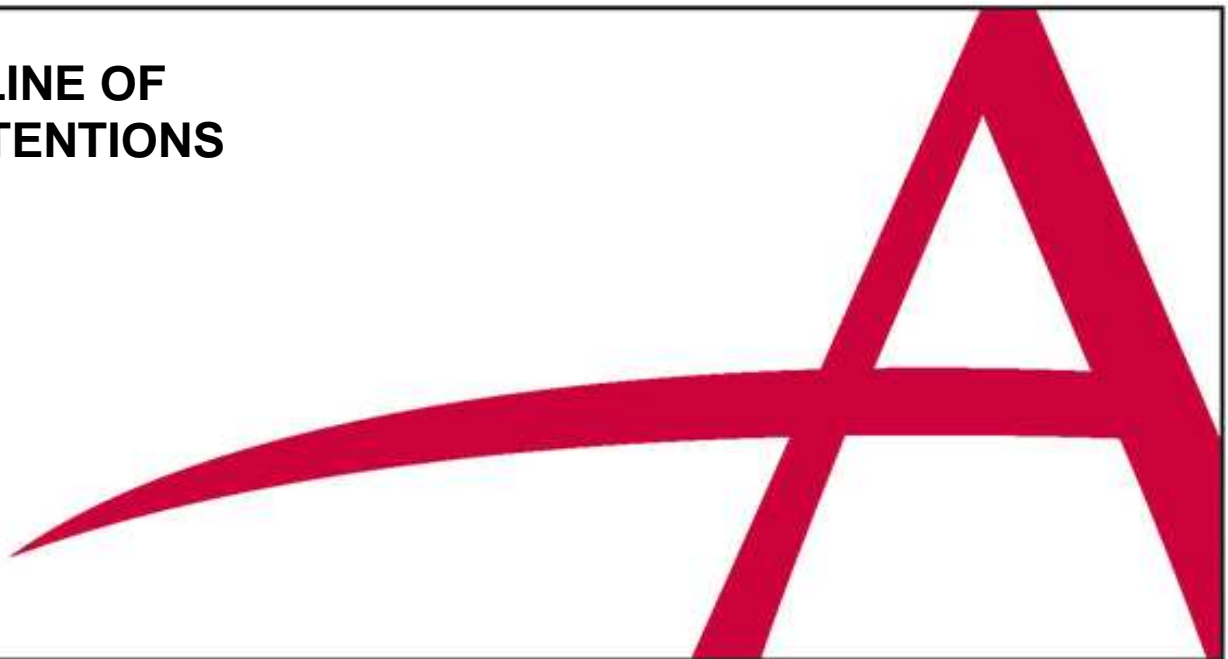


**OUTLINE OF
CONTENTIONS**



**EQUAL REMUNERATION CASE
(C2010/3131)**

 AUSTRALIAN INDUSTRY GROUP

6 August 2010

Table of Contents

	<i>Page</i>
1 Procedural matters	3
2 Overview	5
3 The Tribunal's role and powers	9
4 The rates in the SACS Modern Award have already been Determined applying appropriate criteria	12
5 Equal remuneration orders should not be used to circumvent the objects of the Act, the modern awards objective or the minimum wages objective	15
6 The proposed order would distort and destabilise the award safety net	19
7 Collective bargaining and the low paid bargaining stream	22
8 If the problem is a lack of Government funding the problem can be addressed without an equal remuneration order	26
9 The relevance of the 2010 Annual Wage Review Decision	29
10 Remuneration and salary packaging in the SACS industry	32
11 Federal equal remuneration cases	36
12 How should the Tribunal deal with applications for equal remuneration orders?	41
13 Equal pay cases before State Industrial Commissions	48
14 Gender pay equity is a complex issue and the Tribunal is not well-placed to implement community wide solutions	50
15 The elements of the unions' proposed order	53

Annexure 1 – ASU Bulletin, 30 July 2010

Annexure 2 – Witness Statement of Professor Deborah A. Cobb-Clark

OUTLINE OF CONTENTIONS

EQUAL REMUNERATION CASE

(C2010/3131)

1. Procedural matters

1. This Outline of Contentions is filed in accordance with the Tribunal's Directions of 27 April 2010.
2. We note that the Commonwealth, the ACTU and various other parties have sought an extension of time for the filing of their Outlines of Contentions and statements of evidence. As stated by the Full Bench on 11 May 2010: "*We make it plain, however, that all parties are entitled to an adequate opportunity to meet the case against them.*"
3. If an extension is granted by the Tribunal, Ai Group submits that the Tribunal should allow Ai Group and the other parties who are opposing the unions' application a period of four weeks from the extended filing date to:
 - File any further contentions, evidence and/or other materials; and
 - Determine which witnesses they wish to cross-examine.
4. In their Outlines of Contentions the ACTU and other parties supporting the unions' application are likely to draw conclusions and make assertions about the statements of evidence and other materials filed on time. Therefore, it would be unfair to require Ai Group and the other parties who are opposing the unions' application to finally determine which witnesses they wish to cross-examine at this early stage.

5. After the above steps have been taken, and after the evidence has been heard by the Tribunal, Ai Group submits that:
 - The unions and other parties supporting the application should be given the opportunity to file final written submissions;
 - At least four weeks after the filing date for the unions' final submissions, the parties opposing the application should be required to file their final written submissions.
6. Final written submissions are likely to be of great assistance to the Full Bench, given the large number of witnesses and the complex issues involved in these proceedings.
7. The wage rates in the *Social, Community, Home Care and Disability Services Industry Award 2010* (SACS Modern Award) are not operative until 1 July 2011, so there is ample time for final written submissions to be filed after the evidence has been heard.

2. Overview

8. Ai Group supports the principle of equal remuneration for work of equal or comparable value (the equal remuneration principle), and the quest to improve gender equity in the workplace.
9. However, we submit that the unions' proposed equal remuneration order would cause far more problems than it would solve.
10. The unions' application in this case is appropriately viewed as an attempt to establish the award rates in the Social and Community Services (SACS) industry on the basis of narrow equal remuneration criteria, rather than on the basis of the wider criteria in the modern awards objective and the minimum wages objective. If this was not the unions' aim, they would have logically applied to vary the SACS Award under s.158 of the *Fair Work Act 2009* (FW Act).
11. Since 1989, a vast amount of work has been done in achieving consistency and equity in the classifications and wage rates within and across awards. While the outcome is not perfect, increasing the minimum rates so substantially in one industry, as sought by the unions, would be problematic and would result in a raft of flow-on claims in other industries.
12. If the unions succeed with their claim for large increases in the minimum wage rates in the SACS industry, similar claims could be pursued in every industry where the majority of employees are female. The eventual outcome could be that minimum wage rates in industries where mostly females are employed are much higher than minimum rates in industries where the majority of employees are males. This would not be logical or fair.

13. Awards are intended to provide a safety net only. Minimum wage rates are not intended to reflect paid rates or market rates. If they did, then the minimum rates would act to discourage the making of enterprise agreements, in conflict with the objects of the FW Act.
14. Ai Group submits that the applicant unions have done very little since the FW Act came into operation to pursue enterprise agreements in the SACS industry. Instead of consulting with employers and employees in individual workplaces and convincing them of the merits of bargaining, the unions have decided to pursue an application for an equal remuneration order across the entire SACS industry designed to achieve large wage increases.
15. In fact the ASU has announced a decision not to renegotiate most of the enterprise agreements which expire in the SACS industry this year, and not to pursue new agreements in the industry, given the unions' application in these proceedings. This stance conflicts with the objects of the FW Act.
16. The unions allege that SACS workers are low paid and that enterprise agreements are not easily achieved in the SACS industry. If this is the case, then the circumstances are consistent with the purpose of the low paid bargaining stream in the FW Act, which the unions have not sought to utilise.
17. It is often argued that the reason why SACS workers are low paid is because of a lack of Federal and State Government funding over the years. Regardless of what, if any, commitments are given by Governments, the Tribunal is not well placed to take into account issues of Government funding when making decisions about minimum wage rates. Even if it were possible for the Tribunal to obtain a cast-iron guarantee from the current Federal Government and every State and Territory Government, that they would fund the wage increases sought by the unions, Governments change over time and Government policies can change at any time.

18. Of course there is a lot of support for low paid SACS workers and Ai Group does not want to be unfair but if the real problem is a lack of Federal and State Government funding then the problem should not be portrayed as a problem relating to minimum wage rates.
19. Governments could of course increase funding to the SACS sector and employers could pass on wage increases to employees in the form of over-award payments or enterprise agreements, without the negative consequences which would flow from the unions' proposed order.
20. Many employers in the SACS industry operate with a mix of Federal and/or State Government funded programs and other programs which are commercial in nature or funded from other sources (eg. donations). Given these different sources of funding, imposing big cost increases on employers in the SACS industry would be very risky even if commitments are given by the Federal Government and every State and Territory Government.
21. Any assessment of remuneration in the SACS industry needs to take into account the salary packaging arrangements which are very common in this industry, and which enable employees to take advantage of the favourable tax concessions which apply to not-for-profit organisations.
22. It is Ai Group's primary submission that the factual context of this case is not appropriate for the establishment of principles for proceedings relating to applications for equal remuneration orders. If our primary submission is not accepted and the Tribunal decides to determine an appropriate approach for dealing with applications for equal remuneration orders under the FW Act then, similar to the sensible and fair approach which FWA has adopted when dealing with numerous other matters under the FW Act, the Tribunal should be guided by the approach that it has formulated over the years in dealing with applications for equal remuneration orders (modified as necessary to reflect the new legislation).

23. In these proceedings the unions are placing great weight on decisions of State Tribunals but such decisions were made under very different workplace relations systems where awards have a wider role and where there is no low paid bargaining stream.
24. The unions have made no secret of the fact that the current proceedings are an attempt to have the rates from the *Queensland Community Services and Crisis Assistance Award 2008* reflected in the SACS Modern Award. They have organised protest marches and initiated letter writing campaigns to politicians. They have generated publicity but this should not distract the Tribunal from ensuring that the application is subjected to the rigorous scrutiny that is warranted, particularly given the sweeping nature of the order and the huge wage increases sought.
25. There are many dimensions to the topic of gender pay equity, including:
- The fact that the gender pay gap is small while employees are young and increases during working lives;
 - The fact that the problem largely exists in market rates, not minimum award rates;
 - The fact that the gender pay gap increases at higher education and skill levels; and
 - The fact that the problem has as much to do with the unequal load carried by women and men in the home as it does with their role in the workplace.
26. Gender pay equity is a complex issue. While FWA plays a vital role in the community, the Tribunal is not well-placed to implement community wide solutions to address gender pay equity problems.

3. The Tribunal's role and powers

27. FWA has been given various powers to ensure equal remuneration for men and women workers for work of equal or comparable value, including:

- Dealing with applications to make and vary modern awards where a variation is necessary to achieve the “modern awards objective”¹; (The modern awards objective includes eight elements which must be taken into account, one of which is the “principle of equal remuneration for work of equal or comparable value” – ie, the equal remuneration principle);
- Establishing and maintaining a safety net of fair minimum wages, taking into account the “minimum wages objective”²; (The minimum wages objective includes five aspects which FWA must take into account including the equal remuneration principle);
- Considering applications for equal remuneration orders to ensure that “for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value”³.

28. The Explanatory Memorandum for the *Fair Work Bill* provides the following commentary:

“Clause 302 – FWA may make an order requiring equal remuneration

1189. Clause 302 allows FWA to make any order it considers appropriate to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value in relation to the employees to whom the order will apply (subclauses 302(1) and (2)).

¹ Section 134 of the FW Act

² Section 284

³ Part 2-7 – Equal Remuneration

1190. *The term remuneration encompasses entitlements in addition to wages (i.e., it encompasses wages and other monetary entitlements).*

1191. *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.*

1192. *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.”*

29. The provisions of Part 2-7 of the FW Act:

- Are broader than the previous provisions in the *Workplace Relations Act*, in that they enable work of “comparable value” to be taken into account as well as equal value;
- Give FWA the power to make 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 (s.302(1));
- Clarify that the term “equal remuneration for work of equal or comparable value” relates to equality between men and women (s.302(2));

- Require that the Tribunal take into account orders and determinations made by the Minimum Wage Panel in annual wage reviews and the reasons for those orders and determinations (s.302(4));
- Enable the Tribunal to increase rates of remuneration in stages in an equal remuneration order (s.304);
- Provide that 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 the term of an equal remuneration order that applies to the employee (s.306).

30. The legislative provisions are considered in some detail in later sections of this submission.

4. The rates in the SACS Modern Award have already been determined applying appropriate criteria

31. In its Stage 4 Award Modernisation Decision the Full Bench decided:

“[79] At the outset it is necessary to deal with proposals advanced by the ASU to defer the operation of parts of the modern award to permit it to pursue an application to establish new wage rates based on pay equity or work value grounds. The ASU and the Australian Government are parties to Heads of Agreement which provide for the adoption of pre-modern award rates in the modern award on an interim basis pending the outcome of the foreshadowed claim. The ASU proposed that we include a schedule of transitional provisions incorporating conditions from some 32 awards and NAPSAs and that any provisions of the modern award affecting pay or pay-related conditions should not come into operation. A number of other interested parties, including some state governments, supported the ASU position. The proposal was opposed to varying degrees by a number of representatives of employers.

[80] We have decided to make a modern award based on the terms of the exposure draft but with a number of alterations some of which we deal with below. The award will include the classifications and minimum wages which appear to us, on the material available at this time, to be appropriate for a modern award in this industry. We accept the force of the submissions made that in the circumstances it would be inconvenient to say the least to introduce new classifications and minimum wages for the industry covered by the award when a significant case is contemplated before Fair Work Australia next year. We have decided that the operative date for the implementation of the new classifications and wages should be delayed until 1 July 2011.

[81] *In relation to transitional provisions, we do not intend to adopt the detailed schedule proposed by the ASU for reasons which we set out in our decision of 2 September concerning model transitional provisions. Furthermore, to the extent that the Heads of Agreement are relied upon, it is tolerably clear that the Heads of Agreement are primarily concerned with rates of pay and there is no warrant to delay the implementation of other conditions, whether pay-related or not. The model transitional provisions will be included in the modern award, but cl.2.3 of the phasing schedule will be modified to substitute 2011 for 2010.”*

32. As is clear from the above extract, the Full Bench has already determined the classifications and wage rates for the SACS Modern Award. The classifications and wage rates are terms of the Award, even though under the transitional provisions the wage rates are not operative until 1 July 2011.
33. The classifications and wage rates in the SACS Modern Award appeared to the Tribunal *“on the material available at this time, to be appropriate for a modern award in this industry.”*
34. The classifications and rates of pay in the SACS Modern Award have been determined by the Tribunal applying the same criteria used in establishing rates of pay and classifications in all modern awards. As stated by Watson VP in [2010] FWA 2800: *“The approach of the Australian Industrial Relations Commission in award modernisation was to give effect to the award modernisation objectives in the Workplace Relations Act 1996 by paying particular regard to the content of pre-existing instruments.”*
35. The Tribunal has determined fair and appropriate minimum rates for the SACS Modern Award weighing up all relevant factors. One of the factors which was required to be considered was to promote the equal remuneration principle (see s.576B(2)(e) of Part 10A of the *Workplace Relations Act*).

36. If the unions wish to vary the rates in the SACS Modern Award, they should make application under s.158 of the Act, on the basis that a variation is justified by work value reasons and necessary to meet the modern awards objective (s.157(2)). The application would also need to be consistent with the minimum wages objective (s.284).

5. Equal remuneration orders should not be used to circumvent the objects of the Act, the modern awards objective or the minimum wages objective

37. Equal remuneration orders have an important role to play, particularly at the workplace level, but the unions' application in this case is appropriately viewed as an attempt to establish the award rates in the SACS industry on the basis of narrow equal remuneration criteria, rather than on the basis of the wider criteria in the modern awards objective and the minimum wages objective. If this was not the unions' aim, they would have logically applied to vary the SACS Award under s.158 of the FW Act.
38. No doubt the unions are disappointed that FWA decided that the SACS Modern Award would not contain the rates in the *Queensland Community Services and Crisis Assistance Award – State 2008* (an award from which a NAPSA was not derived and which has never applied to constitutional corporations or other employers in the national workplace relations system). The unions' application in these proceedings is an attempt to achieve that outcome.
39. Significantly, the unions' proposed order would apply across the entire SACS industry. The order has a scope which is similar to the coverage of the SACS Modern Award and which would oust the operation of the wages and classifications in the Modern Award.
40. If the Tribunal decided to make the order proposed by the unions, the rates in the SACS Modern Award would immediately become irrelevant. Such an outcome would:

- Conflict with section 3(c) of the FW Act which states that it is an object of the Act to ensure “a *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through National Employment Standards, modern awards and national minimum wage orders*”;
 - Result in the Tribunal not complying with the modern award objective which states that “*FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions..*” (s.134(1));
 - Conflict with the minimum wages objective in s.284 which requires that FWA “*establish and maintain a safety net of fair minimum wages*” (s.284(1));
 - Fail to take account of the fact that FWA can only make a determination varying modern award minimum wages outside the system of four yearly reviews if the variation is justified by work value reasons and the variation is necessary to achieve the modern awards objective (s.157(2)) plus in other very limited and specified circumstances.
41. These are sufficient grounds for the Tribunal to reject the application for an equal remuneration order and to invite the unions to apply to vary the award under s.158 if they wish to pursue higher minimum wage rates for the entire SACS industry.
42. If the equal remuneration order is made then the only way that the rates in the SACS Modern Award will become relevant is if the award wage rates are increased to align them with the order. Regardless of whether an application is made by the unions or the Tribunal acts on its own initiative, the rates could only be varied if the Tribunal was satisfied that the variation:
- Is justified by work value reasons (s.157(2)(a)); and

- Is necessary to achieve the modern awards objective (s.157(2)(b)); and
 - Is consistent with the minimum wages objective (see s.284 and the note under s.157(2)); and
 - Is consistent with the objects of the Act (see s.3 and the notes under s.134(2) and s.284(2)).
43. In circumstances where a party applies for an equal remuneration order across an entire industry or occupation which is covered by a modern award, the fairest and most rationale approach is for the Tribunal to ensure that any order made is consistent with the modern awards objective, the minimum wages objective and the overall objects of the FW Act. Otherwise a party could circumvent the key provisions which are intended to apply to variations to the award safety net.
44. At the award level, the role of equal remuneration orders is problematic. There are other provisions of the FW Act which are more suited towards ensuring that the equal remuneration principle is taken into account when wage rates and other award provisions are set or varied, in particular:
- The modern awards objective. (The equal remuneration principle is reflected in s.134(1)(e)); and
 - The minimum wages objective. (The equal remuneration principle is included in s.284(d)).
45. The modern awards objective and the minimum wages objective require FWA to take into account the equal remuneration principle, along with other important aspects such as productivity, competitiveness, employment costs etc. This balanced approach is sensible and appropriate. There is no point in granting large minimum wage increases to female workers if the overall effect is to reduce employment opportunities and/or to adversely affect workforce participation.

46. The unions are being open about what their intent is in these proceeding, that is, to increase the rates in the SACS Modern Award. An ASU bulletin dated 30 July 2010 is included as **Annexure 1** (as obtained from the ASU's website on 5 August 2010).

47. With reference to the unions' application in these proceedings, the article on page 1 of the ASU's bulletin states that:

"..the unions national campaign is focused on award rates for the modern Social, Community, Home Care and Disability Services Industry Award 2010.."

48. The article on page 2 of this bulletin states that:

"The Australian Services Union is proud to be running a special National Pay Equity case in 2010, as an extra avenue to increase award wages".

49. The rates in the unions' application are not consistent with the modern awards objective or minimum wages objective.

6. The proposed order would distort and destabilise the award safety net

50. Since 1989, a vast amount of work has been done in achieving consistency and equity in the classifications and wage rates within and across awards. While the outcome is not perfect, increasing the minimum rates so substantially in one industry, as sought by the unions, would be problematic and would result in a raft of flow-on claims in other industries.
51. The 1991 National Wage Case Decision (Print J7400) provides the following account of the lack of fairness which existed in award classification structures and wage rates prior to 1989 and the problems which such inequity caused. The extract also explains the structural efficiency exercise which was embarked upon from 1989 to address the problems:

"The result is there exist in federal awards widespread examples of the prescription of different rates of pay for employees performing the same work but this is only part of the problem. For too long there have existed inequitable relationships among various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards.

There is a further dimension to the problem. Employers have introduced and will continue to introduce wage relativities both as between employees employed under the same award and employees covered by other awards in a particular establishment. These relativities can vary from workplace to workplace and may bear no resemblance to the relativities set in the award or awards concerned."

The Commission noted that this situation had inevitably caused feelings of injustice leading to industrial disputation and "flow-on" settlements and:

". . . has also led to economically unsustainable general wage increases, particularly when attempts have been made to move away from a highly centralised system, which have severely affected the state of the national economy."

The Commission concluded that this situation had to be corrected; otherwise continuing instability within and between awards would seriously reduce the effect of moves to modernise those awards. Consequently it determined that:

". . . minimum rates awards will be reviewed to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards".

The Commission stated in its August 1989 National Wage Case decision that its decision had to be read in conjunction with the August 1988 National Wage Case decision and the February 1989 Review decision. It also elaborated on what had been said in the February 1989 Review decision about the requirement to review relationships between classification rates and supplementary payments in minimum rates awards, stating:

". . . we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be \$356.30 per week with a \$50.70 per week supplementary payment. The minimum classification rate of \$356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.

Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions

under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established.”

(Emphasis added)

52. The outcomes of the structural efficiency exercise are embedded in the wage rates and classification structures in modern awards. To a large extent modern award wage and classification structures still bear a relationship to the wage rates and classification structure in the Metal Industry Award (now the Manufacturing Modern Award).
53. If the unions succeed with their claim for large increases in the minimum wage rates in the SACS industry, similar claims could be pursued in every industry where the majority of employees are female. The eventual outcome could be that minimum wage rates in industries where mostly females are employed are much higher than minimum rates in industries where the majority of employees are males. This would not be logical or fair and “*feelings of injustice*” would re-emerge.
54. The safety net should be as consistent as possible across industries. Such consistency is important in ensuring that the safety net remains “fair” (s.3(b) and (c), s.134(1) and s.284(1) of the FW Act).
55. Awards are intended to provide a safety net only. Minimum wage rates are not intended to reflect paid rates or market rates. If they did, then the minimum rates would act to discourage the making of enterprise agreements, in conflict with the objects of the FW Act (s.3(f)).

7. Collective bargaining and the low paid bargaining stream

56. Nowadays awards are intended to set minimum wage rates only, not paid rates or market rates. Under the FW Act, collective bargaining is the prime mechanism intended to deal with wages above the safety net.
57. The FW Act came into operation on 1 July 2009 and it has given employees and their bargaining representatives significantly enhanced opportunities to pursue an enterprise agreement. The Act:
- Imposes good faith bargaining obligations upon employers if the majority of their employees wish to bargain for an enterprise agreement;
 - Gives FWA substantial new powers to make orders during bargaining; and
 - Enables FWA to make a determination in certain circumstances.
58. Ai Group submits that the applicant unions have done very little since the FW Act came into operation to pursue enterprise agreements in the SACS industry. Instead of consulting with employers and employees in individual workplaces and convincing them of the merits of bargaining, the unions have decided to take the easy way out and pursue an application for an equal remuneration order across the entire SACS industry designed to achieve large wage increases.
59. In fact the ASU has announced a decision not to renegotiate most of the enterprise agreements which expire in the SACS industry this year, and not to pursue new agreements in the industry, given the unions' application in these proceedings. Such a decision conflicts with the objects of the FW Act.

60. The ASU bulletin (dated 30 July 2010) in **Annexure 1** states that:

“ASU Focus on the National Community Services Award 2010 outcomes

The Australian Services Union, Queensland Services Branch has made a decision to limit and delay the enterprise bargaining agenda for small to medium sized organisations within the Social and Community Services sector for the rest of the year. This decision will allow the ASU to maintain focus and concentrate resources on our National Pay Equity campaign, where the maximum benefit to the largest number of workers can be delivered.

Many Social and Community Services organisations have agreed to this delay when their agreements are at their expiry date as all parties currently acknowledge that whilst there is a desire to make an agreement at this point in time they are not in a position to bargain for wage increases other than award rates because of the significant increases to the award rates proposed and their heavy reliance on government funding. While the unions national campaign is focused on award rates for the modern Social, Community, Home Care and Disability Services Industry Award 2010, the union believes that when members’ wage outcomes expectations are considered, the campaign work we are doing for the sector is the best way to make the most progress to benefit the whole sector. The outcome of the new award will in fact supersede the rates of pay in the majority of current agreements.

Some large organisations, that have bargained for the last 5 – 10 years and have the capacity to meet and extend beyond the award minimums at present and where there is substantial membership density and significant delegate’s structures will continue to bargain as the award outcomes are determined.”

(Emphasis added)

61. In addition to the enhanced opportunities which the FW Act has given to employees and unions to pursue enterprise agreements, the Act contains a special low paid bargaining stream (Division 9 of Part 2-4 and Division 2 of Part 2-5).

62. A relevant union may apply to FWA for a “low-paid authorisation” in relation to a proposed multi-employer agreement covering “low paid employees”. If an authorisation is issued, FWA may provide whatever assistance it considers appropriate to facilitate bargaining for a multi-employer agreement and it can determine an outcome if an agreement is not reached. The Explanatory Memorandum for the *Fair Work Bill* (at paragraph 992) specifically refers to the community services sector as an industry where the low paid bargaining provisions are likely to have application.
63. The unions allege that SACS workers are low paid and that enterprise agreements are not easily achieved in the SACS industry. If this is the case, then the circumstances are consistent with the purpose of the low paid bargaining stream.
64. As set out in paragraph 992 of the Explanatory Memorandum:
- “Division 9 provides a framework to facilitate bargaining for multi-enterprise agreements for certain types of employees, being low-paid employees who either have not had access to collective bargaining or who face substantial difficulties in bargaining at the enterprise level. These employees include, e.g. certain employees in the community services sector and the cleaning and child care industries.”* (Emphasis added).
65. The applicant unions have not sought to use the low paid bargaining stream in the SACS industry, but rather are pursuing large wage increases through an application for an equal remuneration order.
66. If the Tribunal decides to make the order which the unions have applied for, there will be little or no space left for enterprise bargaining in the SACS industry, including bargaining for enterprise agreements and bargaining for multi-employer agreements under the low-paid bargaining stream (which was designed for the SACS industry).

67. Also, many of the existing enterprise agreements in the industry would not pass the Better Off Overall Test unless large wage increases are included in replacement agreements, decreasing the likelihood of replacement agreements being made.
68. These outcomes conflict with the objects of the Act which emphasise the importance of collective bargaining, and of awards being a safety net which underpins bargaining (ss.3(b), 3(f) and 171).

8. If the problem is a lack of Government funding the problem can be addressed without an equal remuneration order

69. It is often argued that the reason why SACS workers are low paid is because of a lack of Federal and State Government funding over the years.
70. Undoubtedly many employers in the SACS industry are heavily reliant on Federal Government funding, State Government funding, or both.
71. It appears that many employers in the SACS industry support the unions' application **provided that** Federal and State Governments agree to fund the outcome of the case. The unions recognise that employers in the industry will not be able to pay the large wage increases which they are seeking without significant reductions in staff and services, unless Governments increase their funding substantially. Consequently, the unions are endeavouring to procure Government commitments to fund the outcome which they are seeking.
72. At this stage Ai Group is unaware of any Governments which have budgeted for the funding increases which would be necessary if the unions' claim is granted.
73. The following is a relevant extract from a media release issued by the ASU – QLD Services Branch on 2 August 2010, which indicates that the Federal Government has not given any commitments at this stage:

“Social and community service (SACS) workers in Townsville, Cairns and Mackay will put their case, for increased federal funding for fairer pay rates, to the ALP’s Queensland Senator, Mark Furner, at meetings in the three cities this week. They will be supported by ASU-Services Queensland secretary, David Smith, who is also an ALP Senate candidate.

Australian Services Union Queensland Services Branch (ASU-Services) members in the non-government SACS sector are part of a national campaign to win significant improvements in pay and conditions for SACS workers.

The campaign includes the first pay equity test case run before Fair Work Australia, with hearings due to start this month. This national pay equity case is aimed at replicating across the country the May 2009 Queensland Industrial Relations Commission (QIRC) decision, which provided big pay rises for SACS workers still covered by the State industrial relations system at the time.”

74. Regardless of what, if any, commitments are given by Governments, the Tribunal is not well placed to take into account issues of Government funding when making decisions about minimum wage rates. Even if it were possible for the Tribunal to obtain a cast-iron guarantee from the current Federal Government, NSW Government, Victorian Government, QLD Government, SA Government, WA Government, Tasmanian Government, ACT Government and NT Government, that they would fund the wage increases sought by the unions, Governments change over time and Government policies can change at any time.
75. Of course there is a lot of support for low paid SACS workers and Ai Group does not want to be unfair but if the real problem is a lack of Federal and State Government funding then the problem should not be portrayed as a problem relating to minimum wage rates.
76. Governments could of course increase funding to the SACS sector and employers could pass on wage increases to employees in the form of over-award payments or enterprise agreements, without the negative consequences which would flow from the unions' proposed order.

77. If Governments believe that SACS workers are not paid enough they are able to address this problem, by increasing their funding, without any involvement from the Tribunal.
78. Many employers in the SACS industry operate with a mix of Federal and/or State Government funded programs and other programs which are commercial in nature or funded from other sources (eg. donations). Given these different sources of funding, imposing big cost increases on employers in the SACS industry would be very risky even if commitments are given by the Federal Government and every State and Territory Government.

9. The relevance of the 2010 Annual Wage Review Decision

79. Section 302(4) of the FW Act states:

“(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.”*

80. In 2010, the Tribunal awarded a generous wage increase of \$26 per week. A determination has been issued to incorporate the 2010 Annual Wage Review increase into the rates in the SACS Modern Award (MA000100, PR997934).

81. In Chapter 10 of its decision the Full Bench said:

“[320] In this chapter we consider our decision in relation to modern award minimum wages and the national minimum wage for adult award/agreement free employees. Leaving aside increases in minimum wages which may have arisen as a result of award modernisation, there have been no increases for the relevant employees since October of 2008. We deal first with modern award minimum wages.

[321] The modern awards objective and the minimum wages objective, which are set out in Chapter 1, prescribe the criteria to be applied in annual wage reviews. The modern awards objective requires Fair Work Australia to ensure that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions. In the context of an annual wage review, the Panel is therefore required to ensure that, so far as minimum wages are concerned, modern awards provide a fair and relevant safety net. The

minimum wages objective is in different although complementary terms. It requires us to establish and maintain a safety net of fair minimum wages.”

(Emphasis added)

82. The Full Bench went on to decide:

“[337] With some hesitation we have decided on a dollar increase. There are two reasons. The first is that to the extent there is a choice between a percentage increase benefiting the higher levels and a dollar amount benefiting the lower levels we think that the current circumstances favour a greater benefit for the lowest paid. We are required in particular to take the needs of the low paid into account. In light of the fact that award-reliant employees have not had an increase in wages since 2008, it is desirable that we increase award rates by the largest amount consistent with the statutory criteria. Secondly, we have very little data concerning the impact of a percentage increase on costs and employment. We have insufficient information to be confident that a percentage increase would not have disproportionate effects on employment at the higher award levels. Nevertheless in the Annual Wage Review 2010-11 we expect to be addressed on the issues we have raised and to be provided with relevant data, including cost estimates. We return to next year’s review in a later chapter dealing with research.

[338] We have decided on an increase of \$26 in all modern award minimum weekly wages. There will be proportionate increases in hourly minimum wages and annual salaries.”

(Emphasis added)

83. As set out above, the Tribunal awarded the largest increase consistent with the statutory criteria. The statutory criteria are prescribed in the modern awards objective and the minimum wages objective (see para [321] above). The equal remuneration principle is an element of the modern awards objective and the minimum wages objective.
84. If a \$26 increase (as incorporated into the SACS Modern Award) is the largest increase which is consistent with the statutory criteria, it follows that the increases sought by the unions are not consistent with the modern awards objective or the minimum wages objective.
85. As explained in Section 5, any application for an equal remuneration order which covers all or a substantial part of an industry or occupation which is covered by a modern award, should be justified on work value grounds and should be consistent with the modern awards objective and the minimum wages objective.

10. Remuneration and salary packaging in the SACS industry

86. As set out in the Explanatory Memorandum, the term “remuneration”, as used in the equal remuneration principle, includes more than wages:

“1190. The term remuneration encompasses entitlements in addition to wages (i.e., it encompasses wages and other monetary entitlements).”

87. Any assessment of remuneration in the SACS industry needs to take into account the salary packaging arrangements which are very common in this industry, and which enable employees to take advantage of the favourable tax concessions which apply to not-for-profit organisations.

88. The existing tax concessions are summarised in the following extract from the final report arising from *Australia’s Future Tax System Review* (“the Henry Review”):

“B3–2 Existing NFP tax concessions and regulatory arrangements are complex

Tax concessions

The tax concessions available to NFP organisations include income tax exemptions, a higher GST registration threshold, the ability to make supplies GST-free in certain circumstances, GST input credits, capped exemptions from (or rebates of) fringe benefits tax (FBT), and the ability to receive tax deductible gifts (see Table B3–1). Not all NFP organisations receive all concessions — generally the concessions depend on the particular public benefit purposes of the organisation.

Table B3.1: Main tax concessions for major types of NFP organisations^(a)

	Value (\$m) (2008–09)	Charities	Public benevolent institutions^(b) and health promotion charities	Deductible gift recipients	NFP and public hospitals, and public ambulance services
Income tax exemption ^{(c)(d)}	*	Yes	Yes	–	Yes
GST concessions	*	Yes	Yes	Yes	Charities only
FBT exemption (\$17,000)	260	–	–	–	Yes
FBT exemption (\$30,000)	715	–	Yes	–	–
FBT rebate ^(e)	20	Charitable institutions only	–	–	–
Deductible gifts	1,080	–	Yes	Yes	Yes

a. Entities may have more than one status (for example, a charity could also be a deductible gift recipient).

b. There are over 11,000 public benevolent institutions in Australia, including organisations such as: Anglicare Australia Inc; Australian Federation of Disability Organisations Ltd; Australian Red Cross Society; Parents, Families and Friends of Lesbians and Gays Inc; Refugee Council of Australia Inc; and Society of St Vincent de Paul Pty Ltd.

c. Many NFP organisations are taxable, but are entitled to special rules for calculating taxable income and lodging income tax returns and are able to access special rates of tax.

d. Income tax exempt entities that do not meet the broad definition of a NFP organisation, such as municipal corporations, local governing bodies, constitutionally protected funds, and public authorities constituted under Australian law, are not discussed in this section.

e. Certain non-government NFP organisations are eligible for this concession.

* The value of the concession cannot be quantified.

Sources: ATO (2007) and Treasury (2009)."

89. Section B3-2 of the Henry Report goes on to explain some of the benefits commonly offered to staff of not-for-profit organisations as part of a salary package, and highlights that a market salary paid by a not-for-profit organisation is not directly comparable with a market salary paid by another organisation because the costs of the salary are different:

“Fringe benefits tax

In effect, labour is taxed at a reduced rate for NFP organisations that are eligible for FBT concessions. These organisations can offer benefits such as mortgage repayments, laptop computers, and motor vehicle leases tax free, or at a reduced rate — concessions that are unavailable to their for-profit competitors. Consequently, NFP organisations have an advantage in attracting staff in labour markets, as they can afford to pay the market wage at a lower cost.”

90. Employees of not-for-profit organisations enjoy favourable FBT concessions which are not enjoyed by employees of other organisations, and these concessions are a significant feature of salary packages of SACS industry employees. Therefore, any comparisons between the wage rates of SACS industry workers and employees in other industries, for the purposes of assessing whether there is equal remuneration for work of equal or comparable value, is particularly problematic.
91. Representative bodies for not-for-profit organisations were very vocal during the Henry Tax Review and during the Productivity Commission’s recent *Review of the Contribution of the Not-For-Profit Sector*.
92. With regard to the FBT exemption, the following extract from the submission of the Australian Council for International Development to the Productivity Commission is typical of the views widely expressed by not-for-profit organisations:

“FBT exemption

The Commission’s report makes much of the issue of competitive neutrality and the effects of the FBT exemption currently enjoyed by those organisations that receive PBI status. The report takes for granted many assumptions that FBT causes a skewing of the market.

It is important to understand the significance of the exemption to the NFP sector. Salary packaging through the provision of fringe benefits is considered highly crucial to the successful recruitment and retention of quality staff. This enables NFPs to compete against the often higher incomes that are offered by government and private organisations. Without the FBT exemption, many NFPs would face acute financial difficulty, would have difficulty retaining staff and would ultimately need to reduce programme activity or increase reliance on government funding.”

11. Federal equal remuneration cases

93. The Tribunal's involvement in equal pay cases dates back to 1969. The 1969 case established an initial equal pay principle. In a further case in 1972, the principle of equal pay for work of equal value was established. These two cases led to the abolition of separate male and female wage rates in awards.
94. In the *Equal Pay Case* of 1972 (147 CAR 172) the Tribunal decided that female rates must be determined “*by work value comparisons without regard to the sex of the employees concerned*” (147 CAR 172 at p.179).
95. In more recent times, the most significant Tribunal decision on equal remuneration has been *AFMEPKIU and HPM Industries* (Print P9210, 4 March 1998). Ai Group's predecessor organisation (the Metal Trades Industry Association) was extensively involved in the proceedings, representing HPM. In this case the AMWU sought an equal remuneration order requiring that the company pay female process workers classified at C13 under the Metal Industry Award, the same rate of pay as the highest paid male general hand classified at this level, and that it pay female packers classified at C12, the highest rate paid to a male general hand and/or storeperson classified at C12.
96. The HPM proceedings were lengthy and hard-fought and many of the arguments which are being raised by the unions in the current proceedings were considered in detail by the Tribunal.
97. After 7 days of hearings, Simmonds C decided that:
- The term “equal remuneration for work of equal value” refers to rates of remuneration established without discrimination based on sex;

- The Tribunal must follow the definition of discrimination established in the *Third Safety Net Adjustment and Section 150A Review* decision (Print M5600);
- The primary issue is whether or not the work of process workers is of equal value when assessed against that of general hands, and whether the work of packers is of equal value when assessed against that of general hands and storepersons;
- The onus of proof lies with the applicant union to show that the different rates paid to process workers and packers by comparison to that paid to general hands and storepersons, amounts to discrimination based on sex;
- The metal industry competency standards are an objective and gender neutral mechanism for measuring the relative competencies of job requirements and the individuals who perform those jobs, but they do not provide a means of assessing other relevant attributes such as elements of responsibility that are not skill-related, the nature of the work, and the conditions under which work is performed. Also, they are not the only means of providing an objective judgement of the factors which may have a place in an overaward system of remuneration such as timekeeping, productivity and individual merit; and
- In the absence of agreement, the appropriate method of evaluating “equal value” is to apply the criteria of work value, as described in the current wage fixing principles.

98. The AMWU’s application was rejected.

99. After Simmonds C had handed down his decision, the AMWU immediately renewed its application on work value grounds. The new application was dealt with by Munro J and a procedural decision was handed down on 19 May 2008 (*AFMEPKIU and HPM Industries*, Print Q1002). In this decision His Honour analysed in some detail the relevant provisions of the *Workplace Relations Act 1996*.

100. The views expressed by His Honour in his decision included:

- *“..the carriage of a section 170BD application rests upon the applicant union. It may be assumed that an applicant's case may be struck out if a proper case is not established on the face of the evidential matters and considerations that it seeks to prove.”* (para 13)
- *“...there must at least be a clear and relatively complete depiction and hopefully finding about both the "work" of the employee(s) to be subject to the order, and the "comparator" work of equal value. Upon the relevant two sets of work content being established, the valuation and relative equivalence of them will need to be established. That forensic task involves a requirement to persuade the Commission of both the validity of an evaluation principle to be used and of the equivalence of value of the work resulting from the application of it.”* (para 17)
- *“...it will be open to the Commission member concerned to adopt any method of evaluation that he or she may hold to be adequate and effective in persuading the member to be satisfied about the fact that the relevant work is of equivalent value. As Simmonds C stated in his decision on 4 March 1998, the Commission's principles and practice related to work value comparison and changes are a primary source of guidance about what factors and considerations are of accepted relevance to such evaluation. However, experience of work value cases suggests that work value equivalence is a relative measure, sometimes dependent upon an exercise of judgment. A history of such cases would disclose that a number of evaluation techniques have been applied for various purposes and with various outcomes from time to time.”* (para 18)

101. In *AFMEPKIU and David Syme* (Print R5199, 26 May 1999), Whelan C reached the following conclusions about the equal remuneration provisions of the *Workplace Relations Act 1996*:

“[24] In the 1972 Equal Pay Case [147 CAR 173] the Commission stated, "We have in this country built up over the years a system of work evaluation not inconsistent with job evaluation." That Bench went on to establish a principle of "equal pay for work of equal value" which required that female rates be determined by work value comparisons without regard to the sex of the employees concerned. As noted by both Simmonds C and Munro J the Commission's principles and practice related to work value comparison and changes are a primary source of guidance about what factors and considerations are of accepted relevance to evaluating whether the relevant work is of equivalent value.

[25] The terms of the Convention provide that equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex. The words of the Convention do not suggest that the only comparisons acceptable are those which compare the work being performed by males with that being performed by females. Indeed it is clear that the issue is not who performs the work but the basis upon which the rates have been established.

[26] The Equal Pay for Work of Equal Value principle, as an example, recognised that work value comparisons could be made between a number of different comparitors:

"Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and/or comparisons of work value between female classifications in different awards. In some cases comparisons with male comparisons in other awards may be necessary." [147 CAR 173 at 180]

[27] It is for the applicant to establish on the evidence it determines to adduce that a proper case has been established upon which a s.170BC order should be made. It is also for the applicant to establish that the orders it seeks can both be founded on the evidence adduced and can reasonably be regarded as appropriate and adapted to giving effect to the particular Conventions and Recommendations cited. It would be wrong in my view to preempt the parameters of either s.170BC(3)(a) or s.170BC(3)(b) in the absence of the evidence which the applicant seeks to present.

[28] The onus is on the applicant to establish that for the employees which it seeks to have covered by the orders:

- (a) there is not equal remuneration for work of equal value;*
- (b) the rates of remuneration for these employees have not been established without discrimination based on sex;*
- (c) the orders proposed will ensure that for the employees covered by the orders, there will be equal remuneration for work of equal value.*

[29] How the applicant chooses to establish these elements is a matter for the applicant. The comments made by Simmonds C in the HPM case² may provide the applicant with some guidance but must be seen in their context which was in response to the way that the applicant in that matter chose to present their case. In this matter the applicant must persuade the Commission of both the validity of the evaluation principles and that those principles establish the appropriate work value equivalence for the employees it seeks to have covered by the orders.”

102. The abovementioned Tribunal decisions are of substantial assistance in identifying the approach which FWA should take in dealing with future applications for equal remuneration orders under the FW Act. This approach is explored further below.

12. How should the Tribunal deal with applications for equal remuneration orders?

103. It is Ai Group's primary submission that:

- The unions' application should be rejected as they are attempting to misuse the provisions of Part 2-6 of the FW Act in these proceedings by making an application for an equal remuneration order when their aim is to increase award rates (see Section 5 above); and
- The factual context of this case is not appropriate for the establishment of principles for future proceedings relating to applications for equal remuneration orders.

104. If Ai Group's primary submission is not accepted and the Tribunal decides to determine an appropriate approach for dealing with applications for equal remuneration orders under the FW Act, the following points are relevant.

105. Similar to the sensible and fair approach which FWA has adopted when dealing with numerous other matters under the FW Act, Ai Group submits that the Tribunal should be guided by the approach that it has formulated over the years in dealing with applications for equal remuneration orders (modified as necessary to reflect the new legislation).

106. The previous approach can be described as:

1. The onus of proof rests with the applicant.
2. The applicant must establish that the "work" of the employees to whom the order will apply, is equal to the "comparator" work.

3. Once the two sets of work have been established, the valuation and relative equivalence of them need to be established. This task requires that the Tribunal be convinced of the validity of the evaluation method used and the equivalence of value of the work resulting from the application of it.
4. Competency standards may provide an objective and gender neutral mechanism for measuring the relative competencies of job requirements and the individuals who perform those jobs, but they do not provide a means of assessing other relevant attributes such as elements of responsibility which are not skill-related, the nature of the work, the conditions under which work is performed, timekeeping, productivity and individual merit.
5. In the absence of agreement, the appropriate method of evaluating equivalence of value is to apply the criteria of “work value”, as described in the Tribunal’s wage fixing principles.
6. To establish that equal remuneration for work of equal value is justified it is necessary for the applicant to establish that the rates of remuneration have been established without discrimination based on sex.
7. Once the applicant has established that there is not equal remuneration for work of equal value, the applicant must establish that the orders proposed will ensure that, for the employees covered by the orders, there will be equal remuneration for work of equal value.
8. If all of the above requirements have been met, the applicant must convince the Tribunal that it is appropriate in the circumstances to make the order.

107. The Tribunal's work-value principle (as extracted from the 2005 Safety Net Review Decision, PR002005) is:

“6. WORK VALUE CHANGES

- (a) *Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.*

In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.

- (b) *In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed (s.88B(3)(a)).*
- (c) *Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.*

- (d) *The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the August 1989 National Wage Case decision (August 1989 National Wage Case) [Print H9100; (1989) 30 IR 81].*
- (e) *Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.*
- (f) *Where the tests specified in (a) are met, an assessment will have to be made as to how that alteration should be measured in monetary terms. Such assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work.*
- (g) *The expression “the conditions under which the work is performed” relates to the environment in which the work is done.*
- (h) *The Commission will guard against contrived classifications and over-classification of jobs.*
- (i) *Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other principle of this Statement of Principles, will not be taken into account under this Principle.*

108. The Tribunal’s work-value principle emphasises that any applications for wage increases must be vigorously tested and stresses the importance of not disturbing the relativities within and between awards, unless a change in work-value is clearly demonstrated.

109. The Tribunal's work-value principle is consistent with the definition of "*work value reasons*" in s.156(4) of the FW Act. Both definitions centre around the nature of the work, the level of skill and responsibility involved in doing the work, and the conditions under which the work is done.
110. Two specific issues which arise in the context of the FW Act are:
- Whether it is necessary for the applicant to prove that discrimination is involved in the setting of remuneration; and
 - The extension of the principle to work of "comparable value".
111. The Explanatory Memorandum for the *Fair Work Bill* states that:
- "1192. 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."*
112. Even though discrimination no longer needs to be proved as a threshold issue, the issue of whether or not discrimination is involved in setting rates of pay is a factor which may be relevant to the exercise of the Tribunal's discretion to make the order.
113. With regard to work of "comparable value", this concept can be readily incorporated into the approach which the Tribunal has developed to deal with applications for equal remuneration orders, as set out below.
114. Ai Group submits that the approach which the Tribunal should adopt in dealing with applications for equal remuneration orders under the FW Act is as follows (changes to the Tribunal's previous approach, as described above, are highlighted):

1. The onus of proof rests with the applicant.
2. The applicant must establish that the “work” of the employees to whom the order will apply, is equal or comparable to the “comparator” work.
3. Once the two sets of work have been established, the valuation and relative equivalence or comparability of them need to be established. This task requires that the Tribunal be convinced of the validity of the evaluation method used and the equivalence or comparability of value of the work resulting from the application of it.
4. Competency standards may provide an objective and gender neutral mechanism for measuring the relative competencies of job requirements and the individuals who perform those jobs, but they do not provide a means of assessing other relevant attributes such as elements of responsibility which are not skill-related, the nature of the work, the conditions under which work is performed, timekeeping, productivity and individual merit.
5. In the absence of agreement, the appropriate method of evaluating equivalence or comparability of value is to apply the criteria of “work value”, as described in the Statement of Principles attached to the 2005 Safety Net Review Decision, PR002005.
6. To establish that equal remuneration for work of equal value is justified it is not necessary for the applicant to establish that the rates of remuneration have been established without discrimination based on sex, but this factor may be relevant to the exercise of the Tribunal’s discretion to make the order.

7. Once the applicant has established that there is not equal remuneration for work of equal or comparable value, the applicant must establish that the orders proposed will ensure that, for the employees covered by the orders, there will be equal remuneration for work of equal or comparable value.

8. If an application is made for an order covering all or a substantial part of an industry or occupation which is covered by a modern award, any order made must be justified on work value grounds and must be consistent with the modern awards objective and the minimum wages objective.

9. If all of the above requirements have been met, the applicant must convince the Tribunal that it is appropriate in the circumstances to make the order.

10. In deciding whether to make an equal remuneration order, FWA must take into account orders and determinations made by the Minimum Wage Panel in annual wage reviews and the reasons for those orders and determinations.

13. Equal pay cases before State Industrial Commissions

115. The unions are endeavouring to convince the Tribunal to place great weight on the NSW Pay Equity Inquiry conducted by Glynn J of the New South Wales Industrial Commission and the QLD Pay Equity Inquiry and subsequent SACS State Award case conducted by Commissioner Fisher of the Queensland Industrial Relations Commission. With respect to Glynn J and Commissioner Fisher, these State proceedings have far less relevance to FWA's deliberations than the decisions made over the years by the federal Tribunal and the approach which it has developed.
116. The legislation which applies in NSW and QLD is very different to the FW Act and the *Workplace Relations Act 1996*. For example, under the *Industrial Relations Act 1996 (NSW)* and the *Industrial Relations Act 1999 (QLD)*:
- Awards have a much broader role than under the federal legislation;
 - There has been less emphasis on the need for consistency across the wage and classification structures in different awards, than under the federal system;
 - There is less emphasis on enterprise agreements than under the federal system;
 - There is no low-paid bargaining stream; and
 - State IRC Members have wide arbitration powers.
117. With regard to the proceedings relating to the *Queensland Community Services and Crisis Assistance Award 2008*, these proceedings post-dated the WorkChoices legislation and therefore a NAPSA was not derived from this award. The award has never applied to constitutional corporations or other employers covered by the National workplace relations system.

118. It is not surprising that during the award modernisation process the Full Bench apparently took the view that the provisions of the SACS Industry NAPSAs in QLD were more relevant when determining the wage rates and classifications for the SACS Modern Award, than the provisions of the *Queensland Community Services and Crisis Assistance Award 2008*.
119. The unions have made no secret of the fact that the current proceedings are an attempt to have the rates from the *Queensland Community Services and Crisis Assistance Award 2008* reflected in the SACS Modern Award. They have organised protest marches and initiated letter writing campaigns to politicians. They have generated publicity but this should not distract the Tribunal from ensuring that the application is subjected to the rigorous scrutiny that is warranted, particularly given the sweeping nature of the order and the large wage increases sought.

14. Gender pay equity is a complex issue and the Tribunal is not well-placed to implement community wide solutions

120. Ask almost anyone and they will agree that there should be equal remuneration for work of equal value but beyond this general principle there are many different views and perspectives on the problems and the solutions.
121. These days most employers are strongly committed to gender equality and they genuinely want to be involved in implementing initiatives in this area. It is widely accepted that across the community there are too few women in senior management roles and on Boards and most employers have taken some positive steps to improve gender equality.
122. Australia has tough laws at the federal and state levels which prevent discrimination on the grounds of sex, and we have the *Equal Opportunity for Women in the Workplace Act* and Agency which play an important role.
123. Also, from July 2010 the ASX Corporate Governance Council has changed its *Corporate Governance Principles and Recommendations* which include a recommendation that entities listed on the ASX disclose in their annual report their achievement against gender objectives set by their Board, and disclose the proportion of women on the Board, in senior management and employed throughout the organisation. This is a positive initiative which Ai Group supported.
124. There are many dimensions to the topic of gender pay equity, including:
- The fact that the gender pay gap is small while employees are young and increases during working lives;

- The fact that the problem largely exists in market rates, not minimum award rates;
- The fact that the gender pay gap increases at higher education and skill levels; and
- The fact that the problem has as much to do with the unequal load carried by women and men in the home as it does with their role in the workplace.

125. A Witness Statement of Professor Deborah A. Cobb-Clark is included as **Annexure 2**. Professor Cobb-Clark is recognised internationally as an expert on gender pay equity matters.

126. Professor Cobb-Clark's research shows that:

- The reasons for the gender wage gap in a particular industry or occupation are complex and multi-faceted, and differ between low-paid and higher-paid workers;
- Differences in pay between lower paid men and women are much more a matter of differences in the "productivity characteristics" of the population than of gender *per se*;
- In Australia occupational segregation seems to improve rather than undermine the relative wages of women;
- There is little relationship between the size of the gender wage gap and the extent to which an occupation employs a high proportion of men or women;
- Women have lower wages on average not because they work in different occupations than men do, but rather because they earn lower salaries than their male colleagues employed in the same occupation;

- There is no single explanation for occupational segregation in the Australian labour market. It is unclear whether the propensity for women and men with similar skills to be employed in particular occupations results from differences in the preferences of men and women for certain occupations or from the hiring behaviour of employers.
127. Professor Cobb-Clark's research indicates that raising minimum wages for an occupation because employees in another occupation are on average more highly paid is unlikely to significantly reduce the gender wage gap.
128. Gender pay equity is a complex issue. While FWA plays a vital role in the community, the Tribunal is not well-placed to implement community wide solutions to address gender pay equity problems.

15. The elements of the unions' proposed order

129. As explained above, the order which the unions have applied for is based upon the provisions in a QLD State Award which has only ever applied to non-corporations. We submit that the order sought is manifestly inappropriate and would dramatically increase the wage rates payable in this sector.

130. The proposed order if granted would:

- Result in minimum wage rates between 15% and 50% higher than the rates in the SACS Modern Award, depending upon the classification;
- Establish wage rates which operate as a default safety net and have no relationship or correlation to the modern award safety net created by the Tribunal;
- Implement different classification descriptors resulting in widespread reclassification of employees to higher levels with consequential additional large wage increases;
- Introduce an incremental increase process within the classification structure which removes the requirement to attain particular competencies to achieve higher wage rates;
- Establish loaded wage rates for certain continuous shiftworkers which are then to be used for calculating other entitlements under the SACS Modern Award including overtime; and
- Introduce new “sleepover” provisions which, in addition to substantially increasing the costs of such arrangements, would impose conditions on employers which are entirely unrelated to equal remuneration.

Lack of correlation with the modern award safety net

131. If the Tribunal was to grant the orders sought by the unions those orders would, pursuant to section 306 of the FW Act, entirely override the wages and classifications in the SACS Modern Award and operate as a default wage safety net for employees in the SACS Industry.
132. Given the significant increases in wage rates prescribed by the order, Ai Group is concerned that such an outcome could have serious implications for the stability and maintenance of the modern award safety net, as explained in Section 6 above.
133. From 1989, classifications, relativities and wage rates in the federal award system have been based around the notion that the C10 rate should be used as an anchor around which other rates are determined. Minimum rates have been required to be properly fixed. These notions are still embedded within modern awards.
134. The wage rates specified in the unions' draft order appear to have no correlation to these notions. Clause 6.8 of the unions order states:
- “6.8** *For the purpose of the Social, Community, Home Care and Disability Services Industry Award 2010 the “standard rate” is a Community Services Worker level 3 pay point 3.”*
135. The weekly rate for a CSW level 3, pay point 3, employee under the unions' draft order is \$907.82, an amount that is \$244.22 or 36.8% higher than the current C10 rate. Indeed even the lowest rate in the unions' draft order, the CSW Level 1, pay point 1, which applies to an employee with “no qualifications”, “direct supervision” and “no scope for interpretation” is \$38.05 or 5.7% higher than the C10 rate.

136. If the unions succeed with their claim, similar claims could be pursued in every industry where the majority of employees are female. The eventual outcome could be that minimum wage rates in industries where mostly females are employed are much higher than minimum rates in industries where the majority of employees are males or where there is an even segmentation of males and females.

Reclassification

137. Particularly at the lower levels of the classification structure proposed by the unions, seemingly arbitrary movement of qualifications necessary for attainment of a classification has been adopted in lieu of the qualification framework contained within the SACS Modern Award. This movement has the compounding effect in many cases of providing employees not only with a wage increase as a result of the increase in minimum rates, but additionally a second increase due to higher reclassification in accordance with the qualification pre-requisites.

138. The following table illustrates the manner in which qualification adjustments affect classification as compared to the SACS Modern Award:

Qualification	Classification - Union Order	Classification - SACS Modern Award
Certificate III	CSW2 (pay point 3)	CSW2 (pay point 1)
Certificate IV	CSW3 (pay point 1)	CSW2 (pay point 2)
Diploma	CSW3 (pay point 2)	CSW2 (pay point 1)
3yr Degree	CSW3 (pay point 3)	CSW3 (pay point 2)
4yr Degree	CSW3 (pay point 4)	CSW3 (pay point 3)
3yr Degree (2yrs exper.)	CSW4	CSW4
4yr Degree (1yr exper.)	CSW4	CSW4
Post Grad	CSW6	CSW6

139. We submit that there is no basis for the realignment of qualifications to classifications. Indeed, even if there was a basis for reviewing the allocation of qualifications to particular classifications, such a claim is not properly advanced through an equal remuneration application. Instead it is a matter that should be dealt with via an application to vary the SACS Modern Award.

Wage increases without attainment of competency

140. In addition to seeking elevation of remuneration through an arbitrary realignment of qualifications with classifications, the unions' draft order removes the requirement which is present in the SACS Modern Award for demonstrated competency before advancement to the next pay point within a classification. Clause 13.3 of the SACS Modern Award expresses that requirement in the following terms:

“13.3 Progression

(a) *At the end of each 12 months' continuous employment, an employee will be eligible for progression from one pay point to the next within a level if the employee has demonstrated competency and satisfactory performance over a minimum period of 12 months at each level within the level and:*

(i) *the employee has acquired and satisfactorily used new or enhanced skills within the ambit of the classification, if required by the employer; or*

(ii) *where an employer has adopted a staff development and performance appraisal scheme and has determined that the employee has demonstrated satisfactory performance for the prior 12 months' employment.”*

(Emphasis Added)

141. The terms of the unions' draft order make no reference to competency as a prerequisite for advancement and instead states:

"5.3.1 An employee shall not move from one paypoint to the next paypoint within the classification level contained within Schedules 1 and 2 until:

(a) Either

- (i) in the case of a full-time employee, that employee has been paid at the same rate for 12 months; or*
- (ii) in the case of a part-time employee, that employee has worked 800 ordinary hours and been paid for 12 months on that paypoint."*

142. This removal of the pay point progression requirements is not even consistent with the terms of the *Queensland Community Services and Crisis Assistance Award – State 2008* upon which the unions' order is supposedly based as it too requires attainment of competence before progression to the next pay point:

"5.7.1 An employee shall not move from one paypoint to the next paypoint within the classification level contained within Schedules 1 and 2 until:

(a) Either

- (i) in the case of a full-time employee, that employee has been paid at the same rate for 12 months; or*
- (ii) in the case of a part-time employee, that employee has worked 800 ordinary hours and been paid for 12 months on that paypoint. and*

(b) the employee has given satisfactory service over the preceding 12 months; and

- (c) *the employee has, on assessment, acquired and is required by the employer to utilise new and/or enhanced skills within the ambit of the level definition for their position or other skills where agreed at the staff development/performance review, and this has been certified in writing following, and as part of, the assessment process.*

(Emphasis Added)

143. As can be seen from the above extract, whilst the unions' proposed order reproduces the first portion of the Queensland award's incremental progression provision, the significant part which requires attainment of competence has been entirely omitted. There is no evidence of a justification for this result in the submissions of the unions.
144. The separation of competence from increases in remuneration within a classification has no legitimate relationship to claims for equal remuneration and no merit. Indeed, it merely serves as a mechanism to further inflate rates of pay with nothing other than length of service as a criteria.

Loaded ordinary rate as a basis for other modern award entitlements

145. The unions' draft order seeks to introduce wage rates for Crisis Accommodation Workers (Levels 1 -3) who are continuous shiftworkers. These rates are identified as "Category B" rates and represent a loading of 8.81% on the wage rates sought for Crisis Accommodation Workers who are not continuous shiftworkers.
146. In accordance with Clause 6.6 of the unions' draft order, these rates are to be used *"to calculate all other employee entitlements as provided for in the relevant award or other instrument applying to the employee."*

147. As a result, the Category B loaded rate, if granted, would be used as the basis for calculating such entitlements as an employee's overtime rate under the award⁴. The loading of overtime in this manner is entirely inconsistent with established industrial law. Furthermore, this substantial variation to the manner in which a shiftworker's overtime rate is to be calculated is not related to questions of equal remuneration as indeed the Category B classification is only of limited application to the sector.

Sleepover arrangements

148. Ai Group submits that the introduction of new sleepover provisions within the unions' draft order represents a blatant attempt to circumvent the modern award variation provisions of the FW Act under the guise of an equal remuneration order.

149. Not only is it difficult to conceive of the manner in which a provision which would have application to a limited number of employees in the sector would result in greater wage equality, but moreover the vast majority of what is sought under Clause 7 – Sleepover of the unions' draft order relates to restrictions or limitations on the introduction of sleepover arrangements which have no relationship to remuneration for employees. For example:

- Clause 7.2 precludes an employee from having to perform sleepover work where an employee *“could not be expected to have a reasonable night's sleep”* or *“would be put at risk if sleeping or woken from sleep during a sleepover”*;
- Clause 7.3 articulates the steps required by an employer to *“enable the employee to have a reasonable night's sleep”*;

⁴ The Note beneath the table of wage rates which features on page 10 of the union's application states:

“NB: Category B rates include all penalties except overtime and public holiday and apply to those workers defined in Schedule B as a continuous shift worker.”

- Clause 7.4 identifies the conditions which must be present for a sleepover to occur including, the requirement for mutual agreement for a sleepover shift, the commencement and ceasing time of the sleepover, the maximum duration of the sleepover, the interaction between a sleepover shift and another work shift;
- Clause 7.5(e) which stipulates that an assessment of suitability of an employer's premises must be undertaken prior to the introduction of a sleepover shift;
- Clause 7.5(f) directs the employer and employee to use the dispute settlement procedure in the SACS Modern Award if there is a dispute in relation to implementation; and
- Clause 7.5(g) prescribes the manner in which leave entitlements should accrue for an employee who is working sleepover shifts.

150. Indeed, with the exception of Clause 7.5(a)-(d) the entirety of Clause 7 of the unions' draft order is irrelevant to the question of an employee's remuneration.

151. We contend that Clause 7 is nothing more than a thinly veiled attempt to achieve variation to clause 24.7 of the SACS Modern Award without being required to discharge the obligations imposed by section 157 of the FW Act.

Impact of the cost increases

152. Ai Group submits that the large increases in wages and conditions sought by the unions could lead to substantial job losses in the SACS industry and a significant reduction in services to the community.

153. Job losses would have a harsh impact on SACS workers. Reductions in services would have a harsh impact on many vulnerable people who rely on the services provided by organisations in the social, community and disability services sector.

154. It is unlikely that the unions will obtain a guarantee of increased funding from the Federal Government plus **every** State and Territory Government. Even if such commitments were given:
- Governments change from time to time and government policies can change at any time;
 - Many employers in the SACS industry operate with a mix of Federal and/or State Government funded programs and other programs which are commercial in nature or funded from other sources (eg. donations).
155. Accordingly, even if a guarantee of funding is secured from every Government, the risk of job losses and reductions in services would not be removed.
156. Also, as outlined in Section 7, if the Tribunal decides to make the order which the unions have applied for, there will be little or no space left for enterprise bargaining in the SACS industry, and this would reduce opportunities for productivity and efficiency improvements.
157. These outcomes conflict with the objects of the FW Act.
158. For all of the reasons set out in this Outline of Contentions, the Tribunal should reject the unions' application.