workforce. ((1988) 25 IR 170 at p179)

196. In reflecting on the application of the 1987 restructuring and efficiency principle, the Commission commented:

"The proper application of the restructuring and efficiency principle called for a positive approach by trade unions, their members, and individual workers and by employer organisations, their members and individual employers. In the Commission's experience some were inadequate for the task. Many others made positive efforts: the best not only derived benefits which produced immediate efficiency and productivity improvements but also laid the foundation for future improvement.

Despite the degree of success achieved we are not satisfied that the principle in its present form and as understood and accepted by many parties should be continued. Because of the general approach adopted to its application, some parties have exhausted the usefulness of the principle and it would seem impractical to expect others, who have not yet been capable of applying the principle successfully, to repeat the process.

We consider it essential, however, that any new wage system introduced should build on the steps already taken to encourage greater productivity and efficiency. Attention must now be directed toward the more fundamental, institutionalised elements that operate to reduce the potential for increased productivity and efficiency" ((1988) 25 IR 170 at p.174).

197. The Structural Efficiency Principle, stated in the *National Wage Case August 1988* provided that:

"Increases in wages and salaries or improvements in conditions allowable under the National Wage case decision of 12 August 1988 shall be justified if the union(s) party to an award formally agree(s) to co-operate positively in a fundamental review of that award with a view to implementing measures to improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid jobs. The measures to be considered should include but not be limited to:

- establishing skill-relating career paths which provide an incentive for workers to continue to participate in skill formation;
- eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;
- creating appropriate relativities between different categories of workers within the award and at enterprise level;
- ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;
- including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any

amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;

- updating and/ or rationalising the list of respondents to awards;
- addressing any cases where award provisions discriminate against sections of the workforce." ((1988) 25 IR 170 at p177)

198. In accordance with the intention expressed in the *National Wage Case August 1988,* the Commission commenced a review in February 1989 to consider the progress of individual award reviews pursuant to the SEP. (*National Wage Case February 1989 Review* (1989) 27 IR 207)

199. In the *February 1989 Review*, the Commission endorsed in principle the approach proposed by the ACTU that minimum rates awards should be reviewed "to ensure that classification rates and supplementary payments in an award bear a proper relationship to the classification rates and supplementary payments in other minimum rates awards" (1989) 27 IR 207at p212. This was the precursor to the minimum rates adjustment principle adopted in *the National Wage Case August 1989.*

200. The Commission also stated in the *February 1989 Review* that it would encourage the parties to take account of the joint suggestions of the ACTU and the CAI relating to the removal of discrimination from awards when considering structural efficiency. ((1989) 27 IR 207 at p214-215)

201. The Commission paid considerable attention to irregularities in rates of pay which were viewed as providing widespread examples of the prescription of different rates of pay for employees performing the same work in federal awards. In particular, it was said that:

> "For too long there have existed inequitable relationships among various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards." ((1989) 27 IR 207 at p210)

202. To this the Commission added:

> "There is a further dimension to the problem. Employers have introduced and will continue to introduce wage relativities both as between employees employed under the same award and employees covered by other awards in a

> particular establishment. These relativities can vary from workplace to workplace and may bear no resemblance to the relativities set in the award or awards concerned.
>
> In turn, this has inevitably caused feelings of injustice leading to industrial disruption, unwarranted "flow-on" settlements and leap-frogging in particular case. This has seriously handicapped the Commission in its efforts to achieve the objects of the Act. It has also led to economically unsustainable general wage increases, particularly when attempts have been made to move away from a highly centralised system, which have severely affected the state of the national economy." (National Wage Case August 1989 (1989) 30 IR 81 at p.212).

203. In the *National Wage Case August 1989*, the Commission translated into practice the approach to award relativities endorsed in principle in the *February 1989 Review*. Having established the minimum classification rate for a metal industry tradesperson and a building industry tradesperson, the Commission stated that:

> "Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases...on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular awards when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards." (1989) 30 IR 81 at p94

204. The Commission noted that:

> *". . .to achieve a proper and lasting reform of awards, it is essential that the structural efficiency exercise and the proper fixation of minimum award rates be treated as a package" and further that "the minimum rates adjustment exercise could detract from the benefits to be obtained from the structural efficiency principle if priority is not given to the latter principle." (1989) 30 IR 81 at p95*

205. The Minimum Rates Adjustment Principle, set down in the *National Wage Case August 1989*, provided that:

> "Minimum rates adjustments allowable in the National Wage case decision of 7 August 1989 shall be in accordance with the following:
>
> (i) the appropriate adjustments in any award will be applied in not less than 4 instalments which will become payable at 6 monthly intervals;

(ii) in appropriate cases longer phasing-in arrangements may be approved or awarded and/ or parties may agree that part of a supplementary payment should be based on service;

(iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or 3 months after the variation of the particular award to implement the first stage structural efficiency adjustment, whichever is the later;

(iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary; and

(v) acceptance of absorption of these adjustments to the extent of equivalent overaward payments is a prerequisite to their being applied in any award.

THE 1972 EQUAL PAY PRINCIPLE AND CASES BROUGHT UNDER THE NATIONAL STRUCTURAL EFFICIENCY AND MINIMUM RATES ADJUSTMENT PRINCIPLES

206. There have been some notable cases in which it appears to have been the intention of the applicants to use the Wage Fixing Principles, the Structural Efficiency Principle and the Minimum Rates Adjustment Principle in particular, to redress gender based pay inequities.

207. The *Child Care Industry (ACT) Award 1985 Case* ((1990) 39 IR 194) was heard by a Full Bench of the Australian Industrial Relations Commission following an Anomalies Conference and an Inquiry.

208. The Bench acknowledged in relation to the child care industry that:

> "Members of this industry's workforce, from whom the community expects much, have been disadvantaged. They form part of that class of lower paid workers whose position was recognised in the National Wage Case March 1987 and who qualify for special attention according to the principle providing for adjustment of minimum rates which was published by the Full Bench in the National Wage Case August 1989. The awards fall into the category to which the national wage Full Bench referred when it stated '...there is no doubt that the current award wage system contains irregularities in rates of pay which must be dealt with." ((1990) 39 IR 194 at 195)

209. It was argued that the shortcomings of the awards, in summary, were that:

- existing award rates had not been adequately established in the past;
- an inequity existed as a result of child care workers doing similar work but being paid different rates;
- there had been significant changes in the child care industry,

including training of child care workers; and

- the child care industry is one which should provide a proper career structure.

210. The parties in the *Childcare Case* had agreed to a new structure. They agreed further that minimum rates adjustments should apply to the award rates and that this would result in appropriate salary outcomes for the workforce. The disagreement between the parties lay primarily in the identification of the base rate and the actual rates which should apply to the proposed classification. ((1990) 39 IR 194 at p195)

211. For the purposes of the *Childcare Case*, the relevant Wage Fixing Principles were the SEP and the MRA Principle as stated in the *1989 National Wage Case*. That Case had stated the MRA Principle for the fist time and had made only minor changes to the SEP, by providing that structural efficiency exercises should incorporate all past work value considerations.

212. The parties generally agreed that an appropriate comparison, for the purpose of determining the minimum rates adjustment, would be a Child Care Worker Level 3 after one year's service with the Engineering Tradesperson Level 1 in the Metal Industry Award. The Commission noted that:

> "It was not suggested [by the parties], of course, that these classifications could be "compared" in the conventional sense, but by reference to the training requirements for each classification, a guide was found to the level of competence which must be attained." ((1990) 39 IR 194 at p197)

213. The Commission noted further, that:

> "It is apparent that the decision in the National Wage Case August 1989 did not require that direct comparisons of skill, responsibility and work conditions had to be found before relativities could be approved; if this was required, very few categories of worker in awards other than the trades award would qualify." ((1990) 39 IR 194 at p197)

214. The Commission accepted the new structure for the award proposed by the parties and the comparison between a Child Care Worker Level 3 after one year's service with the Engineering Tradesperson Level 1 in the Metal Industry Award for the purpose of determining the minimum rates adjustment, finding that the exercise used to establish a comparison of the two classifications by looking at their training requirements was the proper way of conducting the minimum rates adjustment exercise. ((1990) 39 IR 194 at p197)

215. Thus, it would appear that while the Commission had rejected the concept

of "comparable worth" in the *Nurses' Comparable Worth Case*, it is not opposed in principle to making comparisons between dissimilar occupations for the purpose of determining the value of work, as it has done in the context of the MRA Principle.

216. The proceedings in the *Journalists (Book Industry) Award 1990 Case* provides a further example of the Wage Fixing Principles being used to effect wage increases for female dominated award classifications.

217. The proceedings concerned a dispute notification relating to the implementation of a structural efficiency agreement between the parties and in particular to the relativities for certain grades of editor under the award.

218. The Commission in that Case applied the principles of *the National Wage Case April 1991*, the relevant principle of which was in the following terms:

> "Consistent with the ongoing implementation of the structural efficiency principle determined in the National Wage case decision of 7 August 1989, any party to a minimum rates award or a paid rates award seeking the increases in wages or salaries allowable under the National Wage case decision of 16 April 1991 is required to satisfy the Commission:
>
> (a) that the parties to the award have examined or are examining both award and non-award matters to test whether work classifications and basic work patterns and arrangements are appropriate- examination to include specific consideration of:
>
> (i) the contract of employment including the employment of casual, part time, temporary, fixed term and seasonal employees,
> (ii) the arrangement of working hours;
> (iii) the scope and incidence of the award;
>
> (b) that facilitative provisions have been inserted in relevant clauses of the award;
>
> (c) that the award requires enterprises to establish a consultative mechanism and procedures appropriate to their size, structure and needs for consultation and negotiation on matters affecting their efficiency and productivity;
>
> (d) that the award, in order to ensure increased efficiency and productivity at the enterprise level, while not limiting the rights of an employer whereby consideration can be given to changes in award provisions; any agreements reached under this process would

have to be formally ratified by the Commission and any disputed areas should be subject to conciliation and/ or arbitration;

(e) that there is a provision in the award to the effect that an employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training;

(f) that the parties to the award have implemented, substantially, the structural efficiency principle determined in the 7th August 1989 National Wage case decision and have applied or are applying consequential award reforms to the workplace; and

(g) that the parties to the award have commenced the minimum rates adjustment process or are prepared to commence it, in the acceptable near future." (National Wage Case 1991)

219. The Australian Journalists Association claimed that the work of book editors had never been properly recognised in the award and that this was because of a lack of recognition of the work value of editors as a heavily female dominated industry; the percentage of women in the industry having been put at 90%.

220. The Association claimed that its position embraced the direction taken by the Commission in the *National Wage Case August 1989* in using the Structural Efficiency Principle to address any cases where award provisions discriminate against sections of the workforce. (*Journalists (Book Industry) Award*, 28 August 1992, Print K4339 at p7)

221. The Association further claimed that the structural efficiency principle and the minimum rates principle provide a means of addressing gendered wage differentials, citing a Federal Government policy statement. The statement, quoted in the decision, was to the effect that:

"The Government strongly supports the continued review of award wage relativities based on comparisons of skill and responsibilities through the minimum rates adjustment (MRA) process, This process is a fundamental and essential part of award restructuring. It believes that this process provides an historic opportunity to ensure that work is properly valued, particularly that traditionally done by women...Properly applied, the MRA process should allow for the work value of all award classifications to be reassessed in light of these criteria, and for any undervaluation of work that is identified to be addressed." (Journalists (Book Industry) Award, 28 August 1992, Print K4339 at p7)

222. The Australian Journalists Association and the Australian Book Publishers Association both relied on the decision in *Re Child Care Industry (ACT) Award 1985* to support their claims as to the appropriate way to make the necessary comparisons to determine the relativities in dispute. The

Commission accepted that a comparison should be made between a single classification in the award and the Engineering Tradesperson Level 1 in the Metal Industry Award.

223. It would also appear that the Structural Efficiency Principle, as it has existed from time to time, has been used in attempts to redress classification compression in feminised occupations in the Australian Public Service.

224. Evidence tabled in the *Family Court Counsellors Case* (Australian Industrial Relations Commission, unreported, No.90086 of 1992) showed that 82% of the female dominated counsellor profession were compressed into the lowest two levels of the five level classification structure. In the *Social Workers' Case*, (*Re Professional Officers Association, Australian Government Employment, Professional and Executive Salaries Award 1990,* 27 June 1997, Print P2275) evidence was led which showed that 94% of the Department of Social Security's social workers were compressed into the same two lowest levels. (NB: F Rafferty, "Equal Pay: The Evolutionary Process 1984- 1994" *Journal of Industrial Relations*, 1994, Vol.36 No.4 pp.451- 467. Felicity Rafferty appeared in both these cases as the union's industrial officer.)

225. In the *Family Court Counsellors Case*, the applicant, in a dispute arising out of a claim for a restructuring of the Family Court Counselling Service, argued that the actions of the employer in reclassifying deputy registrars and thereby disturbing relativities with family court counsellors, was discriminatory. It was further argued that this disturbance of relativities should be remedied by restructuring the position of counsellors within the award and, in addition, that there had been a change in the nature of the work of counsellors and that this fact alone would enable the Commission to deal with the matter.

226. Ultimately the claim was successfully processed as a work value case (*Family Court Counsellor's Case*, 25 August 1993 Print No K8931) However, the lack of clear classification descriptions in the award, as required in the SEP for paid rates awards, impeded the Commission's ability to determine the matter. (*Family Court Counsellor's Case*, 25 August 1993 Print No K8931 at p2)

227. The *Social Workers' Case* principally concerned the appropriateness and correctness of the application of position classification standards to the DSS social worker positions pursuant to the application of the SEP. The union successfully argued for an upgrading of the classifications for the five social worker positions under consideration.

228. The Commission recommended that a number of issues should be the subject of discussions between the parties, two of which in particular appear to be directed at reducing classification compression. The Commission noted that a review of the position classification statements

for professional officers was initially intended by the parties to be done with a view to reaching agreements about their amendment and stated that:

> "...a number of the current descriptions drew on examples from the hard sciences by reference to technology and the like. As a consequence their application to soft or behavioural sciences is made more complex." (Re Professional Officers Association, Australian Government Employment, Professional and Executive Salaries Award 1990, 27 June 1997, Print P2275, at p51)

229. The Commission further recommended that:

> "...consideration be given to some form of broadbanding so that over time newly inducted social workers having very little experience can, as competency and skills develop such that the Social Worker involved can and is required to work at a more senior level is properly remunerated ie if social worker [Professional Officer 1's] are required to work at the Social Worker Professional Officer 2 then they should receive the appropriate rate." (Re Professional Officers Association, Australian Government Employment, Professional and Executive Salaries Award 1990, 27 June 1997, Print P2275, at p.51)

230. While the Wage Fixing Principles have been used to indirectly advance pay equity claims, the Commission, in the national wage fixing cases, has also directly addressed pay equity issues in the context of its obligations under s.150A of *the Industrial Relations Act* 1988 (Cth). This section made the Commission responsible for identifying discrimination in awards and taking steps to remedy it.

NATIONAL WAGE FIXING PRINCIPLES AND DISCRIMINATION

231. To submissions in the *National Wage Case April 1991* ((1991) 36 IR 120) by the ACTU and the Commonwealth that the Commission should ensure that the SEP was not implemented in a discriminatory manner, the Commission responded that parties appearing before it in individual cases should raise any issue relevant to those proceedings which they consider to be inconsistent with the requirements of s.93 of the *Industrial Relations Act* 1988 (Cth). (That Act requires the Commission to take account, inter alia, of the principles embodied in *the Sex Discrimination Act* 1984 (Cth).

232. In the *Review of Wage Fixing Principles August 1994* ((1994) 55 IR 144), the Sex Discrimination Commissioner submitted that the Commission should carry out an annual review of wage fixing including matters such as minimum rates adjustments and progress towards adjusting relativities among awards to reflect current work value and skill, concepts and measurement of work value and assessment of progress towards equal pay.

233. The Commission decided to respond to these and related submissions in four ways, stating that it considered that these measures should provide ample scope for dealing with discrimination and addressing pay equity considerations.

234. First, the Commission stated that the provisions of the *Industrial Relations Act* 1988 (Cth) concerned with discrimination and equal remuneration would guide the Commission in its implementation of its wages system and referred to the Introduction to the Statement of Principles. Second, the Commission proposed amendment of the Rules of the Commission to collect data relating to gender, age and ethnicity of employees in applications for the certification of agreements and approval of enterprise flexibility agreements. Third, the Commission was to establish a database of such information and to issue public reports. Fourth, the Commission stated that the s.150A review process may also provide an opportunity to address issues of discrimination and pay equity. ((1994) 55 IR 144 at p167)

235. The Commission stated that, if these measures failed to adequately deal with the discrimination and pay equity issues over which it has jurisdiction, it would take appropriate action consistent with the Act to remedy the situation. ((1994) 55 IR 144 at p167)

236. In the *Third Safety Net Adjustment & Section 150A Review October 1995*, the Human Rights and Equal Opportunity Commission, supported by the National Pay Equity Coalition, proposed that the Commission specifically investigate the reasons for the cessation in the improvement in the female to male earnings ratio.

237. The Commission, noting that it was not a "general regulatory body", stated that the measures referred to in the *August 1994 Review* had been implemented and reiterated that should the measures prove inadequate, it would take action in accordance with the Act to remedy the inadequacy. ((1995) 61 IR 236 at p290)

238. The Commission also made the third award level arbitrated safety net adjustment subject to the conditions that the award be varied to insert the model anti-discrimination clause set out in the decision and that, where the s.150A review of the award had not been completed, discussions between the award parties were continuing with particular attention on the removal of discrimination. ((1995) 61 IR 236 at p251)

239. It is clear that the Structural Efficiency and the Minimum Rates Adjustment Principles, both on their face and in practice, have a greater potential to redress gender based pay inequities than did the 1972 Equal Pay Principle. The major advantages of these Principles as they have been applied are that they:

- provide a means for comparing award classifications for the purposes of determining relative value; and
- they permit a broader range of issues which affect women's pay than wage differentials, such as multi-skilling, training and broadbanding.

NEW SOUTH WALES EQUAL PAY DEVELOPMENTS: 1986 TO THE PRESENT

240. The case law emanating from the NSW industrial jurisdiction shows a limited degree of activity by the industrial parties in pursuing pay equity for female employees. There appears to have been only one application in the period from 1986 seeking the application of the 1973 NSW equal pay decision which resulted in an award variation. This is perhaps understandable given the length of time which had elapsed since the decision.

241. There does not appear to have been a continuation of the Federal trend to utilise the wage fixing principles (the SEP and the MRA principle in particular) to achieve equal pay outcomes. Nor do there appear to be any significant attempts to utilise the provisions in NSW industrial legislation to achieve this outcome.

IMPLEMENTATION OF THE NSW 1973 EQUAL PAY PRINCIPLE

242. It would appear that in this period only one application was made for an award variation which resulted in the application of the 1973 NSW equal pay decision. The *Toymakers' Employees (State) Award* was varied pursuant to a 1989 decision to provide an additional entitlement to female employees of an allowance as a first equal pay instalment, from 13 November 1973. (This award is still in force- see *Awards and Contract Determinations in Force as at 30 January 1998*, supplement to the New South Wales Industrial Gazette Volume 303 and see also 260 IG 1421)

EQUAL PAY AND THE NSW WAGE FIXING PRINCIPLES

243. The NSW Industrial Relations Commission has in general flowed on the national wage case decisions since 1987.

244. The *National Wage Case March 1987*, which first adopted the Restructuring and Efficiency Principle, was adopted by the NSW Industrial Relations Commission in the *State Wage Case March 1987*. ((1987) IR 105) In the *State Wage Case August 1988* ((1988) 26 IR 24) the Commission associated itself generally with the decision of the Federal Commission which introduced the Structural Efficiency Principle.

245. The State tribunal adopted generally, in a decision of 4 October 1989, the principles set down in the *National Wage Case August 1989*, but deferred for further and separate consideration the question of whether the

Minimum Rates Adjustment provisions of the National Wage Adjustments Principle should be adopted. ((1989(30 IR 107)

246. The Minimum Rates Adjustment principle was adopted reluctantly by the State of New South Wales, with the Full Bench of the Industrial Commission of New South Wales in Court Session noting:

> "The Commission is being asked to adopt a new provision laid down by the Australian Commission in the National Wage case - August 1989 as part of that Commission's wage-fixation principles which will have the effect of changing significantly the method of wage fixing traditionally applied in this State.
>
> Under this new provision, rates of wages in awards will be split up into two components, minimum rates and supplementary payments, contained within different clauses in an award, but which, when added together, will represent the minimum amount which employers are legally required to pay to employees of the classification in question. The assessment of such amounts will be heavily influenced by comparisons between classifications of employees in question with tradespersons in the metals and building industries and the minimum rates and supplementary payments approved for such tradespersons by the Australian Commission in the National Wage Case August 1989." ((1989) 35 IR 183 at p193)

247. Even though the Commission observed that the role of supplementary payments in the State system had never been a significant feature of the New South Wales wage-fixing system and that the new system was being pressed in the face of strong opposition by major employer groups and the Crown, the Full Bench followed the federal precedent due to one overriding factor:

> "As we have stated in the past, the need for comity between industrial tribunals and consistency in approach in a system of centralised wage fixation is of great importance. . .
>
> In regard to the provision now under consideration, not only has it been adopted by the Australian Commission but also by industrial tribunals in all other States. If we were now to reject the provision in the context of the New South Wales system, it would seem to us to constitute a real threat to the stability of the general system throughout Australia. Accordingly, but admittedly with some misgivings, we formally decide that the provision in question should be adopted as part of the wage-fixing principles of the

> Industrial Commission of New South Wales." ((1989) 35 IR 183 at p193-194)

248. Despite the fact that developments under the NSW Wage Fixing Principles have largely mirrored those under the National Principles, it would appear that the attempts to use the wage fixing principles (the SEP and MRA in particular) as vehicles for equal pay claims in the NSW jurisdiction have not been as clear as those in the Federal jurisdiction.

249. Further, there appears to have been limited consideration in the NSW cases in this period concerning women's pay under awards and its connection with structural and classification issues.

250. There was, however, extensive consideration given in *the Clerks' Case* to competency standards in the setting of relativities, to which evidence of the connection between women's position in the classification structure and the availability of formal training and qualifications was considered to be relevant. The Commission noted that evidence had been given that "lower female pay simply has been a fact of Australian industry". The evidence further referred to:

> "bias that discriminates in favour of obvious formal qualifications as against the more informal ones available to clerical employees, male and female. Females, particularly in those areas where there are short courses involved, can undertake quite a number of short courses, but they don't add up to a credential. Within female dominated occupations such as the clerical industry there is a higher proportion of females at the lower classification levels, and relatively higher percentage of males at the higher levels. That is reflected in the way training is distributed- lots of training, short courses and unrecognised courses for those at the bottom, and more formal credentialled courses for those at the top." (Clerical and Administrative Employees (Classification Structure) State Award, 25 October 1996 Matter No IRC2335 of 1992 at p85)

251. The Commission in that case went through a painstaking process of determining relativities for the classifications under the award in accordance with the applicable SEP and MRA principles. However, there were no further references to any particular considerations which might affect women's pay.

252. In its application in the 1997 State Wage Case, the Labor Council of NSW initially sought a State decision which addressed "the concept of gender equity and equal remuneration and the issue of discrimination relative to the setting of wage rates". However, this part of the application was withdrawn by the Labor Council "in light of the announced intention of the Minister for Industrial Relations to file a ministerial reference" which would incorporate this aspect of the application. ((1997) 73 IR 200)

253. In fact, the last case in New South Wales, up to 1986, to deal with equal pay was the *Universities (Equal Pay) Case* [1980] AR 616. In this case, a Full Bench heard an appeal from a decision of Macken J concerning the rates of pay for predominantly female keyboard employees.

254. The Public Service Association of New South Wales (PSA) had made an application at first instance to have a single integrated scale for all clerical and keyboard employees, claiming that the clerks' scale included more incremental steps and higher salaries than the predominantly female keyboard group, and there was discrimination based on sex.

255. The application had been dismissed by Macken J, who held that the scales were correctly set, reflecting the skills of the employee, the works performed and the level of responsibility, irrespective of the sex of the worker.

256. On appeal the Full Bench held that no case had been made out that the basis of the separate salaries scales for stenographers and typists was the sex of the employees; rather, work-value consideration were the basic reason for the differentiation between them and the salaries for clerks. The Bench held further that:

> "...while, not unexpectedly, examples of overlapping were brought to light, was were individual cases of an employee of one classification performing work which one might well regard as being properly the province of an employee of another classification, we were not satisfied overall that the work value of the three groups was so similar that an integration of rates should in justice take place." (at p.631)

257. While there were some individual cases of overlapping of functions, the work-value of the three groups was not so similar overall as to justify integration of rates.

258. Nevertheless, the Commission considered that a further adjustment of the salaries for stenographers and typists was needed, stating that:

> "...we think that the adjustments made in 1873 were inadequate to implement equal pay and that the salaries for stenographers and typists needed a further adjustment now to ensure that the principles are fully satisfied." (at p.631)

259. This was because the salaries for those employees had been assessed by reference and in relation to a basic wage for adult females, and the heart of the equal pay principles was the abolition of the differential between male and female basic wages. While there had been adjustments to the salaries in 1973 purporting to implement those principles, the same adjustments were also intended to pass on a wage movement occurring in the Public Service (with which there was an

acknowledged relationship) and on the evidence the amounts of those adjustments were insufficient to satisfy both the equal pay principles and the general increase.

NSW PAY EQUITY LEGISLATION

260. No reported decisions were handed down by the NSW Industrial Relations Commission under section 88D of the *Industrial Relations Act* 1940 (NSW) in the period from 1986.

261. The *Industrial Relations Act* 1991 (NSW), which repealed the 1940 Act, contained the following equal pay provision:

> s.100 (1) On application, the Commission is required to insert in man award provisions for equal pay for employees of either sex.
>
> (2) The Commission is required to insert the provisions only if the award relates to wage rates for male and female employees performing work of the same or a like nature and of equal value.
>
> (3) The provisions may be inserted in an award by way of variation or otherwise.
>
> (4) This section applies to an award whether made before or after the commencement of this section.

262. No applications were made in the period under consideration to vary awards in accordance with this section.

263. The 1991 Act also provided for anti-discrimination matters more generally, requiring the Commission, inter alia, to take account of the principles contained in the *Anti-Discrimination Act* 1977 (NSW) relating to discrimination with respect to employment in the exercise of its jurisdiction and functions (ss. 300 and 351).

264. The *Industrial Relations Act* 1996 (NSW), which in turn repealed the 1991 Act, contains various which deal with pay equity and discrimination. However, there have to date been no cases brought by applicants pursuant to the legislation for the purpose of seeking an equal pay outcome.

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APPENDIX NO. 9.

ILO CONVENTIONS

C100 Equal Remuneration Convention, 1951
Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value
(Note: Date of coming into force: #FORCE=23.05.1953.)

PREAMBLE

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-fourth Session on 6 June 1951, and

Having decided upon the adoption of certain proposals with regard to the principle of equal remuneration of men and women workers for work of equal value, which is the seventh item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts the twenty-ninth day of June of the year one thousand nine hundred and fifty-one, the following Convention, which may be cited as the Equal Remuneration Convention, 1951:

TEXT

Article 1

For the purpose of this convention-

(a) the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;

(b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. 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
   (d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of tis 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 tis appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.

3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Article 4

Each Member shall co-operate as appropriate with the employers' and workers' organisations concerned for the purpose of giving effect to the provisions of this Convention.

Article 5

The formal ratification's of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 6

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratification's have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratification's of two Members have been registered with the Director-

General.

3. Thereafter, this convention shall come into force for any Member twelve months after the date on which its ratification's has been registered.

Article 7

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of article 35 of the Constitution of the International Labour Organisation shall indicate-

   (a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;

   (b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;

   (c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

   (d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 9, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 8

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.