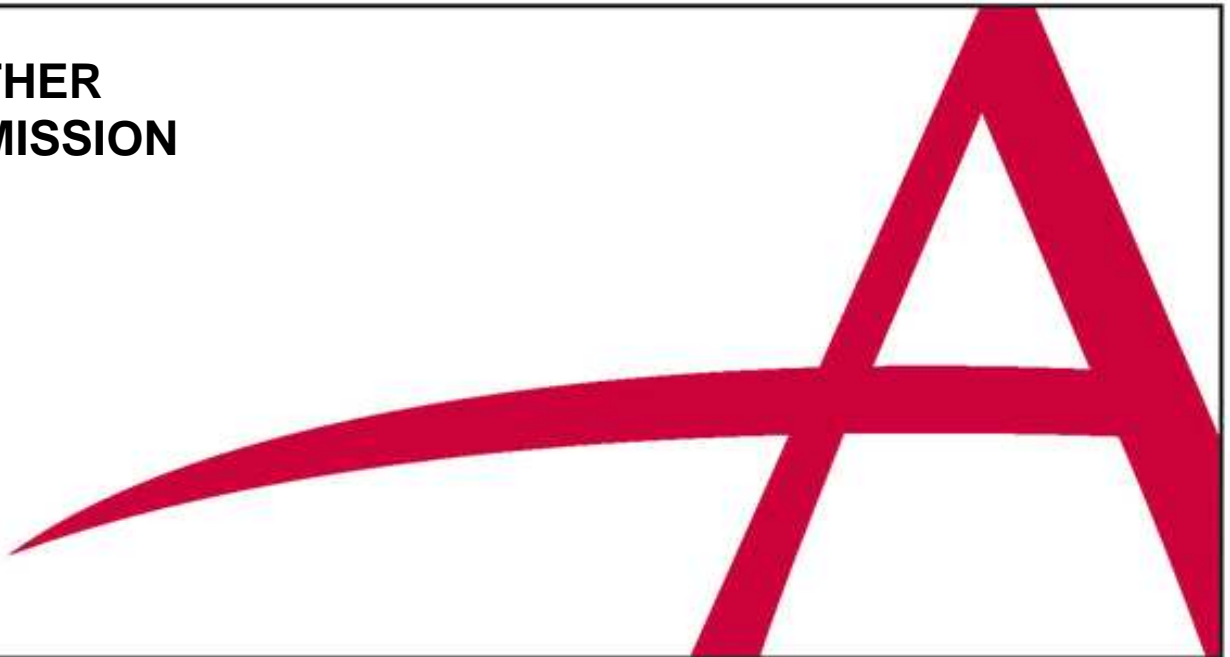


**FURTHER
SUBMISSION**



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

 **AUSTRALIAN INDUSTRY GROUP**

29 July 2011

Table of Contents

<i>Section</i>		<i>Page</i>
1	Introduction	3
2	The nature of the alterations, if any, that should be made to the classifications and associated wage rates in the SACS Modern Award	7
3	The extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations	17
4	The amount or amounts, either dollar or percentage, to be included in any equal remuneration order and estimates of the cost	34
5	The phasing-in of any equal remuneration order and the effect of such phasing on the transitional provisions in the modern award	37
6	The form of any equal remuneration order	40
7	Whether the quantum in any equal remuneration order should be included in the SACS modern award	45

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

1. INTRODUCTION

1. The Australian Industry Group (Ai Group) has filed a number of comprehensive submissions in these proceedings. These submissions are dated:
 - 6 August 2010;
 - 15 December 2010;
 - 28 March 2011.
2. In addition, we have filed evidence in the form of two witness statements from Professor Cobb-Clark - a recognised international expert on pay equity.
3. Further, we have made submissions at the Full Bench hearings and are currently participating in a conciliation process with Commissioner Smith.
4. Throughout these proceedings we have argued, amongst other matters that:
 - Ai Group supports the principle of equal remuneration for work of equal or comparable value and the quest to improve gender equity in the workplace;
 - It is essential that the Tribunal adopt a very careful, methodical and rigorous approach in:
 - Determining whether to make an equal remuneration order, and, if so, the terms of such order; and

- Determining whether the rates of pay in the SACS award properly reflect the value of the work and, if not, the terms of any award variation;
 - It is vital that the role of the award system in providing a genuine safety net of fair, relevant and enforceable minimum terms and conditions, is not undermined; and
 - The important role of enterprise bargaining in delivering productivity improvements and enterprise-specific wages and conditions, must be preserved.
5. Ai Group welcomes the wise and careful approach taken by the Full Bench in issuing a decision on 16 May 2011 setting out certain conclusions, ruling upon various jurisdictional and other issues, and seeking further views on a number of important issues. In its decision, the Tribunal stated that the members of the Full Bench would be particularly interested to know the views of the parties on the following six matters:
1. The nature of the alterations, if any, that should be made to the classifications and associated wage rates in the *Social, Community, Home Care and Disability Services Industry Award 2010* (SACS Modern Award);
 2. The extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations, including how the amount of the gender related undervaluation of the work of the classifications in the industry should be calculated and concrete examples of that gender related undervaluation;
 3. The amount or amounts, either dollar or percentage, to be included in any equal remuneration order and estimates of the cost;
 4. The phasing-in of any equal remuneration order and the effect of such phasing on the transitional provisions in the modern award;

5. The form of any equal remuneration order, including whether it should specify the particular wage rates that are to apply to the classifications in the modern award, or a monetary or percentage addition to the wage rates for the classifications in the modern award and whether it should provide for salary packaging and absorption of any overaward payments; and
 6. Whether the quantum in any equal remuneration order could or should be included in the modern award having regard, amongst other things, to the operation of the better off overall test.
6. These six issues are considered in this submission. In summary our position is:
- No alterations should be made to the modern award, with one possible exception. If the Tribunal is satisfied that an error was made during award modernisation in translating the rates for graduates from pre-modern awards, such error could be addressed under s.160 of the *Fair Work Act*.
 - Including the quantum of any equal remuneration order in the SACS Modern Award would distort and destabilise Australia's modern award safety net.
 - Ai Group has not put forward a specific amount to address the gender inequality which the Tribunal has found to exist but has put forward a comprehensive analysis to assist the Tribunal to determine an appropriate amount.
 - The unions have failed to make any meaningful attempt to undertake the tasks given to the parties by the Full Bench. Their submissions on remedy conflict with their own evidence and submissions in the case.

- Increased rates of pay for SACS workers should be phased-in over a minimum of five years, to reduce the risks that will arise from any substantial increase in minimum rates of pay.
- Ai Group has put forward a detailed proposal for the form of the equal remuneration order which includes a phasing approach which draws upon the Tribunal's model transitional arrangements for modern awards.

2. THE NATURE OF THE ALTERATIONS, IF ANY, THAT SHOULD BE MADE TO THE CLASSIFICATIONS AND ASSOCIATED WAGE RATES IN THE SACS MODERN AWARD

7. Except in the circumstances identified in s.160 of the *Fair Work Act* (ie. to remove an ambiguity, uncertainty or to correct an error), the SACS Modern Award can only be varied if the variation meets the requirements of s.157 of the Act (and of ss. 134 and 284, which are referred to in s.157), including the requirements that:

- the variation is necessary to achieve the modern awards objective;
- the variation of modern award minimum wages is justified by work value reasons; and
- the variation of modern award minimum wages is consistent with the minimum wages objective.

8. At paragraph [261] of its May 2011 Equal Remuneration Decision, the Full Bench said:

“[261] We deal first with the applicants’ submission that the minimum wages in the modern award do not properly reflect the value of the work. Given the basis on which minimum rates are fixed, it is not possible to demonstrate that modern award wages are too low in work value terms by pointing to higher rates in enterprise agreements, or in awards which clearly do not prescribe minimum rates. In order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards. No real attempt has been made to deal with those important issues.”

(Emphasis added)

9. As highlighted by the Full Bench in the above paragraph, the applicant unions have failed to meet the legislative requirements for varying the SACS Modern Award.
10. The requirements of s.157 of the Act, so as to justify a variation to the SACS Modern Award, have not been met by any party involved in these proceedings.
11. Further, given the nature of these proceedings as an application for an equal remuneration order rather than an application for an award variation, we submit that it is not appropriate for the Tribunal to act on its own initiative and vary the SACS Modern Award under s.157 of the Act.
12. Whilst these proceeding have considered the principle of equal remuneration for work of equal or comparable value and the need to encourage collective bargaining, there are numerous other mandatory considerations under s.157 (and of ss. 134 and 284, which are referred to in s.157) which have not been adequately focussed upon in these proceedings, including:
 - Relativities with the structures and rates in other awards (as referred to in paragraph [261] of the Tribunal's May 2011 Equal Remuneration Decision);
 - Whether the variation is justified by work value reasons (s.157(2)(a));
 - Relative living standards and the needs of the low paid (ss.134(1)(a) and 284(1)(c));
 - The need to promote social inclusion through increased workforce participation (ss.134(1)(c) and 284(1)(b));
 - The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d));

- The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and
 - The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g));
 - The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)); and
 - The performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth (s.284(1)(a)).
13. At paragraph [229] of its May 2011 Equal Remuneration Decision, the Full Bench concluded that ss.134 and 284 “*have no direct application to these proceedings*”. This reinforces the argument that the award should not be varied under s.157 as an outcome of these proceedings.

Ai Group’s position on the Australian Government’s arguments regarding graduate wage rates

14. At paragraph [262] of its May 2011 Equal Remuneration Decision, the Full Bench discussed the submission made by the Australian Government that the rates for graduates in the SACS Modern Award may not have been properly translated from predecessor awards.
15. No party has filed an application to vary the rates for graduates in the award and we submit that the Tribunal should not vary the award on its own initiative unless it is satisfied that an error has been made or the variation otherwise complies with s.160 of the Act. A variation under s.157 is not appropriate for the reasons outlined above.

16. With regard to whether or not an error has been made and a variation under s.160 is warranted, Ai Group provides the following observations to assist the Full Bench:

- The Australian Government has identified that the current paypoint in the SACS Modern Award for a social and community services graduate with a 4 year degree is paypoint 3.3 and that this should instead be 3.4.¹
- The wage rates and classification structure in the SACS Modern Award were largely adopted from the *Social and Community services (Queensland) Award 2001* (Federal SACS QLD Award).²
- The Federal SACS QLD Award set the entry level rate for a social and community services worker with a 4 year degree at paypoint 3.4. Despite this, the Modern Award set the same qualification at paypoint 3.3. The AIRC Full Bench did not explain the reason for the difference in the entry level paypoints for degree qualified social and community service workers but the change can be traced back to the first exposure draft of the SACS Modern Award published on 25 September 2009.
- During the award simplification process, His Honour Senior Deputy President Cartwright determined that a social and community services graduate with a 4 year degree was comparable to a 4 yr science and engineering graduate covered by the former *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998* and that accordingly the wage rates should be set at 130% above the C10 rate.

¹ See the Australian Government submission filed 18 November 2010

² *Award Modernisation* [2009] AIRCFB 865 at [101]

- Professional engineers and scientists in the metal industry are now covered by the *Professional Employees Award 2010*. The minimum rate for an engineer or scientist with a 4 year degree under the award is set at paypoint 1.2 and is expressed as a salary of \$42,022 per year. When compared to the equivalent paypoint for the 4 year degree level under the SACS Modern Award (being paypoint 3.3 with an annual salary of \$40,913.60) the difference between the rates is approximately 2.7%. However, when the same analysis is conducted using paypoint 3.4 in the SACS Modern Award, the difference is much less, at 0.7%, suggesting that the current entry level paypoints for degree qualified workers in the SACS Modern Award may have been incorrectly transferred from the pre-modern award.
- However, we note that during the award modernisation process the AIRC integrated crisis accommodation employees into the social and community services employee wage rate structure and took into account qualification levels during this process.³ The Full Bench relied on wage rates and classification definitions from the federal *Crisis Assistance Supported Housing (Queensland) Award 1999*. This award set the wage rate for a crisis accommodation employee with a 4 year degree at paypoint 1.2 (relativity 120%). In contrast, the Federal SACS QLD Award placed employees with a four year degree at paypoint 3.4 (relativity 130%). This might explain why the Full Bench placed SACS employees with a four year degree (including crisis accommodation employees and other employees) at paypoint 3.3, rather than 3.4.

³ *Award Modernisation* [2009] AIRCFB 865 at [102]

Ai Group's position on the Applicant's argument that the rates in the SACS Modern Award have not been subject to work value considerations

17. In the Applicants' February 2011 submissions, they argue that the wage rates in the pre-reform awards on which the rates in the SACS Modern Award were based, had not been subject to work value considerations.⁴ This is not correct.
18. The classifications and wage rates within the SACS Modern Award are primarily based upon the Federal SACS QLD Award.⁵ This award was reviewed by His Honour Senior Deputy President Cartwright as part of the award simplification process in 2001 and 2002.⁶ Other federal awards applying in Victoria⁷, the ACT⁸, the NT⁹ and WA¹⁰ were also reviewed during this process.
19. Cartwright SDP held that the wage rates in each federal award were not properly set minimum rates. His Honour adjusted the rates on the basis that the key classification in the federal SACS awards, being a graduate social worker with a 4 year degree, was 130% of the C10 fitter rate in the *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998*.¹¹
20. In his review, Cartwright SDP applied the *principles for conversion of awards which do not contain properly fixed minimum rates* (Conversion Principles)¹² formulated by the Full Bench in the *Paid Rates Review* in 1998.¹³ The Full Bench in that decision said:

⁴ The Applicant's submissions dated 28 February 2011 at paragraph [277]

⁵ *Award Modernisation* [2009] AIRCFB 865 at [101]

⁶ *Social and Community Service (Queensland) Award 1996* - PR914950

⁷ *Social and Community Services - Victoria - Award 2000* - PR915831

⁸ *Social and Community Service (ACT) Award 2001* - PR918263

⁹ *Social and Community Services Industry - Community Services Workers - Northern Territory Award 1996* - PR920526

¹⁰ *Social and Community Services Industry - Community Services Workers - Western Australia Award 1996* - PR912428

¹¹ See above n. 3, 4, 5, 6 and 7

¹² See above n. 3, 4, 5, 6 and 7

¹³ *Paid Rates Review Decision* - Print Q7661

(a) Rates of Pay

We have decided that in principle all awards which provide for rates of pay which are not operating, or not intended to operate, as minimum rates and which do not bear a proper work value relationship to award rates which are properly fixed minima, should be subject to a conversion process so that they do contain properly fixed minimum rates of pay. We consider that the Act compels this conclusion. Item 51(4) refers to ss.88A, 88B and 89A(3). The following parts of those provisions are particularly important:

"88A *The objects of this Part are to ensure that:*

(a) wages and conditions of employment are protected by a system of enforceable awards established and maintained by the Commission; and

(b) awards act as a safety net of fair minimum wages and conditions of employment; and . . ."

88B *(1) The Commission must perform its functions under this Part in a way that furthers the objects of the Act and, in particular, the objects of this Part.*

(2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

(a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community; . . .

(3) In performing its functions under this Part, the Commission must have regard to the following:

(a) the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed; . . .

(d) the need to apply the principle of equal pay for work of equal value without discrimination based on sex;¹⁴

(Emphasis added)

21. It is clear from the above extract that the Full Bench took into account work value considerations and the principle of equal pay for equal work value into consideration when setting the Conversion Principles.
22. In reviewing the Federal SACS QLD Award, Cartwright SDP held that he was satisfied that the increase in the key classification relativity to 130% from 120% reflected a properly fixed minimum rate, which included a consideration of work value elements :

[19] As a result of my interim decision in relation to the relativity of the key classification, further hearing days were set down to resolve the conversion of the other rates in the award. With the assistance of the Commission in conference, the parties achieved a consent position to finalise the conversion of the rates of pay in accordance with the principles. The increase of the relativity of the key classification to 130% did not displace the internal relativities of the other classifications in the award. The impact of the change in relativity of the key classification was in 3 areas. Firstly, the entry pay point for graduates changed within the same classification from Level 3/paypoint 1 for a three year graduate to Level 3/paypoint 3 and from Level 3/paypoint 2 for a four year graduate to Level 3/paypoint 4. Secondly, the parties sought to vary the classification descriptors to ensure continuous progression is available to the next level for employees with graduate qualifications, after gaining required experience. Thirdly, an additional paypoint was added at Level 2 in recognition of the nature of the duties.

¹⁴ Ibid at section 13

[20] *I am satisfied that the proposed variations will result in a classification structure with integrity and which is consistent with the Commission's current wage fixing principles. Equally, I am satisfied that the proposed variation is consistent with the Award Simplification Principles and the Conversion Principles. Accordingly, I have decided to vary the award in the terms sought, either under item 51(5) or, to the extent required, of my own motion under section 113.*

[21] *Apart from the changes specifically identified in para [19] above, I have adjusted all the other rates in the Award according to the internal relativities established when the award was made in 1996. The wage rates in the Award were then increased to account for subsequent safety net adjustments. In this regard I note that the rates of pay in the award include the 2001 safety net adjustment. I am satisfied that the wage rates contained in the simplified award are properly fixed minimum rates. Finally, I compared these properly fixed minimum rates to the existing rates. As the properly fixed minimum rates are higher than the existing rates, it is unnecessary to identify residual amounts.*

[22] *The award contains increments. I have reviewed the form of the mechanism for progression and I am satisfied that it is not simply service based but rather includes the element of work-value required by the Full Bench in the Paid Rates Decision. On this basis, I accept that the incremental paypoints in the award may be maintained.¹⁵*

(Emphasis added)

23. Notably, Cartwright SDP was assisted in his decision by the submissions of the ASU:

¹⁵ See above n. 3

[12] During the process of reviewing the rates in the Social And Community Service (Queensland) Award 1996 ("SACS(Qld) Award"), I received extensive submissions from the ASU concerning properly fixed rates of pay in other Awards for similar work to that covered by the Award. This evidence was primarily focused on the rates of pay for the entry points of degree qualified social workers. On the basis of submissions from the parties, as well as the considerable evidence led during the course of the proceedings, I reached the conclusion that that the appropriate relationship between a social worker with a four year degree and the metal industry C10 fitter was 130%. This accords with the approach adopted in the Professional Scientist classifications in the Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998 [AW797948] which are set at 125% and 130% for three year and four year degrees. The reasoning behind this conclusion can be found in my earlier decision [PR914950].¹⁶

(Emphasis added)

24. It is not correct to suggest that Cartwright SDP did not turn his mind to work value considerations when the federal SACS awards were reviewed during the award simplification process. The awards on which the SACS Modern Award was based had been adjusted to ensure that they contained properly fixed minimum rates that took into account work value considerations and equal pay for work of equal value.

¹⁶ See above n. 5

3. THE EXTENT TO WHICH WAGE RATES IN THE SACS INDUSTRY ARE LOWER THAN THEY WOULD OTHERWISE BE BECAUSE OF GENDER CONSIDERATIONS

The public sector comparator

25. Comparing wages and conditions between the public and private sectors is fraught with difficulty.
26. Over the years the Tribunal has recognised that it is not appropriate to base wages and conditions in the private sector on those in the public sector.
27. For example, in *CPSU V Employment National*¹⁷, a Full Bench of the AIRC said:

"In general we agree with these submissions. The APSA and its predecessors were developed over a long period and were designed to reflect the particular circumstances and needs of the APS and a significant number of the conditions of employment were inserted in the award by consent. The provisions of the APS awards were of necessity developed to cover a diverse range of services and functions across Australia involving a multiplicity of employment categories. Many of the provisions are either interrelated with various Public Service Acts or had their origins from these Acts and in other cases from particular public service disputes.

We have cited other provisions to demonstrate that it would be unfair to impose public service conditions created for the needs of the public service on an employer operating in a completely different environment. This is

¹⁷ Print R2508, 26 February 1999, Macbean SDP, Duncan DP, Jones C

particularly so when regard is had to the fact that many of the APSA provisions were originally introduced as part of consent arrangements.”

28. The Full Bench in its preliminary decision identified a range of factors, unrelated to gender, which were potentially relevant in understanding and explaining the wage gap between SACS employees and those performing comparable work in the public sector. These matters included:

- The peculiar circumstances of different enterprises;
- Relativities within the public sector;
- Restructuring;
- Productivity;
- Attraction issues;
- Retention issues;
- Cost of living factors;
- Industrial negotiations;
- Bargaining;
- Informal dispute settlements;
- Arbitrations;
- Historical fixations for paid rates awards;
- The general disposition of various governments;¹⁸
- Differences in the actual work performed;¹⁹ and
- Funding arrangements.²⁰

¹⁸ At [277]

¹⁹ At [280]

²⁰ At [281]

29. Furthermore, the evidence which was led in the proceedings clearly revealed that public sector employees carried a range of statutory responsibilities as part of their role which were separate and distinct from the responsibilities of SACS industry employees.
30. Unpacking these elements within a particular Government entity, or indeed for the public sector more broadly, is almost impossible given the diversity of arrangements in place. We submit however that there are a number of features more broadly within the public sector which go to explaining aspects of any wage gap between public and private sector employees and the identified gap for SACS employees.

Public sector premium

31. To the extent that a more generalised public vs private sector wage premium can be demonstrated, any identified gap between the public sector and the SACS industry should be reduced to account for this factor. We submit that given the diversity of work in the public sector any comparison against the private sector which shows a wage premium cannot, in the absence of confirming evidence, reasonably be held to be attributable to gender.
32. We contend that precisely such a public sector wage premium exists and furthermore, not only is there a range of empirical data which supports this contention, but analysis of some of the evidence which has been led in these proceedings supports the existence of such a premium.
33. The evidence of Professor Gabrielle Meagher (Exhibit ASU 1), whilst not included for the purpose of illustrating a public sector wage premium, identifies this phenomenon. Of particular note is the following table within her evidence:

Table 8: Average income per hour worked by sector of employment and occupational group, selected industries, Australia, 2006, dollars²¹

			Commonwealth, State and Local Government	Private sector	Public sector premium (penalty)
SACS	Care occs	Male	27.41	23.04	4.37
		Female	24.42	23.82	0.60
Other community services	Non-care occs	Male	29.27	25.11	4.16
		Female	29.57	24.22	5.35
	Care occs	Male	26.66	20.95	5.71
		Female	25.09	19.22	5.87
Other industries	Non-care occs	Male	29.25	26.28	2.97
		Female	27.25	21.98	5.27
	Care occs	Male	26.44	26.89	-0.45
		Female	26.45	25.74	0.71
	Non-care occs	Male	31.85	24.40	7.45
		Female	28.45	23.43	5.02

(Emphasis Added)

34. Professor Meagher in analysing this data stated:

“The table shows that with the exception of male care workers in industries other than community services (primarily health and education), there is a considerable ‘public sector premium’ on earnings.”²²

(Emphasis Added)

35. Despite making this concession, no further discussion of the ‘public sector premium’ on earnings and its possible effect on explaining the gap between wages is found in her evidence or the submissions of the Applicant.

²¹ Exhibit ASU 1; at Pg 31

²² Exhibit ASU 1; at Pg 30

36. We submit that the emphasised sections, which highlight the difference in wages enjoyed by males in the public sector in non-care occupations (i.e. those not experiencing a caring penalty nor presumably gender-based undervaluation) are indicative of the wage premium that exists for employees in the public sector.
37. This material although summarised at an aggregated level reveals a substantial wage premium attributable to work in the public sector. For males performing work in 'other industries' (i.e not in the SACS industry or other community services sector) the premium is in excess of 23% (\$7.45) against their private sector counterparts. For those in non-caring occupations connected to community services there is a premium of between 10% (\$2.97) to 14% (\$4.16).
38. These findings are consistent with a number of studies and literature which have considered the differences between public and private sector employment. The following table contained within an OECD report on public sector pay and employment illustrates this fact:

Table 8. Pay differentials in public and private sectors²³

(Ratio gross average earnings in the public sector/ gross average earnings in the private sector)

	1989	1990	1991	1992	1993	1994	1995	1996	1997
<i>Australia</i> ₂	1.21	1.18	1.20	1.24	1.24	1.26	1.23	1.22	1.27
<i>Canada</i> ₂	1.35	1.38	1.37	1.37	1.41	1.40	1.40	..	..
<i>Finland</i> ₂	..	1.04	1.04	1.04	1.04	1.04	1.03	1.04	..
<i>France</i> ₃	1.05	1.05	1.06	1.08	1.10	1.10	1.09	1.11	..
<i>Hungary</i> ₂	..	..	..	..	..	0.95	0.93	0.83	0.86
<i>Mexico</i> ₄	1.50	1.52	1.54	1.71	1.68	..	..	..	..
<i>Netherlands</i> ₂	1.15	1.13	1.14	1.16	1.15	1.16	1.10	..	..
<i>New Zealand</i> ₂	..	..	..	1.16	1.14	1.14	1.13	1.13	1.13
<i>Poland</i> ₂	..	..	..	..	..	1.12	1.09	1.09	..
<i>Portugal</i> ₄..	..	..	..	1.61	1.64	..	..	..	..
<i>Spain</i> ₂	1.27	1.26	1.29	1.30	1.27	1.22	1.23	1.24	..
<i>Switzerland</i> ₂	..	..	..	..	..	..	..	..	..
<i>United Kingdom</i> ₂	0.97	0.92	0.99	1.02	1.02	1.02	1.00	1.01	..
<i>United States</i> ₂	1.16	1.16	1.18	1.18	1.18	1.15	1.16	1.12	..

²³ *Public Sector and Employment Data Update – PUMA/HRM(98)2* 18 June 1998; at pg 29
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=PUMA/HRM\(98\)2&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=PUMA/HRM(98)2&docLanguage=En)

39. Contemporary Australia literature also supports this conclusion. Attached to this submission at **Attachment A** is an article published in the Australian Journal of Labour Economics which analyses the earnings gap between men in the public and private sectors. The findings of this study are particularly relevant given the fact that due to its focus solely on the remuneration of men, assertions that earnings in the public sector are elevated due to greater recognition of gender equality are not available.
40. In analysing the earnings of men in the public and private sector the study recorded that:
- On average men working in the public sector have a 9% premium applied to their wages once human capital elements are equalised;²⁴
 - The magnitude of the premium varies depending on where they sit in the earnings distribution:
 - Men with earnings at the 10th quantile of the earnings distribution have a premium of 20.8% on their earnings;²⁵
 - Men with earnings at the 50th quantile of the earnings distribution have a premium of 8.5% on their earnings;²⁶ and
 - Only men in the 80th and 90th quantile of earnings receive no premium from working in the public sector.²⁷
41. This generally accords with evidence led by Ai Group in these proceedings. Annexure B to the statement of Professor Cobb-Clarke (Exhibit AiG 1) contains the following table using HILDA data which identifies the wage gap between public and private sector employees based on gender and their position within the wage distribution.

²⁴ Pg 108

²⁵ Pg 110

²⁶ Pg111 - 112

²⁷ Pg 111 - 112

TABLE 1
Unconditional Gender Wage Gap across the Wage Distribution by Sector (in 2001 Dollars)

	<i>Wages in public sector</i>			<i>Wages in private sector</i>		
	<i>Woman</i>	<i>Man</i>	<i>Wage gap</i>	<i>Woman</i>	<i>Man</i>	<i>Wage gap</i>
<i>Mean</i>	20.96 (0.20)	23.82 (0.29)	2.86 (0.35)	17.20 (0.16)	20.82 (0.19)	3.62 (0.24)
<i>10th percentile</i>	13.01 (0.18)	14.78 (0.28)	1.77 (0.33)	10.96 (0.12)	11.88 (0.11)	0.92 (0.16)
<i>25th percentile</i>	15.78 (0.19)	18.07 (0.27)	2.28 (0.33)	13.07 (0.08)	14.44 (0.12)	1.37 (0.15)
<i>Median</i>	19.97 (0.23)	22.60 (0.28)	2.64 (0.36)	15.52 (0.11)	18.23 (0.19)	2.71 (0.22)
<i>75th percentile</i>	24.87 (0.28)	28.05 (0.35)	3.19 (0.45)	19.37 (0.24)	24.40 (0.34)	5.03 (0.42)
<i>90th percentile</i>	30.05 (0.36)	34.23 (0.66)	4.18 (0.75)	25.29 (0.43)	33.56 (0.59)	8.27 (0.74)

(Emphasis Added)

42. Focusing on the results attributable to males within the table (so as to counteract any arguments about gender equality in the public sector being responsible for the elevated rates) these figures, which were unchallenged in the proceedings, show that at all levels of the wage distribution, public sector employees receive a wages premium. Additionally, with the exception of employees at the 90th percentile, the premium is substantial ranging from 15.0% (75th percentile) to 25.1% (25th percentile).
43. The existence of a public sector premium is also supported by the *Trends in Federal Enterprise Bargaining* reports released by the Department of Education, Employment and Workplace Relations from the Workplace Agreements Database.²⁸ An analysis of the reports over a 10 year period from 2001 – 2010 (shown below) identifies a disparity between public and private sector rates of 6.23%.

²⁸ <http://www.deewr.gov.au/WorkplaceRelations/Pages/Reports.aspx>

Average Annualised Wage Increases for agreements lodged between 2001 and 2010											
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total increase ²⁹
PRIVATE SECTOR AAWI(%)	3.9%	3.7%	4.1%	4.0%	4.2%	3.9%	3.9%	4.2%	4.1%	3.9%	147.88%
PUBLIC SECTOR AAWI(%)	4.0%	4.3%	4.3%	5.1%	4.7%	4.5%	4.6%	4.3%	4.1%	4.3%	154.11%
											6.23%

44. This disparity was calculated using the average annualised wage increases in enterprise agreements lodged for each year between 2001 and 2010. The result clearly shows that public sector wage outcomes in enterprise agreements over the set period have resulted in public sector employees receiving a 6.23% premium over private sector employees.

45. Any assessment of the earnings of SACS employees against the earnings of employees in the public sector must take these matters into account and a substantial discounting of the public sector rates must be applied to account for the premium which is paid in the public sector. This premium is unrelated to gender.

Form of wage increases – enterprise agreements and the safety net

46. The gap between award rates of pay in the SACS industry and bargained rates in the public sector has focused the parties and the Tribunal's attention in the proceedings. FWA in its preliminary decision identified this as one of two principal propositions around which the Applicant's case was grounded:

²⁹ This number is derived from the compounded average of the wage increases year on year between 2001-2010

“[259] In considering whether an equal remuneration order should be made it is necessary to evaluate the two principal propositions on which the applicants’ case rests. The first proposition is that the wages and some other conditions in the modern award are inferior and that the order sought would rectify problems with the award structure and rates and the sleepover provisions...”

[260] Since the early 1990s wage fixation in the federal jurisdiction has been based on two dominant ideas. The first is the creation and maintenance of a safety net of minimum wages fixed by award. The second is a system of above-award bargaining, primarily at the enterprise level. Both elements of the system are important and there are fundamental differences between them. Generally speaking minimum rates in one award are not varied, other than in general wage reviews, except on grounds of relative work value... This approach to wage fixation, which has been developed over many years and has statutory recognition, contributes to the maintenance of stability in award relativities. It involves a strict separation between minimum wages and paid or market rates.”

47. In considering the gap between public sector enterprise agreement rates and the rates as set by the modern award safety net it is not only important, as the Full Bench has done, to consider the function of the safety net, but also the different mechanism by which rates have been increased at a safety net level compared to the mechanism that rates in public sector agreements have been increased by.
48. In the *Annual Wage Review 2009-2010 Decision* the Minimum Wage Panel made the following observation regarding the form of increases which had operated at the safety net level since 1993:

“[335] In considering the nature of the increase we are particularly conscious of the requirement that we ensure modern awards provide a fair and relevant minimum safety net. The history of adjustment of minimum wages in federal awards since the legislated introduction of enterprise bargaining in 1993 has been one of dollar increases rather than percentage increases. This has compressed relativities in the award classification structures. While the compression of relativities is an important issue in itself, a number of parties also submitted that it is desirable that the real value of minimum wages should be maintained throughout award structures, not just at the lower levels or at the level of the minimum wage. The fall in the real value of minimum wages at various award levels is demonstrated by Chart 5.2 set out in Chapter 5. Furthermore, there may be adverse implications for the incentive for employers to bargain if the gap between award wages and earnings is too big.”

49. This compression of relativities referred to by the Minimum Wage Panel has a significant effect in explaining the magnitude of the gap between the rates in the SACS Modern Award and those classifications which are identified as comparable in public sector enterprise agreements.

50. At a safety net level since 1993, minimum rates have been increased by a flat dollar amount. The rationale which has been advanced for such an approach in the relevant minimum wage decisions has been recognition of the needs of the low paid³⁰ including considerations around gender equality³¹. By comparison, wage increases provided for within public sector agreements have almost exclusively been via a uniform percentage increase which has been applied to each classification.

³⁰ *Annual Wage Review 2010-2011* [2011] FWAFFB 3400; at [219]
Safety Net Review 2005 [Print PR002005]

³¹ *Annual Wage Review 2009-2010* [2010] FWAFFB 4000; at [319]

2002	3.55%
2001	3.05%
2000	3.14%
1999	2.58%
1998	3.10%
1997	2.27%
1996	-----
1995	1.85%
1994	1.88%
1993	1.92%

54. Applying these percentage increases in lieu of the flat dollar increases, to the SACS Modern Award illustrates that for all classifications other than Level 1 (which is not subject to this application) the modern award rates would be increased. Indeed, the effect of the flat dollar increases to the modern award rates, in lieu of a percentage increase, are substantial particularly at the upper levels of the classification structure.

Modern Award Classification	Rates applying % increase	% difference to current Modern Award rates
Level 1 – Pay Point 1	\$603.41	-2.7%
Level 1 – Pay Point 2	\$632.99	-1.3%
Level 1 – Pay Point 3	\$668.88	0.0%
Level 2 – Pay Point 1	\$668.88	0.0%
Level 2 – Pay Point 2	\$701.61	+2.5%
Level 2 – Pay Point 3	\$737.46	+4.6%
Level 2 – Pay Point 4	\$767.10	+5.9%
Level 3 – Pay Point 1	\$767.10	+5.9%
Level 3 – Pay Point 2	\$799.82	+7.3%
Level 3 – Pay Point 3	\$832.45	+9.4%
Level 3 – Pay Point 4	\$856.72	+10.3%
Level 4 – Pay Point 1	\$889.43	+11.6%
Level 4 – Pay Point 2	\$922.19	+12.6%
Level 4 – Pay Point 3	\$954.91	+13.8%
Level 4 – Pay Point 4	\$984.52	+14.8%

Level 5 – Pay Point 1	\$1017.23	+15.8%
Level 5 – Pay Point 2	\$1049.98	+17.0%
Level 5 – Pay Point 3	\$1082.73	+17.9%
Level 6 – Pay Point 1	\$1115.46	+18.8%
Level 6 – Pay Point 2	\$1148.17	+19.6%
Level 6 – Pay Point 3	\$1180.90	+20.4%
Level 7 – Pay Point 1	\$1213.64	+21.1%
Level 7 – Pay Point 2	\$1246.35	+21.9%
Level 1 – Pay Point 3	\$1279.11	+22.6%
Level 8 – Pay Point 1	\$1311.83	+23.2%
Level 8 – Pay Point 2	\$1344.56	+23.9%
Level 8 – Pay Point 3	\$1377.29	+24.5%

55. Accordingly, we contend that a significant proportion of any identified gap between the rates paid to employees in the public sector and the rates paid in the SACS industry is attributable to the manner in which award wages have been varied. Such a matter is not connected to gender based undervaluation.

The Applicant's revised claim

56. The Tribunal's May 2011 Equal Remuneration Decision, importantly found that whilst there was a gap between the earnings received by SACS industry employees and those enjoyed by public sector employees performing comparable work, not all of the gap could be attributed to gender.³³

57. The task that the Full Bench gave to the parties was to identify and attribute value to the aspects of the gap which are not related to gender. The Tribunal's approach was both prudent and appropriately cautious, particularly given the observations made by the Full Bench about the complexity of the task³⁴.

³³ [2011] FWAFB 2700; ay [282]

³⁴ [2011] FWAFB 2700; at [282]

58. It is disappointing that the Applicants have seemingly seized upon this complexity and, in lieu of seeking to provide assistance to the Full Bench to navigate this difficult path, have recast their application and pursued an even higher outcome than that which was originally asserted as ‘necessary’ to ensure equal remuneration.
59. The Applicants have failed to make any meaningful attempt to undertake the task which the Tribunal gave to the parties. Indeed, the conclusion reached by the Full Bench that the gap in wages could not be solely ascribed to gender has been ignored by the Applicants and replaced with the assertion that ‘*all of the undervaluation is gender based*’³⁵.
60. In their submission of February 2011 the Applicants stated:

“519. Accordingly the primary submission by the applicants is that the rates of pay to SACS industry workers in Queensland are appropriate rates of pay for all workers as these rates will provide equal remuneration for work that is, beyond doubt, equal or comparable.

... ..

522. The comparators cover a majority, but not all, of the positions about which evidence has been given in these proceedings. As the purpose of the comparator evidence is to provide a framework, or context, for the Queensland rates, it was unnecessary to establish exactly matched comparators for every position. At the same time, the level of comparability at some positions is sufficient to indicate the relevance of the comparators to a consideration of equal remuneration based on equal or comparable work.”

(Emphasis Added)

³⁵ Applicants submission on Remedy; at [22]

61. Given the basis upon which the evidence was provided, it is untenable that the same evidence can now be proffered to justify increases up to 30% greater than that which was originally claimed. We submit that this fact alone illustrates that the Applicant's submission on remedy is disingenuous and reflective of an ambit position.

Relevant comparators and the weighted average

62. The Applicants' submission on remedy proffers a range of rates derived from a series of public sector instruments to establish what they contend are appropriate national rates for the work being performed in the public sector.

63. We submit that not only is the methodology used to calculate a national comparator disconnected from any rationale regarding gender inequality but additionally the instruments identified for the purpose of making such calculations are an artifice inconsistent with the Applicant's own evidence in the proceedings.

64. The Tribunal is required, in accordance with section 302(1) of the *Fair Work Act*, to only issue an order if it considers that this is appropriate to ensure that there will be equal remuneration for the employees for whom the order will apply. In arriving at this conclusion it is difficult to conceive of a situation where the number of employees that work in a given jurisdiction is relevant to such a question.

65. In the context of these proceedings, there is no basis for concluding that the rates in New South Wales are 31 times more relevant to establishing equal remuneration than the rates in the Northern Territory or almost four times more relevant than the rates in South Australia or Western Australia. Seen through this paradigm it is undeniable that the methodology adopted by the Applicants is fundamentally flawed.

66. In addition, we contend that any determination of rates for an equal remuneration order which relies on the instruments identified by the Applicants in their remedy submission is inappropriate and inconsistent with their own evidentiary case.
67. The Applicants tendered in the proceedings a series of statements from union officials which identified various public sector industrial instruments in which the rates exceeded those prescribed in the SACS Modern Award. The assertion being that these instruments illustrated undervaluation of the work of SACS employees.
68. The range of rates which were contained in these instruments was diverse and led the Tribunal to observe:

“[277] ... The comparisons are between the actual remuneration of employees in the SACS industry and the actual remuneration of certain public sector employees, accepting as we do that the wage rates in the Queensland SACS award and the transitional pay equity order have their origin in state and local government awards and agreements. Differences in rates of remuneration between any one enterprise and another are to be expected. Indeed there are significant differences within the SACS industry itself. The reasons for differences between enterprises will be many and varied and are the result of the peculiar circumstances of each enterprise.”

(Emphasis added)

69. In advancing their case on the question of remedy the Applicants have ignored instruments, particularly those applying to local councils, which prescribe significantly lower rates of pay and which were asserted as reflective of comparable work by the Applicants in their evidentiary case.

70. Throughout the proceedings there was no evidence that any public sector instrument was undervalued for reasons of gender. Indeed, the conclusions of FWA in relation to the diversity of rates within state and local government awards and agreements involved considerations quite distinct from gender including:

“[277] ... relativities within the public sector, issues of restructuring and productivity, attraction and retention issues, cost of living factors, industrial negotiations, bargaining, informal dispute settlements, arbitrations, historical fixations for paid rates awards and the general disposition of various governments.”

71. In the absence of any finding that a particular instrument, classification structure or rate of pay within a public sector instrument is undervalued by gender, it is our submission that it must be assumed that rates within the public sector instruments are set on a gender neutral basis. The corollary of this conclusion is that those rates which exceed the lowest public sector rate in a comparator instrument do so for reasons other than gender.

72. Accordingly, in assessing the remuneration gap between SACS workers and public sector employees, and the portion of the gap that should be attributed to gender-based undervaluation, only the lowest rate from any comparator instrument should be considered. It is this rate that should then be discounted for any factors which in its fixing were non-gender related.

4. THE AMOUNT OR AMOUNTS, EITHER DOLLAR OR PERCENTAGE, TO BE INCLUDED IN ANY EQUAL REMUNERATION ORDER AND ESTIMATES OF THE COST

Form of the order

73. The form of the order, including whether dollar or percentage amounts are appropriate, is dealt with in **Section 6** below.

The amount to be included in any equal remuneration order

74. Ai Group's primary interest in these proceedings is to ensure that the provisions of Part 2-7 of the *Fair Work Act* are applied correctly and with rigour given the influence which the Full Bench's decision is likely to have in other industries.

75. As stated by the Full Bench in its May 2011 Equal Remuneration Decision:

"[289]....This decision, together with any other decision we make in these proceedings, will constitute a significant precedent in any event."

76. Ai Group has not put forward a specific amount to address the gender inequality which the Tribunal has found to exist, but our analysis in **Section 4** is designed to assist the Tribunal to determine an appropriate amount.

77. It may be that the appropriate amount would be different for lower classification levels than higher classification levels, or different for "caring" work as opposed to administrative or other work.

78. The following factors should also be central considerations of the Tribunal in exercising its discretion and determining the amount of any increase:

- The need to ensure that awards remain relevant and that their role in comprising the safety net is not undermined;
- The need to avoid disturbing relativities between the wage safety nets which operate in different industries;
- The need to encourage collective bargaining; and
- The need to avoid undermining the low paid bargaining provisions of the *Fair Work Act*.

Cost estimates

79. In its May 2011 Equal Remuneration Decision, the Full Bench decided that cost and funding are important issues to take into account in determining whether to make an equal remuneration order and, if so, the terms of any order. The Full Bench also highlighted the possibility of significant unemployment arising if an equal remuneration order is made and is not affordable:

“[230] The applicants asked us to find that questions of the funding required to assist employers to comply with any order should only be taken into account under s.304 of the Act. That section permits an order which operates in instalments. That submission is consistent with the submission we have rejected earlier, that if relevant undervaluation is found to exist an equal remuneration order must be made. We reject this latter submission also. No doubt questions of cost, including questions of cost to a funds provider which is not the employer, might lead to an order implementing equal remuneration in instalments as provided for in s.304. But it does not follow that cost, and funding, cannot be taken into account in deciding whether to make an order at all. It is possible to imagine a case in which the making of an equal remuneration order might lead to significant unemployment. In our view the

potential for such a result could be taken into account pursuant to s.578 in deciding whether to make any order at all.

(Emphasis Added)

80. Ai Group has considered the cost estimates put forward by the Australian Government, based upon a 10 percent, 20 per cent and 30 per cent increase in wages and we have no reason to believe that the estimates are not accurate.
81. However, we note that the Australian Government has identified significant uncertainty in respect of its cost estimates and has expressed the view that the cost could be much higher.
82. Also, the cost to the Australian Government of any decision made in these proceedings is only one part of a very complex equation.
83. The State and Territory Governments provide a substantial proportion of the funding in the SACS industry and they have not yet filed their submissions. Accordingly, Ai Group and other parties have not yet had the benefit of the cost estimates which we anticipate these Governments will provide.
84. In addition to carefully evaluating the cost estimates of the Australian Government plus the State and Territory Governments, it is essential for the Tribunal to remain very mindful of the evidence and submissions in these proceedings which demonstrate that many employers in the SACS industry operate with a mix of Government funded programs, commercially funded programs, and programs funded by donations.

5. THE PHASING-IN OF ANY EQUAL REMUNERATION ORDER AND THE EFFECT OF SUCH PHASING ON THE TRANSITIONAL PROVISIONS IN THE MODERN AWARD

85. We submit that any increased rates of pay for SACS workers should be phased-in over a minimum of five years to reduce the impact on SACS industry employers and the community, and reduce the risks.
86. There are considerable risks associated with the Tribunal's decision, given that many employers in the SACS industry operate with a mix of Australian Government funded programs, State / Territory Government funded programs, commercially funded programs, and programs funded by donations. The risks include:
- The potential loss of some SACS industry organisations, particularly those which are not reliant on, or which are only partially reliant on, Government funding;
 - The scaling-back of programs by SACS employers;
 - The cancellation of programs by SACS employers;
 - Redundancies;
 - Reduced hiring;
 - The scaling back or abolition of Australian Government programs and services outside of the SACS industry due to the impact of the Tribunal's decision on the Budget of the Australian Government; and
 - The scaling back or abolition of State and Territory programs and services outside of the SACS industry due to the impact of the Tribunal's decision on the Budgets of State and Territory Governments.

87. Phasing-in the wage increases over a minimum of five years will reduce the above risks.

88. Phasing-in is permitted under s.304 of the *Fair Work Act*.

89. We note the following extract from the Heads of Agreement reached between the Australian Government and the Australian Services Union in October 2009:

“9. Accordingly, in the event that Fair Work Australia awards a significant increase to the current rates of pay of SACS workers, the ASU agrees to support the argument (which will be put in the Australian Government submission):

a. *that any increase awarded on pay equity or work value grounds should not take effect until at least 6 months after the date of any decision, in order to allow sufficient time for the necessary funding arrangements to be put in place; and*

b. *that any increase awarded on pay equity or work value grounds should be phased via instalments over not less than an additional four and a half year period (so that additional costs are imposed gradually over this period); and*

c. *assuming that any increase awarded by Fair Work Australia on pay equity grounds is based upon a pay equity comparison undertaken on or about the time of the decision, then annual minimum wage adjustments (as awarded each year by Fair Work Australia under section 166 of the Fair Work Act 2009) should also be applied throughout the phasing in period to ensure the comparative pay equity position of any increased rate so awarded is not eroded over the agreed phase in period.”*

(Emphasis added)

The effect of phasing on the transitional provisions in the modern award

90. The transitional provisions in Schedule A of the SACS Modern Award apply to wage rates, penalties and loadings.
91. Under Schedule A, from 1 February 2012 higher or lower rates are set to be phased-in.
92. Ai Group submits that, if an equal remuneration order is made, the wage-related elements of Schedule A (i.e. clauses A.2 and A.3) should be removed from the SACS Modern Award.
93. As the equal remuneration order would set the minimum wages for employees in the SACS industry, clauses A.2 and A.3 of Schedule A would become unnecessary. The retention of these clauses would most likely confuse employers, employees and other parties.

6. THE FORM OF ANY EQUAL REMUNERATION ORDER

94. In its May 2011 Equal Remuneration Decision, the Full Bench concluded that:
- The classification structure in the equal remuneration order will be the same as the structure in the SACS Modern Award (ref. Para [238]); and
 - Any increases flowing from the decision in these proceedings will vary in magnitude depending upon the award wages applying at the time and taking into account any over-award payments (ref. Para [287]).
95. The Full Bench also expressed a “*preliminary view*” that any equal remuneration order made “*should take the form of an addition to rates of pay in the modern award*” (ref. Para [285]).
96. In considering this issue it is important that any order made not operate permanently, but rather only until equal remuneration for work of equal or comparable value has been achieved.
97. Implementing an equal remuneration order which remains in force permanently would:
- Conflict with the purpose of equal remuneration orders, i.e. to deliver equal remuneration for work of equal or comparable value; (Once equal remuneration for work of equal or comparable value has been delivered, the order should no longer apply);
 - Conflict with the legislative requirement that awards (including their wage rates) be relevant; and
 - Result in a complex safety net for the SACS industry.

98. Ai Group concurs with the following views expressed by the Australian Government in its 8 July submission:

“4.22. A clear benefit of option two is that it could provide for the quantum of the equal remuneration order to reduce over time in recognition of reforms that will be occurring in the NFP sector and to allow for and encourage, improved bargaining in the sector. Further, this approach preserves the role of modern awards in providing a genuine safety net of fair, relevant and enforceable minimum terms and conditions.

4.23. In order to give effect to the equal remuneration provisions in the FW Act, the Government reiterates that any undervaluation should only be remedied if it can be clearly demonstrated it has occurred due to reasons of gender. Not to do so may have the unintended effect of undermining the avenues intentionally provided for in the FW Act to assist bargaining outcomes.”

(Emphasis added)

99. To prevent the equal remuneration order applying permanently and to preserve the important role of awards and enterprise agreements, Ai Group proposes that the order have a term which expires two years after the final step in the phasing-in process.
100. If the concept of a specific expiry date is not supported by the Full Bench, Ai Group proposes that a provision be included in the order which requires that FWA undertake a review two years after the final step in the phasing-in process. The review should consider whether it is necessary for the order to remain in force any longer, having regard to such matters as:
- Rates of pay in the SACS industry;
 - Whether the incidence of enterprise bargaining has increased in the SACS industry since the order was made; and

- The need to avoid undermining the role of modern awards in providing a genuine safety net of fair, relevant and enforceable minimum terms and conditions.

Specification of wage rates in the equal remuneration order

101. To increase certainty and to avoid confusion, Ai Group proposes that the equal remuneration order should specify, firstly, the actual wage rates which apply at the time when the order comes into operation for each classification and, secondly, the method of calculating the increased wage rates during the life of the order.
102. Furthermore, a provision should be inserted into the order with the effect that no employee shall be paid less than the wage rate which the employee was entitled to under the relevant award-based transitional instrument at the date when the equal remuneration order came into operation.
103. The wage rates payable under the order should be calculated by applying phased increases to the wage rates in the SACS Modern Award, as set out in the following example:

Example

- The wage rate for the relevant classification in the SACS Modern Award = \$1,000 per week.
- FWA decides that this classification rate is undervalued by 2.5% due for reasons of gender.
- FWA decides that wage increases under the Equal Remuneration Order (ERO) will be phased-in over a five year period commencing from 1 July 2012.
- The Minimum Wage Panel increases minimum wages by \$10 per week in its 2012-13, 2013-14, 2014-15 and 2014-15 Annual Wage Reviews (AWRs).

Current Modern Award Rate =	\$1,000
Equal remuneration rate =	$\$1,000 + (1.025 \times \$1,000) = \$1,025$
Transitional amount =	\$25

Proportion of the transitional amount payable under the ERO:	1 July 2012	20% (i.e. \$5)
	1 July 2013	40% (i.e. \$10)
	1 July 2014	60% (i.e. \$15)
	1 July 2015	80% (i.e. \$20)
	1 July 2016	100% (i.e. \$25)

From 1 July 2012:

Rate in ERO =	$\$1,000 + \$5 + \$10$ (AWR increase) =	\$1,015
Modern award rate =	$\$1,000 + \10 (AWR increase) =	\$1,010

From 1 July 2013:

Rate in ERO =	$\$1,010 + \$10 + \$10$ (AWR increase) =	\$1,030
Modern award rate =	$\$1,010 + \10 (AWR increase) =	\$1,020

From 1 July 2014:

Rate in ERO =	$\$1,020 + \$15 + \$10$ (AWR increase) =	\$1,045
Modern award rate =	$\$1,020 + \10 (AWR increase) =	\$1,030

From 1 July 2015:

Rate in ERO =	$\$1,030 + \$20 + \$10$ (AWR increase) =	\$1,060
Modern award rate =	$\$1,030 + \10 (AWR increase) =	\$1,040

From 1 July 2016:

Rate in ERO =	$\$1,040 + \$25 + \$10$ (AWR increase) =	\$1,075
Modern award rate =	$\$1,040 + \10 (AWR increase) =	\$1,050

Absorption into over-award payment

104. It is essential that wage increases reflected in the equal remuneration order be absorbable into over-award payments. Any other approach would not be fair upon employers or logical.

105. The purpose of an equal remuneration orders is to ensure equal remuneration for work of equal or comparable value. Such orders are not intended to impose obligations on employers who are paying wages rates in excess of those deemed by the Tribunal to be appropriate for an equal remuneration order.
106. To avoid uncertainty, the equal remuneration order should contain a provision along the lines of:

“The wage increases in this equal remuneration order may be offset against any equivalent amount in rates of pay received by employees covered by this order which are above the wage rates prescribed in this order”.

Salary sacrifice arrangements

107. Section 324 of the *Fair Work Act* permits employees to enter into a salary sacrifice arrangement with their employer and to:
- Forgo an amount payable to the employee in relation to the performance of work; but
 - Receive some other form of benefit or remuneration.
108. The above provision would apply to amounts payable under equal remuneration orders. Given the prevalence of salary sacrifice arrangements in the SACS industry, it would be worthwhile for the equal remuneration order to include a provision along the lines of the following:

“Note: Section 324 of the Fair Work Act 2009 permits employees to enter into a salary sacrifice arrangement with their employer and to forgo an amount payable to the employee in relation to the performance of work but receive some other form of benefit or remuneration, subject to certain conditions set out in Act.”

7. WHETHER THE QUANTUM IN ANY EQUAL REMUNERATION ORDER SHOULD BE INCLUDED IN THE SACS MODERN AWARD

109. The quantum in any equal remuneration order should not be included in the SACS Modern Award for the reasons set out in **Section 2**.
110. Furthermore, including the quantum in the SACS Modern Award would distort and destabilise Australia's safety net of modern awards.
111. 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. Incorporating the terms of the equal remuneration order in the SACS Modern Award would disturb the relativities between awards and result in a raft of award variation claims in other industries.
112. 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).
113. 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 *Fair Work Act*).
114. Awards are intended to provide a safety net only. Minimum wage rates are not intended to reflect paid rates, market rates or enterprise agreement rates.

Ai Group's position on the Australian Government's arguments about work value

115. At paragraphs 4.9 to 4.17 of the Australian Government's submission of 8 July 2011, the Government discusses FWA's powers to vary an award under s.157 for work value reasons. The submission focuses upon the wording of subsection 156(4) of the *Fair Work Act* but fails to take account of the importance of ensuring that appropriate relativities are maintained between different awards.
116. The maintenance of such relativities is of course central to the achievement of the modern award objective and the minimum wages objective. However, the maintenance of appropriate relativities between awards is also central to work value considerations.
117. 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.*

(Emphasis added)

- 118. The Tribunal's work value principle stresses that any applications for wage increases must be vigorously tested and emphasises the importance of not disturbing the relativities within and between awards, unless a change in work value is clearly demonstrated.
- 119. The Tribunal's work value principle is consistent with the definition of "work value reasons" in s.156(4) of the *Fair Work Act* and the principle remains relevant under the current legislation. Both emphasise 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.
- 120. In its May 2011 Equal Remuneration Decision, the Full Bench identified the important link between work value and relativities, as follows:

"[261] We deal first with the applicants' submission that the minimum wages in the modern award do not properly reflect the value of the work. Given the basis on which minimum rates are fixed, it is not possible to demonstrate that modern award wages are too low in work value terms by pointing to higher rates in enterprise agreements, or in awards which clearly do not prescribe minimum rates. In order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards. No real attempt has been made to deal with those important issues." (Emphasis added)

121. We note that the Australian Government concludes in paragraph 4.16 of its submission that *“there is no statutory barrier”* to increasing the rates in the SACS Modern Award to address gender inequality, but does not venture a view on whether such an approach would be the best course of action.

122. We agree with the Government’s final comment in that section of its submission:

“4.17. The Government does not support, however, any approach which would effectively introduce a bargained rates outcome in to the SACS Modern Award as this would potentially undermine future access to the low-paid bargaining stream.”

Better Off Overall Test

123. At paragraph [275] of FWA’s May 2011 Equal Remuneration Decision, the Full Bench raised the issue of whether the equal remuneration order should be included in the SACS Modern Award because of the nature of the Better Off Overall Test (BOOT).

124. The BOOT will not operate unfairly as a result of any equal remuneration order. No employee covered by an equal remuneration order will be disadvantaged because a term of an enterprise agreement has no effect in relation to an employee to the extent that it is less beneficial than a term of an equal remuneration order (s.306).