

Gender Pay Equity, Wage Fixation and Industrial Relations Reform in Australia: One Step Forward and Two Steps Backwards?

Abstract

Since the 1970s Australia has been one of the few countries that has progressively advanced the concept of gender pay equity. This achievement has largely been due the centralised, industrial tribunal based, wage fixing system. The wage rates created by industrial tribunals have been able to improve the pay of women workers due to their coverage of the workforce of an entire industry within the jurisdiction of the tribunal. State tribunals, in particular, have also been at the forefront of this development due to the adoption of new 'equal remuneration' wage fixing principles resulting in notable increases in award based wages for certain industries dominated by women workers. However, the capacity of state tribunals to continue to apply gender free wage determinations is under threat because of the federal government's 2006 'reforms' to the Australian industrial relations and wage fixation systems.

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Track 16: Gender issues and diversity management.

The issue of gender pay equity is a vexed one for policy makers, trade unions, employers and women in paid work. Many countries and legal jurisdictions have since the 1970s progressively implemented measures to overcome instances of direct discrimination where women are remunerated at a lower level than men performing the same duties. However, notable differences still exist between the overall earnings of women and men. While these differences can be partly explained by the occupational locations of women and men in the respective labour markets, the industrial relations and wage fixation system and 'masculine' concepts of skill are equally influential (Whitehouse 2003). In the Australian context, recent developments at the state (provincial) level have sought to address the issue of gender pay equity with a series of case studies, inquiries, legislative amendments and changes to the way industrial tribunals assess pay and conditions of employment in the process of making minimum wage industrial awards. Institutional arrangements in Australia remain distinctive from those evident in international jurisdictions by way of their location in labour law as opposed to human rights legislation. However, these institutional arrangements are now under threat from changes made to the Australian system of wage fixation by the federal government's 'Work Choices' regime. The new federal workplace relations effectively ends the tribunal based wage determination system by focusing on agreement making at the workplace or individual level. Consequently the recent innovations in pay equity adopted by state industrial tribunals are curtailed, as allegations of unequal pay can only be remedied at the individual – and not collective – level and only if direct gender discrimination is found.

The paper discusses the impact on the new federal wage fixing system in the context of gender pay equity, and is divided into four parts. The first section briefly examines the history of pay (in)equity under the Australian tribunal based industrial relations system.

The second section overviews the recent developments at the state level focused on gender pay equity. The third section discusses recent cases in state wage fixing systems designed to remedy the gender based undervaluation of children's services employees. The fourth and final section discusses the implications of the new 'national' workplace relations laws in the context of gender pay equity in Australia.

Concept of Gender Pay Equity

A consistent finding in more recent research studies is that female domination of a workforce reduces relative pay. A review of the Australian studies examining the relationship between rates of pay and gender by Kidd and Ferko (2001, 71) notes that the evidence points to a gap of up to 20 per cent between the earnings of male and females, even when both sexes have 'similar productivity-related characteristics'. Their own analysis also found 'gender discrimination' in wage outcomes (Kidd and Ferko 2001, 86). A study by Kidd and Shannon (2002) projecting the size of the gender wage gap in Australia to the year 2031 found that only minor changes in gender pay differences would result despite projecting 'substantial' increases in both labour force participation and labour market experience of females.

At face value gender pay equity is a simple equation: men and women should receive equal remuneration for work of equal value. Yet both sides of that equation involve complex issues of measurement. The first component of that equation – equal remuneration – involves reviewing a variety of different employment forms and wage measures, spanning issues of full-time and part-time hours of work and the inclusion or otherwise of overtime and indirect forms of remuneration. The second component of the equation – equal value –

leads to similarly vexed discussions as to what constitutes 'work value', and how it should be measured. Should the valuation of 'female' work (i.e., female dominated occupations and industries) require a comparison to 'male' work, or can an abstract standard be applied to address the 'undervaluation' of women's work on its own terms.

Over the last three decades Australian policy has approached this issue by way of labour law measures, an approach that has provided for collective remedies as pay increases are granted through a centralised, tribunal based, industry level industrial award system, with increases in award wages being granted on an industry basis. This approach stands in contrast to the measures available in the United Kingdom and North America where pay equity reform has been promoted through a series of human rights measures ill-suited to promoting aggregate remedies.

Equal pay measures in the United Kingdom bear the influence of international conventions, largely the International Labour Organisation's (ILO) 1951 Convention No. 100 *Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* but more particularly the United Kingdom's membership of the European Union. European Union (EU) law forms part of domestic law in EU member states, although ambiguity still attends the precise relationship between EU and domestic law. While the European Court of Justice has delivered a number of judgements favourable to pay equity reform, equal pay legislation in the United Kingdom is primarily, although not exclusively, directed to individual claimants and limited to a single employer. Differential rates embedded in similarly skilled but different areas of work have remained resilient to change, a function of the absence of collective mechanisms and the inability of claimants to pursue cross-employer comparisons.

In the United States, ILO Convention 100 has not exercised a decisive impact on domestic pay equity reform as the United States is not a signatory to the Convention. The applicable measures comprise direct equal pay legislation and human rights legislation aimed at the prevention of discrimination. Direct statutory reform at a federal level was introduced in 1963 but the right to equal pay was limited to work involving equal skill, effort, responsibility and working conditions. Given the limitation activists sought a separate legislative path, the *Civil Rights Act 1964* (US), a broadly based discrimination rights legislation. Contrary to expectations, the ability of applicants to utilise this pathway to pursue ‘comparable worth’ style applications to address women’s disproportionate representation among low wage workers, has largely been denied.

Pay equity measures in Canada primarily reside in human rights legislation. Across federal and provincial jurisdictions, the measures are diverse and embrace both complaint based and proactive models. In broad terms the available measures hold that it is a discriminatory practice for employers to establish or maintain differences in wages between women and men employees in the same establishment who are performing work of equal value. The existing complaint based approaches are viewed as an inadequate platform for Canada to meet its international and domestic obligations. While the impact of proactive models has been assessed as positive, such measures have realised a narrower scope than expected – both in the number of workplaces responding to the legislation and the average size of wage increases that had resulted from the measures (Pay Equity Task Force, 2004: 138-140, 418).

Australian Award System

Returning to the measures in Australia it is now something of an irony that the historic differences in the pay received by men and women in Australia derive from the social assumptions that guided the decisions of industrial tribunals under the centralised industrial relations system. The wage fixation principle underpinning the origins of the award system was based on men working full-time as family 'bread winners'. Accordingly the initial construction of the minimum or basic wage in 1907 was based on the average weekly expenditure of an unskilled male worker with a wife and three children (CCCA 1907). For a considerable period a rate of 54 per cent of the male award wage was the predominant benchmark for women, although female process workers were granted 66 per cent of the male award rate. With this guiding principle three models of female wages emerged: jobs where equal pay was granted as male employment would be under threat by women earning lower wages; jobs where women earned between 54-75 per cent of the male rate on both the basic wage and the skill margin, where a margin applied, and; jobs where women earned the same skill margin as men but, due to the concept of the family wage, received a lower basic wage (Short 1986, 316).

The International Labour Organisation's Convention 100 resulted in a number of Australian states ultimately amended their industrial legislation to provide for equal pay, consistent with the Convention. New South Wales (NSW) was the first state to pass legislation, the *Female Rates (Amendment) Act 1958* (NSW) which required the Industrial Commission of NSW and conciliation committees, in certain specified circumstances, to insert provisions for equal pay as between the sexes in awards and industrial agreements.

Other states followed, although not necessarily in quick succession; Victoria and Western Australia (WA) passed legislation as late as 1968 and 1969, respectively (Short 1986).

The 1969 decision the federal industrial tribunal adopted the principle of *equal pay for equal work* which rested on a narrow interpretation of equal pay. Similar to the implicit constraint in state based legislation, the decision only applied to situations where ‘work performed by men and women was of the same or a like nature’ (CCAC 1969). The restricted nature of the measures available under the 1969 decision was soon evident and led to further applications as part of proceedings for the 1972 National Wage Case. As a result of the 1972 proceedings, the effective exclusion of female dominated industries from the ambit of the 1969 decision was removed, through the introduction of the broader principle of *equal pay for work of equal value* (CCAC 1972). The 1972 principle was also adopted by state industrial tribunals.

The precise approach of the federal tribunal and trade unions to the valuation of feminised areas of work received specific prominence in 1986. The Australian Council of Trade Unions sought to have the federal tribunal adopt the doctrine of comparable worth in interpreting the 1972 equal pay principle in proceedings to vary the *Private Hospitals and Doctors’ Nurses (ACT) Award* (ACAC 1986). The tribunal’s rejection of the doctrine was influenced by an expansive interpretation of the doctrine, determining that 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’ (ACAC 1986, 114). In other words, notions of skill based wage relativities and comparative wage justice were incompatible with the application of an abstract measure of work value. The persistence of pay inequity in Australian can be seen by the proportion of

female full-time 'ordinary time earnings' (i.e., earnings that exclude overtime) relative to male earnings. In the period between 1981 and 2003 female earnings in Australia have ranged from about 80 to 85 per cent of male earnings, the application of the 1972 equal pay for work of equal value principle notwithstanding (Smith and Ewer 2005). This stagnation in gender pay equity was a key impetus for the amendment in 1993 of the federal *Industrial Relations Act 1988* to include equal remuneration provisions based on ILO Convention No. 100 and other anti-discrimination international labour standards. The equal remuneration provisions introduced in 1993 were substantially retained with the passage of the *Workplace Relations Act 1996* (Cth) and the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Sappey et al. 2006, Chapter 8).

State Pay Equity Inquiries and Wage Fixing Developments

Following a reference from the NSW Minister for Industrial Relations, Justice Glynn of the Industrial Relations Commission of NSW conducted a pay equity inquiry in 1998 (IRC of NSW 1998a; IRC of NSW 1998b; IRC of NSW 1998c). The impetus for the Inquiry arose not only from the plateau in gender pay equity ratios but also the significance of the state system of industrial awards for women in paid work in NSW (IRC of NSW 1998a; McCallum 1998). The Inquiry concluded that a new 'equal remuneration' wage fixing principle be adopted by the NSW Commission to 'make the industrial prescriptions fully effective in dealing with pay equity' (IRC of NSW 1998b, 164). The Inquiry explicitly rejected the test of discrimination as the threshold for an equal remuneration claim, the test that is required by provisions in the federal Workplace Relations Act and which had been problematic in the only case to proceed to arbitration under the federal equal remuneration provisions (AIRC 1998). More broadly the Inquiry concluded that cases should not require

the existence of, or proof of, gender causation and rejected any requirement for a causal connection between the rates of pay and some pre-existing circumstance connected to the gender of the workers concerned (IRC of NSW 1998b, 157-176). Since then inquiries have also been conducted in WA and Victoria in 2004, though these were not conducted through state industrial authorities. At the time of writing, the recommendations of the WA inquiry have not resulted in any tribunal response or legislative changes. The situation in Victoria is complicated by that state's referral of substantial industrial relations powers to the federal parliament and the federal Commission. The major recommendations of the Victorian inquiry concern amendments to the federal equal remuneration provisions together with a proposal for voluntary pay equity audits. An inquiry in Tasmania resulted in the adoption of an equal remuneration principle by the Tasmanian Industrial Commission, similar to NSW (TIC 2000).

Commissioner Fisher of the Queensland Industrial Relations Commission (QIRC) conducted a pay equity inquiry during 2000 and reported in March 2001. The final report of the Queensland Pay Equity Inquiry recommended both legislative amendments and a new equal remuneration principle to be effected through the industrial relations system. The report adopted the position of the NSW Inquiry in recommending that the most effective means of reform would be by way of labour law rather through the claims lodged under anti-discrimination legislation. The Queensland parliament passed legislative amendments to the *Industrial Relations Act 1999* (Qld) in line with a recommendation of the Inquiry, to the effect that the QIRC must ensure that all awards and agreements provide equal remuneration for men and women workers. The principle ultimately declared by the QIRC (QIRC 2002) is more expansive than that available in NSW, an expansiveness assisted by the preceding legislative amendments. The principle provides a more proactive

role for the QIRC in satisfying itself that the principle of equal remuneration has been met. The principle also specifically identifies the features of an occupation or industry that may have contributed to undervaluation including the degree of occupational segregation, the disproportionate representation of women in part-time and casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements. To assist organisations with equal remuneration applications before the QIRC the Queensland government established a resource fund, a policy initiative that has not yet been matched by other state jurisdictions in Australia.

State Equal Remuneration Principles

The NSW Commission, in the absence of any legislative guidance, determined that the 'Equal Remuneration Principle' was confined to the Commission's award making and wage fixation functions, and inclusive only of the award rate of pay rather than a broader definition inclusive of remuneration as recommended by the Inquiry (IRC of NSW 2000). The NSW Commission is able to take account of the actual rates paid irrespective of whether the payment is made under a individual or collective agreement, or as an 'over award' payment, for the purpose of properly fixing an award rate reflecting equal remuneration and other conditions of employment for men and women workers for work of comparable value. This provides that the Commission can take account 'over award' payments if they relate to work value considerations (such as skill, responsibility, qualifications and conditions).

The first application under the NSW equal remuneration principle concerned the design of classification and grading structures as well as the gender related undervaluation of the work of state government employed librarians, library officers and archivists. The case study submitted to the NSW Pay Equity Inquiry (Fruin 1998) and the Pay Equity Inquiry findings about undervaluation of librarians' work provided a partial basis for agreement between industrial parties that there was gender related undervaluation of librarians' work. The issue of whether the work was undervalued was therefore not contested between the parties, thus the Commission was not required with this case to provide further guidance by way of an arbitrated decision as to what is required to establish gender related undervaluation. It did, however, establish the 'main indicia' of an undervaluation on a gender basis: (1) the findings of the Pay Equity Case study; (2) the findings of Justice Glynn in the Pay Equity Inquiry; (3) the occupation is female dominated; and (4) the workers covered by the award have not been subject to a work value inquiry by the Commission in the past (IRC of NSW 2002, paragraph 28). The NSW Commission was, however, required to arbitrate on the size of any pay increase to remedy gender undervaluation of librarians' work. It was accepted that it was appropriate to compare the work of librarians with other public sector based professions and it was relevant that librarians were paid less than other professions where work value had been assessed by the Commission in setting rates. Relevant factors in the comparison were the requirement for a bachelor's degree or equivalent for entry and career progression based on experience and merit based appointment for promotion. Substantial increases were awarded: on average 16 per cent across classifications, and up to 37 per cent for some classifications. The Crown Librarians decision has been described as 'a great victory for Australian librarians' and an 'endorsement of their value and their profession' (Teece 2002, 140).

Two other applications under the NSW principle did not result in an arbitrated decision. In the ‘assistants-in-nursing’ case the Commission held there was insufficient evidence ‘to come to any determination as to whether the work of AINs is under valued on gender grounds’ (IRC of NSW 2003, paragraph 286). Nevertheless it granted the relevant union ‘reserved’ leave to make a new application on this issue at some time in the future (IRC of NSW 2003, paragraph 287). The other case concerned the disparity in the hours of work of community services staff employed in local government. Here the Commission approved a consent application by the parties to remedy the disparity in which the relevant union agreed ‘there had been no undervaluation on a gender basis of positions covered by the functions of community services and children’s services’ in the award with respect to hours of work (IRC of NSW 2004, paragraph 5).

The first application under the Queensland equal remuneration principle concerned dental assistants covered by the relevant state award. The union, Liquor, Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees (LHMU), made the application in 2003 and it was opposed by the relevant employer association. Dental assistants seemed to be an ‘obvious’ workforce with which the QIRC’s equal remuneration principle could be tested because of the findings of the 2001 Queensland pay equity inquiry (Whitehouse and Rooney 2006, 112). In reaching its decision in this case, the QIRC noted ‘the absence of precedents in this or other jurisdictions made it difficult for the parties to determine how to conduct their respective cases’ (QIRC 2005, paragraph 40). The QIRC held there had been an undervaluation of dental assistants’ work because of gender related factors, and granted award wage increases of \$63.60 per week (about 11 per cent) plus an ‘Equal Remuneration Component’ (QIRC 2005).

Pay Equity and Children's Services

Children's services in Australia is a relatively new industry. State industrial awards to cover the industry were established first in NSW in 1969, and progressively in other jurisdictions during the 1970s. The award in the Northern Territory was created as late as 1982. Initially the philanthropic origins of the 'kindergarten movement' influenced the rates of pay contained in awards (Lyons 1996). Centre based services, long day care, are subject to regulations by state governments which set minimum standards for centre operation (NCAC 1993, *iii*). From the mid-1990s long day care has also been subject to a national accreditation system administered by a federal government agency, the National Childcare Accreditation Council Inc (NCAC 1993, 2001). Adherence to the accreditation system, the Quality Improvement and Accreditation System (QIAS), is required for centres to have access to the federal government's fee subsidies (currently the Child Care Benefit). Regulations also specify the minimum educational qualifications needed for staff to perform specific duties in centres. Progressively since the 1970s the number and type of qualifications relevant for employment in children's services have increased, to now include certificates, diplomas and advanced diplomas. The present range of qualifications adheres to the structure established by the Australian Qualifications Framework (AQF national code CHC50302). Nowadays, the majority of centres are for-profit businesses, a reversal of the situation in the 1970s and 1980s. Most centres are typical 'small' workplaces, employing less than 20 staff (Lyons 1996), even though large 'corporate' employers have been a feature of the recent growth of the industry (e.g. ABC Learning Centres Limited 2005). The 'child care' workforce, both in NSW and other Australian states, is overwhelmingly female dominated with males constituting less than five per cent of all employees (Lyons et al. 2005).

The rates of pay under awards for children's services staff has been identified as relatively substandard. For example, the 1996 report of the Economic Planning and Advisory Commission concluded: 'Pay rates for child care workers are below those for even unskilled occupations such as shop assistants or care park attendants and are generally out of step with the pay rates for occupations with similar proportions of workers with education and training' (EPAC 1996, 27). Therefore it should come as no surprise that 'child care' was one of the industries examined in both the NSW and Queensland pay equity inquiries (IRC of NSW 1998a; QIRC 2001).

NSW 'child care' pay equity case

Encouraged by the outcome of the Crown Librarian case, the trade union with responsibility for staff employed in long day care centres (excluding degree qualified early childhood education teachers, who are covered by the Independent Education Union), the NSW branch of the LHMU, made an application to the NSW Commission to vary the *Miscellaneous Workers' Kindergartens and Child Care Centres, & C. (State) Award* ('the Award') in mid-2004. The application relies heavily on the Commission's equal remuneration principle. According to the LHMU (2004) the justifications for consideration under the equal remuneration principle included:

- The work of childcare has historically been undervalued. A key determinant is the feminised nature of the industry. Childcare is an industry based on skills associated with the care, nurturing and development of children, that has been predominately carried out by women. Valuations of the work have

reflected normative assumptions about the value of childcare work and have consequently been based on gender.

- Changes in the childcare industry and in the skills required by childcare workers are not reflected in the rates of pay in the award. There have been a significant number of changes to licensing, accreditation, training and regulation of childcare workers, including health and safety requirements, and obligations arising from child protection and privacy legislation. Mandatory Reporting and Government policy have also impacted on the work of the childcare industry and directly on the work and training of child care workers.

On 7 March 2006 the Industrial Relations Commission of NSW upheld the NSW branch of the LHMU's application. The NSW Commission noted in its decision this was the first case it was 'called upon to consider a fully contested application brought under the [Equal Remuneration] principle' (IRC of NSW 2006, paragraph 2), and held 'we are satisfied that consistent with the Equal Remuneration principle, a case of undervaluation on a gender basis was made out on the evidence' submitted by the LHMU (IRC of NSW 2006, paragraph 199).

The LHMU relied on expert witness evidence of gender undervaluation for long day care workers. The NSW Commission agreed with the expert evidence that 'the uniqueness of the work of child care workers, limited the usefulness of selecting any particular male dominated industry as a "comparator"' (IRC of NSW 2006,

paragraph 103). The expert academic evidence of the LHMU showed (IRC of NSW 2006, at paragraphs 101-106):

- female domination of an industry workforce reduces relative wages;
- relative low wages deter male employment into the children's services industry;
- the skills exercised by long day care staff had not been appropriately recognised by employers or industrial tribunals when wage rates were previously established;
- research evidence showed that working with young children is not 'innate' to women, and is a learned skill;
- the skills demanded of long day care employees by the federal government's QIAS are often overlooked and undervalued;
- the charitable and philanthropic origins of the child care industry had ongoing consequences for the low levels of pay fixed by the Award;
- the 'utilisation' rates of long day care centres had increased;
- the federal government's fee relief subsidy under the Child Care Benefit had made child care more affordable for parents, thus increasing the demand for child care; and
- survey data suggests parents place an emphasis on centre quality over costs of child care when choosing a particular centre.

The NSW Commission noted that 'some employer witnesses in these proceedings accepted those views' and that 'child care workers are generally perceived to have low pay and low status' (IRC of NSW 2006, paragraph 200), and one reason for the

relative low pay was some employers 'maximise their profit levels' despite 'the importance to our society of the work which the predominately female child care workers employed in this State perform' (IRC of NSW 2006, paragraphs 201-202). The Commission further remarked that this position persisted despite the entry into the industry of at least one substantial corporate employer with a rapidly growing business throughout NSW 'generating very substantial and growing profits for its shareholders' (IRC of NSW 2006, paragraph 209). The NSW Commission concluded that while it may be 'difficult to detect gender based undervaluation' no witness supplied explanations that challenged the expert academic evidence or the findings of the 1998 Pay Equity Inquiry (IRC of NSW 2006, paragraph 210). The Commission endorsed the findings of the federal industrial tribunal, the Australian Industrial Relations Commission (AIRC), in the 2005 work value federal award decision (IRC of NSW, paragraph 240):

Prima facie, employees classified at the same AQF levels should receive the same minimum award rate of pay unless the conditions under which the work is performed warrant a different outcome. Contrary to the employer's submissions the conditions under which the work of child care workers is performed do not warrant a lower rate of pay than that received by employees at the same AQF level in other awards. Indeed if anything the opposite is the case. Childcare work is demanding, stressful and intrinsically important to the public interest.

As a result the decision of the NSW Commission granted substantial pay increases for long day care workers employed in NSW, ranging from about 20 per cent to 50

per cent. A comparison between the old and new Award weekly wage rates, and the percentage increases, awarded by the NSW Commission are shown in Table 1.

Table 1: New long day care weekly wages under the 2006 NSW Award

Classification	Old Award Rate \$	New Award Rate \$	Pay Increase \$	% Increase
<i>Child Care Worker:</i>				
Lowest step	507.80	611.28	103.48	20.4
Highest step	521.40	633.47	112.07	21.5
<i>Advanced Child Care Worker:</i>				
Lowest step	532.20	639.82	107.62	20.2
Highest step	555.20	676.00	120.08	21.8
<i>Advanced Child Care Worker (Qualified):</i>				
Lowest step	569.50	687.94	118.44	20.8
Highest step	614.20	842.78	227.98	37.0
<i>Centre Coordinator:</i>				
Lowest step	551.50	774.48	222.98	40.4
Highest step	586.00	834.87	248.87	42.5
<i>Centre Coordinator (Qualified):</i>				
Lowest step	623.30	950.77	327.47	52.5
Highest step	658.70	1011.16	352.46	53.5

Source: IRC of NSW 2006, *Miscellaneous Workers' Kindergartens and Child Care Centres, & C. (State) Award (NSW)*.

Queensland 'child care' pay equity case

In 2003 the Queensland branch of the LHMU made an application to the QIRC to vary the Queensland *Child Care Industry Award – State 2003* (the Award) under the QIRC's Equal Remuneration Principle (LHMU 2003). The grounds for the Queensland branch of the LHMU's application included:

- The occupation of child care fits the profile that indicates undervaluation: child care work is characterised as female, the occupation is usually carried out in small workplaces, there had been a lack of effective work value outcomes, qualifications are inadequately recognised, child care is a new industry with new occupations, and it is a service industry involving ‘soft’ – traditionally female – skills which have not been properly valued;
- Long day care employees receive significantly less remuneration than workers in many other occupations which have comparable levels of skill, qualifications and responsibilities;
- There has been inadequate recognition given in the Award to many of the skills which child care professionals require in their work because they are characterised as female attributes rather than skills; and
- Award pay rates were originally based on comparisons with rates paid for children’s services employees in other Australian states, with no regard for the value of the work relative to other occupations, particularly male dominated occupations.

The QIRC handed down an ‘interim’ decision on 24 March 2006 (QIRC 2006, unpaginated). The QIRC found ‘the work performed by childcare workers has been historically undervalued based on the gender of the workers’, and noted some employers had, in the proceedings, attempted to diminish the value of particular skills exercises by children’s services workers. The QIRC held the conditions under which the work is performed had not been adequately taken into account in the past when the value of the work was assessed. Expert academic and professional witness evidence submitted by the

LHMU concerning the gender undervaluation of the work was accepted ‘without reservation’ by the QIRC. However, the QIRC held that achieving pay equity needed to be balanced against the ‘public interest’ of ensuring children’s services is affordable and accessible to parents. Consequently, the QIRC rejected the LHMU’s wage claim as being ‘excessive’ for it would ‘put at risk the public interest consideration mentioned above’. The wage increases granted by the QIRC were similar the award wage increases granted by the federal industrial tribunal in the 2005 ‘work value’ case for federal award covered long day care workers. For this reason the award pay increases granted to long day care employees by the QIRC are not as generous as the wage increases granted by its NSW counterpart (see Table 2). For employees holding the appropriate academic or vocational qualifications, the pay increases range from about 14 to 29 per cent.

Table 2: New long day care weekly wages under the 2006 Queensland Award

Classification	Old Award Rate \$	New Award Rate \$	Pay Increase \$	% Increase
<i>Assistant CC Worker:</i>				
Lowest step	494.90	497.60	2.70	0.5
Highest step	544.90	622.70	77.90	14.3
<i>Group Leader:</i>				
Lowest step	544.80	622.70	77.90	14.3
Highest step	555.60	632.70	77.10	13.9
<i>Group Leader (Qualified):</i>				
Lowest step	599.10	701.40	102.30	17.0
Highest step	633.20	724.90	91.70	14.5
<i>Centre Coordinator:</i>				
Lowest step	626.60	760.80	132.20	21.4
Highest step	640.30	763.90	132.60	19.3
<i>Centre Coordinator (Qualified):</i>				
Lowest step	640.30	763.90	132.60	19.3
Highest step	674.20	867.70	193.50	28.7

Source: QIRC 2006.

New Federal Workplace Relations System and Pay Equity

The federal *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) has an objective (section 3) of ‘assisting in giving effect to Australia’s international obligations in relation to labour standards’. One of the international labour standards specifically referred to in the 2005 Act is the International Labour Organization’s 1951 Equal Remuneration Convention. Despite the reduction of powers, functions and responsibilities of the AIRC under the Work Choices regime, the 2005 Act directs the AIRC to take into account the need to apply the principle of equal pay for work of equal value in the performance of its functions (section 44B). The Amendment Act also directs the new Australian Fair Pay Commission (AFPC) to apply the principle that men and women should receive equal remuneration for work of equal value in the performance of its functions (section 90ZR). Further, under the new federal system an individual is able to make a complaint to the federal anti-discrimination tribunal (the Human Rights and Equal Opportunity Commission) if her or he believe they have been discriminated against because of the pay of gender based unequal remuneration, and seek an order from the AIRC for equal remuneration to be paid in the future (DEWR 2005, 62). Consequently, it could be argued that the new federal system pays significant attention to the issue of gender pay equity. However, section 7C excludes the operation of ‘a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value’.

In this context, the way the Work Choices regime deals with the issue of gender pay equity has been subject to considerable criticism. For instance, the ending of the AIRC’s ability to convene and decide ‘test cases’ on employment issues of particular significance to working

women and then have those decisions applied to the award system has, according to Pocock and Masterman-Smith (2005), undermined the principle of equal pay for work of equal value. The Australian Democrat's Senate committee minority report also noted weakness with the Amendment Act's pay equity provisions:

State industrial tribunals have been more successful in addressing the historical undervaluation of women's skills and in assessing the work value of occupations traditionally carried out by women employees. HREOC [the federal Human Rights and Equal Opportunity Commission] is concerned that the restriction of State industrial jurisdictions will remove an important avenue of redress for women employees seeking equal remuneration. HREOC recommends that the Australian Government seriously consider introducing equal remuneration provisions similar to those in NSW or Queensland (Australian Democrats 2005, 127).

The ability of the Work Choices regime to advance notions of pay equity must be seen in the context of the other changes made to the federal award system, the coverage of state awards, and 'covering the field' for the purposes of equal remuneration. The removal of the AIRC's general award making powers, and the further weakening of the award system, disadvantages more women than it does men. Simply put, the award system protects the wages of proportionally more women than men. Erosion of the award system also diminishes the capacity for centralised determinations to improve the work and family balance, which is a persistent 'drag' on women's lifetime earnings.

The wage fixing system that put Australia at the forefront of equal pay for work of equal value is not featured in the Work Choices regime. The strength of the developments in industrial regulation that substantially improved the relative pay of women in the period 1970-1990 was the way in which equal pay for work of equal value measures flowed through the awards of the federal and state tribunals. The mechanism of increasing wages by collective industry awards meant that a single application to the federal and state wage fixing tribunals could deliver wage increases which flowed automatically and immediately to women employed in the workplaces covered by a particular award. While the 2005 Act retains the equal remuneration provisions of the 1996 Act, they only provide a nominal right to equal pay for work of equal value because they are based on a test of sex discrimination: a comparison against a (male) 'comparator group'. This test fails to address gender pay inequity, which is generally systemic and not necessarily a result of overt discrimination. Thus the provisions cannot adequately address the issue of the lower earnings returns that women receive from their qualifications and experience (in comparison to men), and cannot adequately address the issue of undervaluation of the work traditionally performed by women because of gender based stereotypical assumptions regarding the concept of 'skill'.

Under the new federal system the AIRC is prevented from issuing an order if it would be overall inconsistent with a decision of the AFPC. This limitation fails to address the means through which gender pay inequity can be embedded in systems of wage determination that appear, on the surface, to be fair and equal. For example, women are generally employed in different industries and occupations to men (labour market segregation), thus making it difficult to nominate a male 'comparator group' to demonstrate an earnings inequity. The result of the Amendment Act's pay equity provisions is to individualise

remedies for pay inequities, as the AIRC is effectively refrained from making orders that remedy pay inequities on a collective basis. Moreover, Work Choices not only lacks the means to ensure that Australia's international obligations are met but also removes, or excludes, equal remuneration provisions in state industrial relations systems from its operation. Women engaged in paid work access to the state jurisdictions, which have developed new and more sophisticated ways to tackle undervaluation of the work of state award workers (equal remuneration principles), are denied.

Despite the key objective of the new federal system to have agreement making the main way employment is regulated, this emphasis on agreements offers workers almost no mechanism to achieve pay equity. The restrictions the Amendment Act places on making collective agreements, and the effective prohibition on pattern bargaining by trade unions especially, makes it difficult, if not impossible, for unions representing workers employed in female dominated occupations to pursue the issue of pay equity because it would require negotiating more than one collective agreement that seek common wages extending beyond a single business (section 106B of the 2005 Act).

Conclusions and Implications

The recent developments at the state level in Australia are positive steps on the path to achieving gender pay equity. The commissioned case studies and inquiries demonstrate that governments – and state Labor governments in particular – have placed the issue of the gender earnings gap on the policy agenda. The adoption by state industrial tribunals of 'equal remuneration principles' is a major achievement in the process to eliminate stereotypical gender based attitudes when minimum pay rates are established for female

dominated industries and occupations under industrial awards. Application of equal remuneration wage fixing principles by the industrial tribunals of NSW and Queensland has resulted in noteworthy, and in some cases significant, wage increases for the employees working in the respective female dominated workforce. The ‘crown librarians’ decision resulted in pay increases of up to 37 per cent and the ‘child care’ decision of the NSW tribunal resulted in wage increases of over 50 per cent for some workers. While the pay equity decisions of the Queensland tribunal have been less generous than its NSW counterpart, both the QIRC and the IRC of NSW have acknowledged that workers employed in the relevant female dominated industries and occupations – librarians, dental assistants and children’s services – have been disadvantaged because of an undervaluation of their work due to gender based factors. This outcome alone is a major achievement for the attainment of gender pay equity.

With the operation of the new federal workplace relations system from 27 March 2006 the prospects for further progress to the goal of gender pay equity are limited due to the ‘take over’ of gender based equal remuneration by the ‘national’ wage fixing system. While the federal wage fixing law has had since 1994 an ‘equal remuneration’ provision, no successful application has resulted under this provision due to the requirement to demonstrate direct discrimination in the wage rates of women workers. The new federal laws seek to exclude state industrial tribunals from considering pay equity claims by ‘covering the field’ for constitutional purposes within the Australian federation’s law making authority. Instead, the retention of the 1994 federal equal remuneration provision as the only means to remedy gender pay inequity effectively means that the concept of pay equity in Australia can no longer be remedied on a collective basis. The federal Work Choices regime is indeed two steps backward on the road to gender pay equity in Australia.

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