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30 September, 2008

The Secretary
Standing Committee on Employment and Workplace Relations
House of Representatives
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Dear Committee members,

**Submission of the Australian Council of Trade Unions (ACTU)
to the
Inquiry into Pay Equity and Female Workforce Participation**

Please find attached the Submission of the Australian Council of Trade Unions (ACTU) to the Inquiry into Pay Equity and Female Workforce Participation.

If you have any queries or would like to discuss any matters in relation to this Submission, please contact Belinda Tkalcevic on (03) 96647349 or email btkalcevic@actu.asn.au.

Yours sincerely,

Sharan Burrow
ACTU President

ACTU

ACTU Submission to the Productivity Commission's

Inquiry into

Pay Equity and Female Workforce Participation

September 2008

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1. INTRODUCTION

1.1 The ACTU is the peak body representing 47 unions and almost 2 million working Australians. We welcome this opportunity to make a submission to this inquiry.

1.2 Almost 40 years have passed since the Industrial Relations Commission awarded equal pay for work of equal value. In the years immediately following the removal of discriminatory pay scales the gender pay gap narrowed. However, pay inequality and pay inequity have remained stubborn features of our labour market. Disturbingly, in recent years we have seen the gap widen. And women, particularly women with family responsibilities, remain locked out of secure and satisfying jobs.

1.3 While there has been a dearth of policy development at the national level over recent years, various State based inquiries have examined the causes of pay inequity. Over the past decade the following inquiries have probed the causes of the pay gap, and proposed remedial legislative and policy changes.

- A NSW inquiry in 1998;
- A Tasmanian inquiry in 1998
- A West Australian inquiry in 2004;
- A Victorian inquiry in 2005; and
- Two Queensland inquiries in 2001 and 2007.

1.4 Each inquiry involved thorough and detailed analysis of pay inequity in Australia and made constructive and practical recommendations for strategies to eliminate gender based pay inequity.¹ The Inquiries confirmed that:

- The Australian labour market's particularly high levels of gender segregation has resulted in women in female dominated occupations and industries earning up to 40% less than women in male dominated occupations and industries² with this trend appearing to be increasing.³
- Australia has a particularly high incidence of women employed in part time work⁴, which is concentrated in the lower classifications within organisations and provides fewer opportunities for training, skill development and promotion.⁵

¹ A table summarizing the key recommendations of each of these inquiries is attached.

² Barbara Pocock and Michael Alexander, *Labour and Industry*, Vol. 10, No.2 December 1999

³ Since 2005 there has been a growing pay gap between male and female dominated industries, with mining and construction sectors growing 4 % faster than the all industry average and retail and hospitality growing almost 3% slower than the all industry average.³

⁴ Forty-five percent of women work part time compared to just 14% of men; with female dominated industries having the highest levels of part-time work and 50% of employees in the retail sector, 60% of employees in accommodation and food services and 40% of employees in education and administrative support services working part time: ABS 6306.0 May 2006

⁵ EOWA Census on Women in Leadership January 2008.

- Australian women continue to shoulder the responsibility for unpaid work in the home and care of children and other dependent family members.⁶
- The Australian industrial system has systematically undervalued the skills and qualifications associated with work carried out by women;⁷
- Women, particularly those employed as part time and casual employees, are highly dependent on award minimum wages and conditions⁸ and have low levels of unionisation.⁹
- Women generally have not made the same gains as men under the bargaining system and enjoy less over-award entitlements than men;¹⁰ and
- The gap between low paid workers on minimum award wages and employees able to negotiate over award wages and conditions continues to be a key source of pay inequity for women.

1.5 Despite the remedial activities at State level the gender pay gap has widened from women earning 87 cents for each dollar earned by men in 2004 to 84 cents in 2007.¹¹ Average weekly earnings for women have not kept pace with inflation, and in May 2007 women's total earnings actually fell in real terms.¹²

1.6 The WorkChoices regime undermined the capacity for women to maintain pay equity by stripping the safety net in general and promoting individual contracts¹³ and by restricting women's access to equal remuneration remedies.¹⁴

1.7 It is our view that the State Inquiries represent significant analysis of the pay equity issue in Australia and that this Committee should give due consideration to the recommendations of these Inquiries

⁶ Ironically, women's lower wages are a major factor in families' initial decisions that women should undertake the unpaid caring role: HREOC Submission to the AFPC p.40

⁷ The recent pay equity cases for child care workers, librarians and dental assistants demonstrated the systematic undervaluation of skills and qualifications in females dominated occupations and industries: Children's Services Award, Librarians and Queensland Dental Assistants Case, 2005

⁸ In 2006, 44% of casuals and 33% of part time employees' wages and conditions were determined solely by awards. Unsurprisingly, employees in these sectors are also the lowest paid: ABS 6306.0 May 2006

⁹ In 2006, almost 60% of employees working in the accommodation and restaurant industry, 40% of employees in community services and 32% of employees in the retail sector were reliant on award wages. ABS 6306.0 May 2006

¹⁰ Women have less access to over-award allowances and bonus payments, overtime and penalty rates. For example, women earn 35% less paid overtime than men: ABS 6306.0 May 2006

¹¹ ABS cat no. 6320.0 AWOTE May 2008

¹² ABS 2007

¹³ OEA Data supplied to the Senate Estimates Committee in May 2006 confirmed that 100% of AWAs removed at least one protected award condition, the majority cut overtime, penalty rates, annual leave loading, public holidays payments and shift loadings and that the pay gap was worst for women on AWAs: One Year On: The Impact of the New IR Laws on Australian Working Families, ACTU publication, March 2007. In 2006-7, women on AWAs earned on average \$87 less per week than their counterparts on collective agreements with part-time women earning \$140 less: ABS 2007

¹⁴ In addition, WorkChoices specifically removed access to remedies which would be inconsistent with the minimum wages set by the AFPC and removed access to State Tribunals with superior equal remuneration principles.

- 1.8 The gender pay gap must not be allowed to widen further. The government is well placed to capitalise on the constructive work conducted by its State counterparts and implement strategies that will not only stem the widening pay equity gap but work towards achieving gender equality in Australia.
- 1.9 It is important that the government address the widening gender pay gap not only because pay equity is an important human right,¹⁵ but it is also critical to the development of a robust Australian economy. Pay equity promotes greater labour force participation of women, enhancing the quality and competitiveness of the Australian labour market and assists in sustaining the tax base of an aging population.¹⁶
- 1.10 Wage fixation is far more complex today in 2008 than it was in 1968. Addressing the gender pay gap requires intervention at every stage where decisions about wages and conditions of employment are made. For that reason the ACTU recommends that amendments to the *Workplace Relations Act (1996)*, the *Equal Opportunity for Women in the Workplace Act (1999)* and the *Sex Discrimination Act (1984)* be made to establish a robust legislative pay equity framework which is part of a proactive public educative and regulatory regime.
- 1.11 While the award system has traditionally been a means by which the pay gap was narrowed in Australia enterprise level collective bargaining, and more recently individual wage fixation, has reduced role of awards in setting wages in Australia.
- 1.12 Only one in five workers rely on the award to set their actual rate of pay, while four in ten are covered by collective agreements and another four in ten by individual wage fixing (most of which is over-award). While awards will remain important, the legal framework within which bargaining occurs is much more important than awards in today's labour market.
- 1.13 The government's policy commitments set out in *Forward with Fairness* will see role of awards to diminish further as wage fixation above the safety net

¹⁵ One of the principal objects of the WRA Equal Remuneration Provision is to give effect to the ILO Equal Remuneration Convention (C100), and Discrimination (Employment and Occupation) Convention (C111) and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). These Conventions recognise pay equity as an important element of substantive gender equality.

¹⁶ For example, Government Intergenerational Report noted that, a modest 2.5% increase in labour participation rates would produce an additional 9% increase in economic output by 2022: Gruen, D & Garbutt, M., "The Output Implications of Tighter Labour Force Participation", Treasury Working paper, 2003-02, October 2003.

is devolved further to enterprise level. Collective bargaining will be the dominant means for formal wage bargaining for the foreseeable future.

- 1.14 The legal framework within which wage bargaining occurs can support or inhibit women's participation in bargaining. The ACTU proposes a range of measures that will facilitate women's participation in formal wage bargaining.
- 1.15. While statutory individual contracts will be phased out, individual wage fixation above the award safety net will be available through common law contracts.
- 1.16 At firm level, remuneration practices that contribute to pay inequity are no longer confined to over award rates of pay, or access to overtime. A fresh examination of the gender pay gap must consider allowances; penalties and shift loadings; and access to benefits. Important too are the complex and opaque performance based pay schemes that are commonplace today. This submission suggests new ways to ensure both formal and informal over-award wage fixation is conducted in a transparent and accountable manner.
- 1.17 The final set of recommendations address the institutional supports that will promote gender equity in wage fixation, including the interaction with the anti-discrimination legislation.
- 1.18 The ACTU argues that the following reforms are essential to address the equity scheme should include:
- Maintaining a decent safety net of minimum wages and conditions;
 - Improving the capacity for women to bargain for over award wages and conditions;
 - Providing remedies to address the pay gap between employees who do and those who do not have access to collective bargaining;
 - Improving access to flexible work arrangements and provisions for carers;
 - Introducing mandatory annual reporting of basic remuneration data for all employers;
 - Instigating regulatory measures to prevent pay inequity;

- Broadening the capacity of Fair Work Australia (FWA) to address pay equity;
- Providing FWA with broad powers to may make any orders it sees fit to prevent pay inequity;
- Establishing a specialist Pay Equity Unit which is proactive in addressing the gender gap and which integrates the monitoring, compliance and remedial aspects of the pay equity scheme; and
- Establishing a Pay Equity Commissioner within FWA.

2. THE REGULATORY FRAMEWORK

2.1 There are a range of regulatory tools that can be deployed to enhance women's labour force experience, and address the gender pay gap. Effective marginal tax rates, provisions of child and elder care, and enforceable equality legislation can address female workforce participation rates. Equity measures in the education and training sector can influence girls career choices, and return to work opportunities for women who have broken work patterns due to caring roles.

2.2 Despite deregulation of the wages system, the primary regulatory tool available to government is the industrial relations legislation. The government should ensure that its new one stop shop, Fair Work Australia (FWA) has pay equity in its sights in the performance of all of its functions.

Recommendation 1: That the Objects of the new industrial relations legislation include ensuring equal remuneration for work of equal or comparable value as a stand alone Object. This should also be a specific object in relation to the setting of minimum wages and workplace bargaining.

3. MINIMUM WAGE FIXATION AND THE AWARD SYSTEM

3.1 While the proportion of the labour force that is award reliant is predicted to continue to reduce, the award system will continue as an important means by which to address gender pay inequity. The government proposes that award wages will be reviewed annually, and that awards will be reviewed every four years to ensure they remain relevant.

Minimum wage setting

Recommendation 2: That in setting and adjusting minimum wages FWA should be required to ensure that minimum award wages provide for equal pay for work of equal or comparable value. Further, a person bound by an award must be able to make an application to adjust the minimum rates to ensure equal pay for work of equal or comparable value.

3.2 This approach was recommended by the State based inquiries, which noted the focus of the work of the tribunal should be to ensure there is no undervaluation of work on a gender basis.

3.3 The Committee should note that this would be an evolutionary, not revolutionary change. Until the WorkChoices amendments of 2005, the AIRC was able to adjust minimum wages to ensure equal pay for work of equal value under its wage fixing principles. Upon application the Commission could adjust wages if there had been change in the:

“nature of the work, skill and responsibility required or the conditions under which work is performed...[that] constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification. ...a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related...the time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the August 1989 National Wage Case decision (August 1989 National Wage Case) [Print H9100; (1989) 30 IR 81].

3.4 The AIRC relied upon the generally accepted notion (contained in statement by Senior Commissioner Taylor in 1968 to the effect) that the following factors were relevant to the assessment of work value:

- qualifications necessary for the job;
- training period required;
- attributes required for the performance of the work;
- responsibilities for the work, material and equipment and for the safety of the plant and other employees;
- conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;
- quality of work attributable to, and required of, the employee;
- versatility and adaptability: for example, performing a multiplicity of functions;

- skill exercised;
- acquired knowledge of plant and process;
- supervision over others or necessity to work without supervision; and
- importance of the work to the overall operations of the plant.

3.5

Thus, the AIRC's wage fixing principles allowed for the adjustment of award rates of pay based upon undervaluation of work. However the criteria did not reflect the criteria recommended by the various State based inquiries. In particular, the AIRC was not concerned with historical undervaluation of work, but changes in the value of work that had occurred since the last work-value assessment, effectively entrenching long-standing gender based undervaluation of work.

Recommendation 3: That FWA be obliged, in ensuring equal pay for work of equal or comparable value that FWA be empowered to consider historical undervaluation.

Recommendation 4: that FWA have regard to all relevant matters including:

- (a) Whether there has been some characterisation or labelling of the work as "female";**
- (b) Whether there has been some underrating or undervaluation of the skills of female employees;**
- (c) Whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;**
- (d) Whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or**
- (e) Whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.**

Award modernisation

3.6

In 2005 the AIRC was stripped of its wage setting function, and the AIRC repealed its wage fixing principles. As a result, the AIRC is now modernising the award system without the guidance of formal wage fixing principles. While the modernisation process includes the promotion of the principle of

equal remuneration for work of equal or comparable value:¹⁷

- the process is complex and inevitably all parties will want the capacity to address unintended inequities prior to the next scheduled 4 yearly review
- the timetable has meant that the approach adopted by all parties has been to minimise change, rather than to take the opportunity to address longstanding inequities or inefficiencies; and
- At least some awards will be modernised prior to the conclusion of this inquiry and the implementation of any recommendations arising.

Recommendation 5: That FWA should have the capacity to review any awards that are modernised and unions should have standing to seek a review of remuneration rates on a case by case basis to ensure that inequities have not been perpetuated through the award modernisation process.

Regular and ad hoc review of awards

- 3.8 *Forward with Fairness* envisages regular four yearly reviews of awards to ensure that they remain relevant. This mechanism has the potential to ensure that award reliant workers are not left behind those workers engaged in formal and informal over-award wage bargaining. However to be effective FWA would need to be empowered to adjust award rates of pay having regard to market based movements.
- 3.9 Both the Western Australian and Queensland industrial relations systems provide scope, albeit limited, for award rates to be lifted from time to time to address the gap between award and negotiated rates within an industry or occupation.
- 3.10 The approach adopted by the Queensland Industrial Commission in the Dental Assistant's case is instructive of how FWA could address market based movements without disturbing the wage relativities and the relevance of the award for future bargaining.
- 3.11 In that case the QIRC accepted that to properly assess the pay inequity it needed to acknowledge that

¹⁷ In setting the new award rates of pay the AIRC is required to have regard to a range of factors, including

- the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and to promote the principle of equal remuneration for work of equal value; and

“it is this lack of access to, or participation in, enterprise bargaining that we consider to be the single biggest contributing factor to pay inequity for [dental assistant’s].¹⁸

3.12 The Commission provided a separate increase in recognition of the premium that dental assistants working in the private sector were denied by their lack of access to enterprise bargaining. The Commission referred to enterprise agreement databases and included a one-off increase of 11% in the equal remuneration order.

3.13 In recognition of the need to address the gap resulting from lack of access to bargaining in an ongoing sense, the Commission further provided for an equal remuneration component of 1.25% which was an ongoing percentage amount to compensate for inequities that would inevitably arise as a result of future bargaining outcomes in the comparator sectors.

3.12 Without the amendments to the Queensland *Industrial Relations Act 1999* and the Equal Remuneration Principle the QIRC would not have been able to consider bargaining outcomes as a source of pay inequity.

3.13 The Queensland approach does not substitute arbitration for wage bargaining. In spite of the gains made, the increases achieved in this case were modest and still left the dental assistants working in the private sector well below the actual rates achieved through bargaining of the comparator males and dental assistants working in the public sector. With further rounds of bargaining, this gap can be expected to widen further. Nevertheless, the strategy developed by the QIRC in the Dental Assistant’s case demonstrates how the regular reviews of modern awards could become the vehicle to address the gap between market and award rates.

Recommendation 6: That, in undertaking the four yearly reviews of awards, or upon the application of a person bound by an award, FWA be both required and empowered to ensure equal pay for work of equal or comparable value having regard to all elements of remuneration, including rates of pay in collective agreements and over award pay arrangements.

¹⁸ QIRC 2005:183

Relativities

3.15 Retaining skill based classification structures in awards is particularly important in promoting pay equity, ensuring objective and transparent evaluation of work value and facilitating comparison of wage relativities within and across industries.¹⁹

The legislation must provide that the competency standards process contained in the relevant award is a significant component of the assessment of work value.

4. ASSISTING THE COLLECTIVE BARGAINING CAPACITY OF WOMEN

4.1 The starkest source of pay inequity is the fact that women working in certain female dominated sectors lack access to bargaining. If improvements in wages and working conditions are predominantly to be achieved through bargaining, then the legal framework must facilitate participation by low paid female dominated industries in collective bargaining.

4.2 The pay gap between women and men employed on collective agreements is lower than AWAs or informal over-award individual bargaining. (insert FIGURE).

4.3 However, addressing the pay gap will require positive measures to encourage award reliant women (and their employers) in low paid sectors to bargain.

4.4 The ACTU calls for the new workplace laws to provide for multi-employer bargaining in low paid sectors as a means to lift women in these industries off the award minimum.

4.5 The capacity to bargain across more than one employer would encourage bargaining in small enterprises where the employer does not have a human resources function, and where the employer is effectively constrained from workplace bargaining due to the nature of the product or service market within which they operate. Examples of sectors of low paid, female dominated sectors that would participate in multi employer bargaining include:

- the health and community services sector where the employer is often dependent upon government funding and has little flexibility to increase the price they charge for services, and therefore cannot meet new labour costs on a workplace by workplace basis,

¹⁹ In the equal pay test case of *AMWU v HPM Industries*, the Commission was prevented from applying the competency standards contained in the relevant award for the assessment of work value without the agreement of the employer: *Automotive, Food, Metal Engineering Printing and Kindred Industries Union v HPM Industries*(1998) 43 ALR

- the contract cleaning and contract catering industries where labour costs account for a significant proportion of the cost of the business. In these industries employers are unable to raise prices due to the competitive nature and short duration of supply contracts;
- franchised stores and restaurants where the employer has no real capacity to bargain on a workplace by workplace level.

Recommendation 7: That employees and their employers can engage in multi employer bargaining:

- as a single business where a group of employers are effectively controlled by another entity, or
- facilitated by FWA where the employees are low paid or have been unable to access collective enterprise bargaining.

Recommendation 8: That in considering whether to facilitate multi-employer bargaining claims for the low paid FWA should take into account:

- The needs of low paid workers and the desirability of promoting bargaining and lifting living standards;
- Where employees lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or sector mitigates against collective bargaining at the single business level; and
- The need to address the gender pay gap.

Recommendation 9: Where the parties to a bargaining dispute involving low paid employees are unable to resolve the dispute, and where all other measures to resolve the dispute have been exhausted FWA should be empowered to settle the outstanding differences between the parties.

Protections in the application of individual flexibility clauses

- 4.6 There must be appropriate protections in the Act in relation to the use of individual flexibility clauses to ensure that pay equity for women is not adversely affected by the implementation of lower terms and conditions. The primary focus for flexibility in the workplace should be through collective bargaining.

Recommendation 10: Individual flexibility clauses must not be used to undermine collective terms and conditions or the safety net.

Recommendation 11: There must be strong anti-coercion and freedom of association protections which recognise the unequal bargaining position of employees to employers, particularly in relation to individual negotiations.

Pay equity should be considered before certifying an agreement

- 4.7 *Forward with Fairness* envisages that FWA will approve an agreement that provides that workers are better off overall when compared to the award.

Recommendation 12: FWA should be able to refuse to certify an agreement if it is inconsistent with an equal remuneration order, or if it is not satisfied that the agreement ensures equal remuneration for all men and women employees of the employer for work of equal or comparable value.

- 4.8 Pay equity data should be provided to FWA at the agreement certification stage in order to assist FWA to ensure the proposed agreement complies with equal remuneration principles and meets the better off overall test.
- 4.9 Not only would this enable FWA to quickly ascertain if there was a potential pay inequity issue requiring attention prior to certification, it would assist in developing a culture amongst bargaining parties of routinely factoring gender pay equity issues into the bargaining process.

Recommendation 13: Parties to agreements should be required to provide a comparison of each entitlement under the agreement with the corresponding entitlement under the designated award, and to attest to the steps taken by the employer to ensure that the agreement provides equal remuneration for work of equal or comparable value.

The legal framework should facilitate organising

- 4.10 The various State based pay equity inquiries acknowledged the link between lower levels of union representation in female dominated industries and the associated lower bargaining outcomes. Female dominated industries are characterised by workplaces with small numbers of employees, often working on a part-time or casual basis, with low levels of unionisation. The lack of industrial organisation of employees bargaining in female dominated industries is a key factor in the growing wage gap between men and women.
- 4.11 Access to advice, information and support at work is important to develop the collective bargaining skills of the workforce. Union right of entry is a necessary corollary to workers rights to advice and information at work. The legislation should provide right of entry for two purposes:
- To provide information and represent employees and to engage in bargaining activities; and

- To ensure compliance with awards, agreements and industrial laws
- 4.12 Unions should have access to a room or venue that is fit for the purpose of entry including proximity and privacy. For example, recently an employer directed the female employees to attend a union meeting in the women's toilets and despite objections from both union officials and the workers, refused to allow the union organiser access to any other site at the plant to talk to workers.²⁰

Recommendation 14: Right of entry laws should explicitly provide for:

- Unions to have access to a room or venue that is fit for the purpose of entry including proximity and privacy;
- Unions should be able to inspect both member and non-member records;
- The capacity to bargain for complementary rights of access;
- Unions should have right to access workplaces regardless of the industrial instrument which regulates the employment of employees

- 4.13 In low paid female dominated workplaces fear of retribution for contacting a union can discourage collective bargaining. In a recent case, a union meeting was forced to be held in an open-air car park adjacent to a loading dock under the unblinking eye of a surveillance camera.²¹

Recommendation 15: The legislative framework should provide very strong anti victimisation provisions, including obligations on employers to facilitate reasonable union right of entry, and should support delegates in representing employees, particularly during the bargaining process.

Following on from the success of workplace OH&S representatives in improving workplace safety, the UK has provided for the appointment of workplace based learning representatives. Based on the success of this education scheme, current proposals under the review of the UK Equality Act include the appointment of trade union based workplace equality representatives. The equality representatives are to provide employees and employers with greater support to address gender discrimination and pay inequity in the workplace. As in the case of the OH&S representatives, in order to play an effective role, equality representatives need to have strong legal rights.²²

Recommendation 16: Appointment of trade union based workplace equality representatives responsible for initial contact for complainants, identification of pay inequity and input into proposals to eliminate inequity in workplaces.

5. INDIVIDUAL PAY SETTING

²⁰ Case involving the Textile Clothing and Footwear Union (TCFUA) and Feltex Carpets
²¹ Case involving the Automotive, Manufacturing Workers Union (AMWU) and Geon Australia.
²² M. Jaffe, B. McKenna & L. Venner, *Equal pay, Privatisation and procurement*, The Institute of Employment Rights, August 2008 p.40

- 5.1 Women who were employed on AWAs were significantly disadvantaged compared to women employed on other wage fixing instruments. Women on AWAs earned on average \$2.90 an hour (or \$100.20) less than women on registered collective agreements²³ and between 2001-2006, the real wages of full time women in the private sector fell by 1.8%.²⁴
- 5.2 AWAs that reduced entitlements to penalty rates, overtime, casual loading and flexible work arrangements particularly disadvantaged women.²⁵ The growth in the gender pay gap that emerged in recent years must be in part attributable to the widespread use of AWAs in low paid female dominated industries such as hospitality and retail.
- 5.3 A sinister feature of AWAs was the requirement that employees maintained confidentiality as to the terms of their employment contracts. This significantly undermined the capacity to address pay inequity. The ACTU supports the proposal contained in the UK Equality Bill to outlaw pay secrecy clauses. The recommendations contained in Section 7 of this submission relating to transparency and reporting of pay data will be important mechanisms to address pay equity.
- 5.4 The government's commitment to abolish AWAs, and to develop a robust regime for good faith collective bargaining should partly ameliorate this. Nonetheless individual pay setting will remain a feature of the Australian labour market, both as an over award common law arrangement, and in award free areas (including where employees earn more than \$100,000 per annum).

6. ENCOURAGING GREATER FEMALE PARTICIPATION AND OPPORTUNITY IN THE LABOUR MARKET

- 6.1 Traditionally the analysis of Australia's gender pay gap has focussed upon average comparable male and female earnings at a point in time, rather than across the life course. However, the more recent State based inquiries have acknowledged that the quality of women's jobs and access to career progression are an important component of women's remuneration, and a determinant of women's retirement incomes.
- 6.2 Evidence suggests that women's caring responsibilities are a key factor in pay inequity.

²³ Based on a 38 hour week, ABS 6306.0 Feb 2007

²⁴ ABS cat no.s 6410.0, 6302.0 March 2007

²⁵ OEA Data supplied to the Senate Estimates Committee in May 2006 confirmed that 100% of AWAs removed at least one protected award condition, the majority cut overtime, penalty rates, annual leave loading, public holidays payments and shift loadings and that the pay gap was worst for women on AWAs: *One Year On: The Impact of the New IR Laws on Australian Working Families*, ACTU publication, March 2007

Women with caring responsibilities are more likely to work in lower paid part time or casual jobs in order to balance work and family. Any commitment to addressing pay inequity must include strengthening the capacity of employees to combine their careers and caring responsibilities.

6.3

Government can play a role by ensuring that flexible work arrangement provisions supporting employees balancing work and family commitments are contained within the minimum safety net. It is crucial that the minimum safety net maintain a strong focus on work and family related entitlements to ensure that they are not bargained away.

Recommendation 17: That the relationship between the NES and modern awards must clearly provide that award terms can build upon NES conditions to provide higher standards of minimum entitlements.

Recommendation 18: Access to award dispute settlement procedures for both NES and award matters is necessary to ensure women in weak bargaining positions have appropriate support and representation in resolving workplace disputes.

Improving the work and family safety net

6.4 Whilst in recent times, much progress has been made in relation to care for very young children, caring requirements for children do not stop once children reach school age. The aging population and trend towards informal care of elderly parents in the home is likely to place more pressure on women who continue to carry the responsibility of care for family members.

Recommendation 19: The proposed National Employment Standards (NES) flexible work arrangements provision should be extended to the care of school aged children, disabled and elderly dependents.

Recommendation 20: There must be an obligation on employers to reasonably consider an employee's request for flexible work arrangements and to provide a reason for refusing such a request.

Recommendation 21: The grounds upon which an employer may rely on 'reasonable business grounds' for refusal of a request should be limited. Employees must be provided with the capacity to review an unreasonable refusal.

Recommendation 22: Provisions for carer's leave in both the NES and awards should be clarified to ensure that the entitlement applies to a wide range of caring responsibilities broader than illness or emergency and is able to accommodate circumstances such as attending to a dependent's needs.

- 6.6 The provision of paid parental leave currently the subject of an Inquiry by the Productivity Commission is important to addressing the gender pay gap both as replacement of income during period of enforced leave and to mitigate the effects of broken service on superannuation savings.
- 6.7 Affordable and accessible quality early childhood care and education including the provision of before and after school care also impacts positively on women's capacity to participate in the labour force.
- 6.8 Workplace arrangements that facilitate transition in and out of the workforce are central to increasing the workforce participation of women. Without such flexibility, women suffer loss of career path, loss of service related entitlements such as annual and sick leave and instead enter into precarious employment with minimal access to career development opportunities.

Quality part time work

- 6.9 The right to part-time work upon return to work from parental leave is a critical factor in addressing the gender pay gap. A recent study indicated that a significant proportion of mothers are routinely (illegally) denied the right to return to their pre-leave job let alone access to part time work upon returning to work from maternity leave.²⁶

Recommendation 23: The right to part-time work upon return to work from parental leave should be available to all employees and an education program for employees and employers about this right should be conducted

- 6.10 As part of the solution to balancing work and family, flexible work arrangements however, must not be at the expense of quality of work. Hours of work, rosters, shift work and training arrangements influence the capacity of women with caring responsibilities to access equal opportunities at work.

²⁶ Sara Charlesworth and Fiona MacDonald, *The Unpaid Parental leave Standard: What Standard? Paper delivered at the ACTU International Women's Day Forum, 2008*

- 6.11 Research by the Public Service Commission also revealed that two thirds of females who took maternity leave in 2001 had not received any promotion by 2007.²⁷ Over 90% of the respondents were satisfied with their flexible work provisions arrangements, indicating the issue was not simply a matter of accessing flexible work. Possible reasons cited by the Commission included:
- A majority of the women take maternity leave when they are at a level that is an important feeder group for higher management positions (significant numbers of whom take subsequent periods of parental leave);
 - Many of these are denied access to more senior role as they are concerned they cannot manage the extra demands and hours of work and their caring responsibilities;
 - There is a lack of career opportunities for women employed in part-time work.
- 6.12 Similarly, a recent report into the effects of flexible work arrangements on women working in corporate law firms found that “far from being a panacea, flexible work is being invoked to confine women to subordinate roles and to restrict access to partnerships.”²⁸
- 6.13 In Australia, part-time work is the main means by which women workers are able to balance work and family commitments. Forty-five percent of women worked part time in 2005 compared to 26% across the OECD.²⁹ Strategies need to be developed to ensure that this part-time work does not result in a solution to work life balance that is detrimental to gender equality at the workplace.
- 6.14 Employers should include equitable provision of workplace based training and career development opportunities. Part time women employees made up just 15% of all employees who accessed work-related training in 2005.³⁰
- 6.16 Employer’s reporting requirements should include access to training and professional development opportunities and access to formal or informal mentoring programmes.
- 6.15 Strategies to encourage and support women to attain senior or leadership positions should be promoted as a mechanism to address pay inequity. For example, the gender wage gap is less pronounced in

²⁷This compared to just 42% of childless women who missed out on promotion in the same six year period: Public Service Commission, *Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave*, 2008.

²⁸ “The Gender Trap: Flexible Work in Corporate Legal Practice” Thornton, M & Bagust, J., Published in *Law Institute Journal* September 2008

²⁹ Dr. Barbara Pocock, *Labour Market Participation, Working Time and Work-Care Conflict: Lessons from Europe for Australia*, June 2005.

³⁰ ABS Cat no. 6278.0, *education and training Experience*, 2005.

businesses where there are significant numbers of women on Boards of Directors.³¹

Recommendation 24: Strategies aimed at providing quality part time work and addressing work organisation such as hours of work, rosters, shift work and training arrangements which discriminate against women with caring responsibilities should be identified and promoted.

Recommendation 25: Access to part time work, hours of work, rosters, shift work and training arrangements should be considered by FWA as part of the Object of ensuring equal pay for equal or comparable remuneration in agreement making.

Access to vocational training

- 6.15 Access to vocational training is vital for equality of opportunity for women re-entering the labour force and also as part of their ongoing career development.
- 6.16 Sub optimal access to vocational training for women also affects the international competitiveness of the Australian economy. Over the past decade Australia has slipped below the OECD average on investment in vocational training and graduation levels.³² In particular, the number of women participating in vocational education has dropped as has the number of women graduating from higher level certificates and diplomas.³³
- 6.17 The Australian National Training Authority in its report argued that investment should also include:
- Flexibility of training;
 - Family friendly VET provision;
 - Accessible pathways from informal to formal learning; responsiveness to different learning styles; access to role models and mentors;
 - Learning supports that recognise whole of life needs and remove barriers to participation; and
 - Professional development programmes that respect and include casual and part-time workers.³⁴
- 6.18 There has been no general improvement in women's' access to vocational training and employment pathways to suggest that further investment in these areas is not warranted.
- 6.19 Greater provision of infrastructure to support women's participation such as childcare services should be considered.

³¹ *National Foundation for Australian Women media release 27 August 2008*

³² *The Economic and Social Impact of Increased Investment in Vocational Education and training – An ACTU Discussion Paper, May 2007, p.4*

³³ *XXX, Recommendations to NSOC on Future Advisory Arrangements and a Proposed Structure to Manage Equity Reform Within the VET System XXX*

³⁴ *ANTA National Women's Vocational education and Training Strategy 1996-2000; 2004-2010.*

Equitable Retirement Income

- 6.18 Pay inequity in employment is perpetuated in retirement due to women's significantly lower levels of retirement earnings as a result of lower earnings and broken service patterns. Women have just half the amount of savings men have accumulated in their superannuation accounts and 75% of women aged 60-64 have less than \$40,000 superannuation savings.³⁵
- 6.19 ACTU Congress has endorsed the following retirement income policies as a minimum:
- Increasing minimum contributions to a goal of 15%, which can be achieved through one or more of bargaining, legislation or changes to taxation of superannuation;
 - Reducing the contribution tax including removal of the tax on incomes of less than \$70,000per annum;
 - Restructuring superannuation taxes to provide greater equity;
 - Extending the entitlement of SG to all workers, irrespective of age or minimum earnings;
 - Fully disclosing all fees and charges, together with a ban on entry and exit fees and commissions charged on SG contributions; and
 - Equal treatment of same sex couples in the allocation of superannuation benefits.

7. EFFECTIVELY IDENTIFYING PAY INEQUITY

Equal remuneration audits

- 7.1 Current data is inadequate to reliably monitor changes that might impact on pay equity issues.
- 7.2 Provisions for equal remuneration for work of equal or comparable value are rendered meaningless if there are no tools by which unequal pay can be identified. Without access to information regarding remuneration outcomes in their organisation, it is not feasible to expect employees to pinpoint pay inequity. Access to information is also necessary to facilitate identification by unions, relevant agencies or FWA of systemic pay inequity.
- 7.3 In discussing the merits of mandatory pay equity reporting under the UK Equality Act, the Equal Opportunities Commission commented that "only an

³⁵ Clare, Ross.200, *Retirement Savings Update, p.1, 9,, Association of Superannuation Funds of Australia(ASFA) research and Resource Centre February 2008. Available at www.superannuation.asn.au*

equal pay review can ensure that an organisation is providing equal pay.” That is, in reality, it is all but impossible for an employer to proactively address pay inequity without having accurate pay data and without examining the reasons for differentials.³⁶

- 7.4 The largest pay gaps are in the private sector, yet many schemes mandate equal pay audits only for the public sector. Pay inequity is most likely to occur in small private sector workplaces with less than 100 employees where there is less likely to be a formal human resources system or collective bargaining. Mandatory pay equity reporting for all employers in both the public and private sectors is essential if we are to seriously address pay inequity.
- 7.5 Yearly reporting requirements should include provision of basic gender which is not overly onerous on employers but which is sufficient for meaningful analysis.

Recommendation 26: The *Equal Opportunity for Women in the Workplace Act (1999)* should be amended to require mandatory annual reporting of basic pay equity data.

Recommendation 27: Reporting requirements should include information on the *quality and standard* of policies and programmes employed by organisations to address pay equity.

Recommendation 28: Employers must be provided with resources and assistance in conducting pay equity audits by the appropriate agency where necessary

Recommendation 29: The appropriate agency charged with the oversight of pay equity matters must be resourced to provide assistance and guidance to employers in complying with reporting requirements.

Recommendation 30: Employers should be required upon request by the pay equity agency following analysis of routine reports, or from an employee or employee organisation, or on the own motion of FWA to conduct an audit.

Bargaining

- 7.6 Access to information relevant to pay equity should be available to unions and employees who may seek to negotiate provisions aimed at reducing pay inequity during the bargaining process.
- 7.7 Pay equity audits should be a mandatory feature of workplace bargaining to ensure bargaining. The information should include as a minimum details of all over award entitlements including, but not limited to, any allowances,

³⁶ M. Jaffe, B. McKenna & L. Venner, *Equal pay, Privatisation and procurement*, The Institute of Employment Rights, August 2008 p.37

incentives, performance based payments, overtime, bonuses, penalty rates and access to training.

Recommendation 31: Provision of pay equity information should be a requirement to meet the good faith bargaining principle and the Object of ensuring pay equity in agreements.

In addition, FWA should have access to information relevant to pay equity when assessing workplace agreements.

The requirement for parties to supply pay equity data and a statement of measures taken to ensure equal remuneration for work of equal or comparable value would facilitate the capacity of FWA to ensure the pay equity object in agreement making has been met.

Recommendation 32: Mandatory equal pay audits should be a specific feature of the implementation of the better off overall test and certification stages of agreement making.

Other reporting mechanisms

- 7.8 Incorporation of pay equity data into employer's mainstream reporting mechanisms encourages stakeholders to consider routinely the pay equity issue in their organisations.

Recommendation 33: Employers should as a matter of course include gender based remuneration data in reports to Annual General Meetings.

Recommendation 34: Accounting standards should be amended to require auditors to consider the risk of non-compliance with the Act in routine company audits.

8. ESTABLISHING A DEDICATED PAY EQUITY UNIT

- 8.1 The State Inquiries identified a lack of understanding across the board of pay equity issues including employers, unions and employees. The ACM support Inquiries recommendations that this be addressed through the support and guidance of a specialist pay Equity Unit.
- 8.2 The Pay Equity Unit could be attached to a government department or be part of FWA, consistent with *Forward with Fairness*' policy of a one-stop-shop for all work related matters. The role of the Unit should include:
- Monitoring of progress towards eliminating pay equity;
 - Reviews of recruitment, training and reward procedures in workplaces;

- Education and publication of best practice models;
- Development of resources and model pay equity audits;
- Assistance to organisations undertaking pay equity audits;
- Data collection and analysis of routine annual equal pay reports;
- Data collection and analysis of equal pay audits;
- Auditing of pay equity plans;
- Monitoring compliance with mandatory pay equity orders;
- Instigating further investigation into a particular employer, sector or group of people where it is deemed appropriate;
- Instigating investigations and pay equity reviews where appropriate;
- Provide organisations with assistance in conducting pay equity cases; and
- Assisting FWA in conducting pay equity reviews.

Recommendation 35: The establishment of specialist pay equity unit to promote the aims of pay equity assist parties to address pay inequity and ensure compliance with pay equity principles.

Recommendation 36: Assistance should also include funding where the costs of running the case are extensive and where there was a low level of union membership in the industry.

The appointment of a dedicated Pay Equity Commissioner within FWA would ensure specialist advice and support for parties involved in the hearing of cases. The Pay Equity Commissioner would have a sophisticated grasp of the legislation, case law, and aims of the equal remuneration scheme as a whole and would oversee and promote an effective programme of remedies to pay inequity.

Recommendation 37: The appointment of a Pay Equity Commissioner specifically responsible for ensuring awards and agreements comply with pay equity principles and for hearing pay equity cases should also be considered.

9. REMEDIAL ORDERS

- 9.1 In addition to the positive obligations on FWA in setting and adjusting minimum wages to ensure equal remuneration for work of equal or comparable value, FWA should have the ability to make remedial orders addressing instances of pay inequity.
- 9.2 The AIRC was given this power in 1994, and has retained the power, in various iterations, since then. However it has proved an ineffective remedy largely

because the early cases before the AIRC adopted concepts from the anti discrimination jurisprudence.³⁷

There should not be a requirement to prove discrimination or to identify a relevant comparator

- 9.3 The requirement to prove discrimination measured against a comparator group of men is particularly problematic in cases of pay inequity which is most likely to occur as a result of systematic undervaluation of work across a female dominated industry or sector rather than a direct case of men and women being paid differently for the same job.
- 9.4 The State based inquiries explicitly rejected the “discrimination” based model, and recommended Tribunals not be required to find evidence of gender discrimination, nor to make comparisons within and between occupations and industries in order to find undervaluation of the work.

Recommendation 38: That FWA not be required to find gender based discrimination nor make comparisons between occupations or industries in order to find that work is undervalued.

Recommendation 39: The equal remuneration provisions should be amended so as to explicitly provide that there is no requirement to prove discrimination in relation to a male comparator group in order to establish pay inequity. It should be explicitly provided that undervaluation of work on gender related grounds is sufficient to establish pay inequity.

Equal remuneration for work of equal or comparable value

- 9.5 Similarly, the requirement to identify pay inequity in relation to ‘work of equal value’ has proved problematic in pay equity cases where there is not an obvious ‘work of equal value’ to identify. This is because unequal pay is usually most likely to occur as a result of undervaluation of work across a female dominated industry or sector rather than a direct case of men and women being paid differently for the same job.³⁸

Recommendation 40: The current definition of equal remuneration in the WRA as ‘work of equal value’ should be reworded as ‘work of equal or comparable value’.

- 9.6 The movement away from centralised wage setting to bargaining requires the scope of the term equal

³⁷ In the Case of *AMWU v HPM Industries*, the Commission held that “to establish that equal remuneration for work of equal value is justified it is necessary to establish that the rates have been established ‘without discrimination based on sex’. In the case of direct discrimination it is necessary to establish that the same circumstances exist and the equivalence of work needs to be established.”: *Automotive, Food, Metal, Engineering, printing and Kindred Industries Union v HPM Industries* (1998) 43 AILR

³⁸ *AMWU v HPM Industries*(1998) 43 AILR

remuneration in the WRA to refer to a broader interpretation of remuneration which includes over award forms of remuneration.

Recommendation 41: The WRA should adopt a broader definition of remuneration consistent with ILO Convention 100 Article 1(a).

10. IMPROVING REMEDIAL POWERS TO ADDRESS PAY INEQUITY

Equal Remuneration Principle

10.1

In conjunction with legislative amendments to extend the scope of the WRA to address pay equity claims, a full bench of FWA should adopt an Equal Remuneration Principle to add clarity to the operation of the WRA equal remuneration provisions and provide guidance to parties seeking to bring a case of pay inequity. The Principle should be a separate stand alone statement of policy.

10.2

In our submission, the Principle should mirror the *Queensland Equal Remuneration Principle*. A full copy of the Principle is attached at Appendix C. The Principle essentially provides:

- That the Commission is to ensure work is valued objectively and free of assumptions based on gender or assumptions that and the award rates were correctly set historically.
- That the Commission is to note contextual matters influencing pay inequity such as the degree of occupational segregation, the disproportionate representation of women in part time and casual work, low rates of unionisation, limited representation by unions in workplace agreements and the incidence of consent awards or agreements.
- That the Commission, in assessing the value of work, is to examine the nature of work, the skill and responsibility required and the conditions under which work is performed as well as other contextual matters relating to the value of work such as whether sufficient and adequate weight has been placed on the typical work, skill and responsibilities performed by women. Another element, “other relevant features” has been added to capture a range of matters such as regular unpaid overtime or unpaid training expenses.

- 10.3 The Queensland *Dental Assistant's*³⁹, *Children's Services*⁴⁰ cases and the *NSW Childcare*⁴¹ case highlighted the importance of these elements of the Principle in effectively capturing the key facets of pay inequity.

Recommendation 42: That a full bench of FWA adopts an Equal Remuneration Principle which mirrors that adopted by the Queensland Industrial Commission as a separate stand alone statement of policy.

Recommendation 43: To provide clarity, it should be made clear that any Equal Remuneration Principle contained in the WRA is to apply to all instruments regulating wages and conditions and that the term remuneration is to be given a broad interpretation.⁴²

Recommendation 44: The legislative provision of broad powers to FWA to address pay inequity would provide it with appropriate flexibility to develop strategies which genuinely aim to redress the gender pay gap.

Addressing the pay gap between award reliant employees and those able to access workplace bargaining

- 10.4 Without the amendments to the Queensland *Industrial Relations Act 1999* and the Equal Remuneration Principle which we have recommended be reflected in the WRA, the Commission would have been restricted in its capacity to address the matter of bargaining outcomes as a source of pay inequity.

- 10.5 If anything, the history of developments in measures to address unequal remuneration reflects the differences in sources of pay inequity and the developmental nature of the process of prosecuting gender pay equity cases.

Recommendation 45: FWA should be given broad powers to may make any orders it sees fit to prevent pay inequity, including the capacity to grant, in addition to adjustment of award based pay rates:

- **One-off increases to redress any gap between award and agreement remuneration rates; and**

³⁹ The QIRC held that there had been an undervaluation of dental assistant's work because of gender related factors, and granted wage increases of \$53.60 per week (about 11%) plus an 'Equal Remuneration Component' (QIRC 2005).

⁴⁰ The QIRC found that 'the work performed by childcare workers had been historically undervalued based on the gender of the workers' based on evidence put forward by the LHMU regarding undervaluation of skills, qualifications and conditions of work.

⁴¹ The NSWIRC agreed that the uniqueness of the childcare sector limited to usefulness of selecting a 'male comparator group'. The Commission found that there was evidence, inter alia, that the female domination of the industry reduced relative wages, that the skills of childcare staff had not been appropriately recognised in prior setting of wage rates, that the skills required by childcare staff were not 'innate' to women and the requirements for accreditation had been overlooked and undervalued. The Commission granted substantial wage increases ranging from about 20% to 50%.

⁴² NSW Librarians case where the NSW IRC determined that the NSW Equal Remuneration principle was confined to the Commission's award-making and wage fixation functions and inclusive only of the award rate of pay. (Lyons, M & Smith, M, *Gender Pay Equity, Wage Fixation and WorkChoices: Forward to the Past?* University of western Sydney, p. 115

- Ongoing equal remuneration increases to redress predicted ongoing pay inequities resulting from prospective bargaining outcomes in the comparator sector.

Recommendation 46: Mechanisms should be provided to ensure a review of any such orders to ensure they continue to effectively address the pay inequity.

Recommendation 47: FWA should also be provided with the powers to make orders for mandatory pay equity plans where appropriate which would be monitored by the appropriate regulatory agency.

Remedies available under the Sex Discrimination Act (SDA)

10.6 The ACTU supports the findings of both the NSW and Queensland inquiries that the most effective means of reform to pay inequity is by way of labour law rather than through individual claims lodged under anti-discrimination legislation.

10.7 However, in saying that, anti-discrimination legislation can and should play an important role in the elimination of gender based inequity, including pay inequity. Amendments to the *Sex Discrimination Act 1984* and the *WRA* should provide for cross vesting of jurisdiction to hear cases of pay inequity.

10.8 We refer this Committee to ACTU submission to the *Standing Committee on Legal and Constitutional Affairs Inquiry into the Commonwealth Sex Discrimination Act (1984)* which can be found at www.actu.asn.au/AboutACTU/ACTUPublications/ACTUSubmissiononSexDiscrimination.aspx.

10.9 In our submission we contend that whilst the role of the *Sex Discrimination Act (SDA)* in resolving individual complaints is critical and needs strengthening, substantive equality between men and women workers will not be achieved if the primary mechanism continues to be remedial orders arising from individual complaints. We propose a new framework to address systemic discrimination which contains three elements:

- A positive approach including the restatement of the objective of the Act as achieving substantive equality between men and women and the introduction of a duty to eliminate sex discrimination;
- New regulatory models that actively uncover discrimination, assist organisations to eliminate discrimination and prevent its recurrence, and enforce non-compliance; and

- Improvements in the way in which complaints are handled.

10.10 The regulatory agencies have limited rights to initiate investigations, enforce or monitor cases of systemic discrimination under the SDA or EOA.

Recommendation 48: The investigative, enforcement and compliance measures provided by the SDA and EO Act should be improved to ensure meaningful advancements in closing the pay equity gap.

10.11 The current requirement to prove discrimination based on a direct male comparison precludes pay inequity claims where male and female workers perform different types of work, or between different workplaces or on the basis of occupational segregation.

Recommendation 49: Remove the current requirement under the SDA to prove discrimination based on a direct male comparison.

Recommendation 50: The capacity of the SDA to address complaints of pay inequity should be reviewed.

10.12 The current provisions of the *Sex Discrimination Act (SDA)* provide only limited protection to employees with caring responsibilities. Redress for discrimination on the grounds of family responsibilities should not be limited to applicants whose employment has been terminated on the basis of direct discrimination. By its very nature, discrimination on the basis of family responsibilities is likely to be indirect through requirements to conform to policies that disadvantage workers with family responsibilities. The current restriction results in many such cases having to be brought under direct or indirect sex discrimination which effectively precludes men with family responsibilities from a remedy for discrimination.

Recommendation 51: The relevant provisions protecting employees with caring responsibilities from discrimination should be expanded.

10.13 The ACTU submission also proposed a new framework for the SDA which had a clear focus on a positive duty to take reasonable measures to eliminate sex discrimination. This model has been adopted in the UK and more recently has been recommended to the Victorian Parliament.

Recommendation 52: Create an *Equality Act* which encompassed the new anti-discrimination framework and which promotes greater

synergy between punitive aspects of the SDA and preventative strategies of the *Equal Opportunity Act*.

- 10.14 The ACTU noted that the majority of sex discrimination complaints were work based and compared the cumbersome complaint process under the SDA with the more efficient, cost effective capacity of the AIRC in resolving workplace disputes.

Recommendation 53: Give consideration to a shared jurisdiction with FWA, HREOC and the Federal and or Magistrates Courts with FWA able to deal with in work related matters

The advantages of locating the pay equity unit within FWA include greater synergy between the preventative and remedial functions of the scheme which address pay inequity and an improved capacity to deal with multiple sources of discrimination.

11. ENFORCEMENT AND COMPLIANCE

- 11.1 The importance of mandatory pay equity reporting and data collection has been discussed. For data collection to be meaningful, it must be integrated with a regulatory system which monitors and enforces mechanisms designed to address pay inequity.
- 11.2 For regulation to be most effective there needs to be a full range of powers including the 'pyramid' of self-regulation, enforceable regulation, and remedies.⁴³ The current system provides a low guidance and self-regulation level and some remedies for pay inequity, but lacks the middle tier of 'enforced self-regulation'.
- 11.3 Enforced regulation is necessary to encourage, educate and assist organisations to address pay inequity and to ensure pay inequity is addressed where it is most likely to occur.
- 11.4 If FWA is to be an effective one-stop shop, its inspectorate and compliance arm should be empowered to audit and investigate incidences of unequal pay for work or equal or comparable worth.

Recommendation 54: In conjunction with other agencies, FWA should be able to monitor pay equity data, and investigate particular employers, sector or groups of people where it is deemed appropriate.

⁴³ Ayres and Braithwaite model of effective regulation requires three tiers of regulation low, medium and high. In Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005, p.14

Recommendation 55: The compliance arm of FWA should have the capacity to follow up such employers or sectors to enforce pay equity audits or instigate a pay equity case where appropriate.

Recommendation 56: The compliance arm of FWA should also be able to enforce orders made by FWA such as mandatory pay equity plans.

Role of governments

- 11.5 Society has legitimate expectations that anti-discrimination measures will be advanced by government and its agencies. Without a proactive role in instigating measures to improve equal pay for work of equal or comparable value, the problem of pay inequity will be continued to be perceived as a private matter to be dealt with by an individual.

Recommendation 57: Governments should set an example through the conduct of equal pay audits and the implementation of pay equity plans.

Recommendation 58: Ethical purchasing policies should be adopted by government agencies to further promote the adoption of pay equity measures in organisations.

Recommendation 59: Evaluation of all government regulation should be prior to its introduction to assess its impact on achieving pay equity.

Monitoring the effectiveness of the pay equity provisions of the Act

- 11.6 A system is required to effectively analyse the effectiveness of the pay equity provisions of the Act and the equal remuneration scheme as a whole. Analysis should include measurement of the prevalence of pay inequity, the effect of measures to address the key sources of pay inequity and the relative effectiveness of the pay equity scheme in delivering remedies to pay inequity.
- 11.7 Programmes designed to measure the extent of pay inequity exist, for example, in the United Nations Economic Commission for Europe on Work and the Economy and the Gender and Work database at York University in Canada. In Australia, the WA Office of Women's policy keeps a modest score card against indicators such as representation of women in public life, labour force participation, health and well being of women in senior positions and so on.

The State based inquiries provided valuable insights into the causes of and possible remedies to pay inequity. The outcomes of these inquiries are a useful starting point from which further follow-up analysis should be based on.

Recommendation 60: Follow up analysis of the effectiveness of the remedies provided through the state tribunals (such as the Queensland Dental Assistants' Case) should be conducted.

Recommendation 61: Continue the comprehensive analysis of targeted areas with gender pay gaps as conducted by the key state based inquiries and cases to better inform policy makers of the causes and symptoms of pay inequity.

Recommendation 62: Indicators or benchmarks against which the extent of pay inequity and the progress towards equal remuneration can be measured should be conducted by agencies on a regular basis and generate a review of the effectiveness of the pay equity system.⁴⁴

Appendix A: Summary of key Recommendations of State Based Inquiries

DRAFT

Appendix B: Pay rates for Men and Women May 2006

Table 1- Mean weekly earnings in main job

Industry	Full time employees only		All (full time and part time) employees	
		Women's earnings as a percentage of men's earnings		Women's earnings as a percentage of men's earnings
Agriculture, forestry and fishing		103		74
Mining		76		75
Manufacturing		80		69
Electricity, gas and water		82		74
Construction		85		73
Wholesale trade		92		80
Retail trade		80		62
Accommodation, cafes and restaurants		86		74
Transport postal and warehousing		74		66
Information, media & telecommunications		75		68
Financial and insurance services		60		54
Rental, hiring and real estate		65		54
Professional, scientific and technical		78		67
Administrative and support		88		80
Public administration and safety		86		79
Education and training		85		74
Health care and social assistance		62		56
Arts and recreational services		93		71
Other services		75		64

Table 2- Average weekly total cash earnings

Industry	Full time employees only		All (full time and part time) employees	
		Women's earnings as a percentage of men's earnings		Women's earnings as a percentage of men's earnings
Mining		70		65
Manufacturing		83		73
Electricity, gas and water		74		68
Construction		79		65
Wholesale trade		80		72
Retail trade		83		65
Accommodation, cafes and restaurants		97		80
Transport and storage		78		72
Communication services		87		75
Finance and insurance		65		58
Property and business services		73		64
Government administration and defence		91		81
Education		89		77
Health and community services		71		62
Cultural and recreational services		82		70
Personal and other services		80		68
All industries		81		66

Source: ABS cat. no's 6306.0 May 2006; 6310August 2007

APPENDIX C: QUEENSLAND EQUAL REMUNERATION PRINCIPLE

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION
Industrial Relations Act 1999 – s. 288 – *application for statement of policy*

**The Queensland Council of Unions and Others AND Queensland Chamber of
Commerce and Industry
Limited, Industrial Organisation of Employers and Others (No. B450 of 2002)**

EQUAL REMUNERATION PRINCIPLE

VICE PRESIDENT LINNANE
COMMISSIONER SWAN
COMMISSIONER BROWN 29 April 2002

STATEMENT OF POLICY

This matter coming on for hearing before the Full Bench of the Commission on 22 March, 16 April and 24 April 2002, the Commission declares by consent as follows:–

EQUAL REMUNERATION PRINCIPLE

1. This principle applies when the Commission:
 - (a) makes, amends or reviews awards;
 - (b) makes orders under Chapter 2 Part 5 of the *Industrial Relations Act 1999*;
 - (c) arbitrates industrial disputes about equal remuneration; or
 - (d) values or assesses the work of employees in “female” industries, occupations or callings.
2. In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features. The expression “conditions under which work is performed” has the same meaning as in Principle 7 “Work Value Changes” in the Statement of Policy regarding Making and Amending Awards.
3. The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.
4. The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.
5. Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.
6. In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:

- (a) Whether there has been some characterisation or labeling of the work as “female”;
 - (b) Whether there has been some underrating or undervaluation of the skills of female employees;
 - (c) Whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;
 - (d) Whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or
 - (e) Whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.
7. Gender discrimination is not required to be shown to establish undervaluation of work.
 8. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.
 9. Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.
 10. Where the principle has been satisfied, an assessment will be made as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.
 11. There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle.
 12. The Commission will guard against contrived classifications and over classification of jobs.
 13. The Commission may determine in each case whether any increases in wages will be absorbed into over award payments.
 14. Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment.
 15. The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular

circumstances of each case and any material relating thereto will be rigorously tested.

16. Claims brought under this principle will be considered on a case by case basis.

17. This Statement of Policy will operate from 1 May 2002.

Dated 29 April 2002.

D.M. LINNANE, Vice President.

D.A. SWAN, Commissioner.

D.K. BROWN, Commissioner

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Appendix D: Summary of key Recommendations of State Based Inquiries

Recommendation	Description	Ref.
Recommendation 1	That the Objects of the new industrial relations legislation include ensuring equal remuneration for work of equal or comparable value as a stand alone Object. This should also be a specific object in relation to the setting of minimum wages and workplace bargaining.	2.2
Recommendation 2	That in setting and adjusting minimum wages FWA should be required to ensure that minimum award wages provide for equal pay for work of equal or comparable value. Further, a person bound by an award must be able to make an application to adjust the minimum rates to ensure equal pay for work of equal or comparable value.	3.1
Recommendation 3	That FWA be obliged, in ensuring equal pay for work of equal or comparable value that FWA be empowered to consider historical undervaluation.	3.5
Recommendation 4	Recommendation 4: that FWA have regard to all relevant matters including: (a) Whether there has been some characterisation or labelling of the work as “female”; (b) Whether there has been some underrating or undervaluation of the skills of female employees; (c) Whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation; (d) Whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or (e) Whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.	3.5
Recommendation 5	That FWA should have the capacity to review any awards that are modernised and unions should have standing to seek a review of remuneration rates on a case by case basis to ensure that inequities have not been perpetuated through the award modernisation process.	3.6
Recommendation 6	That, in undertaking the four yearly reviews of awards, or upon the application of a person bound by an award, FWA be both required and empowered to ensure equal pay for work of equal or comparable value having regard to all elements of remuneration, including rates of pay in collective agreements and over award pay arrangements.	3.13
Recommendation 7	That employees and their employers can engage in multi employer bargaining: <ul style="list-style-type: none"> • as a single business where a group of employers are effectively controlled by another entity, or • facilitated by FWA where the employees are low paid or have been unable to access collective enterprise bargaining. 	4.5
Recommendation 8	That in considering whether to facilitate multi-employer bargaining claims for the low paid FWA should take into account: <ul style="list-style-type: none"> • The needs of low paid workers and the desirability of promoting bargaining and lifting living standards; • Where employees lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or sector mitigates against collective bargaining at the single 	4.5

	business level; and	
	<ul style="list-style-type: none"> The need to address the gender pay gap. 	
Recommendation 9	Where the parties to a bargaining dispute involving low paid employees are unable to resolve the dispute, and where all other measures to resolve the dispute have been exhausted FWA should be empowered to settle the outstanding differences between the parties.	4.5
Recommendation 10	Individual flexibility clauses must not be used to undermine collective terms and conditions or the safety net.	4.6
Recommendation 11	There must be strong anti-coercion and freedom of association protections which recognise the unequal bargaining position of employees to employers, particularly in relation to individual negotiations.	4.6
Recommendation 12	FWA should be able to refuse to certify an agreement if it is inconsistent with an equal remuneration order, or if it is not satisfied that the agreement ensures equal remuneration for all men and women employees of the employer for work of equal or comparable value.	4.7
Recommendation 13	Parties to agreements should be required to provide a comparison of each entitlement under the agreement with the corresponding entitlement under the designated award, and to attest to the steps taken by the employer to ensure that the agreement provides equal remuneration for work of equal or comparable value.	4.9
Recommendation 14	Right of entry laws should explicitly provide for: <ul style="list-style-type: none"> Unions to have access to a room or venue that is fit for the purpose of entry including proximity and privacy; Unions should be able to inspect both member and non-member records; The capacity to bargain for complementary rights of access; Unions should have right to access workplaces regardless of the industrial instrument which regulates the employment of employees 	4.12
Recommendation 15	The legislative framework should provide very strong anti victimisation provisions, including obligations on employers to facilitate reasonable union right of entry, and should support delegates in representing employees, particularly during the bargaining process.	4.13
Recommendation 16	Appointment of trade union based workplace equality representatives responsible for initial contact for complainants, identification of pay inequity and input into proposals to eliminate inequity in workplaces.	4.13
Recommendation 17	That the relationship between the NES and modern awards must clearly provide that award terms can build upon NES conditions to provide higher standards of minimum entitlements.	6.3
Recommendation 18	Access to award dispute settlement procedures for both NES and award matters is necessary to ensure women in weak bargaining positions have appropriate support and representation in resolving workplace disputes.	6.3
Recommendation 19	The proposed National Employment Standards (NES) flexible work arrangements provision should be extended to the care of school aged children, disabled and elderly dependents.	6.4
Recommendation 20	There must be an obligation on employers to reasonably consider an employee's request for flexible work arrangements and to provide a reason for refusing such a request.	6.4
Recommendation 21	The grounds upon which an employer may rely on 'reasonable business grounds' for refusal of a request should be limited. Employees must be provided with the capacity to review an unreasonable refusal.	6.4
Recommendation 22	Provisions for carer's leave in both the NES and awards should be clarified to ensure that the entitlement applies to a wide range of caring responsibilities broader than illness or emergency and is able to accommodate circumstances such as attending to a dependent's	6.4

	needs.	
Recommendation 23	The right to part-time work upon return to work from parental leave should be available to all employees and an education program for employees and employers about this right should be conducted	6.9
Recommendation 24	Strategies aimed at providing quality part time work and addressing work organisation such as hours of work, rosters, shift work and training arrangements which discriminate against women with caring responsibilities should be identified and promoted.	6.13
Recommendation 25	Access to part time work, hours of work, rosters, shift work and training arrangements should be considered by FWA as part of the Object of ensuring equal pay for equal or comparable remuneration in agreement making.	6.13
Recommendation 26	The Equal Opportunity for Women in the Workplace Act (1999) should be amended to require mandatory annual reporting of basic pay equity data.	7.5
Recommendation 27	Reporting requirements should include information on the quality and standard of policies and programmes employed by organisations to address pay equity.	7.5
Recommendation 28	Employers must be provided with resources and assistance in conducting pay equity audits by the appropriate agency where necessary	7.5
Recommendation 29	The appropriate agency charged with the oversight of pay equity matters must be resourced to provide assistance and guidance to employers in complying with reporting requirements.	7.5
Recommendation 30	Employers should be required upon request by the pay equity agency following analysis of routine reports, or from an employee or employee organisation, or on the own motion of FWA to conduct an audit.	7.5
Recommendation 31	Provision of pay equity information should be a requirement to meet the good faith bargaining principle and the Object of ensuring pay equity in agreements.	7.7
Recommendation 32	Mandatory equal pay audits should be a specific feature of the implementation of the better off overall test and certification stages of agreement making.	7.7
Recommendation 33	Employers should as a matter of course include gender based remuneration data in reports to Annual General Meetings.	7.8
Recommendation 34	Accounting standards should be amended to require auditors to consider the risk of non-compliance with the Act in routine company audits.	7.8
Recommendation 35	The establishment of specialist pay equity unit to promote the aims of pay equity assist parties to address pay inequity and ensure compliance with pay equity principles.	8.2
Recommendation 36	Assistance should also include funding where the costs of running the case are extensive and where there was a low level of union membership in the industry.	8.2
Recommendation 37	The appointment of a Pay Equity Commissioner specifically responsible for ensuring awards and agreements comply with pay equity principles and for hearing pay equity cases should also be considered.	8.2
Recommendation 38	That FWA not be required to find gender based discrimination nor make comparisons between occupations or industries in order to find that work is undervalued.	9.4
Recommendation 39	The equal remuneration provisions should be amended so as to explicitly provide that there is no requirement to prove discrimination in relation to a male comparator group in order to establish pay inequity. It should be explicitly provided that undervaluation of work on gender related grounds is sufficient to establish pay inequity.	9.4
Recommendation 40	The current definition of equal remuneration in the WRA as 'work of equal value' should be reworded as 'work of equal or comparable value'.	9.5
Recommendation 41	The WRA should adopt a broader definition of remuneration	9.6

	consistent with ILO Convention 100 Article 1(a).	
Recommendation 42	That a full bench of FWA adopts an Equal Remuneration Principle which mirrors that adopted by the Queensland Industrial Commission as a separate stand alone statement of policy.	10.3
Recommendation 43	To provide clarity, it should be made clear that any Equal Remuneration Principle contained in the WRA is to apply to all instruments regulating wages and conditions and that the term remuneration is to be given a broad interpretation.	10.3
Recommendation 44	The legislative provision of broad powers to FWA to address pay inequity would provide it with appropriate flexibility to develop strategies which genuinely aim to redress the gender pay gap.	10.3
Recommendation 45	FWA should be given broad powers to may make any orders it sees fit to prevent pay inequity, including the capacity to grant, in addition to adjustment of award based pay rates: <ul style="list-style-type: none"> • One-off increases to redress any gap between award and agreement remuneration rates; and • Ongoing equal remuneration increases to redress predicted ongoing pay inequities resulting from prospective bargaining outcomes in the comparator sector. 	10.5
Recommendation 46	Mechanisms should be provided to ensure a review of any such orders to ensure they continue to effectively address the pay inequity.	10.5
Recommendation 47	FWA should also be provided with the powers to make orders for mandatory pay equity plans where appropriate which would be monitored by the appropriate regulatory agency.	10.5
Recommendation 48	The investigative, enforcement and compliance measures provided by the SDA and EO Act should be improved to ensure meaningful advancements in closing the pay equity gap.	10.10
Recommendation 49	Remove the current requirement under the SDA to prove discrimination based on a direct male comparison.	10.11
Recommendation 50	The capacity of the SDA to address complaints of pay inequity should be reviewed.	10.11
Recommendation 51	The relevant provisions protecting employees with caring responsibilities from discrimination should be expanded.	10.12
Recommendation 52	Create an Equality Act which encompassed the new anti-discrimination framework and which promotes greater synergy between punitive aspects of the SDA and preventative strategies of the Equal Opportunity Act.	10.13
Recommendation 53	Give consideration to a shared jurisdiction with FWA, HREOC and the Federal and or Magistrates Courts with FWA able to deal with in work related matters.	10.14
Recommendation 54	In conjunction with other agencies, FWA should be able to monitor pay equity data, and investigate particular employers, sector or groups of people where it is deemed appropriate.	11.4
Recommendation 55	The compliance arm of FWA should have the capacity to follow up such employers or sectors to enforce pay equity audits or instigate a pay equity case where appropriate.	11.4
Recommendation 56	The compliance arm of FWA should also be able to enforce orders made by FWA such as mandatory pay equity plans.	11.4
Recommendation 57	Governments should set an example through the conduct of equal pay audits and the implementation of pay equity plans.	11.5
Recommendation 58	Ethical purchasing policies should be adopted by government agencies to further promote the adoption of pay equity measures in organisations.	11.5
Recommendation 59	Evaluation of all government regulation should be prior to its introduction to assess its impact on achieving pay equity.	11.5
Recommendation 60	Follow up analysis of the effectiveness of the remedies provided through the state tribunals (such as the Queensland Dental Assistants' Case) should be conducted.	11.7
Recommendation 61	Continue the comprehensive analysis of targeted areas with gender pay gaps as conducted by the key state based inquiries and cases to better inform policy makers of the causes and symptoms of pay	11.7

	inequity.	
Recommendation 62	Indicators or benchmarks against which the extent of pay inequity and the progress towards equal remuneration can be measured should be conducted by agencies on a regular basis and generate a review of the effectiveness of the pay equity system.	11.7

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