Attachment 1:
History of Pay Equity in Queensland
Mark Bahnisch, Queensland University of Technology

Queensland Industrial Relations Commission

PAY EQUITY INQUIRY

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Mark Bahnisch
Queensland University of Technology

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1. Introduction

1.1 Purpose and context of paper

This paper has been prepared in order to provide a historical context for the Government submission to the Queensland Industrial Relations Commission's *Pay Equity Inquiry*. The Minister for Employment, Training and Industrial Relations, Hon. Paul Braddy, MLA, has directed the Commission to conduct this inquiry under s. 265(3) of the *Industrial Relations Act 1999* and to report by 30 March 2001.

The terms of reference require the Commission to consider the findings of a similar New South Wales inquiry into pay equity and their relevance for Queensland. As part of the New South Wales *Report*, Counsel Assisting the Inquiry provided a comprehensive history of pay equity[1]. This submission sought to identify 'key developments in industrial law (whether developed in statute or industrial jurisprudence) concerning pay equality and developments in the wage fixation system over time'[2]. In addition, the New South Wales paper sought to provide a comparison of historical developments in pay equity between the Commonwealth and New South Wales jurisdictions in the recognition that there were clear parallels and influences in the two streams of industrial law, as well as significant differences.

This paper largely seeks to achieve the same objectives and examines similar issues to the New South Wales history. It has the objective of informing the Commission and other parties who will be represented before the Commission (or individuals and organisations interested in the matters to be considered in the Inquiry) of the historical, legal and social contexts which have shaped the development of pay equity as an industrial issue in Queensland. This objective recognises that the Commission will by necessity confront the history of pay equity in formulating its recommendations, and in particular the way in which the distinctive Australian approach to pay equity as a public policy issue has been shaped by the structures and institutions of the arbitration system.

1.2 Structure of paper

The paper opens with a brief discussion of the broad context of pay equity and industrial relations in Australia, and goes on to draw out some enduring themes which have shaped policy in this area. A table of key landmarks in the history of pay equity in Queensland and the Commonwealth jurisdiction is then supplied. The paper then proceeds historically, contrasting developments in Queensland and Commonwealth jurisdictions through the various phases of policy and wage fixation. The conclusion summarises the findings of the original research into the Queensland history of pay equity reported in this paper.

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[1] Industrial Relations Commission of NSW, Matter no. IRC6320 of 1997, Pay Equity Inquiry: Reference by the Minister for Industrial Relations pursuant to s. 146(1)(d) of the Industrial Relations Act 1996 – Report to the Minister, vol. 3, pp 72-147, IRC NSW, Sydney, 1998.

[2] *Ibidem*, p. 72

The paper consistently attempts to foreground the interconnection between specific cases and legislation and the broader social, economic and political forces. This approach recognises that these factors have shaped both changing and enduring attitudes to pay equity between the sexes. It is not possible (nor appropriate) to explore the totality of this story, nor to make more than brief reference to the very valuable theoretical and empirical historical and policy literature on pay equity[3]. Neither is it possible to understand decisions of the Queensland commission, for instance, without understanding something of the economic and social forces shaping change in arbitral principles and wage fixation policy. By proceeding in this way, it is hoped that the objective of providing an informative context for the Commission's deliberations and the input of the parties can be met. It is also hoped in this way to assist other interested groups to contribute to the process, with the recognition that the structures of the Industrial Relations System are not widely understood in the general community[4].

1.3 Context - pay equity and industrial relations in Australia

In a real sense, pay equity and industrial relations have always been closely linked in Australian history. The regulation of the employment relationship, and of work more generally, has been subject to a high degree of state intervention in Australia when compared to some other countries with a similar culture – the United Kingdom being the starkest contrast. However, this state regulation has rarely taken the form of direct legislation on pay, employment rights, and other conditions of work. Partly as a result of the inclusion of the conciliation and arbitration power in the Commonwealth Constitution and partly because of the legal and institutional framework developed in the States in the first decade of Federation, direct Government intervention in the employment relationship has been mediated through the industrial tribunals established as the centre of the arbitration system. In order to influence the regulation of work, the government has appeared along with other industrial parties before the Commission and its predecessors.

This has changed somewhat over recent decades as a result of a shift in Australian jurisprudence and legislation towards a concern with human rights[5] evidenced in the adoption of various ILO and UN conventions and legislation such as the *Sex Discrimination Act 1984*, and also because of the new reliance on Constitutional legislative powers by the Commonwealth government such as the Corporations and External Affairs powers. This later shift arises largely from an increased concern with international competitiveness in the Australian economy[6], and while recent legislative developments have in many ways led to greater direct government intervention in the employment relationship[7], current public policy on pay equity is still highly influenced by the procedures and principles laid down by the various Commissions.

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[3] See for instance Burton, C., *The Promise and the Price: The struggle for equal opportunity in women's employment*, Allen & Unwin, Sydney, 1991; Rafferty, F., 'Pay Equity: An Industrial Relations Anomaly?', *Journal of Industrial Relations*, vol. 33 no. 1, pp. 3-19, 1991; Pocock, B., 'Equal Pay Thirty Years On: The Policy and the Practice', *Australian Economic Review*, vol. 32 no. 3, pp. 279-85, 1999; and the special issue of *Labour & Industry: A Journal of the Social and Economic Relations of Work* on 'Equal Pay – 30 Years On from 1969', vol. 10 no. 2, 1999.

[4] See Sir Richard Kirby's Foreword to Healey, B., *Federal Arbitration in Australia: An Historical Outline,* Georgian House, Melbourne, 1972.

[5] Patapan, H., *Judging Democracy: The New Politics of the High Court*, Cambridge University Press, Melbourne, 2000.

[6] Dabscheck, B. *The Struggle for Australian Industrial Relations*, Cambridge University Press, Melbourne, 1995.

[7] In a sense this shift begins with the ALP-ACTU Accord in 1983, but becomes more marked with the diminution in the powers of the Australian Industrial Relations Commission in both the *Industrial Relations Reform Act 1993* and the *Workplace Relations Act 1996*, and the shift to decentralised bargaining over the late 1980s and 1990s.

There is another sense in which the arbitration system is crucial to the history of pay equity. The Commonwealth *Conciliation & Arbitration Act* was enacted in 1904 and the key decision in *Harvester*[8] establishing the structure of the wage fixation system was handed down by Higgins J of the Arbitration Court in 1907. The first consideration of female wages was in the *Fruitpickers' Case*[9] in 1912 and the female basic wage was fixed at 54% of the male wage by Higgins J in the *Clothing Trades Case*[10] in 1919.

Frank Castles has argued that both the Australian welfare and wage fixation systems had their origin in a conception that a male breadwinner should be enabled to live in reasonable comfort, and the (normative) assumption that women were dependent on men[11]. In the welfare system, this led to non-universal and modest benefits, and in wage fixation it led to an ongoing concern with the provision of a 'living wage' for the male head of household. While as we shall see later, this was always held in uneasy tension with notions of productivity and economic efficiency, it does mean that right from the start, the value of women's work and its appropriate remuneration were considered in relation to the needs (and skill) of male workers. Along with a gendered labour market and occupational segregation, the distinctive wage fixation principles of the Commissions (which combined equity and efficiency concerns but at the level of the economy rather than the economic capacity to pay of individual firms), and their underpinnings such as the principle of comparative wage justice, have shaped both the problem of pay inequity and solutions for pay equity in Australia.

1.4 Relationship between Commonwealth and Queensland jurisdictions

Industrial relations policy in Australia is an area where both the Commonwealth and State governments exercise powers. The Commonwealth's power to legislate derives from s.51(35) of the Constitution, and as noted above, more recently legislation has also been based on various other constitutional powers. The states have general legislative powers restricted geographically and by the federal Constitution. Currently, work relations are governed at federal level by the *Workplace Relations Act 1996* and in Queensland by the *Industrial Relations Act 1999*. The relationship between the Commissions is complex and has varied over time, and while there is no general requirement that the state Commissions apply or take cognisance of Federal decisions, as early as 1918 academic scholarship noted the centrality of the Commonwealth wage fixation principles[12]. Queensland has long had a significantly bigger state jurisdiction than some other states, reaching a peak of 73.2% state award coverage in 1954[13]. Currently the state jurisdiction covers 55% of the workforce, the highest State coverage in Australia, of whom 55.77% are solely under state awards, with the remainder also covered by various agreements[14].

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[8] *Ex parte H. V. Mackay* (*Harvester Case*) (1907) 2 CAR 1.
[9] *Rural Workers' Union and United Labourers' Union v. Mildura Branch of the Australian Dried Fruits Association(Fruitpickers' Case)* (1912) 6 CAR 61.
[10] *Federated Clothing Trades v. J. A. Archer (Clothing Trades' Case)* (1919) 13 CAR 647.
[11] Castles, F. *The Working Class and Welfare: Reflections on the political development of the welfare state in Australia and New Zealand, 1890-1980,* Allen & Unwin, Sydney, 1985.
[12] National Industrial Conference Board, *Arbitration and Wage-Fixing in Australia*, Research Report no. 10, NICB, Boston.
[13] Murphy, D. J. 'Labour Relations – Issues' in Murphy, D. J., Joyce, R. B. & Hughes, C. (eds), *Labor in Power: The Labor Party and Governments in Queensland 1915-1917*, University of Queensland Press, Brisbane, 1980, p. 268, n. 5.
[14] Industrial Relations Taskforce, *Review of Industrial Relations Legislation in Queensland: Issues Paper*, Department of Employment, Training & Industrial Relations, Brisbane, 1998 pp. 17-18.

1.5 Enduring themes in the history of pay equity

In this section, some key themes which recur in the history of pay equity are briefly outlined in order to provide context for the following historical discussion. These themes will be revisited in the conclusion, and should be borne in mind in considering and evaluating the historical material that follows.

It has been argued above that the history of pay equity has been shaped by the distinctly Australian arbitral approach to the regulation of work. This is both the cause of the relatively favourable gender wage differential compared to other OECD nations[15] and the reason why progress has sometimes seemed so slow, causing Justice Mary Gaudron to comment in 1979 that 'we got equal pay once, then we got it again, and then we got it again, and now we still don't have it'[16]. The arbitral system has partially removed the fixation of wages and conditions from pure market forces, still true to a lesser extent even with the move to decentralised bargaining over the last 13 years, through the award system. The principle of comparative wage justice[17], the complex system of award relativities clustered around the benchmark of the fitter's grade in the *Metal Trades Award* and the valuation of skill at the industry or occupational level[18] have all combined to ensure a more equitable level of wage differentials than would have been the case under a 'freer' labour market. Important also is the fact that while economic concerns have been balanced against equity concerns, the former have until recently been conceived of solely in terms of macro-economic policy as a whole rather than the productivity or profitability of individual firms and the labour market position of individual employees. Accordingly, there has been a basic element of fairness in the Australian wage fixation system that has benefited women as well as male workers.

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[15] Pocock, B. 'Introduction: What Action Now for Pay Equity?', *Labour & Industry: A Journal of the Social and Economic Relations of Work*, vol. 10 no. 2, 1999, p. 2. In 1990, Australia was 4th in the OECD with regard to female-male wage ratios on an hourly basis. Australia's ratio was 82.5% of male wages while the UK by contrast was 68.4%.

[16] Cited in NSW Pay Equity Inquiry, *op.cit*., vol. 1, p. 5.

[17] On the definition and nature of this principle, see Isaac, J. E. 'The meaning and significance of comparative wage justice' in Niland, J. (ed) *Wage Fixation in Australia, Allen & Unwin,* Sydney, pp. 84-104.

[18] The valuation of skill through margins under the Basic Wage system, and later through work value tests, explains why the Commission has been reluctant to adopt the British approach of job evaluation. Skill has largely been valued comparatively across industries, rather than evaluating jobs in terms of their contribution to a particular organisation or enterprise.

However, the processes and principles of the arbitral system have also contributed to the continued existence of macro wage differentials and gender segregation of work. This contribution is partly a factor of the principles which have endured from Higgins onwards – such as the work value tests which are firmly grounded in a gendered construction of skill and most importantly, the concept of a living wage for a family headed by a male worker. The other principal factor, is the presence of the arbitral system itself – both in the way it proceeds through considering particular cases arising out of disputes between industrial parties[19] and the Commissions' reluctance to depart from established wage fixation principles or to disturb existing relativities. Test cases such as the Commonwealth *Equal Pay Case* (1969) 127 CAR 1142, which established pay equity principles, required these to be applied on application. It is difficult to escape from the variation of awards on an individual basis, even in exercises such as Award Restructuring[20]. The macro-economic policy roles of the Commissions (entrenched in legislation) also play a restraining role on the implementation of equal pay, with the tribunals being concerned by the impact of redressing pay differentials on economic indicators such as growth, unemployment and inflation.

Although there is a history of oscillation between direct bargaining between employees and employers[21] and centralised wage fixation[22], recent developments which appear to have fundamentally reshaped the system towards a decentralised focus reproduce potential inequities for women[23] in decentralised bargaining introduced in earlier periods where direct bargaining on the part of heavily unionised and industrially strong workers with (gendered) skills valued in the labour market entrenched over-award payments and regular overtime for male workers. In short, both the successes and failures in the long and continuing struggle for equal pay have very much been shaped by particular characteristics of the industrial relations system such as the jurisdiction, procedures and principles of the tribunals, the concerns with equity and efficiency and the gendered valuation of skill in a gendered labour market through periods of both centralised and decentralised wage fixation.

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[19] Legislative principles such as Equal Remuneration Orders under the Commonwealth and Queensland Acts (pt. VIA div. 2 of the *Workplace Relations Act 1996* and ch. 2 pt. 5 of the *Industrial Relations Act 1999*) are also implemented only on application by a particular industrial party.

[20] In the Queensland jurisdiction, all awards may be varied by a general ruling of the commission – this power is usually used in State wage cases.

[21] Such bargaining, usually for overaward payments, at times of economic prosperity, tight labour markets, and skills shortages often caused the Commission to fear a loss of control over wage fixation and a wages 'breakout'. See Dabscheck, B., *Australian Industrial Relations in the 1980s,* Cambridge University Press, Melbourne, 1989.

[22] There is a correlation between the extent of collective bargaining and the business cycle and weakness or tightness of the labour market.

[23] There is a large literature on this. See for example, Pocock, B., 'Equal Pay Thirty Years On: The Policy and the Practice', *Australian Economic Review*, vol. 32 no. 3, chapter 7 of the Labor Senators' Minority Report on the Workplace Relations Legislation Amendment (More Jobs and Better Pay) Bill 1999, Senate Standing Committee on Employment, Workplace Relations, Small Business & Education on the web at http://www.aph.gov.au/senate/committee/eet_ctte/index.htm, or the HREOC report *Just Rewards: A Report of the Inquiry into Sex Discrimination in Overaward Payments,* HREOC, Sydney, 1992.

1.6 Key developments in the history of pay equity

Commonwealth Jurisdiction	Queensland Jurisdiction
1904 *Conciliation & Arbitration Act 1904*	
1907 *Harvester Case* Higgins J establishes living wage for a man, his wife and 3 children to live in 'frugal comfort'	
1912 *Fruitpickers' Case* First consideration of female wages – set at lower level to support worker only.	
1912 *Clothing Trades' Case* Female basic wage fixed at 54% of male wage	
1934 *Basic Wage Case* Living wage principles supplemented by economic principle of 'capacity to pay'	**1916** *Industrial Arbitration Act 1916* – Court can award equal pay.
1939-1945 World War II: Women's Employment Board awards up to 90% of male wages.	**1917** *Special Case* Meaning of Act interpreted as work must be equal in class, quality and quantity. Female wage 51% of male wage.
1950 *Basic Wage Inquiry* sets female basic wage at 75% of male basic wage.	**1920** *Teachers' Case* First Case where equal pay denied under this principle.
1953 ILO adopts Convention 100 on Equal Pay.	**1951** *Basic Wage Declaration* Female Wage fixed at 66% of male wage.
1969 *Equal Pay Case* Principle of 'equal pay for equal work' established.	**1961** *Basic Wage Declaration* – 75%
1972 *Equal Pay Case* Current equal pay principles – 'equal pay for work of equal value'.	**1967** *Teachers' Case* – first successful equal pay case.
1974 Australia ratifies ILO Convention 100.	**1972** *Boarding House Employees' Case* adopts 1969 federal principle of 'equal pay for equal work' where men and women perform the same work.
1975 *September National Wage Case* – principles for establishing comparable worth on basis of work value established.	**1975** Amendments to Act enshrine 1969 Federal Equal Pay Principle.
1983 ACTU-ALP Accord signed – wage restraint and partial indexation.	**1983** *State Wage Case* Anomalies & Inequities Principle for work value matters.
1986 *Nurses' Comparable Worth Case* – equal pay to be dealt with under anomalies principle by work value methodology.	

Commonwealth Jurisdiction	Queensland Jurisdiction
1989-1991 Award Restructuring – modernisation of awards including skills based classification structures. **1991** Enterprise bargaining principles adopted by commission. **1993** Equal remuneration orders can be made under Act. **1996** *Workplace Relations Act 1996* **1999** HPM Case – significant equal remuneration order case.	**1987-1989** Work value cases for dietitians, therapists and social workers, Award Restructuring adopted. **1994** Act enshrines UN & ILO conventions, provisions for equal remuneration orders (never used), equal pay for work of equal value. **1999** *Industrial Relations Act 1999* Pay equity an object of the Act, equal pay for work of equal or comparable value. **2000** Minister directs Industrial Relations Commission to inquire into Pay Equity.

2. The *Harvester Case* and Early Developments in the Federal Jurisdiction from 1904 to World War II

2.1 The context and enactment of the *Conciliation & Arbitration Act 1904* (Cth) and the foundations of principles of wage fixation in the *Harvester Case* (1907)

The foundations of the arbitral system lie in the industrial conflicts of the 1890s, the influence on the framers of the Commonwealth Constitution of early arbitral legislation in New South Wales and New Zealand, and the social liberal ideology prevalent at the time. It has been argued by political and labour historians and industrial relations theorists that the establishment of this system represented part of an 'Australian Settlement' which sought (among other things) to quarantine wages from fluctuations on the world market in an economy with a nascent manufacturing sector and highly dependent on commodity exports. This settlement had obvious attractions for unions, but manufacturing industry and retailers clearly benefited as well from both protection and the maintenance of high living standards (then the highest in the world).

S.51(35) of the Constitution, which gave the Commonwealth Parliament the ability to legislate for a system of conciliation and arbitration for 'the settlement of industrial disputes beyond the limits of any one state'[24], was fleshed out with the enactment of the *Conciliation & Arbitration Act* in 1904[25] and the establishment of the Arbitration Court, soon to be headed by High Court Justice Higgins. The *Harvester Case*[26] in 1907 established the basic wage with margins for skill, along the lines discussed above – a family wage sufficient to support a male worker, his wife and 3 children. Higgins J in determining a standard based on 'the needs of the average employee, regarded as a human being living in a civilized community' (remembering the proviso that this employee was a man), fixed the basic wage at 7s a week on the basis that:

> As wages are the means of obtaining commodities, surely the State, in stipulating for fair and reasonable remuneration for the employees, means that the wages shall be sufficient to provide these things, and clothing, and a condition of frugal comfort estimated by current human standards. This then, is the primary test, the test which I shall apply in ascertaining the minimum wage that can be treated "as fair and reasonable" in the case of unskilled labourers.[27]

Higgins J did not consider the question of female wages at this stage, reflecting the current social assumption that work was primarily a male domain. It would have been assumed that work for middle class women was abnormal, and even in the case of working dass women, a transitional stage between school and marriage[28]. So while the labour market reflected gender segregation, in effect normative assumptions about the gendered division of labour in society as a whole (with a woman's 'natural' sphere being the home and the man having the responsibility for her economic support) created a doubly gendered concept of work. As well as establishing the foundational principles of Australian wage fixation, the *Harvester Case* also established a key nexus between the basic wage and family structure and gender relations which continued to influence wage fixation even after the Federal *Equal Pay Case* of 1969.

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[24] *Constitution of the Commonwealth of Australia*, http://www.pm.gov.au/aust_focus/constitution/index.htm#chap1
[25] which did not refer to sex and wages *per se*.
[26] *op.cit.*
[27] *op.cit.* at p. 3-4.
[28] See the judgement of Higgins J in *Federated Clothing Trades v. J. A. Archer* (1919) 13 CAR 647.

The question of female wages was first addressed by the Arbitration Court in the *Fruitpickers' Case* in 1912[29]. The case arose from disputes between fruit growers and unions at Renmark and Mildura over a variety of matters, including the level of remuneration for casual labourers. In his judgement, Higgins J sought to apply the principles he enunciated in *Harvester* and significantly, in order to make a determination on the wage to be awarded on the basis of needs and prevalent prices, defined fruit picking as 'unskilled' labour. Higgins J, in what was also to become a longstanding theme in arbitral wage fixation, defined skill on the basis of what were then seen to be masculine attributes – in terms of strength and speed, contrasting this with the definitions of skill drawn largely from the example of (male) skilled trades. Nevertheless, the final award distinguished between the male (and unskilled) fruitpickers and the female packers whose work involved finer work such as 'trimming and laying paper', and 'giving a neat facing to the boxes to be exposed in shop windows'. While this work arguably involves more skill, these skills were conflated with 'naturally' feminine 'attributes'[30] and thus not valued as such.

The women workers were awarded a lower wage on the grounds that 'they have to find their own food, shelter and clothing; not food, shelter and clothing of a family'. The union's argument sought 'equal pay for work of equal value' (another phrase with a long history to come) but Higgins J while conceding that 'this phrase has an attractive sound, and seems to carry justice on its face', went on to characterise it as 'ambiguous'[31]. Referring back to his judgement in Harvester, the learned judge argued that men were under a legal obligation to support a family, and presumably aware that many working class women in particular had dependents but no male 'provider', concluded that 'she is not, unless in perhaps exceptional circumstances, under any such obligation'[32]. Employers could not be expected to pay a woman more who 'happens to have parents and brothers and sisters dependent on her'[33] while there was no apparent cause for concern that single men or men who failed to support their dependents would nevertheless receive a wage calculated on the basis of the needs of 2 adults and 3 children.

Justice Higgins established two principles in *Fruitpickers'*. Another enduring theme of the need to protect men's jobs from employers' desire to substitute cheaper female labour is established in the principle that equal pay would be granted to women in occupations where both men and women performed work of equal value. His Honour explicitly refers to established social norms where he argues that society (and women) benefit from protecting (and ensuring) the employment of men where both sexes could perform the work[34]. In effect, Higgins J is trying to re-establish traditional moral norms against the forces of market competition (which lead employers to prefer cheaper female labour). The second principle established the female wage discussed above which was dependent only on the needs of a single woman and would apply in occupations and industries which were effectively female. The first application of a pay equity principle in the history of Australian wage fixation, then, had the conscious effect of reinforcing and protecting an already existent gendered labour market to the advantage of male workers.

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[29] Subsequent cases in the Federal Court were addressed on this basis before *Clothing Trades* – see for instance the judgement of Powers DP in *Australian Theatrical and Amusement Employees' Association v. J. C. Williamson Ltd. & ors.* (1917) 11 CAR 133. In this case, Powers DP specifically considered the interaction between work value – 'the value of the work as woman's work' and the needs based female wage at 145-6.

[30] Higgins J at 72 writes, 'I have no doubt that the work is essentially adapted for women with their superior deftness and suppleness of fingers'. Thus, women were not skilled, but 'naturally' biologically different, a difference not recognised through the valuation of skill by the arbitral Tribunal.

[31] *Ibid.* at p. 66.

[32] *Ibid.* at p. 70.

[33] *Ibid.* at p. 71. It is significant in terms of social attitudes that Higgins J does not assume that unmarried women will have children to support.

[34] *Harvester, op.cit.,* at p. 72.

While Justice Higgins enunciated the general principle which would guide practice in fixing women's wages in the *Fruitpickers' Case*, it was not until 1919 when the female rate was set at 54% of the male basic wage in his decision in the *Clothing Trades Case*[35]. This relativity was to persist until the Second World War, and continued to influence arbitral practice in the changed postwar labour market conditions. This case was also noteworthy for the reappearance of Justice Higgins' concern with protecting men's jobs – in this case to preserve the skilled nature of the clothing trades – a common rationale for preserving gender segregation in the labour market through resisting the deskilling involved in the division of skilled (male) labour[36]. Again, Higgins' thinking, progressive for the time and in close consonance with much craft union strategy[37], reflects a wider confrontation socially of a 'moral economy' to the rapidly developing industrial capitalism of the early decades of the twentieth century[38]. In Higgins J's judgement we can once again identify the cluster of social and industrial ideas around skill, wages and gender roles which he wove together to form the thread of pay inequity in the Australian context.

The *Clothing Trades Case*[39] arose out of a union log of claims for a wage for women to be fixed, and also for a shorter working week for women (44 hours as opposed to the 48 hour week worked by both sexes). In dealing with both claims, Higgins J was aware that his decision would set a significant precedent across industry, and he was somewhat reluctant to reach a conclusion regarding a shorter working week for women (despite successfully requesting the Attorney-General to 'appoint a lady, highly qualified for the purpose, to make a report to me as to the appropriate hours for females, having regard to health, efficiency and output'[40]). The Report of Mrs. Osborne, M.Sc. is attached as an appendix to the judgement[41] and is an extremely interesting document which blends consideration of 'efficiency' in industry considered 'scientifically', again a key-note of the thinking of the times, with a moral concern about women's health largely couched in terms of their family responsibilities and future child-bearing[42] (without ignoring their economic value to the employer). In considering the question of whether '48 hours are the standard for men, should the standard for women be lowered to 44 hours', Higgins J takes into account the 'physical limitations of her sex', but after much discussion, decides to award 44 hours on the basis that tailoring is 'mainly a women's industry'[43]. Explicitly, by this qualification, he avoids setting a precedent for industry as a whole. Higgins J balances the 'consideration of output' against 'the consideration of the health of the women and girls employed' which 'infinitely transcends it'. Adopting the prevalent ideology of population and nation building, his decision was made to avoid 'permanent loss to the nation'[44]. Again, here, the industrial relations system in its earliest phases can be seen to be shaped by broader and distinctly Australian attitudes which have contributed much to pay inequity.

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[35] *The Federated Clothing Trades of the Commonwealth of Australia v. J. A. Archer & os* .(1919) 13 CAR 647
[36] See Bahnisch, M. 'Divided Labour, Embodied Work: Subjectivity and the Scientific Management of the Body in Frederick W. Taylor's 1907 Lecture on Management', *Body & Society*, vol. 6 no. 1, pp. 51-68, 2000, Taksa, L. 'The cultural diffusion of scientific management: The United States and New South Wales', *Journal of Industrial Relations*, vol. 37, no. 3, pp. 427-461, 1995, Braverman, H. *Labour and Monopoly Capital: the Degradation of Work in the Twentieth Century*, Monthly Review Press, New York, 1974.
[37] Cockburn, C. *Brothers: Male Dominance and Technological Change*, Pluto, London, 1983, Thompson, P. *The Nature of Work: An Introduction to Debates on the Labour Process*, Macmillan, London, 1989.
[38] In Australia, see Maddison, B. 'From 'Moral Economy' to 'Political Economy' in NSW, 1870-1990', *Labour History*, no. 75, pp. 81-107, 1998.
[39] *Op.cit.*
[40] *Clothing Trades Case*, op.cit. at 690.
[41] *Ibid.* at 785-803.
[42] Higgins J worries about the effect of long hours and mechanised work being 'most detrimental to the female reproductive system' at 707.
[43] *Ibid.* at 709
[44] *Ibid.*

Higgins J did however intend to set a precedent with his decision to award 54% of the male rate to women workers in the clothing trades. His reasoning here was twofold. Firstly, he intended to protect skilled men's jobs from further female competition, concerned about the fact that in tailoring 'the territory has been abandoned to the invading army without a struggle; for it is already in that army's possession[45]'. He refers back to his decision in *Fruitpickers'*, arguing that his judgement 'left employers free to select persons of either sex for fruit picking, without the disturbing temptation or influence of lower wages for women'[46]. He is most explicit on this point when he notes that:

> In the case of tailoring, there is no doubt that men and women are in competition; but that competition is weighted in favour of the women by the practice of paying women lower rates… I find that the lower rates habitual for women are the cause of the gradual disappearance of men from the industry in all but the most skilled operations, or the operations (such as pressing off) which require strength. "Women are equal to men in brains, unequal in muscle", as one employer graciously admits. I find that the lower rates for women have driven the men from the marking of trousers and vests and from the making of most of the sac coats. The men are, in effect, making a last stand at body and dress coats, cutting, trimming, pressing, fitting. Is it right that this Court should aid the gentle invaders?[47]

Higgins J explicitly relates his concerns both to the 'natural' gender roles of men and women – expressed in terms of gendered divisions of labour in both work and family. He claims that 'from Penelope and her virtuous sabotage onwards, sewing and the making of garments, as well as spinning, have been recognised as the work of women, but as part of their domestic functions, not for the earning of wages, not as a gainful employment'[48]. After a rather strange argument deriving the masculinity of tailoring from its etymology as a French word of the masculine gender (*le tailleur*), he comes out in the open and opposes an employer's submission against depriving women of work by arguing 'social expediency'. For the President of the Arbitration Court, what is really at stake here is the preservation of work as the male public sphere: 'to prescribe equal wages for the sexes might lead to widespread hardship and a social cataclysm'[49]. It is the spectre of this cataclysm that led to the judgement that women should have equal pay where it would provide an incentive for employers to employ men, and should have 54% of the male wage where it was not likely that they would displace men from their jobs. Even the basis on which Higgins J carefully calculates the needs-based wage for a single woman in reaching the figure of 54% betrays his anxiety about women remaining in their proper domestic private sphere. While pausing to criticise one of the female witnesses called by the union to testify as to her cost of living for spending 'more than her wages would seem to justify for dress and adornments'[50], he reinforces this normative assumption by expressing his repeated concern that women working should be able to afford to fulfil domestic responsibilities, attract a suitable marriage partner, and attend church regularly.

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[45] *Clothing Trades Case*, op.cit. at 700.
[46] *Ibid.*, at 700-701.
[47] *Ibid.*, at 701.
[48] *Ibid.*, at 701-2.
[49] *Ibid.,* at 704.
[50] *Ibid.*, at 692-703.

The *Clothing Trades Case*, then, is significant not only for reinforcing the principle of equal pay only where necessary to protect male jobs, and for the establishment of 54% as a relativity in the basic wage (exclusive of margins for skill), but also for what it reveals about the social context of the foundations of pay inequity through the arbitration system. The evidence given in Higgins' judgements of the increasing presence of women in manufacturing and agricultural work, as well as the struggle for access to education, employment and political rights being waged at the same time by the 'second wave' feminists[51], both demonstrate the normative nature of the assumptions employed by Higgins. It is significant also that this implicit valorisation of social principles through the living wage and award system over competitive markets and market wages had the intended effect of protecting the centrality of male work and the male wage from the forces of market competition affording (less well paid) employment opportunities to women.

In the context of an application to restore a 10% wage cut across all awards which was one of the measures taken to address the changed economic circumstances of the Great Depression, the Commonwealth Arbitration Court in *Basic Wage Inquiry* (1934) CAR 144 replaced the *Harvester* principles with principles based on economic capacity to pay. In their majority judgement, Dethbridge CJ and Drake-Brockman J expressed some scepticism about the feasibility of providing 'the same standard of living for households of all sizes – the same standard for a family of man, wife and three children as for the unencumbered bachelor wage-earner' through the arbitration system, noting that family welfare payments such as in New South Wales might be better placed to achieve this objective owing to their greater ability to be targeted to families of different sizes[52]. According to the Court, Higgins J was 'compelled to accept a hazy opinion then prevalent that the number in [an average family] was about five'[53].

The Court argued that 'whatever family unit is adopted by a wage-fixing body, the power of that body to endow that unit with any desired standard of living depends on the productive capacity as a whole'[54]. From 1934 on, then, the sort of equity considerations relied upon by Justice Higgins were to be supplemented by the economic criterion of 'capacity to pay'. The Court held:

> A wage-regulating tribunal has to be guided by the trend of unemployment, of prices of primary and secondary products, and of their relationship to each other. Particularly in Australia, which is so largely dependent upon its exports of primary products, the necessity of adjusting the costs of secondary industries so that their products will come within the purchasing capacity of the primary industries are not forgotten.

Thus, the unique settler economy of Australia which had previously formed the basis of a compromise between manufacturing and primary capital which enabled the arbitral system to play its social role of ensuring a high living wage based on 'needs' principles, continued to shape the direction of the arbitral system as the business cycle became much less favourable[55]. The immediate consequences of this shift for the female basic wage were few, as the Court declined to fix a specific basic wage for female workers on the grounds that 'generally speaking they carry no family responsibilities'[56], maintaining the relativity of 54% of the male basic wage determined by Higgins J.

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[51] Ryan, E. & Conlon, A., *Gentle Invaders: Australian Women at Work 1788-1974*, Nelson, Sydney, 1974.
[52] 33 CAR at 149.
[53] *Ibid*, at 148.
[54] *Ibid,* at 149.
[55] And indeed once again when the 'needs' principle returned in the 1950s – see HREOC, *op.cit*., p. 28.
[56] *Basic Wage Inquiry 1934*, op.cit. at 156.

However, the shift away from the primacy of equity criteria in wage fixation was to have significant consequences for the issue of pay inequity and equity as the wage fixation system further developed – the significant point here being the establishment of a crucial nexus with the capacity of the economy as a whole to pay wage increases. In particular, economic and labour market trends during the Second World War and in the 1950s were to impact significantly on the female wage. But in the first 40 years of Federation, the 'ideal… that women only had a secondary right to work, subject to the economic situation[57]' was firmly entrenched. Higgins J had shaped the foundations of pay inequity in the federal jurisdiction in his early judgements.

[57] Thornton, M. , '(Un)equal Pay for Work of Equal Value', *Journal of Industrial Relations*, vol. 23, no. 4, p. 469.

3. Developments in Queensland

3.1 Establishment of the Queensland jurisdiction and the *Industrial Arbitration Act 1916*

Far from being an exception to the development of the arbitral system in the Australian colonies and states, Queensland was at its centre – at least to the degree that many of the 'great strikes' of the 1890s which precipitated interest in and discussion of arbitration were in this State[58] – not the least of which being the Shearers' Strike. With the state's economy recovering to some degree from the ravages of the 90s depression in the first decade of the twentieth century, the union movement reasserted itself and the Liberal Government in response to increasing disputation passed the *Wages Board Act 1908* which was modelled on the Victorian system of tripartite boards for the fixation of wages and conditions in particular trades or occupations, which had its origins in a Royal Commission of 1884 into sweating[59]. By 1912, there were 71 of these boards in existence and the government enacted the *Industrial Peace Act 1912* which established a (cumbersome) appeals process to a new Industrial Court which also had a limited original jurisdiction in cases where no Board legitimately covered a calling[60]. Unions as such had no right to appear before these Boards[61].

With the election of the Labor Government headed by Premier T. J. Ryan in 1915, the *Industrial Arbitration Act 1916* was enacted, and continues in some respects to shape the Queensland jurisdiction in 2000. S.8(1)(a) of the Act gave discretion to the Court in making awards 'provided that in fixing rates of wages in any calling the same wage shall be paid to persons of either sex performing the same work or producing the same return of profit to employers'[62]. This provision was not discussed in the Minister's second reading speech in the Legislative Assembly or in subsequent debate in the House. As Rosemary Hunter notes:

> Queensland in fact had equal pay legislation from a very early date… [s. 8(1)(a)] may sound like a very enlightened provision for its time. It may have been a wartime measure to cater for the fact that women were doing men's jobs while men were away fighting. However it is likely that at least part of the intention of this provision was to prevent employers from exploiting the availability of cheap female labour to undercut men's wages. The logic was that if employers were compelled to pay women the same as men for the same work, they would naturally prefer to employ men. Certainly, the 1916 Act did not lead to the early achievement of equal pay for Queensland women workers. Rather, the widespread gender segregation of the workforce meant that it was only rarely that women would be doing the same work as men, and therefore would be entitled to equal pay[63].

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58 Blackmur, D. *Strikes: Causes, Conduct and Consequences*, Federation Press, Sydney, 1993.

59 National Industrial Conference Board, *op.cit.*, ch. 2.

60 Foernander, O. De R., *Better Employment Relations and Other Essays in Labour*, Law Book Co., Sydney, 1954, p. 98.

61 Speech of Hon. E. G. Theodore MLA, Secretary for Public Works, *Queensland Parliamentary Debates*, vol. CXX, Government Printer, Brisbane, 1915, p. 570.

62 Hall, D. & Watson, K. *Industrial Laws of Queensland*, 2nd edition, Queensland Government Printer, Brisbane, p. 61.

63 Hunter, R., 'The Queensland Pay Equity Inquiry: Addressing the Undervaluation of Women's Work', paper given to the Office of Women's Policy Women in Employment Seminar Series, 6 November 2000, Brisbane, p. 3.

Although it is impossible to be certain about the legislative intent behind this provision, later interpretation in the Industrial Court and its successors and the fact that the first President of the Industrial Court, Justice T. W. McCawley, was involved in the drafting of the Act as Crown Solicitor[64], tends to support the inference that the principle was a legislative embedding of Higgins' logic about the protection of men's jobs. In his second reading speech, the Secretary for Public Works, Hon. E. G. Theodore MLA, specifically stated:

> In making a general ruling as to the minimum wage, for instance, the court must have regard to the necessity for providing a wage sufficient to maintain a well-conducted employee of average health, strength and competence, and his[65] wife and a family of three children, in a fair average standard of comfort, having regard to the conditions prevailing among employees in that particular calling. That is recognised as a well-established guiding principle in Australia. I think the community accepts that principle, which was enunciated by Judge Higgins in an early award, when he laid it down under the Federal Arbitration Act[66].

Queensland then, in the foundational Act of its arbitration system[67], took over from the federal jurisdiction the same principles of needs-based wage fixation based on gendered assumptions about the normative male sex of the wage-earner and his duty to support his family. The legislative provision and its interpretation were to continue to influence the Queensland jurisdiction for many decades – as recently as 1981, the Commission held that the successor section (s.12(1)(d)(i) of the *Industrial Conciliation and Arbitration Act 1961*) 'strongly suggests that the requirement of the section is only related to the situation arising when work performed by females is being compared with that performed by males'[68]. Hall and Watson note that this interpretation upholds the view that 'the provision is not a legislative direction that work of the same or a like nature and of equal value should attract the same wage'[69]. Far from being an early pioneer of equal pay, the 1916 Act and its interpretation have laid the grounds for a situation where Queensland consistently lacked a robust equal pay principle even after the Federal *Pay Equity Case* of 1972[70].

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[64] Sykes, E. 'Labour Relations – Law' in Murphy, D., Joyce, R. & Hughes, C. (eds), *Labor in Power: The Labor Party and Governments in Queensland 1915-57*, University of Queensland Press, Brisbane.
[65] Theodore here is clearly assuming that the Act fixes wage rates for male workers. Nothing in the parliamentary debate indicates anyone considered that women might be workers.
[66] Speech of Hon. E. G. Theodore MLA, Secretary for Public Works, *Queensland Parliamentary Debates*, vol. CXX, Government Printer, Brisbane, 1915, p. 573.
[67] Note that the concept of the basic wage (as noted broadly following Higgins' principle) was enshrined in the Act rather than being at the discretion of the Court. The legislation followed the Federal Act by establishing a system of conciliation and arbitration but some other areas such as leave and hours of work were determined by statute. The Court also had the power to make general rulings varying all awards, and common rule awards, a provision that could not be adopted in the Federal jurisdiction due to the constitutional limitations of s.51(35). For details on labour law in Queensland see Sykes, *op. cit.* & Hall & Watson, *op.cit.*
[68] *Police Award – State* (1981) 108 QGIG 59 at 59 per Matthews P.
[69] cited in *Re Relative Rates of Pay for Male and Female Employees* (1917) 2 QGIG 211 at 213.
[70] Hunter, *op.cit.*

3.2 Key early decisions in Queensland from the *Special Case* to World War II

As noted above, the early jurisprudence around the equal pay provision of the Queensland Act followed the principles underlying the Act in adopting the approach of Justice Higgins. The first case to consider the meaning of the section on equal pay was a reference by Macnaughton J to a Full Bench of the Industrial Court specifically on how this provision was to be understood – *Re Relative Rates of Pay for Male and Female Employees (Special Case)* (1917) 2 QGIG 211. As Thornton noted, up until relatively recently unions in Australia have generally shown little propensity to take up equal pay claims, in the pre-war period largely accepting the dominant social understandings of gender roles. However, as she also notes, some unions with a large number of female members were prepared to argue for equal pay for women workers in their particular industries[71]. The *Special Case* was a case in point, arising from a submission by the Federated Clerks' Union that:

> The wage for male clerks has been fixed; the Act provides that the same wage shall be paid to persons of either sex performing the same work; female clerks perform the same work as male clerks, that is to say, clerical work; therefore the same wage must be fixed for female clerks as for male clerks[72].

McCawley P conceded at the outset of his judgement that 'this is a possible construction of the section'. However, immediately after this rhetorical concession, he points out that 'the work may be the same in class, but dissimilar in other respects – for example, in quantity and quality', raising the issue of male and female skill, and in terms of the wording of the act, value to the employer. McCawley P's reasoning here follows the established rules of statutory interpretation, following Romily LJ in noting that the meaning of words in a statute is not identical with 'popular usage'. Significantly, the President reads s.8 together with s.9 which was the provision enshrining the *Harvester* principles and distinguishing between the requirement for a male employee to be able to support his family to 'a fair and average standard of comfort' and for a female employee to 'support *herself*' at the same standard.

The section particularly relevant to female wages read in full:

> s.9(3)(d)(ii) The minimum wage of an adult female employee shall not be less than is sufficient to enable her to support herself in a fair and average standard of conduct, having regard to the nature of the duties, and to the conditions of living prevailing among female employees in the calling in respect of which such minimum wage is fixed[73].

The presence of this section in the Act clearly adds weight to Hunter's contention that the State Parliament did not intend to provide for equal pay under all circumstances, and demonstrates that the rather tortured logic of the judgement in the *Special Case* nevertheless accurately reflected the Government's position on male and female wages.

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[71] Thornton, *op.cit.*, p. 469.
[72] *Re Relative Rates of Pay for Male and Female Employees* (1917) 2 QGIG 211 at 212.
[73] Quoted in *ibid*. at 213.

While McCawley P highlighted the s.8 approach of 'fixing wages from the aspect of the result to the employer of the employee's labour', he found that the Act gave priority to social standards, among which was the family based wage for the male worker. S.8 also enabled the Court to fix 'in respect of women workers, young workers, apprentices, and improvers in a calling, the quantum of work to be done and the number of hours and the times to be worked by them'. Taking this section into account, McCawley P found that 'from the context and collocation, as referring to work similar' he was entitled to construe the statute as enabling unequal pay to be awarded where the value or nature of the work was dissimilar. McCawley P stated his intention to avoid a situation where 'the tendency will be to induce the employer, from the viewpoint of profit, gradually to replace male by female labour'[74]. As argued above, whatever the intent of the 'equal pay' provision in the *Industrial Arbitration Act 1916*, its application in practice was identical to the string of federal decisions which sought to reinforce gender segregation in the labour market and remove incentives for employers to dispense with male labour by enforcing equal pay only for 'male' jobs.

Macnaughton J, while agreeing with the judgement of the President, gave separate reasons for decision. Macnaughton J's decision is somewhat less solely concerned with matters of statutory construction and interpretation, and thus more revealing of the social attitudes underlying the Queensland approach to pay equity from its outset. Macnaughton J refers to the difficulty involved in awarding unequal pay only where 'callings' are entirely male or female by pointing to the:

> difficulty of drawing such a line – especially in times like the present, when many avocations formerly the exclusive province of men have been entered upon by women, so that this line must be subject to frequent alteration as the flood of female progress advances…[75]

Later he worries about the 'dislocation in many avocations' which might result from awarding equal pay generally, a result he cannot believe the legislature intended. So as with Higgins J, the learned judges of the Queensland Arbitration Court were most concerned to 'hold the line' against the 'gentle invaders'.

The social and historical context producing this anxiety and its reflection in legislative and jurisprudential decisions is the increase in female participation in the labour market rising from 18.2% in 1892 to over 20% by 1920. While this may not seem like an 'invasion' or a 'flood' to use the same language as the Justices of the industrial tribunals, it must be seen in the further context of the deskilling of many formerly skilled male trades as large scale production advanced[76] and the necessity for a larger female presence in the workforce created by World War I. Ryan & Conlon have noted that women's employment in factory work where men were also employed was rising at a rate only slightly behind that of male workers after World War I[77]. It is for reasons like this that Macnaughton J identified female employment in male jobs as 'unfair competition'[78]. As in the federal jurisdiction, these judgements are also intimately related to the basic underlying principles of the arbitral system in its early decades – a fair living wage for male workers, comparative wage justice, and the protection of industry and workers from 'unfair competition' – both from imports and apparently from women.

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[74] All citations in this paragraph are at *Op.cit.* at 212 per McCawley P.

[75] *Special Case*, op.cit., per Macnaughton J at 213.

[76] Taksa, *op.cit.* and Wright, C., *The Management of Labour: A History of Australian Employers*, Oxford University Press, Melbourne.

[77] Ryan & Conlon, *op.cit.*, p. 112.

[78] *Special Case*, op.cit., per Macnaughton J at 214.

Macnaughton J summed up the test for equal pay in the Queensland jurisdiction which was to be followed in later decisions up until at least 1981:

> The true view of the subsection appears to me to be this: It is a matter of evidence when an award is being framed for any calling whether the work done is "the same" or not, in the sense indicated above – the same in class, quality, and quantity. If the Court or Board should be of the opinion that the work done in any avocation by males and females is the same in this sense of the word, then the same wage must be paid to males and females; if not, different rates can be fixed[79].

In practice, it would seem that the Court very rarely found any 'avocation' where this test could be met and equal pay awarded. It is significant also that the President decided that even where the Court had found that a case for equal pay had met its test, there was nothing to prevent it from awarding equal pay if it was in the public interest. However this discretion was not used in the following 51 years until the decision in *Re Assistant Mistresses' Award* (1968) 67 QGIR 184.

Further cases where the principles of the *Special Case* were applied largely arose out of claims made by unions with a large female membership. The first of these was the *Teachers' Case* of 1920[80]. This case dealt with several matters, including cost of living increases sought and various allowances, but included a claim by the Queensland Teachers' Union that equal pay ought to be awarded to 'all teachers irrespective of sex'[81]. In dealing with this application, McCawley P referred to various reports of the then Department of Public Instruction which argued that male and female teachers' 'duties are similar if not identical' and their academic qualifications and social standing the same. He nevertheless wished to continue the regime of higher pay for men on the grounds that:

> The present economic and social conditions, the principles of equality of pay for the two sexes would lead to the one being underpaid and the other overpaid.[82]

McCawley P, though implicitly sympathetic to this view, could not rely on social conditions alone, and pressed the previous interpretation of the Act by the Court into service. The needs principle was used to dismiss the argument that the level of skill was identical, it being 'obvious that it is not requisite that the average female should be awarded a salary prescribed for a man and sufficient to maintain a man, his wife and three children'. McCawley P found that the work of male and female teachers did differ:

> But the Court is not confined to the consideration of generic resemblances, and is entitled to examine with reasonable particularity the various species of work done by male and female teachers respectively. Females are more suitable for kindergarten work and the teaching of girls; males for the teaching of boys, certainly the older boys.

Although various other distinctions could be drawn, despite conceding that 'in certain respects and in certain particular kinds of work there may be little or no difference', McCawley P decided that even if the work by women teachers could be shown to be *more* valuable than that of male teachers, it would not be the *same* and thus the rates could be unequal. The wording of the Act which referred to 'returning the same return of profit to the employer' was held to be inapplicable to public employees as they were not engaged in private business, and reinforced McCawley P's judgement that the results of teaching were not measurable and thus subjective.

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[79] *Ibid*.
[80] *Teachers' Claim* (1920) 5 QGIG 13.
[81] *Ibid.* per McCawley P at 13.
[82] Cited in *Ibid.* at 13.

In this case, then, McCawley P found that the teachers' case did not meet the test enunciated in the *Special Case*.

The way the judgement in the *Teachers' Case* was framed made it unlikely that any public employees would be awarded equal pay. This was confirmed in the judgement of the Board of Trade and Arbitration in *Public Service Award – State* (1927) 12 QGIG 536. The Queensland State Service Union, the Professional Officers' Association and the Federated Clerks' Union had joined in an application for equal pay for public service officers. The claim was denied without any apparent consideration of work value, despite citing the 1917 decision's principle that 'equal pay must be awarded only where there is equal efficiency under similar conditions'.

Significantly, the commissioners comment in the decision:

> We think the provision [s.8(1)(a) of the 1916 Act] was inserted in the Act as much for the protection of men as of women. Where a woman actually does a man's work with equal efficiency she is to get the same pay. That is just to her, and at the same time deters employers from dispensing with men in the hope of getting female labour at lower rates[83].

The Commission also noted that 'the claim for equal pay has been made and declined on eight occasions since 1918'. It is not clear whether the reference was to cases in the Commission, as the public service also had a significant proportion of its terms and conditions decided by legislation and the Public Service Commissioner. Indeed, the Commissioners observed that they had been provided with evidence from the Public Service Commissioner that 'satisfied us that he is observing the spirit of the Act in giving equal pay in cases that demand it'. The influence of prevailing social (and economic) attitudes is clear from the observation that the Commissioners are motivated by seeking to avoid imposing 'an unnecessary burden on the State and at the same time [doing] an injustice to the female section of the community by diminishing their chances of securing government employment'.

A thorough examination of the indices of the *Queensland Government Industrial Gazette* discloses only one case where a claim was made for equal pay in the private sector – for a variation of the Northern and Mackay divisions of the Shop Assistants' award to provide for equal pay for male and female shop assistants 'employed in the manchester, ironmongery or grocery department'[84]. The reasons for decisions are not given, but it is likely that this award variation recognised existing practice. This presumption is further supported by the fact that the application was a joint one by the Australian Workers' Union and the Mackay and North Queensland Employers' Associations. Certainly it does not appear to have been a major matter which might have prompted the Industrial Court to revisit its well settled principles. It would appear, then, as in the New South Wales jurisdiction that although the Higgins principles on equal pay for women performing male work were followed, in practice any sort of equal pay was a dead letter[85].

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[83] *Public Service Award – State* (1927) 12 QGIG 536 at 537 per Webb P, Gillies C & Dunstan C.

[84] *Shop Assistants' Award – Mackay Division – Variation* (1936) 21 QGIG 800, *Shop Assistants' Award – Northern Division – Variation* (1936) 21 QGIG 801.

[85] The only cases before the 1960s where equal pay was awarded under the relevant provision of the Act aside from those cited covered very limited circumstances – eg in remote regions and where men had refused to do work 'described as male work': (1970) 73 QGIG 954.

3.3 Slow progress – adjustments in the Female Basic Wage from 1931

Over a period of some decades, the Court considered the female basic wage in Queensland on a number of occasions. While labour market conditions during World War II led to the female basic wage being fixed at 75% of the male wage in 1950 by the Federal Court[86], and thus female workers paid under federal awards in Queensland received at least this wage from 1950 onwards, the Queensland jurisdiction was not to adopt the 75% relativity until 1961[87]. From 1917 onwards, it had been the general practice of the Queensland Commission to fix the female rate in awards at 51% of the male rate, a lower relativity than the 54% then applying in the federal jurisdiction.

The 1931 *Basic Wage Case*[88] confronted similar issues to those contemporaneously facing the Federal Court – the economic collapse of the Depression and also represented a turn away from the needs based family wage to a wage fixed on economic grounds. Webb J also suggested that the most equitable solution to the maintenance of living standards was a system of child endowment – which would enable the nexus between wages and support for dependants established in *Harvester* to be broken[89]. Webb J argued that 'social justice' also required provision through the welfare system for the support of unmarried women with dependents; the women whom Higgins had denied (on the basis of no Australian evidence) existed. However, as Ryan and Conlon argue, both unions and the community were deeply attached to the concept of the living wage, and in any case the Queensland legislation enshrined the living wage concept[90]. The then Industrial Court had lowered wages in 1922 due to economic circumstances, and this was used as a precedent for a reduction in the basic wage. As the wage of 1 pound 17s. 19d. would arguably be too low, Wallace C decided to bring Queensland practice 'more closely' into line with the Federal Court and raised the relativity to 53%. So despite some evident changes in social attitudes seeking to link wages more closely with purely economic considerations[91], the needs principle in this case resulted in a decision slightly improving women's relative position.

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[86] *Basic Wage Inquiry 1949-1950* (1950) CAR 792.
[87] *Female Basic Wage Case* (1961) 47 QGIG 475.
[88] (1931) 16 QGIG 155.
[89] *Ibid.* at 155-156 per Webb J.
[90] Ryan & Conlon, *op.cit.*
[91] Since at least the Basic Wage Commission chaired by A. B. Piddington KC (established by the Hughes government) in 1920, and in arbitral decisions, Higgins' disregard of statistics and methodology in inventing the basic wage concept and fixing it at 7s (which was the benchmark for quarterly cost of living increases from 1921) had been heavily criticised. In 1925, the Queensland Board of Trade and Arbitration commissioned several economists to report on the economic and statistical bases of the basic wage. While it does not appear that this report – *Report of the Economic Commission on the Basic Wage*, Government Printer, 1925 – was implemented, it nevertheless points to the increasing prominence of economic considerations which was accentuated by the Depression.

The 1939 *Basic Wage Case*[92] (decided in July) was considered under the looming spectre of advancing war. The Trades and Labour Council and the Australian Workers Union had argued for an increase of 12s. in the female basic wage. The Court declined to grant such a 'large increase' on the grounds that 'the employment of adult females would be seriously prejudiced in favour of juniors, if not of adult males' and observed that many female employees 'including public servants, clerks, typists, and shop assistants' received margins for skill and allowances. However, noting that 'a general Australian tendency to improve the Basic Wage of females relatively to that of males', an increase of 2s in the female basic wage was awarded[93]. The 1941 *Basic Wage Case* on very similar grounds awarded an increase of 3s, bringing the relativity to 54%[94]. It is worth observing, as we shall see later, that during the war the Female Employment Board awarded increases in federal awards up to 90%[95], the only comment the Court made about the changed circumstances was:

> The war and the terrible phase it has reached have not been overlooked. This Court cannot predict the course of the war, but must assume that the British Empire will be victorious. The war has not prevented wage increases in Britain or in Australia[96].

In the immediate post war period, the female basic wage was raised to 63% in 1948[97], and 66% in 1950[98]. As noted above, the Commonwealth Court had recognised the continued demand for female employment in the context of the War and post war industrial and economic expansion, and raised the relativity to 75%. The question before the Queensland Court was whether this should be followed in relation to the Queensland female basic wage. The Court the jurisdictional and constitutional peculiarities of the federal jurisdiction, and the fact that the *Harvester* principles were entrenched in the State Act, and thus that it 'was placed in a somewhat different position to the Federal Court'[99].

The judgement raising the female basic wage to 66% was based firmly on the *Harvester* principles and in the absence of detailed evidence which would allow it to formulate a rate providing for 'a fair and average standard of comfort' for female employees, the Court declined 'to take a stab in the dark'. Ryan & Conlon have argued that the living wage concept was an albatross around the neck of social justice in the area of pay equity, being concerned largely with the protection of male wages[100], and it would appear from this decision that the Queensland 'lag' as compared to the Commonwealth and New South Wales jurisdictions can be precisely traced back to the continued presence in the State Act of the *Harvester* principles.

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92 *Basic Wage Declaration* (1939) 24 QGIG 135.
93 *Ibid.* at 316 per Webb J, Ferry C and Riordan C.
94 *Basic Wage Declaration* (1941) 26 QGIG 42.
95 Ryan & Conlon, *op.cit.*
96 *Basic Wage Declaration 1941*, op.cit. at 42 per Webb J, Ferry C and Riordan C.
97 *Basic Wage Case* (1948) 33 QGIG 1010.
98 *Basic Wage Case* (1950) 35 QGIG 1253.
99 *Ibid.* at 1254 per Matthews P, Riordan C, Dwyer C.
100 Ryan & Conlon, *op.cit.*

4. Towards 'Equal Pay for Equal Work'

4.1 The federal jurisdiction from World War II to the 1972 *Equal Pay Case*

We have already seen that the living wage concept of a family wage had effectively been eclipsed in the federal jurisdiction after 1931 by economic considerations and the principle of 'capacity to pay'. However, as the Commonwealth Commission observed in the *Equal Pay Case* (1969) 127 CAR 1142, the 'relic of the concept of the family wage' returned to haunt the question of equal pay between the sexes for decades afterwards. Changing social attitudes exemplified in the foundation of the Council of Action of Equal Pay in 1937[101] and the support of the union movement exemplified in the ACTU's adoption of policy supporting equality in the basic wage at its Congress in 1941[102] did however lead to slow progress towards equal pay in the federal jurisdiction. Social changes resulting from World War Two also affected the status of women, and attitudes to women's participation in the labour market in Australia as in most Western countries[103].

The end of the depression had seen a larger increase in female than male industrial employment (reigniting some residual anxieties) and with the advent of war, women were required in the labour market to fulfil the requirements of a war economy with many men in the armed services. The Women's Employment Board, operating outside the auspices of the tribunal system under specific legislation but proceeding along similar principles, was required by regulation to fix women's rates in federal awards between 60% and 100% of male rates. Although there were many continuities in reasoning when it came to assessing women workers' efficiency and productivity, it did depart from established principles – for instance by awarding an 85% rate in the rubber industry and finding that male and female clerical workers were equally efficient. Many of the rates were fixed between 80% and 90% of the male award level[104].

With concern among policy makers turning to post war reconstruction, the Arbitration Court was empowered by the National Security (Female Minimum Wage) Regulations to fix female minimum rates in vital industries for defence purposes. In a case responding to this brief, the Court found that the female minimum wage in the specified industries was not unreasonably low, which resulted in the Commonwealth government over-riding the judgement and fixing the rate at 75% of the male basic wage by Regulation. This regulation continued in force until 1949, when it was overturned by the High Court, reducing the continuing award pay of some female workers set under the war time regulations from 90%.

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[101] *Ibid.,* p. 122
[102] *Ibid.,* p. 124.
[103] HREOC, *op.cit.*
[104] Ryan & Conlon, *op.cit.*, ch. 5.

Despite the resistance of some male workers and unions to continued female employment in industry, the ACTU pressed for equal pay in 1948 and 1949[105]. In the *Female Minimum Rates Case* (1948) 60 CAR 1405, the Full Court noted that there had not been 'any standard equivalent to the male basic wage laid down by the Court, fixing the basic remuneration of adult females'[106]. A variety of approaches had been adopted in awards. However, the Court found that it had no legislative power to fix a female basic wage, a gap which was redressed by legislation, enabling the Court to establish a female basic wage of 75% of the male wage in the *Basic Wage Inquiry 1949-1950* (1950) 68 CAR 792[107]. The Court rejected the ACTU's application for equal pay on economic grounds and because it did not wish to act in a 'socially undesirable' fashion. However, the Court refused an application by employer groups in the *Basic Wage and Standard Hours Inquiry* (1953) 77 CAR 477 to reduce the female rate to 60%, finding no relevant economic evidence had been adduced to support the application.

In between these two cases, the International Labour Organisation adopted a Covention on Equal Pay (No. 100) which recommended 'equal remuneration for men and women workers for work of equal value… with a view to providing a classification of jobs without regard to sex'. This Convention, which came into force on 23 May 1953, was not ratified by Australia until 10 December 1974[108], but nevertheless provided impetus to the equal pay movement and was cited by industrial tribunals in equal pay decisions. Ryan & Conlon observe that:

> At the 22nd Session of the UN General Assembly the Australian representative made a statement to the effect that the Australian government supported the principle of equal pay. The statement was qualified by the fact that the level of remuneration was a matter for the determination by the established industrial arbitration authorities[109].

The first jurisdiction to give force to the Convention was New South Wales, with the *Industrial Arbitration (Female Rates) Amendment Act* 1958 providing for a phased introduction of an equal basic wage to reach 100% by 1963[110].

In the *Basic Wage, Margins and Total Wage Case* (1966) 115 CAR 93 the Commonwealth Commission ordered that the basic wage increase for adult males be granted proportionately to adult female employees, junior employees and apprentices[111]. The concept of a 'total wage' formulated the next year in the *National Wage Case* (1967) 118 CAR 655 replaced the 'basic wage' and the margins for skill. Introduced in the interests of flexibility and consistency, this decision also put a (provisional) end to the living wage concept deriving from *Harvester*.

In summing up its approach to the new wage fixation principles, the Full Bench reflected on the history of gender wage fixation:

> Although we refer to the total wage, there will for the present be a different total wage for males and females and a number of total wages for many classifications. These result from existing basic wage differentials and from the quite complex history of basic wages particularly those for females, starting many years ago from a concept of differing needs and responsibilities of men and women. Both basic wages have over the years been adjusted in a variety of ways. We are conscious of these apparent anomalies, but consider it not practicable to attempt to deal with either at this time.

[105] *Ibid.*
[106] *Ibid.* per Foster J at 1417.
[107] *Basic Wage Inquiry 1949-1950* (1950) 68 CAR 792 at 817.
[108] International Labour Office Geneva, *List of Ratifications by Convention and Country*, International Labour Office, Geneva, 1996, p. 133.
[109] *Op.cit.*, p. 145.
[110] Industrial Relations Commission of NSW, *Pay Equity Inquiry Report*, op.cit., p. 87.
[111] At 102.

> The community is faced with economic industrial and social challenges arising from the history of female wage fixation. We have on this occasion deliberately awarded the same increase to adult females and adult males. Our adoption of the concept of a total wage has allowed us to take an important step forward in regard to female wages.
>
> The recent Clothing Trades decision [118 CAR 286] affirmed the concept of equal margins for adult males and females doing equal work. The extension of that concept to the total wage would involve economic and industrial sequels and calls for thorough investigation and debate in which a policy of gradual implementation could be considered[112].

A major landmark in the progress towards equal pay was the equal pay cases of 1969 and 1972. In 1969, the first *Federal Equal Pay Case* (1969) 127 CAR 1142 formulated the principle of equal pay for equal work. In reaching its decision, the Commission took into account equal pay legislation that had been passed in several Australian jurisdictions and also ILO Convention no. 111. However, the principle implied that women who performed the same work as men were granted equal pay, progressively phased in. In this we can see that the Commission was very much acting in consonance with the history of its jurisprudence, effectively awarding equal pay only for work in industries where both males and female were employed. The Commission required that women and men be 'performing work of the same or like nature and of equal value'.

However, it was decided that equal pay should not be provided where the work in question was 'essentially or usually performed by females'[113]. This aspect of the decision meant that the equality principles did not apply in female dominated industries and thus the decision led to only 18% of women in the workforce receiving equal pay by 1972[114]. The decision effectively raised the differential between males and females from 85% to 100% by 1972, but this has to be understood with the caveat that the work value tests which would enable these relativities to be awarded were restrictive along the grounds discussed above.

The following principle was adopted by the Commission:

> (1) the male and female employees concerned who must be adults, should be working under the terms of the same determination or award;
>
> (2) it should be established that certain work covered by the determination or award is performed by both males and females;
>
> (3) the work performed by both the males and the females under such determination or award should be of the same or a like nature and of equal value, but mere similarity in name of male and female classifications may not be enough to establish that males and females do work of a like nature;
>
> (4) for the purpose of determining whether the female employees are performing work of the same or a like nature and of equal value as the male employees the Arbitrator or Commissioner, as the case may be, should in addition to any other relevant matters, take into consideration whether the female employees are performing the same work or work of a like nature as male employees and doing the same range and volume of work as male employees and under the same conditions;

[112] At 660.
[113] At 1159.
[114] *Equal Pay Case* (1972) 147 CAR 172, at 177.

(5) consideration should be restricted to work performed under the determination or award concerned;

(6) in cases where males and females are doing work of the same or a like nature and of equal value, there may be no appropriate classifications for that work. In such a case appropriate classifications should be established for the work which is performed by both males and females and rates of pay established for that work. The classifications should not be of a generic nature covering a wide variety of work;

(7) in considering whether males and females are performing work of the same or like nature and of equal value, consideration should not be restricted to the situation in one establishment but should extend to the general situation under the determination or award concerned, unless the award or determination applies to only one establishment;

(8) the expression of equal value' should not be construed as meaning of equal value to the employer' but as of equal value or at least of equal value from the point of view of wage or salary assessment;

(9) notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed[115].

The federal *Equal Pay Case* (1972) 147 CAR 172 arose from submissions by the ACTU seeking a more robust equal pay principle. The Commission refused to raise the female minimum wage to the same level as the male minimum wage, relying on traditional notions of the role of the male worker as family breadwinner:

> …the unions now argue as a simple matter of equity that females should receive the same minimum wage as males. We reject that argument because the male minimum wage in our awards takes account of the family considerations we have mentioned. The fact that the unions consider the amount of the minimum wage to be too low does not affect the concept behind the wage. Because of the essential characteristic of the male minimum wage we decline to apply it to females and we dismiss that part of the unions' claims[116].

In terms of equal pay, the Commission recognised that the concept of 'equal pay for equal work is too narrow in today's world and we think the time has come to enlarge the concept to 'equal pay for work of equal value''[117] – the wording of the ILO convention. The Commission believed that the economic consequences of the decision were unavoidable due to changed social attitudes which would secure community acceptance of the 'concept of equal pay for females'[118].

The new principle was as follows:

1. (1) The principle of "equal pay for work of equal value" will be applied to all awards of the Commission. By "equal pay for work of equal value" we mean the fixation of award wage rates by a consideration of the work performed irrespective of the sex of the worker. The principle will apply to both adults and juniors. Because the male minimum wage takes account of family considerations it will not apply to females.

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[115] At 1158-9.
[116] At 176.
[117] At 172.
[118] At 178.

(2) Adoption of the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned. Differentiations between male rates in awards of the Commission have traditionally been founded on work value investigations of various occupational groups or classifications. The gap between the level of male and female rates in awards generally is greater than the gap, if any, in the comparative value of work performed by the two sexes because rates for female classifications in the same award have generally been fixed without a comparative evaluation of the work performed by males and females.

(3) The new principle may be applied by agreement or arbitration. The eventual outcome should be a single rate for an occupational group or classification which rate is payable to the employee performing the work whether the employee be male or female. Existing geographical differences between rates will not be affected by this decision.

(4) Implementation of the new principle by arbitration will call for the exercise of the broad judgment which has characterized work value inquiries. Different criteria will continue to apply from case to case and may vary from one class of work to another. However, work value inquiries which are concerned with comparisons of work and fixation of award rates irrespective of the sex of employees may encounter unfamiliar issues. In so far as those issues have been raised we will comment on them. Other issues which may arise will be resolved in the context of the particular work value inquiry with which the arbitration is concerned.

(5) We now deal with issues which have arisen from the material and argument placed before us and which call for comment or decision.

(a) The automatic application of any formula which seeks to bypass a consideration of the work performed is, in our view, inappropriate to the implementation of the principle we have adopted. However, pre-existing award relativities may be a relevant factor in appropriate cases.

(b) Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary.

(c) The value of the work refers to worth in terms of award wage or salary fixation, not worth to the employer.

(d) Although a similarity in name may indicate a similarity of work, it may be found on closer examination that the same name has been given to different work. In particular this situation may arise with generic classifications. A similar situation may arise with respect to junior employees. Whether in such circumstances it is appropriate to establish new classifications or categories will be a matter for the arbitrator.

(e) In consonance with normal work value practice it will be for the arbitrator to determine whether differences in the work performed are sufficiently significant to warrant a differentiation in rate and if so what differentiation is appropriate. It will also be for the arbitrator to determine whether restrictions on the performance of work by females under a particular award warrant any differentiation in rate based on the relative value of the work. We should however indicate that claims for differentiation based on labour turnover or absenteeism should be rejected.

> (f) The new principle will have no application to the minimum wage for adult males which is determined on factors unrelated to the nature of the work performed.
>
> (6) Both the social and economic consequences of our decision will be considerable and implementation will take some time. It is our intention that rates in all awards of this Commission and all determinations under the Public Service Arbitration Act should have been fixed in accordance with this decision by 30th June, 1975. Under normal circumstances, implementation should take place by three equal instalments so that one-third of any increase is payable no later than 31st December, 1973, half of the remainder by 30th September, 1974, and the balance by 30th June, 1975. This programme is intended as a norm and we recognize that special circumstances may exist which require special treatment.
>
> (7) Nothing we have said is intended to rescind the 1969 principles applicable to equal pay for equal work which will continue to apply in appropriate cases. We have taken this step because an injustice might be created in cases based on equal pay for equal work where females could become entitled immediately to male rates under those principles[119].

With the exception of the equalisation of the minimum wages in 1974, this principle continues to operate in the Federal jurisdiction[120].

2.4 The Elusive Quest for Equal Pay for Equal Work

Although the new principle represented an advance over the concept of equal pay for equal work, the principle nevertheless contained within it the reasons why (to return to Justice Gaudron's point), equal pay remains remarkably elusive to the present day. There are also factors extrinsic to the decision which contribute to continued equal pay, including indirect discrimination at work and the continuing segregation by gender of occupations. As Hallock notes, 'the higher the percentage of women in an occupation, the lower the wage'[121]. These factors call into question the effectiveness and reach of the industrial relations system and anti-discrimination law as effective policy avenues for the redress of unequal pay.

The principle was not (for constitutional reasons) a variation of all federal awards, and thus had to be implemented by agreement or application. Diane Fieldes has shown the extent of employer opposition to raising female wages to the level of male wages through a case study of the finance industry[122], but the point is more generally applicable. Continuing opposition by some employers can be demonstrated by the recent (and long running) HPM case, where an application by the AMWU for an equal remuneration order was vigorously resisted[123], and indeed by the submissions of employer groups to the New South Wales Pay Equity Inquiry[124]. The practice of the industrial relations tribunals thus requires unions to make application (as now under the regime of equal remuneration orders), which can be expensive and time consuming if contested.

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[119] At 179-180.
[120] Queensland Industrial Relations Commission, *Pay Equity Inquiry: Discussion Paper,* QIRC, Brisbane, 2000.
[121] Hallock, M. 'Pay Equity: The Promise and the Practice in North America', *Labour & Industry*, vol. 10 no. 2, 1999, p. 53.
[122] Fieldes, D. ''Everybody was "Girls" in the Minds of the Management': the Fight for Equal Pay in the Australian Insurance Industry, 1973-75', *Labour History*, no. 73, pp. 187-207.
[123] See http://www.users.bigpond.com/rj_gj/HPM/HPM2.htm#Background, Pocock. 'Introduction', *op.cit.*, p. 5.
[124] Industrial Relations Commission of NSW, *op.cit.*

Secondly, the decision fails to take into account increased male access to overtime (and more recently the greater casualisation of the female work force) and over award payments which increase male wages compared to award rates[125] (even in the case of paid rates awards until they were rescinded by the *Workplace Relations Act* 1996). The problem here is not related to the wording of the principle in terms of 'pay' rather than 'remuneration' which is the term used in the ILO Convention. Much evidence submitted to the New South Wales Inquiry argued that the failure of changes to minimum wages and awards, particularly in the context of decentralised bargaining, to address equal remuneration rather than wages was central to the continued persistence of pay inequity.

In addition, the 1972 principle requires an assessment of work value in order to demonstrate equality (as opposed to the 1969 principle which required an assessment to demonstrate work was also 'of the same or a like nature'). The fact that work value assessments were primarily to be made within an award or if this was inconclusive, with *female* comparators in other awards contributes to the problem of undervaluation of women's work. The argument that women's work and skill were undervalued, which undervaluation we have already observed has deep roots in Australian industrial jurisprudence going back to Higgins, was increasingly advanced from the 1980s by unions and women's groups. The findings of the New South Wales Pay Equity Inquiry also demonstrate that traditional approaches to finding comparators within industrial jurisprudence compound the gendered segregation of the labour market, and suggests a new methodological approach[126]. This is also a question within the terms of reference of the Queensland Inquiry[127].

In 1975 in the *September National Wage Case* 171 CAR 79, the federal Commission emphasised that Principle 7(a) (Work Value) was to be interpreted strictly and that changes in work value such as the nature of the work, skill and responsibility required had to be rigorously demonstrated. In general, as made clear in the *Wage Fixing Principles Case* (1978) 211 CAR 268, the Commission continued to emphasise that cases brought on grounds of work value or anomalies and inequities had to be justifiable and that 'the principle of comparative wage justice… should [not] be available to justify every wage increase wherever sought'[128]. In particular, the Commission was concerned with cost, and after the introduction of the ALP-ACTU Accord in 1983[129] with wage restraint and sought to rule out the possibility of flow-ons.

Rafferty notes the difficulty in achieving pay equity with the requirement that wage increases not exceed the ceiling – leading to a successful anomalies case run by the Professional Officers' Association on behalf of Dental Therapists nevertheless for this reason failing to lead to pay equity[130]. Subsequent to the *Nurses' Comparable Worth Test Case* (1986) 13 IR 189, the Commission confirmed that equal pay matters were to be dealt with under the anomalies and inequities principle. In many of the cases pursued in the 1980s, progress had to wait until Award Restructuring, which will be discussed in a later section of the paper.

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[125] See Pocock, *op.cit.* and HREOC, *op.cit.*
[126] See Hall, P., 'The NSW Pay Equity Inquiry: A New Approach for the New Century', *Labour & Industry*, vol. 10 no. 2, 1999, pp. 33-52.
[127] QIRC, *op.cit.*
[128] At 296.
[129] The Accord was an agreement on wages and prices policy entered into by the ALP and ACTU before the 1983 election. With Labor's victory, and the subsequent Economic Summit, it shaped wages policy until the defeat of the Keating government in 1996, though undergoing numerous metamorphoses. In the period before the introduction of enterprise bargaining in 1991, the Accord emphasised wage restraint in order to improve Australia's international competitiveness. See Stilwell, F. , *The Accord: The Political Economy of the Labor Government*, Pluto Press, Sydney, 1986 and Beilharz, *op.cit.* and Peetz, D., *Unions in a Contrary World: The Future of the Australian trade union movement*, Cambridge University Press, Melbourne, 1998.
[130] Rafferty, F. 'Pay Equity: An Industrial Relations Anomaly?', *Journal of Industrial Relations*, vol. 33 no. 1, p. 5.

The *Nurses'* Case is in itself important for the Commission's rulings on what constituted work value. The case was heard as a test case on the issue of equal pay for work of equal value, and it was further submitted that nurses had not had the benefit of the 1972 Equal Pay Principle. The Commission agreed that the Equal Pay Principle remained in force and was still available to be implemented. The ACTU had argued for comparable worth to be used as a methodology for measuring work value to establish equal value for equal pay. Comparable worth is a method for comparing females' jobs with dissimilar male jobs for the same employer. Such comparison (for instance between the work of an executive administrative assistant and a research officer) is performed using job evaluation techniques. Hunter, noting that this methodology is now recognised as not being gender neutral, nevertheless understands its attractiveness in the 1980s for advocates of equal pay[131] as its implication is that jobs rated the same should be paid the same. Nevertheless, the decision in the *Nurses'* Case is significant in that it reveals that the Commission will rarely go outside established industrial relations principles and its own jurisprudence in order to address policy objectives. In the Case, the Commission asserted:

> It is clear that comparable worth and related concepts, on the limited material before us, have been applied differently in a number of countries. At its widest, comparable worth is capable of being applied to any classification regarded as having been improperly valued, without limitation on the kind of classification to which it is applied, with no requirement that the work performed is related or similar. It is capable of being applied to work which is essentially or usually performed by females. Such an approach would strike at the heart of long accepted methods of wage fixation in this country and would be particularly destructive of the present Wage Fixing Principles[132]

The Commission further noted that:

> the Principle requires equal pay for work of equal value to be implemented by work value inquiries carried out in the normal manner in which such inquiries are conducted in our wage fixing environment[133].

This decision, if nothing else, makes it clear that the industrial relations system has the potential to create hurdles for the achievement of pay equity at the same time as it facilitates its achievement. This adds strength to Pocock's argument discussed early in the paper as to the reasons for the simultaneously strong comparative Australian performance on gender wage differential measures and weak progress towards equal pay over the last couple of decades.

Thus, although the *Equal Pay Case* of 1972 represents a significant advance in the progress of pay equity, both for its impact on reducing the earnings differential[134] and for its symbolic or political and social significance, it cannot properly be seen as a panacea for equality between the sexes in respect of remuneration in the federal jurisdiction. The New South Wales Commission noted the lack of progress at the federal level in implementing the 1972 Equal Pay Principle as early as 1979 in *Re Water Resources Commission (Equal Pay) Award* AR 321 (at 326) and very few cases could be successfully run after the implementation of the 'no extra claims' principle in the *National Wage Case* (1983) 291 CAR 3. Short notes that despite the fact that equal pay cases were supposed to be finalised in 1975, cases were still being heard in the Federal Commission in 1981[135]. A later section of this paper will briefly examine developments in pay equity at the federal level from 1988 to the present.

[131] Hunter, *op.cit.*, pp. 5-6.
[132] At p. 113.
[133] *Ibid.*
[134] Pocock, 'Equal Pay – Thirty Years On', *op.cit.*
[135] Short, C., 'Equal Pay – What Happened?', *Journal of Industrial Relations*, vol. 28 no. 3, p. 319.

5. Queensland from 1950 to the Restructuring and Efficiency Principle

5.1 Continued developments in the level of the female basic wage

Earlier, the series of decisions regarding the female basic wage from 1931 onwards was reviewed. It was demonstrated that Queensland lagged behind the Commonwealth and New South Wales jurisdictions in terms of increasing the relativity between male and female basic wages. The federal jurisdiction achieving a 75% relativity in 1950 that was to persist in the minimum wage until 1974, but Queensland did not adopt this level until 1961. In the 1958 *Female Basic Wage Case* 43 QGIG 540, the Industrial Court refused to grant an application made by the Federated Clerks Union for the female wage to be raised to 75%. This case is noteworthy for the extensive review of the history of Queensland wage fixation outlined by the Court, and also the comparative data for federal and other state jurisdictions up to 1958. For instance, the first declaration of the basic wage in 1921 followed the New South Wales Board of Trade in fixing the female basic wage at 48s, approximately half of the male basic wage. The table in the judgement[136] also demonstrates that the various shifts in the basic wage declared by the Court from 1921 to 1958 did not express the female wage as a fixed percentage relativity but rather awarded a money amount. Consequently the female wage crept up to 67% in 1952, only to fall to 66.9% in 1957.

The failure to maintain a fixed relativity derives from the separate standard, at that time set out in s.9(3)(iii) of the *Industrial Arbitration and Conciliation Act* 1932-1955, whereby female wages should be fixed according to a fair standard of living for a single woman. However, evidence as to this standard of living was not presented in the cases of the 1940s and 1950s and in effect the Court made its decisions on the basis of capacity to pay and its own conception of the appropriate social level for female wages. For economic reasons the Court was reluctant to increase the female basic wage by 8% as this would flow on to all awards covering female workers, because of the legislative capacity to issue general rulings.

Evidence provided by the Crown in the form of a table of salaries of male and female police officers and teachers[137] (incidentally showing that female officers received between 80% and 92% of the male rates) demonstrated that this alteration would have the effect of varying these relativities, and to the evident distaste of the Full Bench, 'in one instance, the effect of increase would be to give the female a higher wage than the male'. This result would clearly highlight the arbitrary nature of the sex-based relativities as resting on gender rather than logic. In addition, the Court argued that most female awards already provided for wages higher than 75% of the male wage. The key objective, then, appeared to be maintaining the system of gender differentials.

The Court refused the application and commented:

> It seems to be in Queensland that no principle has been consistently followed in the ascertainment of female wages. If that is so, and it certainly appears probable, we think it is first necessary to have settled the principle on which female wages are to be ascertained in Queensland – whether it is to be a basic wage plus a margin and how the basic wage and the margin are to be ascertained and computed, or whether it is to be a total wage unrelated to the female basic wage[138].

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[136] At 540.
[137] At 543.
[138] At 543 per Brown P, Bennett C & Taylor C.

However, the Court invited unions to make applications to vary any award where female rates were fixed at less than 75% of the male rate. Three years later, no such applications having been received, the Court heard another case brought by the Federated Clerks Union, Queensland Shop Assistants Union and Australian Workers Union[139]. On this occasion, the Full Bench rejected arguments advanced by employers based on economic impact and the lack of evidence presented as to living standards for female employees. It would appear from the judgement that the Court fixed the female basic wage at 75% of the male wage in recognition of current industrial reality, rather than on any substantive social justice or policy grounds. As Queensland entered the 1960s, the Court was to confront the issue of pay equity within awards separately from the question of the basic wage in response to a number of cases brought by unions.

5.2 Equal pay cases from 1961 to the Restructuring and Efficiency Principle

As in the federal jurisdiction, unions from the 1960s onwards began to argue cases for equal pay. Several of these were in the public sector, where female professionals and public service officers still had relativities to male wages varying from 80% to 90%.

The first significant case to be decided by the renamed Industrial Conciliation and Arbitration Commission of Queensland was the *Public Service Award – State, Professional and Technical Employees' Award – North and South Brisbane Hospitals Boards and Queensland Radium Institute* (1961) 47 QGIG 1051. This case was brought by the Professional Officers Association and sought equal pay for 'female officers in certain professional and technical callings', including Laboratory Technicians and Scientists, Library Assistants and Librarians, School Guidance Officers and Psychologists[140]. Extensive evidence was presented in order to establish equality in qualifications and equality in work value between males and females[141]. The Director of the Queensland Institute for Medical Research, Dr Mackerras, stated in evidence that the work performed by male and female scientists had the same value. The Director of the State Health Laboratory, also declined to differentiate between the work value of female employees as compared to male employees in the same classifications. The claim, also supported by the Queensland State Service Union, was opposed by the Crown and the Hospitals Boards. Evidence led for these bodies argued that women were more likely to leave the service as they were required to so in order to marry[142], and that consequently:

> Whereas male employees generally continue in employment, thus making use of the knowledge and experience gained in employment, it is found that female employees resign for various reasons and the Department not only loses the female employee but also the benefit of her training, knowledge and experience[143].

Comparable statistics for male turnover were not cited, and it is difficult to see how this situation could have been avoided given that legislation required women to resign from the public service on marriage.

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[139] *Female Basic Wage Case* (1961) 46 QGIG 475.
[140] At 1051.
[141] At 1052.
[142] Statistics were cited by Mr Coyne, the advocate, from the Department of Agriculture and Stock to show that 14 of 32 female graduates appointed had resigned on marriage. It was argued at 1053 that given this level of turnover 'long-term research programmes would not be stable if numbers of females were employed in connection therewith'.
[143] At 1053 per Bennett C.

Nine detailed reasons for opposing the submission were given by the Crown advocate, including the need to review the basis of male wage fixation if the submission were upheld, the need to make precise work value measurements in all classifications and the 'generous' employment conditions prevailing for female staff. Despite the work value evidence presented by the Professional Officers Associations, it seems that women's 'turnover… and the greater incidence of sick and special leave' would always prove that their work value was lower. In this case, then, the arguments rest largely on assertions derived from assumptions about the primacy of women's family responsibilities over work responsibilities.

The decision referred back to the judgement of Macnaughton J in 1917, noting that the question of equal pay 'is not new'. The judgements of Bennett C and Harvey C refused the application on the grounds that the evidence of the two scientists was not generalisable to the public service, while Taylor C in a dissenting judgement was prepared to award equal pay to some classifications on the grounds that:

> Where the governing factor in the appointment of an officer to a professional position is the qualification which the officer is required to possess, the sole matter for consideration in determining the salary is the importance of the work itself and such salary should in no way depend on whether the appointee is male or female[144].

This represented a significant departure from the generally observed practice of the Commission where equality of work value could not be demonstrated either because of the family responsibilities of women allegedly impeding their work performance, or as in *Mental Hospitals & Employees' Award – State* (1957) 42 QGIG 818 where the gendered allocation of work responsibilities within the same occupation led to the assumption that male and female work must be dissimilar. In this case, 'males [did] not perform any intimate nursing duties of female patients'[145], being assigned to male patients, or traditionally masculine 'skills' such as heavy lifting or restraining violent patients. It is noteworthy that both these cases were only seeking to establish equality in work value *for the same work* – it was not possible to make work value claims for occupations or industries gendered female. The practice of the Queensland Commission of interpreting evidence of work value according to already established gender divisions or work organisation and skills implied that it was next to impossible to demonstrate equal work value in order to access the equal pay provided for in the Act.

[144] At 1055 per Taylor C.
[145] At 818.

The next significant case to come before the Queensland Commission was brought on behalf of teachers in 1967. The case, argued by the Queensland Teachers Union sought equal pay for all teachers. Evidence was called to demonstrate that female and male teachers performed the same duties and had the same level of responsibility. The majority judgment in *Teachers' Award – State* (1967) 66 QGIR 16 granted equal pay, noting that it was not the Commission's intention 'to discover small and unimportant differences in work'[146]. This was despite the fact that more males than females taught the top grades while most grade one and two teachers were female. The Commission was also influenced by the Federal *Total Wage* decision's preparedness to contemplate the gradual implementation of equal pay. The departure this judgement represented from the consistent reasoning of the tribunal, and in particular from the reasoning of the 1919 *Teachers' Case*, is evident from the dissenting judgement of Tait C. Tait C cited the 1919 case at length, as well as Foster J's dicta from the 1949-50 *Basic Wage Inquiry* that it was socially preferable for males to be remunerated in such amount as would enable them to act as heads of households. Commissioner Tait noted that 'we have the situation rarely heard of many years ago of both husband and wife working' but this was insufficient to persuade him that 'primarily the male is looked upon and accepted as provider for the family unit'[147].

Despite Tait C's traditionalist social beliefs, this case represents a watershed in the Queensland jurisdiction as the majority were able to take account of changing social and economic circumstances, as well as of developments in the Federal jurisdiction. The 1967 *Teachers' Case* was the first significant application of the equal pay principle in Queensland to men and women performing the same work, some 51 years after the provision providing for equal pay in these circumstances was enacted by Parliament. The revolution in women's expectations as well as social attitudes, and the entry of women into the labour market in larger numbers, bore belated fruit in the late 1960s in giving meaning to a substantially unchanged legislative provision dating from 1916.

However, much remained to be achieved. Later in 1967, in *Police Award – State* 66 QGIG 295, police women were still refused equal pay on the grounds of dissimilar work[148]. The Commission in *Professional and Technical Employees' Award – Public Hospital Boards, Brisbane and Queensland Radium Institute* (1968) 67 QGIG 138 awarded equal pay for some professional and technical classifications, while still declining to do so in others, or to fix an equal female wage rate for Research Officers who were all male – there being no chance to compare work value. The Commission made it clear that it was not enunciating any general equal pay principle, and that decisions would still be made on the same grounds as before – even if those grounds could now be more favourably construed for some occupations and classifications[149]. Equal pay could be granted where agreement was reached, as for the Public Service in *Public Service Award – State* (1968) 68 QGIG 36.

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[146] At 16 per Taylor C and Self C.
[147] At 18.
[148] However, an application for equal pay was successful in *Police Award – State* (1970) 75 QGIG 29.
[149] See also *Hotel, Club, Restaurant and Café – Several Divisions - Award* (1970) 74 QGIG 370, *Private and Convalescent Home Employees Awards – Southern, Mackay and Northern Divisions; Hospital Employees Award – North Brisbane, South Brisbane and Chermside Hospitals Board; Public Hospital Award – State (excluding Brisbane); Public Hospital Employees Award – Mater Misericordiae Public and Childrens Hospitals and Public Hospitals Award – Mount Olivet Hospital – Brisbane*
(1971) 77 QGIG 2

But the decision in *Prison Employees' Award – State* (1968) 68 QGIG 172 made it clear that work value equality claims based on different classifications (in this case evidence was heard on the duties of the Prison Matron and Chief Prison Officer) were unlikely to succeed as they still fell within the category of work differentiated according to gender (for example, the male officers were 'armed' and could still be called to deal with difficult female prisoners – logic very close to that used in 1957 to deny female nurses equal pay). As the 1970s progressed, increasingly the Commission began to award equal pay when it could be demonstrated that it was common practice in comparable jurisdictions[150]. Nevertheless, Queensland did not formally adopt the 1972 Federal Equal Pay Principle, as Hall & Watson noted in 1988. The legislation was amended in 1975 to reflect the wording of the 1969 Federal principle after a recommendation of the Commission of Inquiry (Status of Women in Queensland) chaired by Mr Justice Demack in 1974[151]. The Commission had stated in its decision in *Boarding House Employees' Award – State* (1972) 80 QGIG 882 that the Act 'did not provide for equal pay between the sexes – it provides for equal pay for equal work' and noted that the principles of the 1969 federal decision were not in conflict with the approach taken in Queensland: 'the test is still whether the work done is equal in class, quantity and quality'. Hall & Watson refer to the adoption of the 1972 federal principle in New South Wales[152] and comment that with the 1975 amendments, 'there is no reason why the same principle should not be adopted in Queensland'[153].

As Rosemary Hunter observes, 'the implementation of equal pay in Queensland was even less thorough than it was at a federal level'[154]. Queensland lacked a systematic approach to redressing pay inequity through the arbitration system, even a flawed instrument such as the federal 1972 principle. In this respect, up to the 1994 Reform Act which incorporated an equal remuneration for equal work principle and relied on various international conventions prohibiting discrimination, Queensland was very much shaped by the practices and attitudes prevailing in the early years of the century embedded in both legislation and jurisprudential practice.

[150] *Mental Hospitals, etc. Employees' Award – State* (1972) 81 QGIG 223, *Prison Employees' Award – State* (1973) 84 QGIG 3.
[151] *Report and Recommendations of the Commission of Inquiry into the Status of Women in Queensland*, Parliamentary paper no. 1, Government Printer, Brisbane, 1974.
[152] See (1973) AR 125.
[153] Hall & Watson, *op.cit.*, p. 63.
[154] Hunter, *op.cit.*, p. 5.

From 1983 onwards, Queensland closely followed the Federal wage fixation principles in the State Wage Cases[155] and in the *Anomalies and Inequities Decision* (1983) 114 QGIG 279, adopted similar principles whereby inequities could be examined in an Anomalies Conference convened by the Commission. The concerns about wage restraint and flow-ons which led to limited success in equal pay cases under the federal principle were also present in this decision. The Commission noted in the *Dieticians' Case* that:

> Since 1985 (90 QGIG 247) (with the exception of the period from 26.10.81 (108 QGIG 291) to 4 January 1983 (112 QGIG 119)) this Commission has carried out its functions with regard to wage principles or guidelines having the object of limiting wage increases in return for index increases in the cost of living. The system was originally intended to put an end to comparative wage justice which was said to be the reason for a wage spiral in 1972. The provision for work value increases also became suspect after a round of increases in which an averaging concept allowed work value increases to be granted under virtually all awards. In the 1983 wage principles (114 QGIG 87) changes in the nature of work which were widespread or general were not to result in work value increases but were to be considered in claims for increases based on productivity[156].

This principle clearly restricted the impact of work value claims based on gender inequalities. An Anomalies Conference was convened in late 1983 and reconvened in 1984. The proceedings of the Conference were not reported and it would appear that only a few of the cases raised had some pertinence to pay equity[157]. For instance, increasing the rates in the Floral Bouquets, Novelties etc. Making Award – State to parity with rates in the Shop Assistants' Award would likely redress a substantial inequity in a largely female occupation. However, it would appear that no cases seeking pay equity in Queensland were brought under the Anomalies and Inequities Principle[158]. Up until the process of Award Restructuring, many state awards continued to contain discriminatory provisions including different rates of pay for males and females doing the same work[159]. It is clear that the Queensland jurisdiction had mixed success in adequately addressing the issue of pay inequity, at the same time as progress in the federal jurisdiction was also uneven.

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[155] From the *State Wage Case* (1983) 114 QGIG 87, where the Commission announced 'in substance it will adopt the principles of wage fixation enunciated by the Australian Conciliation and Arbitration Commission in its National Wage Case decision of 23rd September 1983.

[156] *Dieticians' Case* (1988) 127 QGIG 381 at 385 per Birch C, Ledlie C & Howatson C.

[157] Records of the decisions held in the IR Policy Branch, DETIR, Brisbane.

[158] However, for professional work in the public sector, a series of decisions in the late 1980s granted what was in effect equal pay compared to primarily male scientists' grades in the Public Service on equivalency of work value grounds – *Therapists' Case* (1987) 126 QGIG 153, *Dieticians' Case* (1988) 127 QGIG 381, *Social Workers' Case* (1989) 131 QGIG 47. It should be noted, though, that equal pay or gender as such were not at issue in these cases.

[159] *Work and Inequality: A Survey of Sex Differentiating Provisions in Queensland State Awards*, Trades & Labor Council of Queensland, Brisbane, 1990.

6. Pay Equity from Award Restructuring to the New Millennium

6.1 Introduction

As Australia enters the new millennium, it would seem that pay equity is still elusive. There has been a major Pay Equity Inquiry in New South Wales, which resulted in a new principle handed down by the Commission[160] and also a new pay equity principle in the Tasmanian jurisdiction. Up to this point the paper has comprehensively discussed the social and jurisprudential history of pay equity, and the conclusions formed will be summarised in the last section of the paper. For a number of reasons, it is not proposed in this paper to dwell at great length on recent developments around the issue. For a start, it is assumed that much of the material in the submissions provided to the Commission will seek to cover this ground in order to facilitate the achievement of the Commission's brief. Secondly, there have been few decisions impacting on pay equity in the State and federal jurisdictions. Some of the relevant decisions have resulted from legislative change and will be discussed. The changes to the Australian and Queensland industrial relations systems will also be outlined in order to provide background for how the issue of pay equity might appropriately be addressed in the new millennium. As this section will be shorter than the historical discussion, and as there are extensive parallels in industrial relations developments, both State and federal jurisdictions will be treated together.

6.2 The decentralisation of Australian industrial relations[161] and pay equity

After the Accord was embodied in the federal and State 1983 Wage Fixation principles, Australia had returned to a seemingly stable centralised wage fixation regime emphasising wage restraint, consensus, and discounted indexation for inflation as the prime source of central wage movements. However, from 1985 onwards, much debate from business groups and economists, and later politicians and unions, argued that the rigidities inherent in arbitral wage fixation impeded productivity and flexibility necessary for economic success in a newly competitive and globalising economy where the traditional reliance on commodity exports could no longer suffice. When this argument was accepted, the system gradually moved towards decentralised bargaining at the enterprise (and later also individual) level with the role of the federal Commission in wage fixation being a residual one of setting a minimum federal wage in Safety Net Cases which replaced the traditional National Wage Case.

From 1987 onwards with the Restructuring and Efficiency Principle and 1989 with the Structural Efficiency principle, elements of wage fixation were devolved to the enterprise level. The 1989 principle, adopted in Queensland in the *State Wage Case – Structural Efficiency Principle* (1989) 132 QGIG 1199, put in train a process of award restructuring which was intended to modernise and rationalise awards, and to add skills-based classifications. In Queensland, the Commission included in its principle the duty for the parties to address 'any cases where award provisions discriminate against sections of the workforce'[162]. It was in this context that unions in Queensland sought to remove sex-based classifications and directly and indirectly discriminatory provisions from awards[163]. The Commission initiated a hearing into discrimination in awards in 1993, under the provisions of the 1990 *Industrial Relations Act* – and in the section 150 award review process, adopted a model anti-discrimination clause for insertion into awards in April 1996[164].

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[160] *Re Equal Remuneration Principle* (2000) NSWIRComm 113.
[161] For a review of this process see Dabscheck, *op.cit.* and Peetz, *op.cit.*
[162] *Op.cit.*
[163] TLC, *op.cit.*, Bucknall, F. & Bourke, J., *Sex Discrimination in Queensland Awards: A Review*, Australian Government Publishing Service, Canberra, 1994.
[164] 152 QGIG 43

The *Industrial Relations Reform Act 1994* inserted a robust equal pay provision into Queensland legislation for the first time. S.58 established a principle of 'equal remuneration for men and women workers for work of equal value'. Such remuneration could be made the subject of an equal remuneration order by the Commission, but only on application (s.61). These provisions mirrored the Commonwealth *Reform Act* of 1993. The current *Industrial Relations Act* 1999 (as well as the Commonwealth *Workplace Relations Act* 1996) provide for Equal Remuneration Orders. The 1999 Act has also extended the wording of the section to 'equal or comparable value'. It has already been noted that few such cases have been brought in the federal jurisdiction, and it would appear that no such cases have been brought in the State jurisdiction[165].

A key problem at federal level (which may also be a reason why no applications have been made in Queensland) is the lack of precedent or guidance from the Commission on the elements needed to establish a successful application. The legislation at federal level is complex. It should be noted that the provisions in Chapter 2, Part 5 of the *Industrial Relations Act 1999* are more straightforward. The relevant provisions of the *Workplace Relations Act 1996* are as follows:

170BA The object of this Division is to give effect, or further effect to:

(a) the Anti-Discrimination Conventions; and

(b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No 90; and

(c) the Discrimination (Employment and Occupation) Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation No 111.

Section 170 BB provides as follows:

Section 170BB

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

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

Other sections of particular interest are:

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

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

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[165] QIRC, *op.cit.*, p. 5.

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

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

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

(i) one or more of the Anti-discrimination Conventions; or

(ii) the provisions of the Recommendation referred to in paragraph 170BA(b) or (c).

[s170BD] Orders only on application

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

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

(b) the Sex Discrimination Commissioner.

[s170BE] No order if adequate alternative remedy exists

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

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

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

The complexity of these provisions has enabled much technical dispute about their meaning and has resulted in significant delay. *The Age Case*[166] exemplifies this problem. In this case, Ross VP agreed with the contention of David Syme Pty Ltd that the application was invalid as an alternative remedy had already been sought under the Act. Although it may well be possible to make an application which meets the somewhat complex requirements for validity, the key question of whether remuneration is currently unequal on the grounds of discrimination between the sexes cannot be determined until the procedural requirements can be satisfied. Nor can any equal remuneration orders operate retrospectively.

As noted earlier in the paper, the most prominent s.170BC case has been the *HPM Case*, now settled outside the Commission. This case was originally brought by the AMWU, the only union to have made applications under s.170BC, in 1995. The case related to employees at the Darlinghurst site of HPM Industries, a workplace covered by the *Metal Industry Award* 1984. It was contended by the union that the wages and conditions of predominantly female packers and process workers were inferior to those of predominantly male storepersons and general hands. For instance, the jobs in which females predominated had a three-level pay scale compared to the one-level scale for packers and process workers.

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[166] *AMWU vs. David Syme & Co Pty Ltd* (1999) 46 AILR 1559.

As noted in the report of the New South Wales Inquiry, this case is the first of its type to be arbitrated in the federal jurisdiction[167]. The case ran for some four years, with much of the procedural disputes the New South Wales Inquiry found to be highly problematic. Significantly, the Commission declined to adopt the definition of discrimination in the *Sex Discrimination Act* 1994 (which are consistent with those of ILO Convention 111 referred to in s.170BA(a) of the Act) and instead adopted that of the Commission in the *Third Safety Net Adjustment and Section 150A Review* (1995) AILR ¶3-195. This decision of Simmonds C placed the onus of proof on the applicant and required a finding that the intent to discriminate on sex grounds had existed[168]. Simmonds C also found that the competency standards established in the Award were not sufficient grounds for comparison and that comparisons of work value had to be made according to established work value tests, as envisaged in the 1972 equal pay principles[169].

The application was subsequently renewed and considered by Munro J in a decision on interlocutory matters on 19 May 1998 (Print no. Q1002). Subsequent to Simmonds C's decision, HPM had dismissed the male employees in the classifications relied upon as comparators, on grounds of redundancy. At issue in the judgement of Munro J was whether evidence related to past employees could be considered for the purposes of comparing work value. Such evidence could be used under the guidelines of the ILO Committee of Experts. However, Munro J held that such evidence 'may be of some probative value in establishing a current inequality'[170]. He declined to specify the 'elements upon which a particular member of the Commission may be satisfied that, for a particular employee or set of employees, there is not equal remuneration for work of equal value'[171]. Subsequently, as noted above, the case was settled.

One of the issues before the Queensland Inquiry is the adequacy of the legislative provisions for equal remuneration orders given this record and the lack of clear principles or facilitative guidance on how an application could be made successfully. Nevertheless these legislative changes in both jurisdictions are extremely significant in adopting international and Australian human rights jurisprudence to entrench pay equity principles – in Queensland for the first time given the failure of the Commission to adopt the 1972 principle.

The Structural Efficiency and the Minimum Rates Adjustment Principles have been argued to possess greater potential to redress pay inequities than the 1972 Equal Pay Principle as they provide a means for comparing award classifications for the purposes of determining relative value and permit a broader range of issues which affect women's pay than wage differentials, such as multi-skilling, training and broadbanding. Some cases in the 1990s were successfully pursued, though at considerable cost and length under these principles. Such cases include *The Child Care Industry (ACT) Award 1985* Case (1990) 39 IR 194, the *Family Court Counsellors' Case* (Australian Industrial Relations Commission, unreported, No.90086 of 1992) and the *Social Workers' Case*, (Re Professional Officers Association, Australian Government Employment, Professional and Executive Salaries Award 1990, 27 June 1997, Print P2275). The latter two cases, discussed by Rafferty[172], redressed the clustering of female public sector professional employees at the bottom of classificatory scales. It is also worthy of note that restructured awards included a model anti-discrimination clause.

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[167] http://www.dir.nsw.gov.au/action/policy/equity/report/equalpay/Page8.html
[168] http://www.dir.nsw.gov.au/action/policy/equity/report/equalpay/Page8.html
[169] *AMWU vs. HPM Industries* (1998) 43 AILR ¶3-739.
[170] At 7.
[171] At 8.
[172] Rafferty, *op.cit.*

Nevertheless, award restructuring overall was not the panacea expected[173]. As Hunter argues:

> Award restructuring… promised many women not only increased pay, but access to a career path for the first time. Numerous publications pointed out that if the goal of pay equity was kept to the forefront, award restructuring and minimum rates adjustments could deliver significant gains for women workers in assigning proper value to their skills, responsibilities and working conditions. In an attempt to ensure that this occurred, the Australian Federation of Business and Professional Women intervened in the 1990 National Wage Case to urge the Industrial Relations Commission to convene a national skills value inquiry, to review all aspects of the evaluation of skill. The Commission, however, rejected this proposal, preferring to leave the restructuring process to negotiation between the industrial parties in each case[174].

At the federal and state levels, awards, restructured or otherwise, receded in importance with the *Industrial Relations Reform Act 1993* (Cth) and the *Industrial Relations Reform Act* 1994 (Qld) which mirrored its thrust and many of its provisions. Increasingly awards came to be seen as a safety net and the basis for enterprise bargaining – a principle first (reluctantly) accepted by the federal Commission in September 1991 and in Queensland in the *State Wage Case* (1992) 139 QGIG 369. Awards have further receded in importance at the federal level, with their reduction to 20 allowable matters under the *Workplace Relations Act* 1996, though in Queensland the *Industrial Relations Act 1999* seeks to maintain and reinvigorate awards as reflective of community standards and not just minima generally and through the award review process. The legislation also provides for the review of awards to ensure equal remuneration, which is also a duty of the Commission in making awards[175].

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[173] See also Department of Industrial Relations, *Women in Restructured Awards*, Australian Government Publishing Service, Canberra, 1990.

[174] Hunter, *op.cit.,* pp. 7-8.

[175] ss 128. 130(4).

7. Conclusions

7.1 Summarising the history of pay equity in Queensland

This paper has traced the history of pay equity (and inequity) between men and women in both the federal and Queensland industrial relations jurisdictions. It breaks new ground in discussing the Queensland history with reference to key cases and legislative enactments, which has not previously been done in the literature. As it is not the purpose of this paper to make policy proposals or recommendations, this section concentrates on summarising the research reported in this paper on the history of pay equity in the Queensland jurisdiction.

After the passage of the *Industrial Arbitration Act 1916*, Queensland legislation always provided for the Commission (and its predecessor bodies) to award equal pay for equal work in making or varying awards. However, from the *Special Case 1917* until the legislation changed in 1990, the provision was interpreted so as to deprive it of general application (as indeed was legitimate given other sections of the Acts). This interpretation followed two phases. Until 1967, the Court rarely gave effect to the section, being largely concerned with the protection of male jobs. The complexity of the test enunciated in 1917 and reaffirmed in 1972 aided this jurisprudence which arose out of social attitudes towards women which were reflected in a gendered division of labour in both the family and the workforce.

From 1967 onwards, the Commission became more prepared to award equal pay for women working in the *same classifications as men under the same award.* This was still very far from being a general equal pay principle, and such a principle did not exist even as through the 1970s and 1980s the Commission showed a willingness to extend the reach of equal pay. The 1975 Act, following judgements in the Commission, effectively enshrined the less robust 1969 Federal principle rather than the 1972 principle. With the Accord in 1983, Queensland industrial jurisprudence and wage fixing principles came into much closer consonance with Federal developments. However, it is not really until the 1994 Reform Act that one could point to a judgement or legislative enactment that enshrined equal pay in the State jurisdiction. In conclusion, it is clear from the history that until recently, Queensland has lagged behind both the New South Wales and Commonwealth jurisdictions in achieving pay equity between women and men.

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