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Hunting for Happy Feet in Honolulu: The Elusive Struggle for Pay Equity – A Comparative View

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Introduction

The National-led Government campaigned during the 2008 election campaign on closing the income gap with Australia.[1] Shortly after being elected as Prime Minister, John Key stated:[2]

> I am horrified that the gap between our wages and those in Australia are now wider than they have been in our history – at more than 35 per cent. How can we hope to hold on to our young people, the educated, the talented, the motivated, if on the Monday you can earn $50,000 for doing one job and on the Friday earn $80,000 by simply moving across the ditch?

As part of their confidence and supply agreement, the National Party and the Act Party agreed on the "concrete goal of closing the income gap with Australia by 2025."[3] In furtherance of this goal, the 2025 Taskforce (the Taskforce) was established to make recommendations on policy that would enable the New Zealand Government to close the income gap with Australia.[4] None of the Taskforce's recommendations included changing any legislative or executive measures in relation to pay equity between men and women and none have been adopted. Another way for the New Zealand labour market to compete more effectively with our Australian counterparts would be to implement effective measures that promote pay equity.

The purpose of this paper is to consider whether, and to what extent, the three branches of government in New Zealand have complied with their international obligations in relation to pay equity by comparing the actions and omissions of the legislative, executive and judicial branches of government with the actions and omissions of their Australian counterparts. It is suggested that competing effectively with Australia requires the New Zealand government to take much more positive steps to achieve pay equity.

In Part II of this paper, "pay equity" will be defined and the rationale for implementing measures that promote pay equity will be evaluated. In Part III, a comparative analysis of the relevant acts and omissions of the legislative, executive and judicial branches of government will be undertaken.

In New Zealand, the median hourly rate of pay that women receive is 89.4% of the remuneration that men receive. The median weekly wage of women in full-time employment equates to 86% of the median male wage. The median hourly earnings of women in fulltime employment amounts to 93.2% of the male rate.[5] These improvements in the remuneration of women represent the culmination of 116 years of struggle. Describing the history of pay equity is beyond the scope of this paper.[6] However, the struggle for pay equity in New Zealand and Australia has been broadly similar, at least until 2009.

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[1] New Zealand Centre for Political Research "Prosperity or Poverty" (2009) <www.nzcpr.com>.
[2] John Key provided the inspiration for the title when he stated that the Green Party's Equal Pay Amendment Bill had "as much chance of being considered as Happy Feet the penguin having a holiday in Honolulu" Otago Daily Times "Pay Equity Bill on Ice" <www.odt.co.nz>.
[3] National-Act Confidence and Supply Agreement (2008) <www.act.org.nz>.
[4] 2025 Taskforce "Answering the $64,000 Question: Closing the income gap with Australia by 2025" (2009) <www.2025taskforce.govt.nz>. As at 4 June 2011, the Taskforce was disestablished.
[5] Statistics New Zealand *New Zealand Income Survey: June 2010 Quarter* (2010).
[6] A brief summary of the history of pay equity in New Zealand is contained in Appendix A.

The current position is that New Zealand women have comparatively better rates of pay than their Australian counterparts. However, this gap is likely to narrow because Australia has recently introduced a range of measures at state and federal level that have the potential to reduce the gender pay gap. In addition, Australian women currently receive higher wages than their New Zealand counterparts because remuneration in Australia is approximately one third higher than in New Zealand.

The Rationale for Pay Equity

The purpose of this part is to establish whether there are sound reasons for promoting and achieving pay equity. If there are, then effective measures should be introduced by domestic governments to provide for pay equity. If there are not sound reasons, then the international obligations requiring measures that promote pay equity should be reconsidered. Before the merit of rationales for promoting pay equity can be evaluated, it is necessary to establish a working definition of pay equity for the purposes of this paper.

A Definition of Pay Equity

"Pay equity", "comparable worth" and "equal pay for work of equal value" all describe a principle of fair and equitable remuneration. However, their meanings require clarification in order to determine what measures would suffice to achieve the principle that they represent. "Pay equity" is not defined in any current New Zealand legislation. However "equal pay" is defined in s 2 of the Equal Pay Act 1972 (the EPA) as "a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees". "Employment equity" was defined in the Employment Equity Act 1990 (the EEA) as:[7]

> the elimination from all forms of paid employment of –
>
> …
>
> (b) Inequality of remuneration for women:

However, the EEA was repealed two months after being enacted. Accordingly, there is no current legislative guidance in relation to the meaning of "pay equity".
New Zealand has ratified a number of international instruments that shed more light on the principle. The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires State parties to provide just and favourable conditions of work which include:[8]

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

The International Labour Organisation (ILO) Convention on Equal Remuneration for Work of Equal Value describes pay equity as "the principle of equal remuneration for men and women workers for work of equal value."[9] This is wider than the principle of equal pay for equal work. The ILO has subsequently expanded on this principle:[10]

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[7] Employment Equity Act 1990, s 2. Note that the EEA was repealed in December 1990 just two months after its introduction.
[8] International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), art 7.
[9] ILO Equal Remuneration Convention 1951 (opened for signature 29 June 1951, entered into force 23 May 1953). Hereafter referred to as ILO (100).
[10] *Gender Equality at the Heart of Decent Work* ILC98, 98th sess, ILC98-VI[2008-12-0081-1(Rev.1)]-En (2009).

> [t]he scope and implications of "work of equal value" are poorly understood. The notion goes beyond equal remuneration for "equal", the "same" or "similar" work: it also encompasses work of an entirely different nature, but nevertheless of equal value. This concept is essential in order to address occupational segregation where men and women often perform different jobs, in different conditions, and even in different establishments.

Last year, the ILO noted that "the concept of 'work of equal value' goes beyond 'similar work' and encompasses work that is of an entirely different nature, but which is nevertheless of equal value."[11] These provisions require a new definition of "pay equity" that is consistent with the international obligations that New Zealand has ratified. For this reason in itself, new pay equity legislation is required. In 2002, the Ministry of Women's Affairs noted that:[12]

> *[e]qual pay for work of equal value* means that women get the same pay as men for doing a comparable job – that is, a job involving comparable skills, years of training, responsibility, effort and working conditions. This is often referred to as *pay equity* … In the USA and Canada, equal pay for work of equal value is called *comparable worth*.

Thus, the New Zealand government has recognised a wider concept of equal remuneration that includes comparable worth and is synonymous with the concept of equal pay for work of equal value. The next step for the New Zealand government will be express recognition of the wider concept in legislation.

The wider concept has been recognised in Australian legislation. The New South Wales Legislature has defined "pay equity" as "equal remuneration for men and women doing work of equal or comparable value".[13] In federal legislation, "equal pay for work of equal or comparable value" is defined as "equal remuneration for men and women workers for work of equal or comparable value."[14] This definition appears circular in that the definition closely resembles the defined term. Nevertheless, it serves to incorporate the broader concept of pay equity.

For the purposes of this paper, "pay equity" refers to equal remuneration for work of equal or comparable value. The work may be different in nature provided that its value is equal or of comparable value. In other words, the interpretation suggested by the ILO is adopted.

Formative or Substantive Equality?

Equal remuneration may be provided for in both formal and substantive ways. It is suggested that both formal and substantive equality are required to close the gender pay gap. It is necessary to distinguish between measures that appear to promote pay equity and measures that actually do so. This requires developing an understanding of the concepts of formal equality, substantive equality and transformative equality.

Hepple refers to each of these concepts, identifying their distinguishing features. He suggests that formative equality does not adequately address indirect discrimination.[15] The United Nations Committee on Economic, Social and Cultural Rights (the Committee) states that formal equality assumes that equality will result if

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[11] *Conference Committee on the Application Of Standards: Extracts from the Record Of Proceedings* ILC99, 99th sess, 2010-09-0040-2-En (2010).
[12] Ministry of Womens Affairs "Next Steps Towards Pay Equity: A Discussion Document" (2002) <www.mwa.govt.nz>.
[13] Industrial Relations Act 1996 (NSW), s 4.
[14] Fair Work Act 2009 (Cth), s 302.
[15] B Hepple *Equality: The New Legal Framework* (Oxford and Portland, Oregon, 2011) at 18.

measures treat men and women in a neutral way and typically maintain existing and inherent disadvantage.[16] Caldwell notes that formative equality is derived from the Aristotelian concept that like should be treated alike.[17] She criticises this "normative aspiration" as presenting barriers to social justice in the context of anti-discrimination law by providing remedies which are limited to direct discrimination.[18] Butler suggests that both direct and indirect discrimination should be proscribed by anti-discrimination provisions.[19]

Substantive equality has been described by the European Union as "full equality in practice" and emphasises providing individuals with equal opportunities. According to the Committee, substantive equality intends to mitigate the effects experienced by inherently disadvantaged groups.[20] This concept encompasses provision of remedies for indirect discrimination by focussing on procedural equality.[21] Hepple notes that indirect discrimination focuses on the effects to the individual as opposed to equal treatment. Undervaluing of women's work through occupational segregation is an example of indirect discrimination. Providing for equal pay for work of equal value requires implementing measures that address indirect discrimination as well as direct discrimination. It is suggested that state parties fulfil their obligations under international instruments by providing for substantive equality.

Transformative equality aims to ensure that there exists among individuals an "equality of capabilities".[22] This is achieved by the dismantling of systemic inequalities and the "eradication of poverty and disadvantage".[23] Under the transformative principle, institutions are burdened with a positive obligation to remove barriers faced by disadvantaged groups and to provide them with resources as required. Laugesen argues that only a transformative approach will result in the narrowing of the gender pay gap.[24] Whether transformative equality is attainable in the current social, economic and political climate is beyond the scope of this paper.

Having clarified these categories of equality, it is appropriate to consider the merit of the rationale for adopting measures that promote pay equity.

Why Should the New Zealand or Australian Governments Adopt Pay Equity Measures?

The purpose of this part is to explore the rationale underlying the current policy directions of the two jurisdictions. It is suggested that there are four key justifications for promoting pay equity: (1) a normative basis which is supported by broad concepts of economic and social justice; (2) a merit-based rationale whereby employees are remunerated according to their worth; (3) an economic justification that employees should be remunerated according to the value of their work in contradistinction to remuneration which is influenced by direct or indirect discrimination; and (4) political justifications based on both the ratification of international instruments by Australia and New Zealand that require those countries to ensure that employees receive equal pay for work of equal value in combination with the enactment of domestic legislation that goes some way towards meeting international obligations in relation to pay equity.

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[16] Committee on Economic, Cultural and Social Rights *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General comment No. 16* UN ESC, 34th sess, at [7], E/C 12/2005/4 (2005).
[17] N Caldwell "Workplace Appearance Standards: Undressing the Law" (2009) 15 Canta LR 1 at 25.
[18] Ibid.
[19] A Butler & P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, Wellington, 2005) at 502-503.
[20] Committee on Economic, Cultural and Social Rights, above n 16.
[21] Hepple, above n 15, at 18-19.
[22] A Sen *Development as Freedom* (Oxford University Press, Oxford, 1999).
[23] Hepple, above n 15, at 22.
[24] Ruth Laugesen "All Aboard" *New Zealand Listener* (New Zealand, 27 August 2011) 18 at 23. Laugesen argues that "only [when flexible jobs become respectable in the workplace], when women and men are seeking the same things from their work and their lives, will there be real hope that the gender gap can close."

The Normative Rationale

The justification of the normative rationale is derived from the concept of human worth and dignity. Pursuant to this justification, promotion of pay equity assists in affirming the concept of human dignity. As Barak observes:[25]

> [m]ost central to all human rights is the right to dignity. It is the source from which all other rights are derived. Dignity unites the other human rights into a whole.

Thomas J observed that "the dignity and worth of the human person is the key value underlying the rights affirmed in the Bill of Rights."[26] Affirming human dignity has the potential to improve the quality of human experiences. Promoting pay equity is a part of this. Any initiatives that affirm and strengthen human dignity are justified. To the extent that pay equity achieves this, it is justified.

Alternatively, pay equity should be promoted as a means of eliminating direct and indirect discrimination in relation to the remuneration of employees. Employees should be remunerated based on the value of their work in contradistinction to their gender or other characteristics which are generally immutable. Discrimination "assails a person's dignity" and erodes a person's sense of their worth.[27] Therefore, discriminatory practices are inherently unfair, counter-productive and should be abandoned.

In short, pay equity measures provide opportunities to both affirm human dignity and to eliminate and/or minimise conduct that erodes human dignity. For these reasons, there exists a normative justification for implementing pay equity.

The Merit-based Rationale

Merit as a concept is complex and contested. It may be argued that currently the recognition of qualifications, skills and experience by employers is merit-based. It follows that any interference with current remunerations practices will distort the current meritocracy. Proponents of the liberal meritocracy suggest that affirmative action programmes or attempts to redefine merit will distort practices that are fair, transparent and market-driven. Accordingly, it is possible for a meritocracy to maintain the status quo and the inherent inequality of disadvantaged groups. For this reason, the merit-based rationale may support or undermine pay equity. Therefore, merit-based arguments require careful analysis.

To measure the cogency of this argument, it is necessary to define the concept of merit. The *Oxford Dictionary* defines "merit" as the "quality of deserving well; excellence, worth". Thornton suggests that the two components of merit (excellence and deserts) have become conflated.[28] Merit appears to provide an objective means for defining remuneration so that remuneration based on merit cannot be discriminatory.

The problem is defining the objective criteria that guide merit-based decision making. According to Thornton, merit is constructed by an "essential subjectivity".[29] The lack of a definition of merit allows every decision-maker the opportunity to choose characteristics and attributes to construct his or her version of

[25] A Barak *The Judge in a Democracy* (Princeton University Press, New Jersey, 2006) at 85.
[26] *Brooker v Police* [2007] NZSC 30; [2007] 3 NZLR 91 at [180].
[27] Ibid.
[28] M Thornton "Otherness' on the Bench: How Merit is Gendered" [2007] SydLawRw 16.
[29] M Thornton, "Affirmative Action, Merit and the Liberal State" (1985) 2(2) Australian Journal of Law and Society 28, 33.

merit.[30] The amorphous nature of the concept gives rise to the possibility of "arbitrary" and "idiosyncratic" selections of personal attributes in determining the merit of particular employees. In the context of judicial appointments, Thornton argues that the "masculinist" construction of merit makes it extremely difficult for women to meet the standard.[31] Malleson has observed that "[t]he criteria are rarely articulated and often unconscious, and may vary".[32] Williams and Davis assert that "merit" cannot be a neutral phenomenon[33] and Bartlett questions whether the construction of merit can either be said to be neutral or objective.[34] Malleson agrees with Thornton that the concept of merit is influenced by the relevant social context and suggests that constructing merit is a "reflexive and dynamic" process.[35]

For the purposes of this paper, the question is whether remuneration based on merit is free from discrimination or sufficiently objective to ensure that employees will not be undervalued on account of gender. It is suggested that merit is such a flexible concept that the possibility that remuneration according to merit is discriminatory cannot be eliminated. The meritocratic approach has the tendency to maintain the status quo because decisions based on merit must follow precedent if they are to be justified. The practical consequence is that work that has historically been undervalued will continue to be undervalued.

Thornton observes that decisions based on merit are inherently uncertain because they represent future predictions based on past performance.[36] It follows that merit-based remuneration may not be optimal remuneration and re-constructing merit or modifying merit-based remuneration is a viable alternative. In this light, the contention that pay equity measures distort merit-based remuneration is weak because it is impossible to measure the discriminatory or inequitable nature of merit-based remuneration.

In short, "[w]hat is merit? Don't ask Alice… ask the March Hare… because women are not good enough. Lacking the magic quality, merit, women do not rate."[37] Accordingly, it is suggested that the rationale for implementing pay equity measures is not weakened by the suggestion that such measures amount to a distortion of fair, merit-based remuneration. Further, merit should be reconstructed so that merit-based arguments support the principle of pay equity.

The Economic Rationale

It is acknowledged that equal remuneration programmes are implemented in an economic context. While programmes provide benefits, they require resources. Costs could potentially outweigh the benefits. On this basis, economic arguments are made in opposition to the implementation of pay equity programmes. These arguments flow from the notion that the sanctity of the free market is, and should be, paramount. If women are undervalued and/or discriminated against in the workplace, this will be remedied by the operation of market forces because the pressures of supply and demand will ensure that employees are appropriately remunerated. In a competitive marketplace, an employee who was insufficiently remunerated would simply choose to work for an employer who would provide the employee with more competitive remuneration. For this reason, if women are undervalued, then the cause cannot be free market economic policy.[38] Therefore,

[30] R Davis & G Williams "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" [2008] MULR 12.
[31] Thornton, above n 28, at 33.
[32] Kate Malleson, "Rethinking the Merit Principle in Judicial Selection" (2006) 33 Journal of Law and Society 126 at 127.
[33] Ibid.
[34] F Bartlett "Model Advocates or a Model for Change? The Model Equal Opportunity Briefing Policy as Affirmative Action" [2008] MULR 12.
[35] Kate Malleson, "Diversity in the Judiciary: The Case for Positive Action" (2006) 33 Journal of Law and Society 376, at 391.
[36] Thornton, above n 28.
[37] J Scutt "No merit to endemic sexism in legal system" *The Australian* (Australia, 19 July 2000) at 13.
[38] New Zealand Treasury *Treasury Comments on the Report of the Working Group on Equal Employment Opportunities and Equal Pay, Toward Employment Equity.*(Wellington, 1990) at 3.

the causes of unequal remuneration must be interference with free market policies. This could result, for example, when a professional group is able to maintain a monopoly or when monopsonistic employment practices are followed.[39]

According to this neo-liberal analysis, policies that implement pay equity may have undesirable consequences by distorting the labour market. Unsurprisingly, the Treasury concluded that the Working Group's proposal for pay equity could potentially reduce "efficiency, flexibility and responsiveness", result in increased unemployment of women and provide a perverse incentive for employers to discriminate against women.[40]

These economic arguments lack merit. The period of greatest shift to free market policies existed during the decade when the Employment Contracts Act 1991 was in force. In 1990, women in New Zealand received 81% of men's average hourly earnings and 77.6% of men's average weekly earnings. By 2001, these figures had increased to 84.3% and 86% respectively. To the extent that market forces improved the remuneration of women, the improvement was negligible.[41] The Working Group found that it was impossible to provide an effective remedy for the gender pay gap without targeted legislation.[42] Failure to address pay equity requires inherently disadvantaged groups to bear the costs of discriminatory employment practices. The reality is that the market is inherently unfair. This explains why the sanctity of the free market is an ineffective mechanism for mitigating the adverse effects of unfair outcomes.

Free market forces are limited in a number of ways in New Zealand. For example, the Fair Trading Act 1986 and the Credit Contract and Consumer Finance Act 2003 are two examples of legislation that protects consumers. Bodies such as the Commerce Commission and the Securities Commission have been created to regulate the market. The illusion of the sanctity of free market principles has been starkly revealed by the collapse of a number of finance companies in New Zealand and by the recession that occurred as a result of the global financial crisis.

The Government has intervened in financial markets on several occasions. These include becoming a significant shareholder in Air New Zealand, repurchasing shares in New Zealand Rail, bailing out South Canterbury Finance at substantial cost and providing state-funded compensation to owners of leaky buildings. More recently, the Government has enacted the Financial Markets Authority Act 2011 that has established the Financial Markets Authority (FMA). The main objective of the FMA is "to promote and facilitate the development of fair, efficient, and transparent financial markets."[43] Its functions include ensuring compliance with specified legislation.[44] This analysis shows that intervention in the market occurs when it is shown to be necessary.

In the employment context, the Employment Relations Act 2000 (the ERA) has introduced good faith industrial relations. This includes creation and recognition of a mutual statutory duty of good faith between employees and employers.[45] The object of the Act is to build productive employment relationships and one

[39] A monopsonist is a very dominant buyer.
[40] New Zealand Treasury, above n 38, at 15.
[41] Ministry of Womens Affairs, above n 12, at 6.
[42] Working Group on Equal Employment Opportunities and Equal Pay *Towards Employment Equity : Report of the Working Group on Equal Employment Opportunities and Equal Pay* (Wellington, 1988) at 23. This position is supported by the conclusions of the Human Rights Commission in their recently released report *Tracking Equality at Work* (2011) at 29 and the Commission's drafting of a Pay Equality Bill which is incorporated into the report.
[43] Financial Markets Authority Act 2011, s 8.
[44] Financial Markets Authority Act 2011, s 9 and Schedule 1.
[45] Employment Relations Act 2000, s 4. The duty is a positive duty and requires parties to an employment relationship to "be active and constructive in establishing and maintaining a productive employment relationship" and requires the parties to be "responsive and communicative". The duty amounts to a limitation on freedom of contract in the labour market.

way of achieving this is "by acknowledging and addressing the inherent inequality of … power in employment relationships".[46] Thus, the Act seeks to remedy the "inherent inequality" by intervening in the labour market. This demonstrates that there are no barriers to state intervention in labour markets in circumstances where intervention is required.

Any argument based on economic grounds needs to balance the costs and benefits of implementing and achieving pay equity. A recent report concluded that the cost to the Australian economy of maintaining the gender pay gap was $93 billion.[47] Given that the arguments in favour of implementing pay equity are powerful, any economic argument that had the effect of delaying or preventing the implementation of pay equity would need to be compelling. In the absence of compelling arguments, economic considerations ought not to prevent the implementation of pay equity programmes.

Historically, the Employers Federation relied on economic arguments to argue that pay equity would be too expensive for the private sector. However, the Treasury established that the Federation's costings were unjustified and provided economic arguments in favour of equal pay that were "totally convincing".[48] Consequently, economic considerations did not prevent the enactment of the EPA. Further, the closer New Zealand and Australia come to implementing pay equity, the smaller the costs are for employers in providing pay equity for their employees. Economic considerations have not prevented the Australian federal government and the New South Wales and Queensland state governments from introducing pay equity measures.

In any event, economic considerations may be relevant in terms of devising the appropriate means of implementing pay equity measures. However, it is suggested that they cannot be relied on to prevent the introduction of effective measures.

The Political Rationale

The justifications for implementing pay equity measures are also political. There are international and domestic limbs to this rationale. Pursuant to the international limb, if countries have undertaken to implement programmes that promote pay equity, then that undertaking should be honoured. Pursuant to the domestic limb, if domestic measures have been shown to be weak or ineffective, they should be modified.

Both New Zealand and Australia have ratified the key international instruments that promote equal pay for work of equal value: the ICESCR, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and ILO 100. New Zealand ratified the ICESCR in 1978, ILO 100 in 1983 and the CEDAW in 1985. Australia ratified ILO 100 in 1974, the ICESCR in 1975 and the CEDAW in 1983. Both countries have consistently undertaken to provide for pay equity. Although it is acknowledged that state parties are afforded a margin of appreciation which entitles them to meet their international obligations in different ways,[49] the obligations should be effectively discharged even if this is achieved using different mechanisms.

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[46] Employment Relations Act 2000, s 3.

[47] NATSEM *Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs: The Impact of a Sustained Gender Wage Gap on the Australian Economy* (2010) at 5 <www.eowa.gov.au>.

[48] Trade Union History Project *50 Years of Struggle: The Story of Equal Pay* (Trade Union History Project, Wellington, 1997) at 16. Note that economic concerns can be met by implementing equal pay initiatives in stages. The GSEPA was implemented over three years and the EPA was implemented over five years.

[49] See *Huang v Minister of Immigration* [2009] 2 NZLR 700 (CA) at 714. For example, the EEA relied on legislative intervention whereas the Plan of Action was based on conducting reviews and implementing recommendations.

Incorporation of international obligations requires domestic legislation.[50] Therefore, the political rationale for implementing pay equity is strengthened if domestic legislation has been enacted to ensure performance of international obligations. Accordingly, it is worthwhile to consider relevant domestic legislation. In New Zealand, while the New Zealand Bill of Rights Act 1990 (BORA) provides for civil and political rights, there is no specific legislation in respect of social and economic rights. However, there is specific legislation in relation to equal pay and discrimination as well as general employment legislation.

The specific legislation relating to equal pay includes the Government Service Equal Pay Act 1960 (GSEPA) and the Equal Pay Act 1972 (EPA). The principle of equal remuneration is recognised in the long title to the EPA: "to make provision for the removal and prevention of discrimination based on the sex of the employees, in the rates of remuneration of males and females in paid employment". This purpose demonstrates the intention of Parliament to meet its international obligations.

The specific legislation relating to discrimination includes s 19 of BORA and ss 20I and 22 of the Human Rights Act 1993 (HRA). The long title to BORA relevantly provides: "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR)."[51] Section 19 of BORA, the long title to the HRA and ss 20I and 22 illustrate Parliament's intention to fulfil its international obligations.[52] In other words, the cumulative effect of the NZBORA and the HRA is to incorporate New Zealand's international obligations into domestic law. This effect is underlined by s 104 of the Employment Relations Act 2000 which provides that an employee may bring a personal grievance claim against her or his employer based on discrimination in employment on any of the prohibited grounds contained in s 21 of the HRA.[53]

In Australia, the same international instruments have been ratified. These instruments have been incorporated into domestic federal legislation in a number of ways. The Industrial Relations (Reform Act) 1993 enabled the Australian Industrial Relations Commission (AIRC) to make orders to provide for equal remuneration for work of equal value. "Equal remuneration" was defined as remuneration without discrimination based on sex.[54] Subsequently, the Work Relations Act 1996 continued similar equal remuneration measures and aligned the Australian definition of equal remuneration with the definition contained in ILO 100. The Workplace Relations Amendment (Work Choices) Act 2005 makes references to the concept of equal remuneration for work of equal value and the international instruments from which the concept is derived. The current federal legislation is the Fair Work Act 2009. This legislation recognises the wider principle by making repeated references to "the principle of equal remuneration for work of equal or comparable value".[55]

The Australian federal domestic legislation has expressly recognised a principle of equal remuneration that is consistent with that country's obligations pursuant to the relevant international instruments to implement pay equity policies. Consequently, the ratification of the ICESCR, CEDAW and ILO 100 and the enactment of domestic legislation in Australia and New Zealand constitutes a very persuasive political rationale for implementing effective pay equity programmes. In the words of the Human Rights Commission, "[t]hat battle [for the right to equal pay for work of equal value] has been won".[56]

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[50] *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (PC) at 347.
[51] International Convention on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) art 26.
[52] New Zealand Bill of Rights Act 1990, s 19 and Human Rights Act 1993, ss 20I and 22.
[53] Employment Relations Act 2000, s 104.
[54] Industrial Relations (Reform) Act 1993 (Cth), s 21.
[55] Fair Work Act 2009 (Cth), s 302.
[56] Human Rights Commission *Tracking Equality at Work* (2011) at 29 <www.hrc.co.nz>.

Having considered the merits of normative, merit-based, economic and political rationales, it is clear that both New Zealand and Australia ought to implement programmes that promote pay equity. The remainder of this paper will assess the effectiveness of the pay equity implemented by the legislative, judicial and executive branches of the New Zealand and Australian governments.

Assessing the Effectiveness of Pay Equity Measures

The effectiveness of pay equity measures will be assessed in New Zealand and Australia. This will be done by considering (1) the relevant legislation and case law; and (2) measures adopted by the executive.

Legislation and Case Law in New Zealand

The first piece of legislation is the Government Service Equal Pay Act (GSEPA). The GSEPA has three sections and only one substantial section. It provided for equal pay for women in the public sector to be implemented in three annual stages.[57] It is difficult to assess the difference the GSEPA made to pay equity because statistics are unavailable prior to 1972 but its effect is likely to have been significant while falling short of eradicating the gender pay gap in the public sector. For example, it has been shown that women social workers currently receive 9.5% less than their male counterparts.[58] The review of workers in the education sector revealed that female support staff were also undervalued.[59] Since 2005, 38 reviews have been conducted of public service departments. In 37 reviews, gender pay gaps were identified ranging from three to 35%.[60] Despite the enactment of the GSEPA, a gender pay gap remains in the public sector. No case law arose under the GSEPA. The GSEPA remains in force.

The Equal Pay Act 1972 (the EPA) is credited with bringing about the most significant erosion of the gender pay gap from 69.9 per cent to 78.8 per cent between 1972 and 1978.[61] The EPA has resulted in the elimination of separate pay rates for men and women performing the same work but has not addressed the wider concept of equal pay for work of equal value.[62] The purpose of the EPA is:[63]

> to make provision for the removal and prevention of discrimination, based on the sex of the employees, in the rates of remuneration of males and females in paid employment.

This purpose appears to be sufficiently broad to encompass pay equity. However, the provisions of the EPA appear to favour a narrow interpretation. For example, "equal pay" is defined as:[64]

> a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees.

Therefore, the provision eliminates differentiation in rates of pay but does not allow for comparisons of comparable work. Section 3 provides for the criteria to be applied in relation to making determinations

[57] Government Service Equal Pay Act 1960, s 3.
[58] Letter from Ministry of Social Development, 18 June 2010. The Review into the pay of social workers found that female staff were paid 9.5 percent less than male staff.
[59] Tripartite Steering Group *Pay and Employment Equity Review: Compulsory Schooling Sector Project Report* (2008) Ministry of Education <www.minedu.govt.nz>.
[60] Public Service Association "Stalling on Pay and Employment Equity" in the PSA journal (June 2009) at <www.psa.org.nz>.
[61] Working Group, above n 42**,** at 43.
[62] See *NZ Clerical Administrative etc IAOW v Farmers Trading Co Ltd* [1986] ACJ 203 [*Clerical Workers case]*.
[63] Equal Pay Act 1972, long title.
[64] Equal Pay Act 1972, s 2.

under the EPA. A distinction is drawn between work which is exclusively or predominantly performed by female employees and work that is not exclusively or predominantly performed by female employees. It follows that the EPA recognises two labour markets: a predominantly male labour market and a predominantly female labour market. Yet, the outcome of a literal interpretation of the EPA is that employees in the predominantly female labour market are unlikely to obtain a remedy even if their work is undervalued and the undervaluing of their work is caused by discriminatory employment practices. Since the majority of women work in women-dominated industries, once different pay rates for the same work have been eliminated, the EPA is unlikely to further reduce the gender pay gap.

Other relevant provisions are ss 6, 9, 17 and 18. Section 6 provides for the elimination of differentiation in rates of pay in five annual steps. Section 9 enables the court to state the principles for the implementation of equal pay. If "equal pay" only refers to equal rates of pay, then this provision is an empty vessel because separate female rates have ceased to exist since 1978. Given that the Arbitration Court interpreted "equal pay" narrowly, then it is not surprising that the Court (or its successors) has not stated any principles in relation to the implementation of equal pay either of its own motion or on the application of a party to proceedings. Section 17 requires employers to keep records of all equal pay determinations made by the employer under the EPA. Under section 18, it is an offence to fail to comply with the provisions of the EPA.

Coleman argues persuasively that the EPA applies to pay equity claims based on a purposive approach to the legislation.[65] Even if this is correct, it remains an untried remedy. In practical terms, the authors of *Mazengarbs Employment Law* identify four scenarios where provisions of the EPA may be invoked: (1) an employment agreement complies with the EPA but a female employee has not been paid at the specified rate; (2) an employee brings a claim against an employment agreement that does not comply with the EPA; (3) an employee brings a claim because even though her employment agreement complies with the EPA, a superimposed ruling rate does not;[66] and (4) the written employment agreement complies with the EPA but an additional oral agreement does not.[67] In short, remedies are limited.

The Working Group concluded that eradication of discrimination required legislative intervention and that the EPA was insufficient to provide an adequate remedy. The Human Rights Commission has recently concluded that: "[c]urrent legal remedies have not resulted in systemic change".[68] The EPA has failed to fulfil its purpose of removing and preventing discrimination based on sex. This failure has made claims under the EPA very difficult. This failure is illustrated by the *Clerical Workers' Case*.[69]

In the *Clerical Workers Case*, the applicant applied for a declaration that the terms of settlement of an award did not comply with the EPA on the grounds that 90 per cent of clerical workers were female whereas most employees in comparable occupations were male. The Court declined to make a declaration on the ground that it lacked jurisdiction to do so. Judge Finnigan stated:[70]

> [i]t is thus our view that the choice of the Equal Pay Act 1972 as the vehicle for remedy of the perceived problems in the present case is an error of law. The Equal Pay Act 1972 contains no powers or other provisions by which the Court can address the issue raised by the union and

[65] Martha Coleman "The Equal Pay Act 1972: Back to the Future" (1997) 27 VUWLR 517, 521-528. This will be discussed in greater depth below.
[66] A ruling rate is a rate of pay for work in excess of work contemplated in the employment agreement.
[67] *Mazengarbs Employment Law* (online looseleaf ed, LexisNexis) at [1803]. Note that most remedies are made pursuant to s 131 of the Employment Relations Act 2000.
[68] Human Rights Commission, above n 55, at 29.
[69] *Clerical Workers Case*, above n 61.
[70] *Clerical Workers Case*, above n 61, at 207.

> gives no powers to the Court to do what the union asks. The Court can take no action on the present application and that must be the end of the matter.

In other words, the Court's jurisdiction under the EPA was limited to circumstances where an award contained different rates of pay for the same work. It did not extend to different rates of pay for comparable work. This was because the Court only had jurisdiction where an instrument made separate provision for remuneration of female employees or where an instrument made provision for female employees only. The fact that the female employees were undervalued could not assist them in this case.

Coleman suggests that the case no longer represents the law since the decision is confined to the implementation of awards and the enactment of the ECA deregulated the labour market.[71] She argues persuasively that a broad approach to interpreting the EPA should be favoured on the following grounds: (1) that a correct interpretation of s 3(1) of the EPA does not oust jurisdiction; (2) that the EPA is human rights legislation requiring purposive interpretation; (3) that there are external indications; (4) that such an approach achieves consistency with international instruments; (5) that the approach achieves consistency with NZBORA; and (6) that such an approach is consistent with international trends in interpreting equal pay provisions.[72]

Generally, Coleman is correct. An interesting question arises if we assume that the literal meaning of s 3 ousts jurisdiction to determine comparable worth claims whereas the long title of the EPA appears to recognise them. In a similar scenario, the Court observed:[73]

> [s]ection 5(1) of the Interpretation Act 1999 says that the meaning of an enactment must be ascertained from its text and in the light of its purpose. Obviously, the purpose of s 66 is to provide a mechanism for clearance of acquisitions which fall outside s 47, and to provide that no clearance should be given to an acquisition which falls foul of s 47 or in respect of which there is doubt as to whether it falls foul of s 47. In order to achieve that purpose, it is necessary to interpret the words 'would be likely' as 'would not be likely'.

Even if the Court was literally correct that s 3 of the EPA ousted jurisdiction, a purposive interpretation would have enabled the Court to make a determination. This approach is supported by clear authority.[74] In terms of BORA, the provisions of BORA apply to any acts done by the judiciary.[75] This imposes a positive obligation on the court. Cooke P stated:[76]

> [s]ection 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.

In 2011, a court would be under a positive obligation to ensure that the right to freedom from discrimination was protected. This positive obligation requires "discrimination" to include "indirect discrimination". Clearly, such an interpretation would be open to a court. Therefore, a court would have jurisdiction unless it considered s 3 of the EPA to be a reasonable limitation on the s 19 right. It would be absurd for a statute whose purpose is expressed as being "the removal and prevention of discrimination" to be interpreted as a limitation on the right to freedom from discrimination. This interpretation supports the view that the

[71] Coleman, above n 65, at 533.
[72] Ibid, at 534-544.
[73] *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 (HC), at 878.
[74] See *R v Cara* (2004) 21 CRNZ 283 at [142] and *McKenzie v Attorney-General* [1992] 2 NZLR 14 (CA) at 17.
[75] New Zealand Bill of Rights Act 1990, s 3.
[76] *Simpson v Attorney General* [1994] 3 NZLR 667; (1994) 1 HRNZ 42 (CA), at 676.

Arbitration Court failed to give effect to the purpose of the EPA. In so doing, it breached New Zealand's positive obligations as a member of a branch of the New Zealand government under ILO 100, CEDAW and the ICESCR.

Even if Coleman is correct and claims can be brought under the EPA, it would still be preferable to have express legislation in unequivocal terms that provides for pay equity, gives clear guidance to courts and provides substantive redress to claimants.[77] Similar concerns resulted in the enactment of the Employment Equity Act (the EEA).

The Employment Equity Act 1990 (EEA) is the most impressive legislative attempt to provide for pay equity. The proposed introduction of the EEA was based on the Report of the Working Group which was informed by two equal pay studies.[78] Between 1988 and 1990, there was a vigorous debate in response to the Working Group's Report and the proposed introduction of the Employment Equity Bill. Participants to the debate included the Business Roundtable, the Human Rights Commission, the New Zealand Treasury, the Employers Federation, the PSA and the Economic Development Commission. In many ways, this period was the golden era of the struggle for pay equity in New Zealand.

As a result of a change in government following the general election in November 1990, the EEA was repealed in December 1990, just two months after its enactment. It contained four parts. Part I concerned the establishment of an Employment Equity Commissioner. Part II provided for equal employment opportunities. Part III provided for pay equity and Part IV contained miscellaneous provisions. "Employment equity" was defined as including: "the elimination from all forms of paid employment of…inequality of remuneration for women".[79] In relation to pay equity, the EEA contained three objects: (1) to provide a system which would enable gender-based discrimination to be identified and removed; (2) to provide for additional pay equity payments to be included in industrial awards and agreements; and (3) to provide for implementation over a period of time that accounted for the economic conditions of New Zealand as a whole and the ability of employers to pay.[80]

The EEA provided for a procedure for unions, employers or 20 or more female workers in a female occupation to lodge a claim for pay equity.[81] Any of these parties could make a request to the Employment Equity Commissioner (the Commissioner) for a pay equity assessment.[82] The Commissioner would determine whether an occupation was a female occupation and whether to carry out a pay equity assessment after receiving submissions from interested parties.[83] At the conclusion of the assessment, the Commissioner would provide a copy of the report to the interested parties.[84] If a report concluded that female employees were underpaid, then a pay equity claim could be lodged in the form of supplementary pay equity payments.[85] If parties are unable to settle a claim within 60 days, the claim could be referred to the Arbitration Commission (AC) for determination.[86] Then the AC would have held a hearing where interested

[77] Note that the Human Rights Commission has drafted a Pay Equality Bill which would address these concerns. The bill is reproduced in full in Appendix C.
[78] Working Group on Equal Employment Opportunities and Equal Pay, above n 42; Urban Research Associates *Equal Pay Study: Phase One Report* (1987); and the Equal Pay Steering Committee *Equal Pay Study: Phase Two Report* (1987).
[79] Employment Equity Act 1990, s 2.
[80] Employment Equity Act 1990, s 37.
[81] Employment Equity Act 1990, s 38.
[82] Employment Equity Act 1990, ss38 and 39.
[83] Employment Equity Act 1990, ss 40,41 and 46.
[84] Employment Equity Act 1990, s 54.
[85] Employment Equity Act 1990, s 56.
[86] Employment Equity Act 1990, s 57. The Arbitration Commission would have consisted of the Commissioner and two lay members who had expertise in the pay equity field.

parties could make submissions.[87] The AC would have based any determination on the Commissioner's report and any evidence presented by the interested parties.[88] The AC would have made a further determination in relation to the timeframe and manner of implementation.[89]

This procedure had the potential to provide an effective remedy for the gender pay gap. However, the effectiveness of the procedure was never tested. Hyman observes that both proponents and opponents of the EEA had their doubts as to its effectiveness and makes express references to "loopholes" in the EEA.[90] However, if the EEA was ineffective, any deficiencies could have been cured when the EEA was reviewed.[91] In any event, the EEA was likely to be much more effective than either the EPA or the Human Rights Commission Act 1977 (the HRCA).[92] The threat it posed to employers probably explains why it was repealed so soon after the National government was elected in November 1990.

Since it was difficult to obtain remedies under the specific equal pay legislation, claimants turned to anti-discriminatory legislative provisions. These included the HRCA (until it was repealed in 1994) and the Human Rights Act 1993 (the HRA). The Human Rights Commission Act 1977 (HRCA) outlawed discriminatory employment practices[93] and outlawed discrimination by subterfuge.[94] This meant that the HRCA was more likely to provide a remedy in relation to discriminatory employment practices that did not result in any differentiation of rates of pay. In *Proceedings Commissioner v Air New Zealand Limited*,[95] the Equal Opportunities Tribunal approved the following comment from an earlier case:[96]

> [w]e observe in passing that if any act ever called for a liberal and enabling interpretation, the Human Rights Commission Act must be it.

If this approach had been taken to the *Clerical Workers* case, the outcome may well have been different. The *Air New Zealand* case deserves some comment. In that case, the Equal Opportunities Tribunal (EOT) held that Air New Zealand had failed to afford or offer the female cabin crew the same promotional opportunities that were offered or afforded to male cabin crew who had substantially the same qualifications. The EOT made a declaration that Air New Zealand was in breach of s 15(1)(b) of the HRCA and ordered the airline to take steps to place each complainant in her appropriate position of seniority.[97] The EOT had to consider whether the HRCA encompassed continuing discrimination that had commenced before the HRCA was in force. The EOT approved the following statement from an earlier case:[98]

> [i]n our view, the treatment of women in the workplace should be no less fair and enlightened in New Zealand than elsewhere in the common law world. Had we felt obliged to record a narrow and restrictive interpretation of the legislation, we would have regarded such a result as out of step with the temperament of modern society.

The EOT held that the HRCA applied to continuing discrimination. Notwithstanding this decision, the Working Group considered that the HRCA was insufficient to provide an adequate remedy. The HRCA was

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[87] Employment Equity Act 1990, s 60.
[88] Employment Equity Act 1990, s 62.
[89] Employment Equity Act 1990, s 63.
[90] P Hyman *Women and Economics: A New Zealand Feminist Perspective* (Bridget William Books, Wellington, 1994) at 87.
[91] Employment Equity Act 1990, s 74.
[92] This is discussed below.
[93] Human Rights Commission Act 1977, s 15.
[94] Human Rights Commission Act 1977, s 27.
[95] *Proceedings Commissioner v Air New Zealand Limited* (1988) 7 NZAR 462 (EOT).
[96] *H v E* (1985) 5 NZAR 333 (EOT).
[97] *Proceedings Commissioner v Air New Zealand Limited*, above n 96, at 483.
[98] *H v E* , above n 96, at 347.

repealed by the Human Rights Act 1993 (HRA).[99] The HRA has been described as "no ordinary statute".[100] According to its long title, the purpose of the HRA is "to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights." According to the High Court,[101]

> [i]t is the responsibility of the Commission, the Tribunal and, on appeal, this Court to give full effect to what Thorp J … called "the special nature and purpose of human rights legislation". It is special because it bears on the very essence of human identity.

The substantive provision of the HRA relating to employment is s 22. This provision outlaws employment-related discrimination by reason of any of the prohibited grounds of discrimination. Sex is one of the prohibited grounds.[102] "Discrimination" is not defined in the HRA but has been defined in subsequent case law as "difference of treatment in comparable circumstances".[103] It is not necessary for a claimant to prove that discrimination was intended but he or she must establish a causal connection between a particular ground and the discriminatory conduct.

A claimant or the Proceedings Commissioner may bring civil proceedings in the Human Rights Review Tribunal (HRRT) once a complaint has been made to the Commissioner.[104] In *Lewis v Talleys Fisheries Ltd*[105], the HRRT appeared to limit the scope for claims. On appeal, the High Court adopted a broader view and stated:

> [i]n our view the need to approach the statute in a generous sense and to adopt an approach that facilitates its important purposes cannot be questioned.

In *Lewis*,[106] the High Court allowed an appeal against a decision of the HRRT which held that the distinct jobs of trimming and filleting fish were not substantially similar and that the appellant had not been discriminated against by reason of her sex.[107] The Court noted that it was beyond question that human rights statutes require a generous and purposive interpretation.[108] The Court proceeded to identify an essential similarity between the two positions in that both filleting and trimming involved the use of a knife, both positions required limited training and both roles are performed to a higher standard with experience.[109] Accordingly, the Court held that the appellant succeeded in proving that she was appointed to a lower-paid position by reason of her sex.[110]

This case is an example of indirect discrimination. The employer could have argued that the plaintiff was not paid less by reason of her sex but because she was employed as a trimmer. A strict application of the "but for" test would have resulted in her claim failing. Further, the respondent's motive or intent was not an

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[99] Human Rights Act 1993, s 146.
[100] *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* [2002] 3 NZLR 333 (CA) at 339.
[101] *Director of Human Rights Proceedings v Cropp* HC Auckland AP7-SW03, 12 May 2004 at [18].
[102] Human Rights Act 1993, s 22.
[103] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).
[104] Human Rights Act 1993, s 92B.
[105] *Lewis v Talleys Fisheries Ltd* 18/7/05, HRRT 019/05; HRRT54/02; HRRT03/03.
[106] *Talleys Fisheries Ltd v Lewis* (2007) 8 HRNZ 413; (2007) 4 NZELR 447 (HC).
[107] Trimmers were predominantly female employees whereas filleters where predominantly male employees and filleters were remunerated at a higher rate.
[108] *Talleys Fisheries Ltd v Lewis*, above n 106, at [32].
[109] Ibid, at [43].
[110] Ibid, at [52].

element of discrimination requiring proof. This illustrates that the Court followed through in adopting a purposive interpretation of s 22 of the HRA.[111]

However, a complicating feature of claims based on discrimination is that the definition of discrimination remains uncertain. The leading case on discrimination is *Quilter v Attorney General*.[112] In that case, the Court of Appeal issued five separate judgments. Tipping, Thomas, Gault and Keith JJ provided different definitions of discrimination. Thomas J described discrimination as "a nebulous and complex concept".[113] Unfortunately, the precise meaning of the nebulous and complex concept has not been clarified. This could present a significant barrier to potential claimants in that the definitional uncertainty makes the assessment of whether a claim is likely to succeed more difficult. For this reason, the HRA remedy is not significantly more effective than remedies that were available under the previous legislation.

General employment legislation enables claimants to lodge personal grievance claims based on discrimination. The Employment Contracts Act 1991 (ECA) effectively deregulated the labour market in New Zealand by providing for individual employment contracts and making membership of unions voluntary.[114] Hyman suggested that the ECA has made pay equity claims more difficult and that making a claim under the HRA is more attractive than making claims under the discrimination provisions of the ECA or under the EPA.[115] Wright considered that the effects of the ECA included reducing the size of groups suitable for job evaluation comparisons and placing responsibility for bringing claims on employees.[116] These effects probably operated as barriers to achieving pay equity. Hume considered that the enactment of the ECA made the introduction of pay equity legislation less likely.[117] Between 1991 and 2001, women's average hourly earnings increased from 81% to 84%.

The leading discrimination case brought under the ECA is *Trilford v Car Haulaways Limited*.[118] In that case, the Employment Court overruled a decision of the Employment Tribunal which held that the plaintiff had not been discriminated against in circumstances where an application for promotion had been refused because the position was "more male oriented". The Court held that this was a case of direct discrimination and that in any event, s 28(1) of the ECA encompassed indirect discrimination.[119] In adopting this approach, the Court favoured a purposive approach over a narrow, literal approach.

Coleman criticises the Court's endorsement of *Sarita*[120] where the Labour Court held that an employer's intention and motive was relevant in relation to whether discrimination has occurred. In addition, Coleman highlights practical difficulties in implementing the "but for" test in relation to indirect discrimination.[121] These criticisms have merit although they should be viewed in the context that the Court recognised that discrimination had occurred, provided the affected employee with a remedy and has subsequently reconsidered its stance in relation to the causal requirement for proving discrimination.[122]

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[111] It is a matter of concern that the HRRT, a specialist tribunal, failed to do so.
[112] *Quilter v Attorney General*, above n 103.
[113] Ibid, at 530.
[114] Employment Contracts Act 1991, ss 6,18 and 19.
[115] Employment Contracts Act 1991, s 28 and the Equal Pay Act 1972, ss 2A, 4 and 13.
[116] Fran Wright "Equal Pay and the Employment Contracts Act 1991" (1993) 7 AULR 501 at 507.
[117] Rochelle Hume "Paid in Full? An Analysis of Pay Equity in New Zealand" (1993) 7 AULR 471 at 481.
[118] *Trilford v Car Haulaways Limited* [1996] 2 ERNZ 351 (EmC).
[119] Ibid, at 377.
[120] *New Zealand Workers IUOW etc v Sarita Farm Partnership* [1991] 1 ERNZ 510 (EmC).
[121] Coleman, above n 65, at 538-539.
[122] *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmC) at 497.

The Employment Relations Act 2000 (ERA) repealed the ECA.[123] The ERA does not contain any pay equity provisions. However, discrimination on the grounds of sex may entitle an employee to bring a personal grievance against an employer.[124] A breach of the EPA may entitle an employee to be paid arrears.[125] Significantly, the ERA heralded the introduction of good faith employment relations. Good faith employment relations are expressly provided for by the statutory duty of good faith which requires parties to an employment relationship to be "active and constructive" in maintaining the employment relationship and requires the parties to be "responsive and communicative".[126] This is relevant because under the statutory duty, an employer may be required to provide an employee with information in relation to wages so that an employee can assess whether he or she is being discriminated against.[127] Once an employee requests increased remuneration to achieve pay equity with other employees, it may be difficult for an employer to refuse his or her request unless there is a genuine reason for disparity in remuneration.

Good faith employment relations work effectively because if an employer dismisses an employee without good cause, the employer runs the risk that an employee will make a personal grievance claim against the employer if the dismissal was unjustified. Similarly, if the employer asks the employee for an explanation in response to allegations of serious misconduct, the employee may fail to provide an explanation. However, if this happens, the employee risks being dismissed. In contrast, if an employer fails to offer an employee equal remuneration for work of equal value, the employee has a choice of accepting unequal remuneration or lodging a claim which is unlikely to succeed. In this scenario, the employee carries the risk and there is little incentive for employers to review remuneration practices. Therefore, a risk analysis underlies the need for effective legislative intervention.[128]

Case law concerning other legislation may also promote pay equity. In two decisions, the Employment Court considered whether remuneration of a community support worker should conform to the requirements of the Minimum Wage Act 1983 (MWA) when a worker was engaged in a sleepover in a community home. In its first decision, the Court held that "sleepovers" were work in terms of the MWA because the employer imposed constraints on the worker's freedom that were "significant and substantial" such as preventing him from carrying on a normal family life, socialising with friends and limiting his privacy. Accordingly, the sleepovers were work in terms of the MWA.[129] In a subsequent decision, the Court held by a majority that an employer was required to pay every employee at a rate no less than the minimum rate for every hour worked.[130] Both decisions have been upheld on appeal although the Supreme Court has granted leave to appeal.[131]

The decisions potentially affect large numbers of employees. Community support workers are predominantly female so that if the decision is implemented, the employees' wages of a predominantly female workforce are likely to increase.[132] The Government has responded by placing Idea Services Limited into statutory management, questioning how the expected $500 million in back pay could be funded and

[123] Employment Relations Act 2000, s 241.
[124] Employment Relations Act 2000, ss 104 and 105.
[125] Employment Relations Act 2000, s 131.
[126] Employment Relations Act 2000, s 4.
[127] See for example *Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 37 where the Court held that an employer was required to provide an employee information about other employees in the context of restructuring.
[128] This view is supported by EEO Commissioner Dr Judy McGregor in her article "Confidentiality Deals Targeted in Move for Equal Employment Opportunities" *The Dominion Post* (Wellington, 4 July 2011).
[129] *Idea Services Ltd v Dickson* [2009] ERNZ 116; (2009) 9 NZELC 93,305; (2009) 6 NZELR 666 (EmC) at [71] and [83].
[130] *Idea Services Ltd v Dickson* [2009] ERNZ 372; (2010) 9 NZELC 93,403; (2009) 7 NZELR 121 (EmC), at [100]. Note that in his dissent, Judge Travis would have allowed averaging of wages based on a purposive interpretation of the MWA.
[131] *Idea Services Limited v Dickson* [2011] NZCA 14, at [24] and [52] and *Idea Services Ltd v Dickson* [2011] NZSC 55.
[132] K Burke & S Nicholls "Underpaid Female Workers Win Big Pay Rise" The Sydney Morning Herald <www.smh.com.au>.

awaiting the outcome of the Supreme Court appeal.[133] This litigation highlights that pay equity is not solely a women's issue. In this litigation, the defendant employee was a male community support worker.

In summary, this analysis reveals the extent of the limitations of New Zealand legislation. The EPA ensured the elimination of a separate female rate of pay. In this way, the EPA has eliminated direct discrimination and provided for formal equality. In addition, between 1972 and 1978, the EPA provided for substantive equality by significantly reducing the gender pay gap. After 1978, the EPA ceased making a substantive difference to pay equity. From 1986 onwards, the New Zealand government was aware that more legislation was required in order to achieve substantive equality. This awareness increased until the EEA was passed. Despite doubts of both its supporters and critics, the EEA had the potential to provide for substantive equality. However it was repealed before it could deliver any benefits.

In 1990, the incoming National government was not under an obligation to implement the EEA. It could have provided for pay equity in a different way. For example, the EPA could have been amended to encompass the wider principle or pay equity provisions could have formed part of the ECA. The repeal of the EEA combined with the failure of any government to enact similar legislation post-repeal has made implementing pay equity measures problematic.

Anti-discrimination measures remain in the HRA, the EPA and the ERA but these may only be invoked by individuals. The deregulation of the labour market has virtually guaranteed that these provisions will have no more than a negligible effect on the gender pay gap. Human rights legislation does not directly address pay equity. In fact, the discrimination provisions appear to be more closely aligned with ILO 111 than ILO 100.[134] There are no provisions in human rights legislation that provide for equal pay for work of equal value.

The current legislative framework consisting of the GSEPA, the EPA, the ERA and the HRA is not effective. This has prompted the Human Rights Commission to draft a Pay Equality Bill. The Bill has merit in that it would provide disadvantaged employees with substantive remedies. However, the Bill could be simplified by adopting the relevant provisions in the Fair Work Act 2009 and would be more effective if it was drafted as an amendment to the ERA because this would result in the provisions being interpreted consistently with the statutory duty of good faith. The prospects of the Bill being supported seem remote.[135]

The limited effectiveness of legislative provisions constrains the judiciary from giving full recognition to the principle of pay equity. Within these limitations, the judiciary has largely recognised New Zealand's international obligations in respect of equal pay for work of equal value. The most striking exception is the *Clerical Workers Case* which was clearly decided incorrectly. It is also concerning that the Employment Tribunal and the HRRT failed to interpret discrimination provisions correctly. Both the High Court and the Employment Court have recognised that discrimination includes indirect discrimination and have provided substantive redress in response to discrimination. In this respect, the judicial branch of Government has recognised and implemented the pay equity principle. However, this judicial recognition has been limited by

[133] Stuff "IHC Firms in Statutory Management" <www.stuff.co.nz>. Subsequently, the government has settled the claim.
[134] ILO 111 refers to the Discrimination (Employment and Occupation) Convention, 1958 and requires parties to provide for equality of treatment and equality of opportunity (Article 2). New Zealand ratified ILO 111 in 1983.
[135] To date, only the Green Party has indicated that they will support the Bill. The Green Party drafted a similar Bill and Prime Minister John Key remarked that it had "as much chance of being considered as Happy Feet the penguin has of a holiday in Honolulu" Otago Daily Times "Pay Equity Bill on Ice" <www.odt.co.nz>. Note that the Bill has received some strong support in G Barhava Monteith and S Wilshaw-Sparkes "Bridging the Pay Divide" *The Business Herald* (Auckland, 29 July 2011) at 14 as well as strongly-worded criticisms. "Caution Vital over Gender Pay Reforms" *New Zealand Herald* (Auckland, 11 July 2011) at 10.

the inadequacy of the legislation. Further, it is suggested that the *Clerical Workers Case* should be revisited at the earliest opportunity.

The Executive in New Zealand

The executive branch of Government has played a critical role in New Zealand. Many of these initiatives featured in New Zealand's Third Periodic Report to the United Nations Committee on Economic, Social Cultural and Rights. They included the establishment of the Pay and Equity Employment Unit in the Department of Labour, the implementation of a Plan of Action and the completion of pay and employment equity reviews in the public sector.[136] In addition to these initiatives, a considerable volume of research has been undertaken at different times in New Zealand by the executive government.[137] However, there has been limited research since 2003. For example, there is no research about recent developments in Australia or the United Kingdom.[138]

The establishment of the Human Rights Commission has contributed to countering the effects of discrimination generally. However, the HRC lacks authority to address pay equity issues. Under the EEA, the establishment of the office of the Equity Employment Commissioner and the Arbitration Commission was promising but their potential was never fulfilled due to the swift repeal of the EEA.[139]

In 2004, the Government established the Pay and Employment Equity Unit (PEEU). The PEEU had responsibility for implementing the Pay and Employment Plan of Action (the Plan). The purpose of the Plan was to ensure that remuneration of women in New Zealand was free of gender bias. The Plan was to be implemented in three phases. In the first phase, pay equity reviews were carried out in the public sector, public health and public education. The second phase would have extended the reviews to state-owned enterprises and Crown entities. The third phase would have extended the programme to private employers.[140]

In the first phase, 27 Pay and Employment Equity Reviews were completed. They revealed that the average gender pay gap in public bodies ranged from 18% to 30%. The gap in starting rates ranged from 3% to

[136] New Zealand Government *Third Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: New Zealand* UN ESC, E/C.12/NZL/3 (2009) at [151] – [152]. In 1999, the Committee of CEDAW recommended "…further efforts by government, including considering development of a strategy for equal pay for work of comparable value" cited in Ministry of Women's Affairs, above n 13, at 15. In response to New Zealand's Second Periodic Report submitted in 2001, the Committee recommended an intensification of programmes to reduce gender-based inequality in employment: New Zealand Government, above n 136 at [150].

[137] See for example *Equal Pay in New Zealand, Report of the Commission of Enquiry* (1971), *Progress of Equal Pay in New Zealand* (1975), *Equal Pay Implementation in New Zealand* (1979), *Equal Pay Study: Phase One Report* (1987), *Equal Pay Study Phase Two Report* (1987), *Towards Employment Equity : Report of the Working Group on Equal Employment Opportunities and Equal Pay* (1988), *Gender Wage Gap : Scenarios of the Gender Wage Gap : Report* (1997), *Gender Wage Gap : An Assessment of the Relative Impact of Each Industry : Report for Ministry of Women's Affairs* (1997), *Performance Pay Systems and Equity : A Research Report* (1999), *Next Steps Towards Pay Equity : A Background Paper on Equal Pay for Equal Work of Equal Value* (2002), *Next Steps Towards Pay Equity : A Discussion Document* (2002), *Report on Public Submissions to Next Steps Towards Pay Equity : A Discussion Document* (2003), *Report of the Taskforce on Pay and Employment Equity in the Public Service and the Public Health and Public Education Sectors* (2004)[137] and *Working Towards Pay and Employment Equity for Women in Public Health, Public Education and Public Service* (2006).

[138] Recently, the Human Rights Commission released *Tracking Equality at Work*, above n 56 which contained a Pay Equality Bill. However, the report was a general report on equality and did not consider recent developments overseas.

[139] The EEA was repealed under urgency on 19 December 1990 while the Ministry of Women's Affairs was holding a Christmas party: M Cook *Just Wages : History of the Campaign for Pay Equity, 1984-1993* (Colation for Equal Pay, Wellington, 1994) at 35.

[140] Queensland Industrial Relations Commission "Pay Equity: Time to Act" (2007) at 89-90 <www.qirc.qld.gov.au>.

5%.[141] Phases two and three were never implemented. In 2009, the Government terminated the Plan, disbanded the PEEU and abandoned two pay and employment equity investigations.[142] The recommendations in the phase one reviews were not implemented.

In 2007, the Queensland Industrial Relations Commission noted the "renewed energy and commitment" shown by the New Zealand government. However, the Commission noted that the effectiveness of the Plan was limited by the low number of public sector employees (18%) and the threat to the Plan and the PEEU posed by a change in Government.[143] It is suggested that the Plan would have been more effective if it was given statutory recognition and an equal remuneration principle had been adopted. Without legislation, it was an easy task for the incoming Government to dismantle the well-intentioned initiatives embodied in the Plan.[144] The failure of the National-led government to give any reasons for disbanding the PEEU, terminating the pay equity initiatives and to provide alternative solutions to remedy the gender pay gap amounts to a breach of New Zealand's international obligations. This breach is compounded by the fact that, in relation to public employees, the Government has the dual role of being an employer in addition to its broader governance role.

The initiatives undertaken between 2004 and 2009 demonstrated an intention on the part of the New Zealand government to provide for equal remuneration. However, the scope of the initiatives was limited and the outcomes were ultimately disappointing. The plethora of pay equity research has failed to deliver substantive outcomes. There is a dearth of current academic research and no specialist body promoting pay equity in New Zealand. The Government has not only failed to intensify its pay equity programmes but has abandoned them. In this respect, the Government is in breach of this country's international obligations.

Legislation and Case Law in Australia

Currently, Australia has effective pay equity legislation and a landmark case has recently been released.[145] However, this state of affairs is the culmination of many years of struggle. Before any legislation was enacted, the principle of equal pay was promoted as a result of case law affecting industrial awards. The cumulative effect of the *1969 Equal Pay Case*, the *National Wage and Equal Pay Cases 1972* and the *National Wage Case, 1974* was that equal pay for equal work was introduced in three stages.[146] This replicated the position in New Zealand in 1978.

In *Re Private Hospitals and Doctors' Nurses (ACT) Award 1972*,[147] the Australian Conciliation and Arbitration Commission affirmed that the equal pay principle could be enforced in all industrial awards in which it was not recognised by invoking the anomalies provisions in the Principles of Wage determination. In effect, this broadened the application of the equal pay principle and led to successful equal pay claims brought by nurses, dental therapists, social workers and childcare workers.[148]

Since 1993, federal legislation has expressly recognised the wider principle in four separate enactments. These are the Industrial Relations (Reform) Act 1993 (IRRA), the Workplace Relations Act 1996 (WRA),

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[141] Public Service Association "Its Time: Pay and Employment Equity – Five Years On" (2008) <www.psa.org.nz>.
[142] These concerned the education sector and social workers.
[143] Queensland Industrial Relations Commission, above n 140, at 92.
[144] The government could still have repealed the legislation but at least there would have been more public discussion and scrutiny before this occurred.
[145] Fair Work Act 2009 (Cth) and the *Equal Remuneration Case* [2011] FWAFB 2700.
[146] *1969 Equal Pay Case (1969)* 127 CAR 1142; *National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172; and *National Wage Case, 1974* (1974) 157 CAR 293.
[147] *Re Private Hospitals and Doctors'Nurses (ACT) Award 1972* (1986) 13 IR 108.
[148] *Equal Remuneration Case*, above n 145 at [196].

the Workplace Relations Amendment (Work Choices) Act 2005 (WRAWCA) and the Fair Work Act 2009 (FWA).

The IRRA empowered the Australian Industrial Relations Commission (AIRC) to make orders to provide for equal remuneration for work of equal value.[149] These provisions were largely unaffected when the WRA was enacted three years later.[150] However, claimants struggled to obtain remedies under the WRA because before a claim could succeed, it was necessary to establish that discrimination was a cause of wage inequalities, there was uncertainty around the meaning of "discrimination" and there were difficulties in applying the test of discrimination.[151] It followed that these claims were rarely successful despite the "considerable promise" of the legislation to deliver substantive remedies.[152] For example, in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries*,[153] the AIRC rejected a claim that female process workers and female packers were underpaid because the claimants failed to satisfy the AIRC that their lower remuneration was caused by discrimination notwithstanding that they were paid at a different rate than male employees who performed similar work.

In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd*,[154]the AIRC struck out a claim by female clerical employees on the discrimination ground on the basis that an alternative remedy was potentially available and the claimant's failure to refute the employer's submission that a successful claim would result in inequities between male and female clerical workers.[155]

The WRAWCA limited the equal remunerations further by requiring applicants to explicitly refer to a comparator group in an application and ousting jurisdiction where the effect of equal remuneration orders would be to increase minimum wage orders. WRAWCA gave the Australian Fair Pay Commission (AFPC) jurisdiction to determine minimum wages. The AFPC made no adjustments or variations to pay scales on the basis of equal remuneration and no pay equity claims were brought under the legislation.[156]

The FWA attempts to remedy the defects of its predecessors. According to its explanatory memorandum:[157]

> The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.
>
> The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.

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[149] Industrial relations (Reform) Act 1993 (Cth), s 21.
[150] See Workplace Relations Act 1996 (Cth), ss 620 -634.
[151] Fair Work Australia *Research Report 5/2011 Review of Equal Remuneration Principles* (2011) at 22-23 <www.fwa.gov.au>.
[152] Ibid, at 22.
[153] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (1998) 94 IR 129.
[154] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (1999) 97 IR 374.
[155] Ibid, at 380.
[156] *Equal Remuneration Case*, above n 145, at [201].
[157] Fair Work Bill 2008 (Cth), Explanatory Memorandum, at [1191] to [1192].

Equal remuneration orders are provided for in Part 2-7 of the FWA.[158] Section 302 confers power on Fair Work Australia (FW Australia) to make equal remuneration orders, defines equal remuneration for work of equal or comparable value and provides for employees, employee organisations or the Sex Discrimination Commissioner to apply to FW Australia for equal remuneration orders.[159] An equal remuneration order may increase but must not decrease rates of remuneration.[160] An equal remuneration order may be implemented in stages.[161] Contravention of an equal remuneration order gives rise to a civil claim.[162]

It seems likely that the FWA will fulfil the promise that its predecessors failed to deliver. In so doing, the Australian Federal Legislature has enacted effective legislation that is likely to reduce the gender pay gap. The FWA is superior to the EPA and comparable to the repealed EEA but more efficient than that legislation would have been.

The trend of unsuccessful litigants has come to an abrupt halt in the recently released *Equal Remuneration Case*.[163] The scale of the case is nothing short of impressive. There were 22 parties to the litigation represented by 46 counsel. FW Australia heard submissions over a nine month period in Melbourne, Brisbane, Perth, Sydney, Ballarat and Adelaide either in person or via video link. There was extensive witness evidence and it was estimated the decision would affect up to 153,000 employees.[164]

The case concerned an application made by the Australian Municipal, Administrative, Clerical and Services Union (ASU) for an equal remuneration order for employees of non-government employers in the social, community and disability services industry throughout Australia (SACS).[165] The ASU sought an order on the same terms as the Queensland SACS award.[166] Relevant features of the application included increased remuneration for sleepovers and higher commencement rates for employees with tertiary qualifications and other specified qualifications.[167]

Fair Work Australia (FW Australia) made a number of important findings. Firstly, FW Australia has a discretion to make Equal Remuneration Offers (ERO). Even if unequal remuneration exists, orders are not mandatory.[168] Secondly, gender-based undervaluation may be established by reference to a male comparator group. However, the absence of a male comparator is not fatal to a claim.[169] Thirdly, even though the essence of a successful claim is that wage rates are discriminatory, claimants are not required to prove that discrimination occurred because this requirement would have been "difficult to prove" and "somewhat artificial" in the present context.[170] Fourthly, SACS employees are predominantly female and remunerated at a lower rate than employees employed by state or local authority organisations. Accordingly, FW Australia concluded that there is not equal remuneration for male and female employees for work of equal or comparable value and a relevant factor, but not the only factor, is gender-based undervaluation of work.[171]

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[158] Fair Work Act 2009 (Cth), ss 302-306. See Appendix B.
[159] Fair Work Act 2009 (Cth), s 302(3).
[160] Fair Work Act 2009 (Cth), s 303.
[161] Fair Work Act 2009 (Cth), s 304.
[162] Fair Work Act 2009 (Cth), s 305.
[163] *Equal Remuneration Case*, above n 145.
[164] Ibid, at [18] and [225].
[165] Ibid, at [1].
[166] Ibid, at [5].
[167] Ibid, at [4].
[168] Ibid, at [227].
[169] Ibid, at [232]. This was relevant because the ASU did not rely on a male comparator group in its submissions.
[170] Ibid, at [233].
[171] Ibid, at [285].

FW Australia invited the parties to make further submissions in relation to the appropriate form of the ERO.[172]

This decision appears to remove many barriers that have previously prevented claims from being successful. There is no longer a requirement to prove that discrimination has occurred or to identify a male comparator group. In reaching its decision, FW Australia considered key developments in state jurisdictions, especially New South Wales and Queensland. In particular, Equal Remuneration Principles (ERPs) and decisions made in accordance with ERP's were significant.[173] To date, librarians,[174] dental assistants,[175] childcare workers,[176] social, community and disability services industry employees[177] and disability support workers[178] have successfully pursued equal remuneration claims.

This analysis reveals that the judiciary recognised the equal pay for equal work principle at a relatively early stage. However, recognising the wider principle of equal remuneration was more difficult. Between 1993 and 2009, the federal jurisdiction appeared to falter in the face of seemingly insurmountable difficulties. During this period, equal pay provisions were much more effective in Queensland and New South Wales.[179] Since 2009, there has been a sudden and dramatic change that may herald "a new dawn for pay equity" by providing for substantive equality.[180]

A. The Executive in Australia

The executive branch of the Australian federal government has recently played an active role in promoting pay equity. While there has not been much research at federal level, pay equity enquiries have been initiated by state governments in New South Wales, Tasmania, Queensland, Western Australia and Victoria between 1998 and 2005.[181] In February 2011, Fair Work Australia released its report on equal remuneration principles. The report is comprehensive and provides current information, including historical and international perspectives.[182]

Fair Work Australia appears to be performing a wide degree of functions including conducting research, hearing equal remuneration claims and providing information to employers, employees and the public. The federal government has established the office of the Fair Work Ombudsman (FWO) and expanded the role of the Sex Discrimination Commissioner.[183] The purpose of the FWO is "to promote harmonious,

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[172] Ibid, at [286].
[173] See Appendices D and E.
[174] *Re Crown Librarians, Library Officers and Archivists Award Proceedings – Applications Under the Equal Remuneration Principle* (2002) 111 IR 48; (2002) EOC 93-197.
[175] *Liquor, Hospitality and Miscellaneous Union (Qld Branch) v Australian Dental Assoc (Qld Branch)* (2005) 180 QGIG 187; (2005) EOC 93-414; [2005] QIRComm 139.
[176] *Liquor, Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Servicers Employers Association* (2006) 182 QGIG 318 and *Re Miscellaneous Workers Kindergartens & Child Care Centres Etc (State) Award (NSW)* (2006) 150 IR 290; (2006) EOC 93-434; (2006) NSWIRComm 64.
[177] *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19.
[178] *Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc* (2009) 192 QGIG 46.
[179] Meg Smith & Andrew Stewart "A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the Fair Work Act" [2010] AJLL 12.
[180] Ibid.
[181] *Equal Remuneration Case*, above n **Error! Bookmark not defined.** at [202].
[182] Fair Work Australia, above n 145.
[183] Fair Work Act 2009 (Cth), s 302.

productive and cooperative workplace relations and ensure compliance with Commonwealth workplace laws."[184]

To date, the federal government has not adopted an equal remuneration principle (ERP) although two ERPs have been developed at state level.[185] Smith and Stewart acknowledge that there is no necessity for a national ERP. However, the authors suggest that adoption would be desirable.[186] There is no necessity because the two main benefits of an ERP are that an ERP could clarify that there is no requirement to prove sex-based discrimination and that comparison with a male group is not essential. These two features have been established in the *Equal Remuneration Case*.[187] Recently, the federal government stated that it would:[188]

> support the development of an appropriate equal remuneration principle for the federal jurisdiction drawing on the Queensland Equal Remuneration Principle of 2002 and explanatory notes and relevant New South Wales jurisprudence.

The development of a federal ERP is expected. This analysis shows that since 2009, the federal government has implemented a broad range of measures to provide for pay equity in fulfilment of its international obligations. The federal jurisdiction is making significant progress towards substantive equality.

Conclusion

There is a compelling rationale for the Australian and New Zealand governments to implement measures that promote pay equity. Historically, New Zealand has been seen as "progressive" in its approach to pay equity.[189] However, this view should be revisited given the repeal of the EEA and the abandonment of the Plan. In contrast, Australia is becoming increasingly progressive.

In response, the New Zealand government should amend the ERA to enable the employment institutions to make EROs. This could be achieved by allowing an employee, an employee's organisation or the EEO Commissioner to bring a claim for personal grievance on the grounds that an employer's failure to provide equal remuneration based on equal or comparable value amounts to an unjustified disadvantage.[190] The employment jurisdictions could be expected to interpret the amendment generously given its fundamental importance and the requirement for employment institutions to acknowledge and address "the inherent inequality of … power in employment relationships".[191] The New Zealand government should also develop an ERP to express its intention to honour New Zealand's international obligations and to provide guidance to the employment institutions.[192] The role of the EEO Commissioner should be expanded and sufficiently resourced to encompass monitoring implementation of pay equity measures and should report to government on a regular basis. If these measures were adopted, the New Zealand government would achieve compliance with its international obligations under ILO 100, CEDAW and the ICESCR.

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[184] Fair Work Ombudsman "About Us" (2012) <www.fairwork.gov.au>.
[185] An ERP is a statement of principle that provides guidance in terms of disputes concerning equal remuneration. See appendices D and E.
[186] Smith and Stewart, above n 179.
[187] *Equal Remuneration Case*, above n 145.
[188] Australian Government cited in Smith and Stewart, above n 179.
[189] Queensland Industrial Relations Commission, above n 14040, at 88.
[190] Employment Relations Act 2000, s 103.
[191] Employment Relations Act 2000, s 3.
[192] Examples of ERP's are located in Appendices D and E.

Until that happens, the gender pay gap is likely to widen in New Zealand and to narrow in Australia. Accordingly, the Key government has failed to fulfil its mandate and to honour New Zealand's international obligations. For women in New Zealand to achieve pay equity, the most effective short-term strategy appears to be emigration to Australia. If New Zealand women follow this course of action, the Prime Minister's horror will become a self-fulfilling prophecy.

Postscript

Recently, Chief Executive of the Employers and Manufacturers Association (EMA), Alasdair Thompson, has provoked outrage by suggesting that one of the reasons for the gender pay gap is that women are less productive because they take more time off work due to period-related illness.[193] In defence, Thompson stated that he supported equal pay for equal work. This comment has been repeated like a mantra as a justification for the present arrangements in New Zealand. The subtext is that because the EPA is on the books, New Zealand is fulfilling its international obligations and no further actions are required. If that is the message, it is out-dated and plainly incorrect.

The dictum of Lee J is apposite:[194]

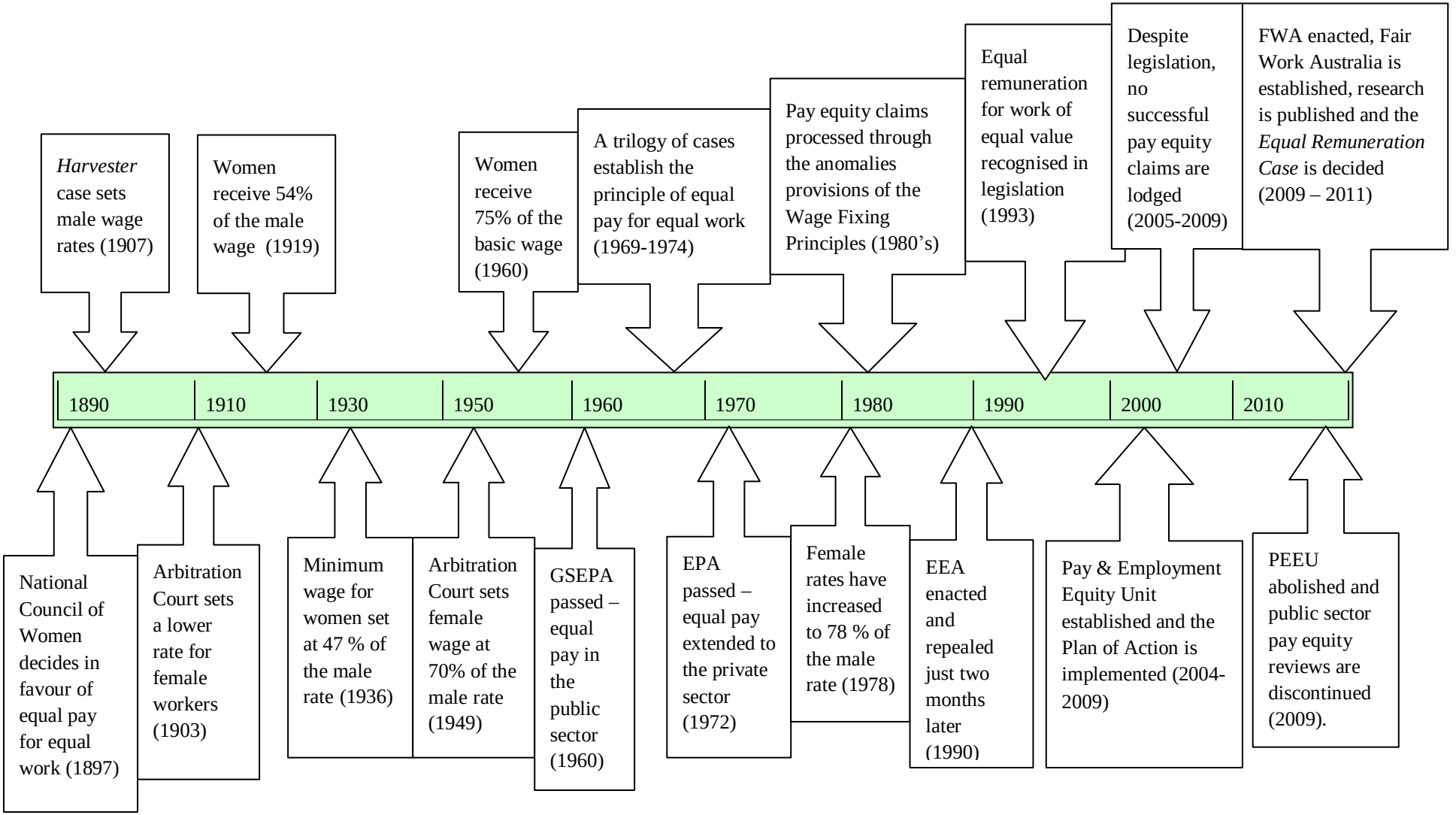
> It is well known that lay people often wrongly conclude that because a person has repeatedly said that something has occurred therefore it must for that reason be true. They are often inclined to the view that mere assertion, particularly if repeated, necessarily means that what is asserted is true. Lewis Carroll's statement in "Hunting of the Snark" that "What I tell you 3 times is true", is quite incorrect. Merely saying something does not necessarily make it so.

Thompson has subsequently resigned. The EMA has not altered its position on pay equity.

[193] New Zealand Herald "Alasdair Thompson Walks Off Interview Over 'Sexist' Claims" <www.nzherald.co.nz>.
[194] *R v Robinson* [1998] QCA 50 at 70.

Appendix A

Timeline of the History of the Struggle for Pay Equity in Australia and New Zealand



Appendix B

Division 2—Equal remuneration orders
302 FWA may make an order requiring equal remuneration

Power to make an equal remuneration order

(1) FWA may make any order (an equal remuneration order) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.
Meaning of equal remuneration for work of equal or comparable value

(2) Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.
Who may apply for an equal remuneration order

(3) FWA may make the equal remuneration order only on application by any of the following:
(a) an employee to whom the order will apply
(b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
(c) the Sex Discrimination Commissioner.
FWA must take into account orders and determinations of the Minimum Wage Panel

(4) In deciding whether to make an equal remuneration order, FWA must take into account:
(a) orders and determinations made by the Minimum Wage Panel in annual wage reviews; and
(b) the reasons for those orders and determinations.
Restriction on power to make an equal remuneration order

(5) However, FWA may make the equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value**.**

303 Equal remuneration order may increase, but must not reduce, rates of remuneration

(1) Without limiting subsection 302(1), an equal remuneration order may provide for such increases in rates of remuneration as FWA considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

(2) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration.

304 Equal remuneration order may implement equal remuneration in stages

An equal remuneration order may implement equal remuneration for work of equal or comparable value in stages (as provided in the order) if FWA considers that it is not feasible to implement equal remuneration for work of equal or comparable value when the order comes into operation.

305 Contravening an equal remuneration order

An employer must not contravene a term of an equal remuneration order.
Note: This section is a civil remedy provision (see Part 4-1).

306 Inconsistency with modern awards, enterprise agreements and orders of FWA

A term of a modern award, an enterprise agreement or an FWA order has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of an equal remuneration order that applies to the employee.

Appendix C

Pay Equality Bill

A Bill to make provision for equality through the removal and prevention of discrimination in rates of pay of males and females in paid employment to promote observance in New Zealand of the principles underlying International Labour Convention 100 on Equal Remuneration and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women.

1. Short Title
This Act may be cited as the Pay Equality Act.

2. Objects
The objects of the Act are –
(1) To provide for the inclusion in all employment agreements, individual and collective, of an equality clause;
(2) To identify equal work and provide for equal pay for equal work and work of equal value;
(3) To provide for the right to be free from the discrimination of inequality of pay.

3. Interpretation
In this Act, unless the context otherwise requires, –
"Agreement" means –

(a) a contract of employment;
(b) an individual employment agreement entered into by one employer and one employee who is not bound by a collective agreement;
(c) a collective agreement as defined in the Employment Relations Act.

"Authority" means the Employment Relations Authority constituted under the Employment Relations Act 2000
"Court" means the Employment Court constituted under the Employment Relations Act

"Employee" includes a person who has entered into or works under a contract of employment or apprenticeship with an employer

"Employer" includes a person employing any employee or employees

"Labour Inspector" means an employee of the department designated under section 223 of the Employment Relations Act to be a Labour Inspector

"Pay" includes the salary or wages actually paid and legally payable and includes bonus and other special payments, allowances, fees, commissions, and any other benefits or privileges whether paid in money or not

"Union" means a union registered under Part 4 of the Employment Relations Act

"Work of Equal Value Unit" means a unit established within the Department of Labour with persons qualified and experienced in the Gender-Inclusive Job Evaluation Standard (P8007/2006)

4. Application of the Act
The Act will apply to both the public and the private sectors.

5. Equal Work
(1) For the purposes of this Act, A's work is equal to that of B if it is-

(a) like B's work,
(b) rated as equivalent to B's work,
(c) of equal value to B's work.

(2) A's work is like B's work if-

(a) A's work and B's work are the same or broadly similar; and
(b) Such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) A's work is rated as equivalent to B's work if a job evaluation study-

(a) gives an equal value to A's job and B's job in terms of the demands made on an employee, or

(b) would give an equal value to A's job and B's job if the evaluation did not include values different for men from those set for women.

(4) A's work is of equal value to B's work if it is-

(a) neither like B's work nor rated as equivalent to B's work, but

(b) nevertheless equal to B's work in terms of the demands made on A by reference to the Gender-Inclusive Job Evaluation Standard (P8007/2006).

6. Equality Clause

(1) Every employment agreement, individual and collective, shall be deemed to include an equality clause.

(2) An equality clause is a provision that provides for equal work as defined in section 5 and has the following effect-

(a) if a term of A's agreement is less favourable to A than a corresponding term of B's agreement, A's term is modified so as to have the same effect as the term in B's agreement;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

7. Defence of Material Factor

(1) The equality clause in A's terms has no effect in relation to a difference between A's term and B's terms if it is shown that the difference is because of a material factor, reliance on which-

(a) does not invoke treating A less favourably because of A's sex than B is treated, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A material factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purpose of subsection (1), the long-term objective of reducing inequality between men and women's work is always to be regarded as a legitimate aim.

(4) A material factor includes evidence that a Job Evaluation Scheme that is consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2006) has been undertaken and implemented by the employer.

8. Obligation to Provide Information

(1) Every employer must at all times keep a record showing that all employees are paid in accordance with the equality clause.

(2) Every employer must record any differences in the remuneration of male and female employees.

(3) Any clause in any individual or collective agreement that prevents or restricts the disclosure of information relating to remuneration is unenforceable against the individual who wishes to disclose the information in the course of establishing discrimination in the rates of pay on the grounds of sex inequality.

(4) A Labour Inspector (or person authorised by a Labour Inspector to do so) may serve on an employer a demand notice, if an employee makes a complaint to the Labour Inspector or the Labour Inspector believes on reasonable grounds, that an employee has not received pay or other money payable by the employer under the Pay Equality Act.

(5) Before issuing the demand notice the procedure laid down in section 224 of the Employment Relations Act must be followed.

(6) A Labour Inspector may commence an action in the name and on behalf of an employee to recover any money payable under the Pay Equality Act.

9. Assessment of Whether Work is of Equal Value

(1) This section applies to proceedings before the Authority on a complaint relating to a breach of an equality clause.

(2) Any party to an employment agreement, individual or collective, may lay a complaint for breach of the equality clause.

(3) Where a question arises in the proceedings as to whether A's work is equivalent to B's work or A's work is of equal value to B's work, the Authority may, before determining the question, require the Department of Labour (Work of Equal Value Unit) to prepare a job evaluation study that is consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2006) on the question.

(4) If the determination of the complaint requires a comparator occupational group to be identified, the Authority will require the Department of Labour (Work of Equal Value Unit) to identify an appropriate comparator group and prepare a job evaluation study consistent with the Gender-Inclusive Evaluation Standard (P8007/2006). The comparator occupational group(s) may be identified within the enterprise itself, or from another enterprise or the same or another industry. The comparator groups are to have same or comparable job evaluation points as determined in accordance with the Gender-Inclusive Job Evaluation Standard (P8007/2006).

(5) If the Authority requires the preparation of a study, it must not determine the question unless it has received the job evaluation study.

(6) On receipt of the job evaluation study the Authority will make it available to the parties and after receiving submissions from the parties will determine the matter.

10. Inclusion of Equality Clause in Collective Agreement
(1) A collective agreement has no effect unless it contains an equality clause.

(2) The form and nature of the equality clause may be negotiated through the collective bargaining process in accordance with the provisions of the Employment Relations Act.

(3) In the event of dispute over the form and nature of the equality clause the matter will be referred to the Department of Labour (Work of Equal Value Unit) for a job evaluation study consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2006).

(4) The job evaluation study will be referred to the parties but if agreement cannot be reached the matter may be referred by one or both of the parties to the Authority for a determination that will be binding.

11. Jurisdiction
(1) The Authority has jurisdiction to determine a complaint relating to or arising out of a breach of the equality clause.

(2) Where an employee would be entitled to make a complaint under the Human Rights Act 1993, the employee may choose to pursue a complaint under the Pay Equality Act or the Human Rights Act but not both.

(3) The Authority has jurisdiction to determine an application for a declaration as to the rights of an employee or employees or employer or employers in relation to a dispute about the effect of an equality clause.

(4) The Authority may, at any time, before or during the hearing or before delivering its decision, on the application of any party to the proceedings or on its own motion, state a case for the opinion of the Employment Court on any question of law arising in any proceedings before the Tribunal.

(5) The Employment Court shall hear and determine any question submitted to it under this section, and shall remit the case with its opinion to the Authority.

12. Remedies
(1) If the Authority is satisfied on the balance of probabilities that the defendant has committed a breach of the equality clause, the Authority may grant 1 or more of the following remedies:

(a) a declaration that the defendant has committed a breach of the equality clause;
(b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order;
(c) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant;
(d) an order that the defendant undertake any specified training or programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act.

(2) Any order made under this section of the Act may be filed in any District Court, and shall be then enforceable in the same manner as an order made or judgment given by the District Court.

13. Offences
(1) Every person commits an offence against this Act and is liable on summary conviction to a fine not exceeding $5000 who, either alone or in combination with any other person or group or body of persons, does any act with the intention of defeating any provision of the Act.

(2) Every person commits an offence who, wilfully obstructs or hinders any Inspector in the performance of the functions under section 8 of this Act.

14. Codes of Practice
(1) The Authority may issue codes of practice-
(a) that ensure or facilitate compliance with a provision of the Act;
(b) that ensure or facilitate the provision of an equality clause in a collective agreement.

(2) The Department of Labour shall issue a code of practice that is consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2007) for the identification of appropriate comparator occupational groups to facilitate the determination of complaint(s) relating to work of equal value.

(3) The Human Rights Commission shall establish procedures for the advocacy and promotion of pay equality by education and publicity and the dissemination of information.

15. Department of Labour
The Act is to be administered by the Department of Labour.

Appendix D

New South Wales Equal Remuneration and Other Conditions Principle

15 Equal Remuneration and Other Conditions

(a) Claims may be made in accordance with the requirements of this principle for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis.

(b) The assessment of the work, skill and responsibility required under this principle is to be approached on a gender neutral basis and in the absence of assumptions based on gender.

(c) Where the undervaluation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.

(d) The application of any formula, which is inconsistent with a proper consideration of the value of the work performed, is inappropriate to the implementation of this principle.

(e) The assessment of wage rates and other conditions of employment under this principle is to have regard to the history of the award concerned.

(f) Any change in wage relativities which may result from any adjustments under this principle, not only within the award in question but also against external classifications to which the award structure is related, must occur in such a way as to ensure there is no likelihood of wage leapfrogging arising out of changes in relative positions.

(g) In applying this principle, the Commission will ensure that any alteration to wage relativities is based upon the work, skill and responsibility required, including the conditions under which the work is performed.

(h) Where the requirements of this principle have been satisfied, an assessment shall be made as to how the undervaluation should be addressed in money terms or by other changes in conditions of employment, such as reclassification of the work, establishment of new career paths or changes in incremental scales. Such assessments will

reflect the wages and conditions of employment previously fixed for the work and the nature and extent of the undervaluation established.

(i) Any changes made to the award as the result of this assessment may be phased in and any increase in wages may be absorbed in individual employees' over award payments.

(j) Care should be taken to ensure that work, skill and responsibility which have been taken into account in any previous work value adjustments or structural efficiency exercises are not again considered under this principle, except to the extent of any undervaluation established.

(k) Where undervaluation is established only in respect of some persons covered by a particular classification, the undervaluation may be addressed by the creation of a new classification and not by increasing the rates for the classification as a whole.

(l) The expression 'the conditions under which the work is performed' has the same meaning as in Principle 6, Work Value Change.

(m) The Commission will guard against contrived classification and over classification of jobs. It will also consider:

(i) the state of the economy of New South Wales and the likely effect of its decision on the economy;

(ii) the likely effect of its decision on the industry and/or the employers affected by the decision; and

(iii) the likely effect of its decision on employment.

(n) Claims under this principle will be processed before a Full Bench of the Commission, unless otherwise allocated by the President.

(o) Equal remuneration shall not be achieved by reducing any current wage rates or other conditions of employment.

Appendix E

Queensland Industrial Relations Commission's Equal Remuneration Principle

EQUAL REMUNERATION PRINCIPLE

This principle applies when the Commission:

(a) makes, amends or reviews awards;

(b) makes orders under Ch 2, Pt 5 of the *Industrial Relations Act* 1999;

(c) arbitrates industrial disputes about equal remuneration; or

(d) values or assesses the work of employees in 'female' industries, occupations or callings.

In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features. The expression 'conditions under which work is performed' has the same meaning as in Principle 7 'Work Value Changes' in the Statement of Policy regarding Making and Amending Awards.

The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.
The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated. Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.

In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:

(a) whether there has been some characterisation or labelling of the work as 'female';

(b) whether there has been some underrating or undervaluation of the skills of female employees;

(c) whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;

(d) whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part-time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or

(e) whether sufficient or adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.

Gender discrimination is not required to be shown to establish undervaluation of work. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis. Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.

Where the principle has been satisfied, an assessment will be made as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.

There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle. The Commission will guard against contrived classifications and over classification of jobs.

The Commission may determine in each case whether any increases in wages will be absorbed into overaward payments. Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment. The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto will be rigorously tested.

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