Women's Wages in Australia and the United States

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I. INTRODUCTION

In 1960, the earnings ratio between female workers and male workers was about sixty percent in both the United States and Australia.¹ Sex discrimination was undeniably a factor that depressed the ratio in both countries. In Australia, the principal institution for set-

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ting wages—the industrial tribunals—explicitly discriminated against women, while in the United States discrimination was sufficiently prevalent that Congress was soon to react to suppress it by passing the Equal Pay Act and Title VII. In 1981, after a decade of efforts in both countries to reduce the level of discrimination against women, the earnings ratio in the United States had decreased marginally to 59 percent, while the earnings ratio in Australia had increased quite significantly to 75 percent. Today, after a quarter-century of antidiscrimination efforts, Australian women are still paid significantly more than American women compared to men in their respective countries. In 1988, the earnings ratio was 78 percent in Australia and 66 percent in the United States.

This article compares the experiences of Australia and the United States in dealing with women’s wages. The comparison holds considerable promise for insight (and, we think, delivers on that promise) because of similarities between the two countries and, ironically, because of their differences.

Prior to the efforts in Australia from 1969 to 1975 to increase the relative wages of women, the labor markets in Australia and the United States produced strikingly similar results for female workers. Most significantly for our purposes, as indicated above, the ratio of female-to-male earnings was similar in the two countries, hovering around the sixty percent mark. The similarities, however, extended beyond that ratio. There was a considerable degree of occupational segregation in both countries and a clear correlation between the proportion of females in an occupation and low pay for that occupation.

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2. See infra notes 91-123 and accompanying text.
7. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, SERIES P-60, No. 174 CURRENT POPULATION REPORTS (1988); AUSTRALIAN BUREAU OF STATISTICS, AVERAGE EARNINGS AND HOURS OF EMPLOYEES AUSTRALIA, Cat. No. 6304 (1988). The earnings ratio varies depending on the precise way in which it is measured. The ratio for the United States compares the annual earnings of year-round, full-time workers; the ratio for Australia compares the weekly earnings of full-time non-managerial workers in the private sector.
8. In Australia, see LEONARD BROOK ET AL., OPPORTUNITY AND ATTAINMENT IN AUSTRALIA (1977); Margaret Power, Woman’s Work is Never Done—by Men: A Socio-Economic Model of Sex Typing in Occupations, 17 J. INDUS. REL. 225 (1975). In the United States, see Jane Bayes, Occupational Sex Segregation and Comparable Worth, in COMPARABLE WORTH, PAY EQUITY, AND PUBLIC POLICY 15 (Rita Kelly & Jane Bayes eds., 1988); Solomon Polacheck, Women in the Economy: Perspectives on Gender Inequality, in COMPARABLE WORTH: ISSUE FOR THE 80s 34 (1984).
Moreover, although there were differences in the participation and unemployment rates of women relative to men in the two countries, the movements in these rates were quite similar both before and after the Australian equal pay efforts.\textsuperscript{9} Australia is a good comparator country, then, because these similarities indicate that the two labor markets were treating women in a roughly similar fashion prior to Australia's efforts to increase women's pay.

Australia is also a good comparator country because of its differences from the United States. In both Australia and the United States (and elsewhere), a complicated and interrelated variety of discriminatory and non-discriminatory factors influence wages and result in a female-male wage gap. Factors that are attributable to discrimination, such as restrictions on access into certain occupations and direct employer wage discrimination, combine with non-discriminatory factors, such as differences between men and women in the amount of time worked, to create an earnings gap between men and women.\textsuperscript{10} In the United States, these factors are incorporated into the wage structure through the private decisions of hundreds of employers. This makes it very difficult to isolate the influence of particular factors, such as sex discrimination, on the wage gap.

In Australia, a centralized wage-setting process formalizes some of the factors that influence wages and incorporates them into the wage structure. Significantly for our purposes, until 1969 sex discrimination was one of the factors which was formalized and incorporated into the wage structure through the centralized wage-setting process. Then, from 1969 to 1975, sex discrimination was removed from the wage-setting process. Australia is a good comparator country, then, because the differences between its wage-setting processes and those in the United States make it possible, first, to isolate the influence of sex discrimination on wage rates prior to 1969 and, second, to trace the effects of eliminating that sex discrimination.

The comparison is enlightening in a number of ways. First, it provides an estimate of the extent to which women's wages in the United


\textsuperscript{10} The dichotomy between discriminatory and non-discriminatory factors, of course, is not a clear one. Discriminatory factors may be based on malicious employer intent, or they may be based on employer attempts to maximize productivity where group productivity is known and information on individual productivity is costly. See Edmund S. Phelps, The Statistical Theory of Racism and Sexism, 62 Am. Econ. Rev. 659 (1972). Non-discriminatory factors, such as differences in hours worked, may be based on the voluntary decisions of women, or they may reflect the discriminatory decisions of employers to offer fewer hours of work to women. Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1781 (1986).
States are depressed by discrimination. The estimate—that about one-third of the wage gap between men and women is caused by discrimination—avoids the problems of similar estimates that are based only on the experience of the United States. Second, the comparison sheds an unflattering light on the dominant theoretical framework that is used to analyze wage issues—the human capital model. Institutions and rigidities in the labor market matter much more than the human capital model would admit. Alternative theoretical models are needed to understand wage issues better and to provide better guidance to those making policy decisions about wages or, indeed, about any type of intervention in the labor market. Third, the comparison helps to identify the elements of a successful public program designed to deal with women's wages. If the United States ever decides to make an effort to address this type of discrimination, the Australian experience instructs us on how to structure the program.

The article first provides a detailed description of the wage-setting process in Australia and the history of women's wages within that process. The article then compares the Australian experience with that of the United States. The doctrines designed to deal with women's wages in the two countries are compared, the inference from the Australian experience that discrimination is a significant factor depressing women's wages in the United States is subjected to rigorous economic analysis, and finally the lessons of the Australian experience for the United States are discussed.

II. WOMEN'S WAGES IN AUSTRALIA

The Australian system of industrial relations is very different from the American system. Several of the central tenets of labor law in the United States are not present in Australia. Selection of union representatives through majority vote of the employees to be represented, employer recognition of unions, and non-involvement of the state in setting wages and other substantive terms of employment are all central principles of American labor law. None are present in Australia. A thorough comparative evaluation of the industrial relations systems of the two countries, then, would be of value. In this article,

14. We have been unable to find any comparative studies in the mainstream of American legal literature, although there have been a few comparative studies published elsewhere, see, e.g., Nicholas Blain et al., Mediation, Conciliation and Arbitration: An International Comparison of Australia, Great Britain and the United States, 126 INT'L LAB. REV. 179 (1987); M. Derber, Reflections on Aspects of the Australian and American Systems of Industrial Relations, in PERSPECTIVES ON AUSTRALIAN INDUSTRIAL RELATIONS 20 (W.A. Howard ed., 1984), and a
however, we have a narrower concern. We are concerned with the manner in which the Australian wage-setting process first contributed to the creation of significant disparities between female and male earnings and then, over a period of years, operated to narrow them.

A. The Wage-Setting Process

State and federal industrial tribunals in Australia have the power to issue awards which set minimum rates of pay and other minimum terms of employment.16 As will be discussed in this section, even though the awards only establish minimum standards and employees may seek "overaward" pay from their employers, the tribunals have a number of articles that describe Australian labor relations practices for an American audience without making a concerted comparative effort. See Richard Mitchell & Malcolm Rimmer, Labour Law, Deregulation, and Flexibility in Australian Industrial Relations, 12 COMP. LAB. L.J. 1 (1990); J.E. Isaac & R.C. McCallum, The Role of Neutrals in the Resolution of Interest Disputes in Australia, 10 COMP. LAB. L.J. 300 (1989); George Strauss, Australian Labor Relations Through American Eyes, 27 INDUS. REL. 131 (1988); Whitfield, The Australian Wage System and Its Labor Market Effects, 27 INDUS. REL. 149 (1988); Stephen J. Frenkel, Australian Employers in the Shadow of the Labor Accords, 27 INDUS. REL. 166 (1988). The economists have done a better job, but their comparative studies, as one would expect, have focused on the economic effects of the respective systems rather than on the industrial relations systems themselves. See, e.g., Daniel J.B. Mitchell, The Australian Labor Market, in THE AUSTRALIAN ECONOMY: A VIEW FROM THE NORTH 127 (Richard E. Caves & Lawrence B. Krause eds., 1984); Robert G. Gregory & Vivian Ho, Equal Pay and Comparable Worth: What Can the U.S. Learn from the Australian Experience, (Australian National University, Centre for Economic Policy Research, Discussion Paper No. 123, July 1985).

15. A principal value of comparative law is that it causes one to re-examine the central premises of one's own system of law. Clyde Summers, Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective, 133 U. PA. L. REV. 175, 176 (1984). A comparison of the Australian and American systems of industrial relations would contribute to this process in large part because the two systems differ significantly on central premises, some of which are under reconsideration in the United States. See, e.g., Employment Rights Symposium, 67 Neb. L. Rev. 1 (1988)(discussing the premise that the state should not be involved in setting the substantive terms of employment); Paul Weller, Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA, 96 Harv. L. Rev. 1769 (1983)(questioning union selection procedures).

16. The federal government and all the states, except the Northern Territory, have industrial tribunals with wage-setting responsibilities. For the federal government, the basic act is the Industrial Relations Act 1988, which replaced the venerable Conciliation and Arbitration Act 1904. For the states, the basic acts are the Industrial Arbitration Act 1940 (New South Wales); Industrial Conciliation and Arbitration Act (Queensland); Industrial Conciliation and Arbitration Act 1972 (South Australia); Industrial Relations Act 1975 (Tasmania); Industrial Relations Act 1979 (Victoria); and Industrial Arbitration Act 1979 (Western Australia). For a general introduction to the acts, see Peter Punch, Guidebook to Australian Industrial Law 483-533 (4th ed. 1984).
great influence on wage rates in Australia and, as a result, on the relative earnings of men and women.

Although the mere existence of industrial tribunals with the power to set wages and other terms of employment is strange to American observers, the initial establishment of the tribunals is certainly understandable as an historical phenomenon. The tribunals were formed at the turn of the century as a direct consequence of the Great Strikes of the 1890s. Labor suffered humiliating and overwhelming defeats during this period. In retrospect, the losses seem almost inevitable. Since the strikes occurred during a severe recession, replacement labor was readily available; the unions had very limited resources; and, as in the United States at that time, the unions had to battle the police and the courts, as well as employers. Labor's losses convinced it of the need for political as well as economic action and resulted in the formation of the Labor Party in the early 1890s. The losses also convinced labor, although with some reluctance, of the need for governmental arbitration of labor disputes. At the same time, the Great Strikes created public sentiment favorable to labor's position. The strikes caused massive public disruption and the pub-

17. One observer has commented that Australian industrial relations is "as exotic as the boomerang or the kangaroo." K.F. Walker, The Development of Australian Industrial Relations in International Perspective, in PERSPECTIVES ON AUSTRALIAN INDUSTRIAL RELATIONS 1 (W.A. Howard ed., 1984).


19. The critical part played by the Great Strikes in all this needs little emphasis. If these strikes had not occurred and if unionism and collective bargaining had been allowed to become more firmly established, as they showed every sign of doing in the 1880s, the course of Australian industrial relations might well have been different. . . . It is probably not an exaggeration to say that the character of Australian industrial relations was shaped by the strikes of the 1890s.

20. For vivid accounts of these strikes, see BRIAN FITZPATRICK, SHORT HISTORY OF THE AUSTRALIAN LABOR MOVEMENT 123-44 (1968) and GEORGE DALE, THE INDUSTRIAL HISTORY OF BROKEN HILL 9-85 (1918).

21. See also DEERY & PLOWMAN, supra note 18, at 66-70, 203-04.


23. Never before [the Great Strikes] had there been a strike covering such a wide area of industry and lasting so long. Consumers were deprived of their accustomed conveniences; transport was disorganized; in Adelaide and Melbourne the strike resulted in a shortage of gas in private homes.
lic viewed strong governmental intervention as a reasonable way of preventing such strikes in the future. Labor's political success, enhanced by the favorable public sentiment, resulted in industrial tribunals in all the states and, after formation of the Commonwealth of Australia in 1901, in the federal government as well. The Conciliation and Arbitration Act of 1904 established a federal industrial tribunal with the power to compel hearings on labor disputes and, if the dispute could not be settled voluntarily, to issue legally binding arbitration awards. Alfred Deakin, one of the principal drafters of the new legislation, made a statement at the time that is reminiscent in its goals and optimistic tone, if not in its central policy, of statements made by Robert Wagner in 1935:

We now substitute a new regime for the reign of violence by endowing the State... with power to impose within the limits of reason, justice, and constitutional government, its deliberate will upon the parties to industrial disputes.

The basic procedure used to resolve industrial disputes under current federal law is relatively straightforward. The Australian In-

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It also meant unemployment as various establishments were forced to close down through lack of materials.


24. Deery & Plowman, supra note 18, at 68; Walker, supra note 17, at 4; Sykes, supra note 21, at 353.


26. Mark Perlman, Judges in Industry 13 (1954). Compare Mr. Deakin's statement to the following statement by Senator Wagner:

[The Wagner Act] is responsive to the serious industrial disturbances of last summer, when blood ran freely in the streets and martial law was in the offing... In its search for industrial peace combined with economic justice, [the Wagner Act] appeals to the conscience and intelligence of all those who know the history of our country and are imbued with its high ideals. In applying the healing balm of an upright, impartial, and peaceful forum to industry and labor it will benefit employers, workers, and the country at large.


27. Because the federal tribunal has disproportionate influence, and for clarity, this article will focus on the federal wage-setting system. David H. Plowman et al., Australian Industrial Relations 117-21 (Rev. ed. 1988).

28. The Conciliation and Arbitration Act of 1904 was repealed and replaced in 1988 by the Industrial Relations Act of 1988. Although there were a number of technical changes made, the overall structure of the industrial relations system remains the same under the new act. Isaac & McCallum, supra note 14, at 301 n.3. Indeed, proposed amendments to the 1988 Act that would have resulted in more basic changes to the industrial relations system (for example, amendments that
Industrial Relations Commission (the Commission)\textsuperscript{29} is notified when a labor dispute arises.\textsuperscript{30} If the Commission has jurisdiction,\textsuperscript{31} it first attempts to conciliate. The Act directs the Commission to "do everything that appears . . . to be right and proper to assist the parties to agree on terms for the prevention or settlement of the industrial dispute."\textsuperscript{32} If an agreement cannot be reached through conciliation, the


29. Under the original Act, the Commission was known as the "Commonwealth Court of Conciliation and Arbitration." In 1956, the Court was divided into two tribunals, the Commonwealth Conciliation and Arbitration Commission which exercises conciliation and arbitration powers under the Act and the Commonwealth Industrial Court (later replaced by the Federal Court—Industrial Division) which exercises judicial powers. Conciliation and Arbitration Act 1956, No. 44, 1956 AUSTL. ACTS P. 476. In 1974, the word "Commonwealth" in the name of the Commission was replaced with "Australian." The 1988 Act instituted the current name. Industrial Relations Act, No. 86, 1988 AUSTL. ACTS P. 1353, § 8. For convenience, this article will always refer to the body with conciliation and arbitration powers as the "Commission."

The Commission consists of a President, a number of Deputy Presidents (currently 4), and a number of Commissioners (currently 30). Industrial Relations Act, No. 86, 1988 AUSTL. ACTS P. 1353, § 8. The President must be legally qualified, \textit{id.} at § 10(1); the Deputy Presidents need not be legally qualified, but usually are, \textit{id.} at § 10(2); and the Commissioners are not usually legally qualified, but are persons who have considerable experience in labor relations. \textit{Id.} at § 10(3). \textit{See PLOWMAN ET AL., supra note 27, at 122-23. Except in quite limited circumstances (§§ 24, 28 of Industrial Relations Act 1988), members of the Commission may not be removed from office, although they are required to retire at age 65. \textit{Id.} at § 16. Depending on the dispute, the Commission operates through single members or through a panel of three members, known as a "Full Bench." \textit{Id.} at § 30. A Full Bench has original jurisdiction over certain cases of national importance, \textit{id.} at § 106; appellate jurisdiction over decisions by single members of the Commission, \textit{id.} at § 45; and reference jurisdiction on matters which are before a single member, but which the President considers ought to be heard by a Full Bench. \textit{Id.} at § 107.

30. \textit{Id.} at § 99.

31. The primary jurisdictional prerequisites to Commission action are that the dispute be in an "industry," \textit{see, e.g.}, R. v. Commonwealth Conciliation and Arbitration Commission; \textit{ex parte} Association of Professional Engineers, 107 C.L.R. 208 (1959) R. v. Holmes; \textit{ex parte} Public Service Ass'n of New South Wales, 140 C.L.R. 63 (1977), that the dispute concern an "industrial matter," \textit{see, e.g.}, R. v. Portus; \textit{ex parte} Australia and New Zealand Banking Group Ltd., 127 C.L.R. 353 (1972); R. v. Judges of the Commonwealth Industrial Court; \textit{ex parte} Cocks, 121 C.L.R. 313 (1968), and that the dispute be "interstate." Caledonian Collieries Ltd. v. Australia Coal & Shale Employees' Federation, 42 C.L.R. 527 (1930); R. v. Commonwealth Conciliation and Arbitration Commission; \textit{ex parte} Australian Workers' Union, 99 C.L.R. 505 (1967).

Commission then arbitrates the dispute. The arbitration proceeding itself resembles American interests arbitration. In conducting the proceeding, the Commission "is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just" and "shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms." The arbitration award is binding on the parties.

The relatively simple procedure, originally designed primarily to prevent and settle industrial disputes, has evolved over time and for a number of reasons into a complex and largely centralized wage-setting process. The national scope of certain issues addressed by the Commission was a major factor that led to the increased complexity and centralization. On issues such as the minimum rate of pay, an increase earned by one union to settle a dispute was likely to create dozens of new disputes as other unions attempted to match the increase. Since the Commission's mission was to prevent, not to create, industrial disputes, it became important for the Commission to resolve these national issues uniformly and simultaneously. National wage cases were the medium developed to do this.

The conceptual framework developed by the Commission early in its history to resolve wage disputes also contributed to the momentum toward a centralized wage-setting process. In three cases decided between 1907 and 1909, Mr. Justice Higgins, an influential early Presi-

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33. Id. at § 104.
34. Id. at § 110(2)(b)
35. Id. at § 110(2)(c).
36. Id. at § 149. Although the awards are formally designated as binding and the Act provides penalties for failure to comply with an award, §§ 178-86, as a practical matter, penalties do not exist. DAVID H. PLOWMAN, WAGE INDEXATION: A STUDY OF AUSTRALIAN WAGE ISSUES 1975-1980 at 14-16 (1981); PLOWMAN ET AL., supra note 27, at 239-42. As a result, in practice the awards establish minimum standards and the overaward process is allowed to operate.
37. The "objects" section of the Act speaks directly of preventing and settling industrial disputes in four of its eight subsections. Industrial Relations Act, No. 86, 1988 AUSTL. ACTS P. 1353, §§ 3(a)-(d). The other subsections list as objects providing for the enforcement of agreements and awards, id. at § 3(e); encouraging the formation and registration of unions and employer organizations, id. at § 3(f); and encouraging democratic control of unions and employer organizations, id. at § 3(g). Setting wages is not mentioned in the objects section of the current Act and, indeed, was mentioned in only one section of the original act and that mention was only as an incident to the prevention and settlement of industrial disputes. Conciliation and Arbitration Act of 1904, § 2(d).
38. Other issues, such as hours of work, vacation leave, and sick leave, were also national in scope.
39. National wage cases are discussed later in this article. See infra notes 58-61 and accompanying text.
dent of the Commission, developed the concepts of a "basic wage" and "margins." The basic wage was to be incorporated into every wage-setting award as a minimum. It was the wage necessary for "the normal needs of the average employee, regarded as a human being living in a civilized community." Margins, or secondary wages, were the amounts added to the basic wage to remunerate a worker "for such skill or other exceptional necessary qualifications as are required for his occupation, and as lift him above the level of the unskilled labourer." The basic wage, then, led to centralization because it provided a common foundation for the entire wage structure conceptualized by the Commission. By 1922, a process had been developed to determine the basic wage on a national basis. By the time the basic wage concept was discarded in 1967, a centralized wage-setting pro-

involve an industrial dispute. Instead, it was decided under the Excise Tariff Act of 1906, No. 16, 5 AUSTL. ACTS P. 59, which imposed duties on certain imported goods to protect Australian manufacturers from foreign competition. To ensure that some of the benefits of this protection reached employees, the Act provided that domestic manufacturers would also be required to pay the duties unless the manufacturers could produce a certificate showing that they paid "fair and reasonable" wages. Id. at § 2(d), 5 AUSTL. ACTS P. 59, 60 (1906). The Commission, was one of the bodies which could issue these certificates. Id. Justice Higgins first developed the basic wage concept to determine whether he should issue such a certificate. Even more ironically, the Excise Tariff Act of 1906 was later declared unconstitutional. R. v. Barger, 6 C.L.R. 41 (1908). In Marine Cooks, Higgins first applied the basic wage concept to a case arising under the Arbitration and Conciliation Act and, in Broken Hill, he first declared the basic wage to be an irreducible minimum:

For this purpose, it is advisable to make the demarcation as clear and as definite as possible between that part of wages which is for mere living, and that part of wages which is due to skill, or to monopoly, or to other considerations. Unless great multitudes of people are to be irremediably injured in themselves and in their families, unless society is to be perpetually in industrial unrest, it is necessary to keep this living wage as a thing sacrosanct, beyond the reach of bargaining.

Broken Hill, 3 C.A.R. 1, 32 (1909).

41. Mr. Justice Higgins was President of the Commission from 1907-1921. For a discussion of his influence, see PERLMAN, supra note 26.
42. Harvester Judgment, 2 C.A.R. 1, 3 (1907).
43. Gas Employees Case, 13 C.A.R. 437, 461 (1919). In addition to skill, Boot Trades Case, 4 C.A.R. 1, 10-11 (1909), margins were awarded for other requirements of the job such as responsibility (Federated Gas Employees Case, 48 C.A.R. 895, 903-04 (1942)); care (Federated Carters and Drivers' Industrial Union Case, 11 C.A.R. 336, 349-50 (1917)); alertness (Australian Railways Case, 23 C.A.R. 708, 745-47 (1926)); and supervisory responsibilities (Woolclassers Case, 38 C.A.R. 68, 69 (1937)).
44. "[T]he basic wage is foundational to every wage fixed by every award." Australian Theatrical and Amusement Employees, 62 C.A.R. 464, 468 (1948).
45. See J. HUTSON, SIX WAGE CONCEPTS 7-8 (1971); PLOWMAN ET AL., supra note 27, at 253-54.
46. The basic wage and margins concept was replaced in 1967 with a single total wage, 1967 National Wage Case, 118 C.A.R. 655, 658-60 (1967), undergirded by a previ-
cess was firmly entrenched.

The process of union recognition and the structure of union organization are other factors that led to centralization. Unions achieve recognition in Australia not by campaigning for majority support of a particular employer's workers, but by defining a segment of the workforce that is not currently represented. Since most unions in Australia are craft unions, these segments of the workforce are usually defined in terms of skills or occupation rather than by employer. Stated another way, unions in Australia generally seek to represent persons who work at a common occupation, even though they may be employed by a number of employers. If an unrepresented segment of the workforce can be identified, recognition comes not from employers, but from the arbitration system itself. Once recognized, a union may submit wage claims for employees within the identified segment, even against employers who do not employ any union members. This structure and process creates few incentives for unions and employers to establish close working relationships at the individual employer level. Instead, centralization is encouraged because the salient contacts between unions and employers are made through organizations, rather than directly, and at state or national, rather than local, levels. Centralization of the wage-setting process is also encouraged because this structure has resulted in a high degree of unionization (union workers constituted 54 percent of the workforce in 1989, compared with 16 percent in the United States) and an even higher proportion of the workforce having wages covered by a Com-
mission award or other union-influenced wage resolution (85 percent in 1985, compared with 16 percent in the United States whose wages were covered by collective bargaining agreements).

All of these pressures to centralize, and others, have molded the relatively simple, basic procedure of the Act into a complex thre-tiered system for determining wages. National wage cases make up the first tier of the system. In these cases, five to seven members of the Commission articulate and apply national wage-setting principles through a test case, the results of which are then widely applied. Although the precise criteria relied upon by the Commission to establish wages in National wage cases have varied over the years, in general terms the Commission has always sought some accommodation between maintaining the real value of the basic wage (often by raising wages in relation to a consumer price index) and limiting wage increases to the economy's capacity to pay (based on an assessment of national productivity). As one would expect, the extent of Commission influence on actual wage rates through national cases has varied over the years, but even at their weakest, national cases have a far greater influence than any single wage-setting mechanism in the United States.

Industry awards make up the second tier of the system. The name, however, is a bit of a misnomer. Because of the structure of union organization, the awards at this level, with very few exceptions, are based on occupation, not on industry. The awards (or wage-setting decisions of the Commission) are "industry" awards not because they apply only to a particular industry, but because most of the workers in an occupation are often found in one industry. Thus, the Transport Workers' Award is the "industry" award for the transport industry men (62 percent) is higher than the rate for women (44 percent). Id. See infra note 55.

55. DIRECTORY OF U.S. LABOR ORGANIZATIONS, 1990-91 EDITION 5 (Courtney D. Gifford ed., 1988). The unionization rate was 20 percent for men and 13 percent for women. Id.

56. AUSTRALIAN BUREAU OF STATISTICS, 1989 LABOUR STATISTICS AUSTRALIA 42, 120 (ABS Cat. No. 6101.0). Eighty-seven percent of women and 83 percent of men were covered. Id.

57. DIRECTORY OF U.S. LABOR ORGANIZATIONS, 1990-91 EDITION, supra note 55, at 65. Twenty-two percent of men were covered, while 15 percent of women were covered. (These statistics are for 1989.) Id.

58. PUNCH, supra note 16, at 149.

59. DEERY & PLOWMAN, supra note 18, at 290.

60. Id. at 286-304. PLOWMAN, supra note 36, at 7-10.


62. See supra notes 47-57 and accompanying text.

63. DEERY & PLOWMAN, supra note 18, at 320-21.
since most truck drivers are found in that industry, but truck drivers
who are employed in other industries (e.g., drivers who are employed
by a brewery rather than a trucking company) are also covered by the
award. Truck drivers, then, are covered by the same award rate of
pay regardless of their employer. Employers, in turn, are governed
by a variety of awards. At the Australian National University, for ex-
ample, there are forty-two different award rates of pay for the admin-
istrative and clerical staffs alone.

The criteria used by the Commission to make industry awards are
of special interest in the equal pay context. The national wage cases
are the primary mechanisms for making general wage adjustments to
maintain living standards or to distribute broad productivity increases
or declines. The industry cases are primarily directed to maintaining
or adjusting the wage relativities between occupations—the relati-

64. Despite this, because the award rates of pay are minima and workers can seek
over-awards, the actual rates of pay of truck drivers may vary. See infra notes 79-
and accompanying text.
65. This notion—that the rate of pay should not depend on the particular employer—
is captured in one of the central principles of wage determination at the indus-
trial level, the principle of comparative wage justice. See infra notes 71-75 and
accompanying text.
88 Cents in the Hourly Male Dollar?, Paper presented at Pacific Rim Compara-
tive Labour Policy Conference, University of British Columbia, Vancouver, Can-
da, 6 (June 24 & 25, 1987). See also Strauss, supra note 14, at 138 (in chemical
industry, average firm deals with 14.9 different unions; in gas, electric and water
industry, average firm deals with 16.3 different unions).

67. For a more detailed discussion of the relevance of these criteria to the equal pay
debate, see infra notes 202-08 and accompanying text.
68. This is certainly true during periods in which the National Wage Cases are de-
cided under principles which index wage increases to increases in the cost of liv-
ing. See Nieuwewuyzen, supra note 61, at 154-55 (during indexation from 1976-
80, 97-99 percent of all increases in award wages were attributable to National
Wage Cases). However, as one would expect in such a complex and dynamic
wage-setting system, there have been periods when the influence of National
Wage Cases was much less. From 1967-74, for example, National Wage Cases,
although still perhaps the single most important mechanism for making general
wage adjustments, contributed only 19-40 percent of the overall increase in award
wage increases. Deery & Plowman, supra note 18, at 298. Even more dramati-
cally, there was a short period from August 1981 to December 1982, during which
there were no increases granted through National Wage Cases, but there were
substantial increases in award rates through other mechanisms. Deery & Plow-
man, supra note 18, at 307-08; Punch, supra note 16, at 304-08.
69. The National Wage Cases are also concerned, in part and to a degree that varies,
with wage relativities between occupations. The Equal Pay Cases are principal
examples of National Wage Cases affecting relativities. For a discussion of the
Equal Pay Cases, see infra notes 124-68 and accompanying text. The National
Wage Cases also often explicitly incorporate a work value component that is pri-
marily concerned with relativities between occupations. See, e.g., National Wage
discussion infra at notes 76-78.
ties that are at the heart of the comparable worth debate.

Two principal criteria used by the Commission in industry cases are comparative wage justice and work value.\textsuperscript{70} Comparative wage justice requires that "employees doing the same work for different employers or in different industries should by and large receive the same amount of pay irrespective of the capacity of their employer or industry."\textsuperscript{71} The "same work," for purposes of comparative wage justice, has not been narrowly construed to mean virtually identical work. Rather, work can be the "same" if it requires similar levels of training, skill, and responsibility. The fitters' job classification provides a good example:

The fitters' classification . . . soon became [a major] benchmark [for purposes of comparative wage justice] because fitters were employed in a wide range of industries, and because it could be extended to other classifications which required the same degree of skill and training: millers, borers, slotters, gear cutters, cutting bar drillers, lappers, precision grinders, brass finishers, turners, boiler-makers and metal moulders. In other industries the fitter's rate was applied to tradesmen such as carpenters, coopers, tailors, printing compositors, butchers and so on. Members of the [Commission] argued that those trades required periods of apprenticeship and training and a degree of manual skill similar to that of the fitter. The establishment of [fitters' rates in an] award in turn provided a benchmark by which the marginal relativities of other classifications within that award could be fixed.\textsuperscript{72}

Under comparative wage justice, then, job classifications were compared to one another based on the training, skill, and responsibility required to do them and those comparisons were then translated into wage relativities between the occupations. Over time the comparative wage justice criterion created an intricate and strongly interrelated system of pay relativities between occupations.\textsuperscript{73} In practice the criterion meant that an increase in any job classification would likely lead to increases in other, comparable job classifications.\textsuperscript{74} Or, as it was more colorfully stated, the wage system operating under the principle was "a huge jelly—touch it anywhere and it trembles to its farthest

\textsuperscript{70} The Commission also uses other criteria to decide industry cases. See generally RAYMOND O'DEA, PRINCIPLES OF WAGE DETERMINATION IN COMMONWEALTH ARBITRATION (1969); HUTSON, supra note 45, at 136-51.


\textsuperscript{72} DEERY & PLOWMAN, supra note 18, at 336.

\textsuperscript{73} Id. at 336-37.

\textsuperscript{74} The criterion of comparative wage justice was popular with the trade unions because it was a way of transmitting [a gain] obtained in one award across a number of other awards, and so enabled them to obtain the same [gain] for jobs with similar characteristics. They developed considerable ingenuity in drawing parallels between classifications, while the hunting down of anomalies became, and remains, a popular sport with them. The rank and file also watched their relativities like a hawk.

HUTSON, supra note 45, at 145.
corner."75

The work value criterion for making industry awards is the flip side of comparative wage justice.76 Comparative wage justice is used to maintain wage relativities that have been established based on the training, skill, and responsibility of the jobs. For example, if Jobs 1 and 2 are the "same" and have historically been paid the same wage and then the wages for Job 1 are increased, the incumbents of Job 2 would likely seek an equivalent increase under the comparative wage justice criterion.77 Work value is used to change relativities when the requirements of a job change.78 Thus, if there is an important change in the duties of Job 1, its incumbents might seek a wage increase based on the work value criterion that would break Job 1's historical wage relationship with Job 2.

Over-awards make up the third tier of the system.79 Awards by the Commission are minima80 and employees can seek more from their employers than the Commission awards. Over-awards allow the wage-setting system to be fine-tuned. Employees who work for especially profitable employers may use the over-award mechanism to obtain some of the benefits of the extra profitability. Similarly, employers who are experiencing special difficulty in attracting labor may agree to over-award pay in an attempt to deal with that problem.81 Less justifiably, perhaps, over-awards permit strong unions to

76. There is, in fact, little distinction between comparative wage justice and work value other than the different circumstances in which the claims are forwarded. Andrew Portus, Inter-Industry Award Fixation Under the Commonwealth Act, 11 J. INDUS. REL. 201, 201, 206 (1969); O'DEA, supra note 70, at 153-61.
77. DEERY & PLOWMAN, supra note 18, at 337.
79. Over-award payments can take many forms, ranging from flat amounts paid to everyone working in a particular occupation at an establishment to amounts that are tied to some measure of productivity, such as length-of-service or attendance. W. Brown, Wage Drift in the Australian Metal Industries Revisited, in PERSPECTIVES ON AUSTRALIAN INDUSTRIAL RELATIONS 140, 142-43 (W.A. Howard ed., 1984).
80. In theory, Commission awards are not minima. The Act provides legal authority for the enforcement of awards. The penalties include fines and deregistration of unions or union members. Industrial Relations Act, No. 86, 1988 AUSTL. ACTS P. 1353, §§ 178, 294, 311. In practice, however, the awards are treated as minima and unions are seldom sanctioned for seeking over-awards. DEERY & PLOWMAN, supra note 18, at 274-76, 278-81. See generally PUNCH, supra note 16, at 231-49. For a brief history, see RAWSON, supra note 49, at 100-05. Amendments to the 1988 Bill which would have strengthened the ability of the Commission to enforce its awards were defeated. See Hamilton, supra note 28, at 56-57.
81. Deery & Plowman, supra note 18, at 330.
Despite the existence of over-awards, the extent of governmental influence on wages in Australia is very great, certainly compared with the extent of governmental influence on wages in the United States. The award system directly regulates the wages of 86 percent of all employees in Australia. The coverage is very high in every industry and in all occupations. The arbitration system also exerts a significant, but difficult to measure, influence on the wages of employees whose wages are not directly regulated by the system—all wage-setting in Australia takes place in the shadow of the arbitration system. The influence of over-awards, although not insignificant, is not too great. Most workers in Australia, for example all public servants and all university employees, receive only the award rate of pay. Most workers do not receive any over-award payments. As a result, over-award payments in the aggregate do not significantly affect earnings. In 1985, only 3 percent of the average weekly earnings of males and 2 percent of the average weekly earnings of females were attributable to over-award payments. More importantly for our purposes, although

82. AUSTRALIAN LABOUR ECONOMICS: READINGS 113 (J.R. Niland & J.E. Isaac eds., new ed. 1975). But see J.E. Isaac, Wage Drift in the Australian Metal Industries, in AUSTRALIAN LABOUR ECONOMICS: READINGS, supra, at 141, 144 (few employers surveyed attributed over-award pay to trade union pressure).

83. It is . . . likely that the proportion of wage rises [from 1945-46 to 1958-59] due to award variations was greater than 77 per cent, but somewhat less than 100 per cent. . . . The behavior of wages and prices is predominantly, though not entirely, the result of the decisions of the tribunals. R. Hancock, Wages Policy and Price Stability in Australia, 1953-60, 70 ECON. J. 543, 545-50 (1960). For a more recent assessment, see Brown, supra note 79, at 145-48 (influence of tribunals on actual earnings fluctuates from 1955 to 1982, but the influence is always significant).

84. That is, the rates of pay and conditions of work of 86 percent of all employees in Australia are normally varied in accordance with variations in awards or determinations made by state or federal commissions in collective agreements registered with state or local commissions, or in specific unregistered collective agreements (not including agreements dealing only with over-award pay). AUSTRALIAN BUREAU OF STATISTICS, INCIDENCE OF INDUSTRIAL AWARDS, DETERMINATIONS AND COLLECTIVE AGREEMENTS, MAY 1983 (ABS Cat. No. 6315.0), at 6, Table 2 (1985).

85. In wholesale trade, the industry with the lowest proportion of employees covered by commission processes, id. at 7, Chart 1, 82 percent of men and 67 percent of women were covered by awards, determinations and collective agreements. Id. at 8, Table 3.

86. Of sales workers, the occupational group with the lowest proportion of employees covered by commission processes, id. at 7, Chart 2, 77 percent of men and 91 percent of women were covered by awards, determinations and collective agreements. Id. at 10, Table 5.


88. AUSTRALIAN BUREAU OF STATISTICS, DISTRIBUTION AND COMPOSITION OF EMPLOYEE EARNINGS AND HOURS, AUSTRALIA, MAY 1985 (ABS Cat. No. 6306.0). See also Brown, supra note 79, 140, 145-48 (although the data permit only rough esti-
over-award payments contribute to the female-male wage gap, as we shall see, they have not been used to counteract significantly efforts to narrow the wage gap.

B. Women’s Pay

1. History

The Arbitration Commission began to treat women differently than men very early in its history. The decisions, like the decision to create the Commission, were very much products of their times.

The Commission first considered female wages in the Rural Workers’ Cases of 1912. In the case, Mr. Justice Higgins decided that male and female fruit-pickers should be paid the same wage rate but women working as fruit-packers should be paid less than the male wage rate. Female fruit-pickers were paid the same wage rate as men because both men and women were employed in the occupation. If women were paid less, Mr. Justice Higgins reasoned, there would be “a tendency [for employers] to substitute women for men... even in occupations which are more suited for men.” Thus, to protect the jobs of the men—to insure that “[t]he women are not all dragged from the homes to work while men loaf at home”—Higgins prescribed equal wage rates for male and female fruit-pickers. With respect to fruit-packers, however, Higgins decided that women should be paid less than the male wage rate. Since nearly all fruit-packers were women, there was no need to pay them the same as men to protect male jobs. Rather, Higgins decided that the fruit-packers should be paid a
living wage—a wage sufficient to satisfy "the normal needs of the average employee regarded as a human being living in a civilized community." The living wage established by Higgins for female workers, however, was less than the living wage he had established for male workers. Women only had to support themselves, while men had to support a family. As a result, Higgins set the basic wage rate for female fruit-packers at 66 percent of the basic wage rate for male workers. The principles developed by Judge Higgins were to survive for half a century, but compared to the wage rates women were to receive under these principles for the next thirty years, Judge Higgins was generous.

Until World War II, the basic wage rate for women was generally set at 54 percent of the male basic wage rate, although there was some fluctuation between 48 and 58 percent. Because occupations then, as now, were quite sex-segregated, only a handful of job classifications received equal pay under Higgins' competition rationale.

This three decade period of relative stability in the relationship between female and male wages was disrupted, along with a number of other things, by World War II. In Australia, as in the United States,

96. Rural Workers' Cases of 1912, 6 C.A.R. 61, 61, 71 (1912)(citing Harvester Judgment, 2 C.A.R. 1, 3 (1907), which originated the concept of the living, or basic, wage). See supra notes 40-46 and accompanying text.

97. Rural Workers' Cases of 1912, 6 C.A.R. 61, 71-72 (1912). See also Australian Theatrical & Amusement Employees' Case, 11 C.A.R. 133 (1917): This Court allows to men a living wage based on the assumption that the average man has to keep a wife and family of three children whatever the value of the work he does may be. The Court allows a living wage to a woman as a single woman. The single man often gets more than his work is worth, but if single men are paid less than married men the cheaper labour would be employed and they could not make the necessary provision for marriage.

Id. at 146.

98. The "living wage" discussed by Judge Higgins in the Harvester case soon came to be called the "basic wage."


100. See Federated Clothing Trades Case, 13 C.A.R. 647, 690-95 (1919)(57 percent); Federated Felt Hatting Employees' Case, 15 C.A.R. 374, 386-87 (1921)(54 percent); Clothing & Allied Trades Employees' Case, 26 C.A.R. 89, 99 (1927)(55.5 percent). See generally HUTSON, supra note 45, at 113-14.

101. HUTSON, supra note 45, at 114.

102. The popular image of Rosie the Riveter is confirmed by labor force statistics. The labor force participation rate for women increased from 27.9 percent in 1940 to 36.5 percent in 1944 and then reverted to 30.8 percent by 1947. Women also disproportionately increased their numbers in traditionally male occupations. Between 1940 and 1950, the number of female nonfarm managers, officials and proprietors had increased by 69 percent and the number of female craftsmen, foremen and kindred workers had increased by 87 percent. The number of males in both of those occupational categories had increased by only 33 percent. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 71, 74 (1960).
women were somewhat reluctantly, but by necessity, encouraged to enter the labor force and to engage in traditionally male occupations. As it was put by the High Court of Australia, "[a]s men are no longer available in significant numbers, it has become necessary to resort to the services of women." These changes in the scope and type of female employment created problems. If women in the formerly male occupations were paid the same as the men they replaced, it would be very difficult to retain women workers in the essential jobs where the traditional, low rates of pay still applied. If, on the other hand, all female wages were raised to counteract these foreseeable labor shortages, inflationary pressures would build. The influx of women workers also created a large amount of work for the Arbitration Commission which was responsible for fixing wage rates.

The Women's Employment Board was established in 1942 to deal with these problems. The Board was authorized to set the wages for this new influx of women workers. The Board was to determine the wages by assessing "the efficiency of females in the performance of the work and any other special factors which may be likely to affect the productivity of their work in relation to that of males," but the female wage rate could not be less than 60 percent nor more than 100 percent.

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103. The purpose of the Women's Employment Act 1942 was "to encourage . . . and regulate[s] the employment of women for the purpose of aiding the prosecution of the present war." § 6(a), No. 55, 40 AUSTL. ACTS P. 176, 177 (1942) (emphasis added).


105. AUSTRALIAN LABOUR ECONOMICS: READINGS, supra note 82, at 124.

106. HUTSON, supra note 45, at 114.

107. Women's Employment Act 1942, No. 55, 40 AUSTL. ACTS P. 176 (1942). The history of the Women's Employment Act is very complicated. The Governor-General initially attempted to create the Women's Employment Board through regulations enacted under the National Security Act 1939-40, No. 44, 38 AUSTL. ACTS P. 78 (1940). See 1942 Austl. Stat. R. Nos. 146, 236, 263, 294, 381, 393. That attempt was frustrated when three of the regulations were disallowed by the Senate under a one-house veto provision contained in the Acts Interpretation Act 1901-41, § 48(4), 1941 AUSTL. ACTS P. 33. (The Senate disallowed 1942 Austl. Stat. R. Nos. 236, 263, 294.) Parliament then passed the Women's Employment Act 1942, No. 55, 40 AUSTL. ACTS P. 176, which authorized the Governor-General to promulgate regulations establishing the Women's Employment Board. One of the regulations the Governor-General promulgated under that authority was also disallowed by the Senate. 1942 Austl. Stat. R. No. 548. The continued status of the Women's Employment Board was eventually sorted out by the High Court of Australia. Victoria Chamber of Manufactures v. The Commonwealth, 67 C.L.R. 347 (1943).

108. More specifically, the Board was authorized to determine whether women could work in the new occupations and to set the terms and conditions of that work where women worked after March 2, 1942 on "work which [was] usually performed by males" or "work which, prior [to the employment of women] was not being performed in Australia by any person" Women's Employment Act 1942, § 6(1) of the Schedule, No. 55, 40 AUSTL. ACTS P. 176, 178 (1942).
percent of the male rate for work of a substantially similar nature.\textsuperscript{109} Although there was some variation, in practice the Board generally set the female rate at 90 percent of the rate for substantially similar work performed by males.\textsuperscript{110}

The system was designed to insulate the wage rates of women workers generally from the wage rates of the new group of women workers.\textsuperscript{111} The wage rates of the new group were set by the Women's Employment Board, while the wage rates for the rest of the women were still within the jurisdiction of the Arbitration Commission. Moreover, the Women's Employment Act 1942 attempted to treat the new group as a special case requiring special treatment. The women were a special case because they were working on work "usually performed by males" or "work which [shortly before] was not being performed in Australia by any person,"\textsuperscript{112} because they were engaged in this work to "aid ... in the prosecution of the present war,"\textsuperscript{113} and because their wages were to be set based on standards different from the standards applied by the Arbitration Commission.\textsuperscript{114} The attempted insulation failed. In 1942 and 1943, the Arbitration Commission raised the award rates of women working in the metal trades, clothing and rubber industries to 75 percent of the male award rate\textsuperscript{115} and, in 1945, after the Commission refused to raise the female rates in twelve other industries to 75 percent of the male rate,\textsuperscript{116} the Government did so itself under its wartime powers.\textsuperscript{117}

In October 1944 the Women's Employment Board ceased to func-

\textsuperscript{109} Id. at § 6(5) of the Schedule, 40 AUSTL. ACTS P. 176, 179.
\textsuperscript{110} \textit{AUSTRALIAN LABOUR ECONOMICS: READINGS}, \textit{supra} note 82, at 125;\textit{ Hutson, supra} note 45, at 115.
\textsuperscript{111} \textit{AUSTRALIAN LABOUR ECONOMICS: READINGS, supra} note 82, at 125.
\textsuperscript{112} Women's Employment Act 1942, § 6(1) of the Schedule, 40 AUSTL. ACTS P. 176, 178 (1942).
\textsuperscript{113} Id. at § 6(a) of the Schedule, 40 AUSTL. ACTS P. 176, 177 (1942).
\textsuperscript{114} Id. at § 6(5) of the Schedule, 40 AUSTL. ACTS P. 176, 179 (1942). \textit{See} Arms Explosives & Munitions Workers Case, 50 C.A.R. 191, 200-14 (1943).
\textsuperscript{115} Metal Trades Award, 47 C.A.R. 776, 788 (1942); Amalgamated Clothing and Allied Trades Case, 51 C.A.R. 632, 635 (1943); Federated Rubber and Allied Workers Case, 51 C.A.R. 648, 650 (1943).
\textsuperscript{116} Female Minimum Rates Case, 54 C.A.R. 613 (1945). The case came before the Commission because the Government, by regulation, had requested the Commission to increase the female rate to 75 percent of the male rate in the following industries: woolen and worsted textile manufacturing; cotton textile manufacturing; knitting and hosiery manufacturing; fruit and vegetable preserving, pickle and jam making, fruit juices and cordial preparation; meat preserving; milk processing, butter, cheese and margarine making; egg processing and packing; boot and shoe making; aircraft manufacturing & assembling; munitions manufacturing; motor, body, coach or carriage building; and domestic workers in hospitals and asylums. National Security (Female Minimum Rates) Regulations, Stat. Rules 1944, No. 108, 1944 Austl. Stat. R. No. 581.
\textsuperscript{117} National Security (Female Minimum Rates) Regulations, 1945 Austl. Stat. R. No. 139.
tion and full jurisdiction over female rates returned to the Commis-
sion. However, the changes resulting from the war and the Board's
actions had caused, in sharp contrast to the long period of stability
from 1912-42, large variations in female wage rates:

In some areas, either equal pay or 90% of the male rate were prescribed be-
cause of pressure from the trade unions and the continuation of the authority
of the decisions of the Women's Employment Board until 1949. In other areas,
75% of the male rate was prescribed, and in others the 54% rate was pre-
scribed. The employers, however, were unable to maintain the lower 54% rate
because the demand for female labour continued, and this forced the market
rate above that rate.

In the 1949-50 Basic Wage Inquiry, the Commission recognized
that the traditional 54 percent rate was no longer viable. Basing its
decision primarily on the prevailing industry practice, which was to
pay women about 75 percent of the male wage, the Commission set the female basic wage at 75 percent of the male basic wage. The
shock caused by the war was over and the new rate, like the old 54
percent rate, enjoyed a long period of stability, although the word “en-
joyed” may not apply as well to the women receiving the rate.

2. The Equal Pay Efforts

The 75 percent basic wage rate for women survived for nearly two
decades. The Commission eliminated it, and the long-standing, insti-
tutionalized wage discrimination against women, in three decisions be-
inning in 1969.

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119. Hutson, supra note 45, at 116. See also Metal Trades Award 1941, 60 C.A.R. 1405 (1948):

[From our review of several awards in which female rates of pay were
prescribed,] no standard can be found while there are almost as many
female minimum rates as there are awards. . . .

Thus it is true to say the adult female minimum rate of remuneration
in the sense of a foundational rate upon which an arbitrator may build
his wage structure does not exist, it has neither been found nor fixed by
the Court nor can it be ascertained from the awards.

Id. at 1417 (emphasis in original).

120. 68 C.A.R. 698 (1949).
121. Id. at 815-19.
122. The Arbitration Act had been amended in 1949 to give the Commission the au-
thority to set a basic wage for females. Commonwealth Conciliation Arbitration
Act (No. 2) 1949, 47 Austl. Acts P. 267 (1949). Thus, although the Commission
had established de facto basic wages for females since 1912, this case was techni-
cally the first case in which a female basic wage was established.

123. Two of the three judges on the Commission panel hearing the case opted for the
The other judge voted to retain the old 54 percent standard. Id. at 782-86.
124. The 75 percent ratio actually began to erode shortly before the 1969 Equal Pay
Case. In the National Wage Cases in 1967 and 1968, the Commission awarded flat
increases of $1.00 and $1.35, respectively, to the wage rates of both men and wo-
men. This had the effect of slightly increasing the ratio of female-to-male wages.
The first of the decisions was Equal Pay Cases 1969\textsuperscript{125} in which the Commission announced principles that were roughly analogous to the concept of "equal pay for equal work" in the United States.\textsuperscript{126} To reach that result, however, the Commission first had to deal with the conceptual basis of the basic wage\textsuperscript{127} and, in particular, with the "living" or "family" wage concept which historically had been used to justify differences between male and female wages.\textsuperscript{128} If the family wage concept was still viable, the Commission could only change the relationship between male and female wages by examining the relative family responsibilities of male and female workers and by determining whether those responsibilities had changed sufficiently in recent years to justify an increase in the wages of women relative to men. Rather than engage in that very difficult inquiry, the Commission decided that the family wage concept had been considerably eroded\textsuperscript{129}


\textsuperscript{126} 127 C.A.R. 1142 (1969). In a previous case, the Commission had all but asked that the issue be placed before it:

\begin{quote}
The community is faced with economic, industrial and social challenges arising from the history of female wage fixation. Our adoption of the concept of a total wage [see infra note 127] has allowed us to take an important step forward in regard to female wages. We have on this occasion deliberately awarded the same increase to adult females and adult males. The recent Clothing Trades Decision, 118 C.A.R. 286 (1967), affirmed the concept of equal margins for adult males and females doing equal work. The extension of that concept to the total wage would involve economic and industrial sequels and calls for thorough investigation and debate in which a policy of gradual implementation could be considered. . . . We invite the unions, the employers and the Commonwealth to give careful study to these questions with the knowledge that the Commission is available to assist by conciliation or arbitration in the resolution of the problems.
\end{quote}


\textsuperscript{126} For a more detailed comparison of the Australian and American concepts, see infra notes 183-97 and accompanying text.

\textsuperscript{127} The "basic wage" and "margins" conceptual framework had been abandoned by the Commission in 1967 and replaced with a "total wage," which combined the basic wage and margins into one figure. National Wage Cases 1967, 118 C.A.R. 655 (1967). The case, however, did not revise the conceptual bases for determining wages. In particular, the case did not discuss the status of the "living" or "family" wage concept which was used to justify the difference between male and female wages.

\textsuperscript{128} See supra notes 41-45, 97-99 and accompanying text.

\textsuperscript{129} Equal Pay Cases 1969, 127 C.A.R. 1142, 1152-53 (1969). Ironically, the Commission relied on its decision in the 1949-50 Basic Wage Inquiry, 88 C.A.R. 698 (1949), to support its claim that the family wage concept had eroded:

\begin{quote}
This decision caused an erosion of the concept of the family wage because if before the decision it had been desirable for family considerations that there should be a 54 percent relationship, the mere fact that industry was paying more should not have caused the Court to change the percentage[,] unless the Court was departing from the concept of [the family] wage.
\end{quote}
and, as a result, was "no real bar to a consideration of equal pay for equal work." As a result, while recognizing that there was still a "relic" of the family wage in the wage structure, the Commission ended its half century of reliance on the family wage and so removed what had been a significant barrier to equal wages for women.

After having disposed of that barrier to change, the Commission decided to follow the lead of four states that required "equal pay for equal work." The state efforts justified change, the Commission said, because they demonstrated "that there is a belief in this community that equal pay for equal work is a socially proper one" and because they made it necessary to harmonize the approaches of the state and federal tribunals on the issue.

Nevertheless, the Commission was cautious in ordering changes: While we accept the concept of "equal pay for equal work" implying as it does the elimination of discrimination based on sex alone, we realise that the concept is difficult of precise definition and even more difficult to apply with precision. . . . [Rather than order a broad solution as urged by the unions, we] consider it preferable to start from a decision or principle [based on the State Acts] and let that principle be worked through the system.

The Commission announced nine principles that were to be applied to implement equal pay for equal work. The principles required men and women to be paid the same when "female employees are per-

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Equal Pay Cases 1969, 127 C.A.R. 1142, 1152 (1969). Thus, according to the Commission, the conceptual basis for female-male wage differentials, the family wage, had eroded 20 years before the Commission decided to reduce the differentials.

130. Id. at 1153.

131. Id. Indeed, the Commission explicitly relied on the "family wage" concept to preserve another type of discrimination against women. The minimum wage applied only to males because of the family wage concept. National Wage and Equal Pay Cases 1972, 147 C.A.R. 172, 176 (1972).


134. Id. The Commission also considered arguments based on international materials and on the potential economic effects of its decisions. The Commission was not persuaded by the international materials calling for equal pay (in particular International Labor Organization conventions calling for equal pay) because neither Australia nor other advanced western industrial countries (such as the United Kingdom, United States, and Canada) had ratified them. Id. at 1155. On the economic effect of its decision the Commission said that "[w]hile we are not able to quantify with any accuracy the effect of our decision, it should cause no significant economic problems" because of the gradual implementation. Id. at 1155.

135. Id. at 1156.

136. The nine principles were as follows:
forming the same work or work of a like nature as male employees and doing the same range and volume of work as male employees and under the same conditions."\textsuperscript{137} They also provided, however, that "equal pay should not be provided . . . where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed."\textsuperscript{138}

The principles, ironically, were very similar to Justice Higgins' original 1912 principles.\textsuperscript{139} Women and men were to be paid the same where they were in competition, but where the work was "women's work," women could be paid less. Higgins' principles had not been consistently and uniformly applied, so the 1969 principles, as stated,\textsuperscript{140}

\begin{itemize}
  \item[(1)] the male and female employees concerned, who must be adults, should be working under the terms of the same determination or award;
  \item[(2)] it should be established that certain work covered by the determination or award is performed by both males and females;
  \item[(3)] the work performed by both the males and the females under such determination or award should be of the same or a like nature and of equal value, but mere similarity in name of male and female classifications may not be enough to establish that males and females do work of a like nature;
  \item[(4)] for the purpose of determining whether the female employees are performing work of the same or a like nature and of equal value as the male employees the Arbitrator or the Commissioner, as the case may be, should in addition to any other relevant matters, take into consideration whether the female employees are performing the same work or work of a like nature as male employees and doing the same range and volume of work as male employees and under the same condition;
  \item[(5)] consideration should be restricted to work performed under the determination or award concerned;
  \item[(6)] in cases where males and females are doing work of the same or a like nature and of equal value, there may be no appropriate classifications for that work. In such a case appropriate classifications should be established for that work which is performed by both males and females and rates of pay established for that work. The classifications should not be of a generic nature covering a wide variety of work;
  \item[(7)] in considering whether males and females are performing work of the same or like nature and of equal value, consideration should not be restricted to the situation in one establishment but should extend to the general situation under the determination or award concerned, unless the award or determination applies to only one establishment;
  \item[(8)] the expression of "equal value" should not be construed as meaning "of equal value to the employer" but as of equal value or at least of equal value from the point of view of wage or salary assessment;
  \item[(9)] notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed.
\end{itemize}

\textit{Id.} at 1158-59.

\textsuperscript{137} \textit{Id.} at 1158.

\textsuperscript{138} \textit{Id.} at 1159.


\textsuperscript{140} In practice, the 1969 principles appeared to have a much larger effect than a nar-
would benefit those women who were not receiving equal pay even though they were performing equal work in areas that were not female dominated. The majority of women workers, however, worked in female dominated areas and, hence, did not stand to benefit from the decision.\footnote{141}

The Commission also attached limitations to its decision that, in a very real sense, made their decision less generous than Higgins’ 1912 decision. First, the decision was to be phased in over a period of three years. Women who qualified under the principles were to receive 85 percent of the male rate beginning October 1, 1969; 90 percent beginning January 1, 1970; 95 percent beginning January 1, 1971; and 100 percent beginning January 1, 1972.\footnote{142} Second, even though the basic wage and margins concept had been replaced with the total wage concept in 1967,\footnote{143} the Commission required equal pay only with respect to male and female wage differences which were attributable to the old “basic wage.” Any differences attributable to the old “margins,” which the Commission explicitly recognized as existing,\footnote{144} did not have to be equalized.\footnote{145} Third, the decision did not extend the minimum wage, which applied only to males, to females.\footnote{146} As a result, when the wage rate for an occupation was below the minimum wage, women would receive the wage rate for the occupation and men would receive the higher minimum wage.\footnote{147}

\footnote{141. In 1973, the unions claimed that only 18 percent of women in the work force had received equal pay under the 1969 decision. National Wage and Equal Pay Cases 1972, 147 C.A.R. 172, 177 (1972).
143. \textit{See supra} note 127.
144. An examination of the history of [“margins”] for females produces a . . . confused result. In some instances females doing the same work as males received the same [“margins”] . . . In some instances . . . they did not. In other cases, . . . they received what might be described as a composite margin to cover a range of [job] classifications. So that when in 1967 the Commission introduced total wages by combining the basic wage and margins the resultant many differences between the wages of males and females were due to a variety of reasons.
145. \textit{Id.} at 1158. Despite this, some decisions did equalize the total wage. \textit{See, e.g.,}
147. The decision implementing equal pay in the Metal Trades Industry, for example, granted equal pay in stages to approximately 80,000 female process workers. Metal Trades Award, 131 C.A.R. 663, 708-11 (1970). However, since the process worker classification was paid sixty cents per week less than the male minimum wage, women were not paid the same as men even after the decision. HUTSON, \textit{supra} note 45, at 127.
Despite these limitations and the ever-present problem of deter-
moving whether men and women were performing "equal work," the 1969 decision influenced the relative award rates and earnings of men and women. After almost two decades of constancy, the relative awards of females to males moved up from 72 percent in 1969 to 77.4 percent in 1972, an increase of 7.5 percent. The actual earnings of women relative to men also moved up, from 58.4 percent in 1969 to 63.2 percent in 1972, an increase of 8 percent.

The relative increases for women were to continue. Shortly after the implementation period of the 1969 decision had ended, the Commission issued another decision that expanded the scope of the equal pay efforts. As with the 1969 decision, the Commission decided to initiate changes within its own wage-setting system largely because of changes occurring elsewhere:

The broad issue we have to decide is whether in the present social and industrial climate it is fair and reasonable that the 1969 principles should remain unaltered. This involves us in making an assessment of what, if anything, has happened in the area of equal pay since 1969 which would make it just and proper for us to alter those principles. . . .

We think that broad changes of significance have occurred since 1969. These changes are reflected in the attitudes of Governments in Australia and in development in the United Kingdom, New Zealand and elsewhere.

[The Commission then noted that the submissions of the Tasmanian and Commonwealth Government supported the concept of equal work for equal value; that the United Kingdom passed legislation in 1970 which supported the concept; and that a bill was introduced in New Zealand in 1972 providing for equal pay.]

[Changes have also occurred in other countries which provide additional evidence of a world wide trend towards equal pay for females.]

All these changes require us to reconsider the 1969 principles and to look at them in the light of present circumstances. . . . In our view the concept of "equal pay for equal work" is too narrow in today's world and we think the time has come to enlarge the concept to "equal pay for work of equal value." This means award rates for all work should be considered without regard to the sex of the employee.

The Commission announced seven new principles which were to

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148. See, e.g., Federal Meat Industry Interim Award, 129 C.A.R. 743 (1969)(approximately 120 women out of 2,000 employed under award were found to be engaged in "equal work" with men). See Hutson, supra note 45, at 126-27.

149. For more detailed discussions of the effects of the equal pay efforts, see infra notes 172-81 and accompanying text.


151. Id.


supplement the 1969 principles. The first principle explicitly provided that the concept of “equal pay for work of equal value” should

154. The principles were as follows:

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

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

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

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

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

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

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

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

(d) Although a similarity in name may indicate a similarity of work, it may be found on closer examination that the same name has been given to different work. In particular this situation may arise with generic classifications. A similar situation may arise with respect to junior employees. Whether in such circumstances it is appropriate
apply to all awards of the Commission. Equal value was defined generally as the determination of wage rates "by a consideration of the work performed irrespective of the sex of the worker." That general concept was to be implemented primarily by comparing the work of female workers with the work of male workers.

The 1972 decision eliminated two of the significant limitations of the 1969 decision. First, it extended the concept of equal pay to women doing work which was "essentially or usually performed by females." Women working as secretaries or nurses or in other female dominated occupations were now covered by the equal pay mandate. Because most women worked in those occupations, the 1969 decision had only reached about 18 percent of working women. The new decision would apply to all working women. Second, the 1972 decision applied to the total wage rate and not just to the portion of the wage to establish new classifications or categories will be a matter for the arbitrator.

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

(f) The new principle will have no application to the minimum wage for adult males which is determined on factors unrelated to the nature of the work performed.

6. Both the social and economic consequences of our decision will be considerable and implementation will take some time. It is our intention that rates in all awards of this Commission and all determinations under the Public Service Arbitration Act should have been fixed in accordance with this decision by 30 June 1975. Under normal circumstances, implementation should take place by three equal instalments so that one-third of any increase is payable no later than 31 December 1973, half of the remainder by 30 September 1974 and the balance by 30 June 1975. This programme is intended as a norm and we recognise that special circumstances may exist which require special treatment.

7. Nothing we have said is intended to rescind the 1969 principles applicable to equal pay for equal work which will continue to apply in appropriate cases. We have taken this step because an injustice might be created in cases based on equal pay for equal work where females could become entitled immediately to male rates under those principles.

155. Id. at 179.
156. Id.
157. Id. at 180.
159. National Wage and Equal Pay Cases 1972, 147 C.A.R. 172, 177 (1972). Although the Commission cited this figure in its decision, it also recognized that it was very difficult to make an accurate estimate. Id.
rate attributable to the old "basic wage" as had the 1969 decision.\textsuperscript{160}

The Commission decided to phase in the 1972 decision, as it had the 1969 decision,\textsuperscript{161} but this time in three installments over a period of approximately two-and-one-half years. Equal pay was to be fully implemented by June 30, 1975.\textsuperscript{162}

The Commission, however, left in place one principle which discriminated against women. The Commission refused to extend the male minimum wage to women.\textsuperscript{163} Curiously, the Commission refused to extend the minimum wage to women because of the "family wage"\textsuperscript{164} which had been rejected as a concept barring equal pay in the 1969 decision,\textsuperscript{165} but which reared its weary head one last time in the Commission's discussion of the minimum wage. It was to be a brief last gasp.

In 1974, the Commission decided that the family wage concept should not apply to minimum wage determinations\textsuperscript{166} and so decided to set a minimum wage for women at the same rate as that for men.\textsuperscript{167} Although the minimum wage increase for women was also phased in, full equality of the minimum wage was to be achieved on the same date the phasing in of the 1972 decision was to be completed.\textsuperscript{168} As a result, on June 30, 1975, women in Australia reached full, formal equality with men in the wage-setting process.

3. Women's Pay Under Formal Equality—1969 to the Present

Formal equality is nice, but as women in the United States have discovered over the past 25 years, it does not necessarily mean that the wages of women relative to men will increase. In the United States, women received full formal equality in wage-setting with the passage of the Equal Pay Act in 1963 and Title VII in 1964.\textsuperscript{169} Nevertheless, the wages of women in the United States relative to those of men re-
mained quite stable at about 60 percent for the following two decades, and began to increase only in the last few years.\textsuperscript{170}

The change to formal equality in Australia could have been equally ineffective (or at least slow) despite the existence of wage-setting tribunals. The Equal Pay Decisions were merely announcements of principle that were to be implemented as individual disputes arose;\textsuperscript{171} the wage-setting tribunals could have failed to implement the Decisions or could have implemented them in a niggardly fashion. Further, men could have attempted to maintain their historic advantages through over-awards which were largely outside of the control of the wage-setting process. Nevertheless, despite these possibilities and in contrast to the experience with formal equality in the United States, the relative wages of women in Australia did increase, and increase quite dramatically, after the Equal Pay Decisions.

From the time of the first Equal Pay Decision in 1969 until full implementation in 1975, women in Australia increased their earnings relative to men by 25 to 30 percent. The precise increase varies a bit depending on the comparison made and, as Table 1 indicates, there are many possible comparisons. But regardless of the comparison, the increase in the relative wages of women in Australia between 1969 and 1975 was significant. The ratio of female-to-male weekly earnings increased 30 percent, the ratio of award rates increased 26 percent, and the ratio of hourly earnings, available only from 1972 to 1975, increased 12 percent.\textsuperscript{172} Perhaps even more significantly, the increased female-to-male wage ratio has not dissipated over time, but has remained quite stable since 1975.

The gains made by women in Australia from the increase in relative wages could have been undermined by reductions in the employment of women. If the gains made by women who received the higher

\textsuperscript{170} See figure 1 \textit{infra}.

\textsuperscript{171} [F]inding a satisfactory solution to the issues now before us is very difficult. We consider it preferable to start from a decision on principle in this case and let that principle be worked through the system. Equal Pay Cases, 127 C.A.R. 1142, 1156 (1969).

\textsuperscript{172} Professor Killingsworth has recently raised the issue of whether the significant increases in relative female wages in the long-term can be attributed to the equal pay decisions. He argues that the equal pay decisions had a considerable effect in the short-term on relative female wages, but that the effect wore off quickly and does not explain the seemingly permanent increase in relative female wages in Australia. \textsc{Mark R. Killingsworth}, \textit{The Economics of Comparable Worth} 250-60 (1990). Unfortunately, his analysis is quite flawed, as two of us have indicated elsewhere. R.G. Gregory & A.E. Daly, \textit{Can Economic Theory Explain Why Australian Women Are So Well Paid Relative to Their U.S. Counterparts?}, 3 \textit{Int'l Rev. Comp. Pub. Pol'y} 81 (1991). A proper economic analysis supports one's intuitions about the causes of the increase in women's wages in Australia—the increases occurred immediately after the equal pay decisions and were caused by them. \textit{Id}.
Table 1
Female-to-Male Wage Ratios in Australia, 1964-88

<table>
<thead>
<tr>
<th>Year</th>
<th>Award Ratesa</th>
<th>Weekly Earningsb</th>
<th>Hourly Earningsc</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964</td>
<td>72.0</td>
<td>59.2</td>
<td>n.a.</td>
</tr>
<tr>
<td>1966</td>
<td>71.0</td>
<td>57.8</td>
<td>n.a.</td>
</tr>
<tr>
<td>1967</td>
<td>72.4</td>
<td>58.2</td>
<td>n.a.</td>
</tr>
<tr>
<td>1968</td>
<td>71.0</td>
<td>57.0</td>
<td>n.a.</td>
</tr>
<tr>
<td>1969</td>
<td>72.0</td>
<td>58.4</td>
<td>n.a.</td>
</tr>
<tr>
<td>1970</td>
<td>73.2</td>
<td>59.1</td>
<td>n.a.</td>
</tr>
<tr>
<td>1971</td>
<td>74.6</td>
<td>60.7</td>
<td>n.a.</td>
</tr>
<tr>
<td>1972</td>
<td>77.4</td>
<td>63.2</td>
<td>76.2</td>
</tr>
<tr>
<td>1973</td>
<td>79.4</td>
<td>65.9</td>
<td>78.6</td>
</tr>
<tr>
<td>1974</td>
<td>85.2</td>
<td>70.9</td>
<td>82.2</td>
</tr>
<tr>
<td>1975</td>
<td>90.8</td>
<td>75.7</td>
<td>85.5</td>
</tr>
<tr>
<td>1976</td>
<td>92.4</td>
<td>77.1</td>
<td>87.4</td>
</tr>
<tr>
<td>1977</td>
<td>93.2</td>
<td>76.6</td>
<td>88.3</td>
</tr>
<tr>
<td>1978</td>
<td>92.9</td>
<td>75.6</td>
<td>88.1</td>
</tr>
<tr>
<td>1979</td>
<td>92.1</td>
<td>74.1</td>
<td>87.5</td>
</tr>
<tr>
<td>1980</td>
<td>91.7</td>
<td>75.2</td>
<td>87.5</td>
</tr>
<tr>
<td>1981</td>
<td>93.1</td>
<td>75.3</td>
<td>n.a.</td>
</tr>
<tr>
<td>1982</td>
<td>91.5</td>
<td>75.7</td>
<td>84.5</td>
</tr>
<tr>
<td>1983</td>
<td>91.5</td>
<td>75.8</td>
<td>85.0</td>
</tr>
<tr>
<td>1984</td>
<td>91.7</td>
<td>76.6</td>
<td>87.5</td>
</tr>
<tr>
<td>1985</td>
<td>91.8</td>
<td>76.7</td>
<td>89.2</td>
</tr>
<tr>
<td>1986</td>
<td>92.1</td>
<td>77.8</td>
<td>88.4</td>
</tr>
<tr>
<td>1987</td>
<td>92.6</td>
<td>77.3</td>
<td>89.0</td>
</tr>
<tr>
<td>1988</td>
<td>92.2</td>
<td>77.7</td>
<td>90.2</td>
</tr>
</tbody>
</table>

Sources: Australian Bureau of Statistics, Wage Rate Indexes (Cat. No. 6314.0), Earnings and Hours of Employees (Cat. No. 6304.0), and Average Earnings and Hours of Employees (Cat. No. 6304.0).

a Adult average minimum award rates for a full week's work, all industry groups, average of four quarters each year.
b Adult average weekly earnings for full-time non-managerial employees in the private sector. New series from 1981.
c Non-overtime hourly earnings for full-time non-managerial employees.

wages were offset by losses to women who were laid off or had their hours reduced because of the higher wages, the overall position of women in the labor force would have been largely unchanged despite the relative increase in wages. Economists regularly predict that exogenous increases in female wages (such as the increases in Australia) and other types of exogenous increases in wages (such as increases in the minimum wage) will be counterproductive because of the resultant reductions in employment.173

In Australia, however, the effect of the relative wage increases on

employment was quite small. From 1969 to 1975, female employment relative to male employment increased despite the significant increases in relative female wages. Relative female employment continued to increase after 1975. Thus, the wage increases did not have an immediate or a delayed effect on the direction of relative female employment. The relative wage increases, however, did seem to have an adverse impact on the rate of increase of female employment. From 1969 to 1975, female employment grew relative to male employment at an annual rate of about 3 percent. Gregory and Duncan estimated that the rate of increase would have been about 4.5 percent in the absence of the wage increases. But Gregory and Duncan qualified that conclusion by noting that factors other than the wage increases (such as tariff reductions that reduced employment in female-intensive industries) contributed to the reduction in the rate of increase in female employment. Their overall conclusion was that the effect of the wage increases on female employment was "very small."

The effect of the relative wage increases on employment mirrored the effect on employment. Female unemployment relative to male unemployment went down between 1969 and 1975, but Gregory and Duncan found that the wage increases reduced the extent of the reduction. In 1977, after the relative wage increases were in place, female employment was about 0.5 of a percentage point higher than it would have been in the absence of the relative wage increases. Gregory and Duncan concluded that female unemployment was "remarkably unresponsive" to the increases in relative female wages.

The extent to which these modest employment losses undermined the gains to women from the relative wage increases can be assessed by examining the share of the total wages in Australia paid to women.

*mum Wage on Employment and Unemployment*, 20 J. Econ. LITERATURE 487 (1982).

174. Between 1969 and 1975, relative female employment increased from 31.6 percent to 34.6 percent. Gregory & Anstie, supra note 66, at 24a.

175. Relative female employment increased to 35.0 percent in 1976, 36.4 percent in 1981, and 39.9 percent in 1986. Relative female employment increased every year from 1969 to 1986, except for 1979 when there was a .4 percent decrease. Id.

176. R.G. Gregory & R.C. Duncan, Segmented Labor Market Theories and the Australian Experience of Equal Pay for Women, 3 J. POST KEYNESIAN ECON. 403, 420-21, 426 (1981). Others have relied on the Gregory and Duncan study to argue that the adverse employment effects of the wage increase were significant. Killingsworth, supra note 173, at 740; Aldrich & Buchele, supra note 173, at 159-60. But see Killingsworth, supra note 172, at 260-63 (the wage increases had a noticeable but small initial negative impact on relative female employment, but the effect wore off fairly quickly). Those commentators, however, do not take into account, as Gregory and Duncan do in reaching their conclusion, the role of other factors operating at the same time as the wage increases (such as tariffs) that also reduced the rate of increase of female employment.


178. Id. at 425.
If relative female wages increased and there were no employment effects, the portion of total wages paid to women would increase. Alternatively, if employment losses were significant, the portion of total wages paid to women could remain stable even after increases in the wages of women relative to men. From 1969 to 1976, the share of total wages in Australia paid to women increased from 20 percent to 28 percent. Gregory and Duncan estimated that without the wage increases, but at the higher employment level that would have resulted, the female share of total wages would have increased to 23 percent. The gains to women from the relative wage increases, then, more than offset the losses to women from reductions in female employment.

Even an overall gain to women, however, might be troublesome if the gains from the wage increases went disproportionately to one class (for example professional or younger women), while the employment losses were disproportionately borne by another class (for example blue collar or older women). But that did not happen in Australia. The gains and losses to women in Australia were distributed quite equally by income (Table 2), industry (Table 3), occupation (Table 4), and age (Table 5).

Table 2
Income Distribution by Quintile, Earned Income of Full-year, Full-time Female Workers

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Lowest</td>
<td>10.0</td>
<td>9.6</td>
<td>10.2</td>
</tr>
<tr>
<td>2nd</td>
<td>14.9</td>
<td>15.6</td>
<td>16.3</td>
</tr>
<tr>
<td>3rd</td>
<td>18.3</td>
<td>18.9</td>
<td>19.5</td>
</tr>
<tr>
<td>4th</td>
<td>21.8</td>
<td>22.7</td>
<td>22.6</td>
</tr>
<tr>
<td>Highest</td>
<td>34.9</td>
<td>33.4</td>
<td>31.4</td>
</tr>
</tbody>
</table>


179. Id. at 423-24.
180. This distribution of the gains across various subgroups of women contrasts quite sharply with the distribution of the gains contributing to the increasing female-male earnings ratio during the 1980s in the United States. See infra note 246.
### Table 3
Female-To-Male Earnings In Selected Industries, Full-Time, Non-Managerial Adult Employees, 1966 and 1976

<table>
<thead>
<tr>
<th>Industry</th>
<th>Percent</th>
<th>1966</th>
<th>1976</th>
<th>Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food, drink and tobacco</td>
<td></td>
<td>25</td>
<td>58.4</td>
<td>76.2</td>
</tr>
<tr>
<td>Textiles, clothing and footwear</td>
<td></td>
<td>66</td>
<td>58.6</td>
<td>76.1</td>
</tr>
<tr>
<td>Paper, printing, etc.</td>
<td></td>
<td>27</td>
<td>54.8</td>
<td>70.8</td>
</tr>
<tr>
<td>Chemicals, dyes, explosives, etc.</td>
<td></td>
<td>26</td>
<td>57.6</td>
<td>72.5</td>
</tr>
<tr>
<td>Foundry, engineering, vehicles, etc.</td>
<td></td>
<td>16</td>
<td>55.9</td>
<td>74.5</td>
</tr>
<tr>
<td>Building and construction</td>
<td></td>
<td>4</td>
<td>58.4</td>
<td>67.9</td>
</tr>
<tr>
<td>Transport and storage</td>
<td></td>
<td>12</td>
<td>56.6</td>
<td>75.4</td>
</tr>
<tr>
<td>Finance and property</td>
<td></td>
<td>44</td>
<td>60.5</td>
<td>81.1</td>
</tr>
<tr>
<td>Wholesale trade, etc.</td>
<td></td>
<td>27</td>
<td>65.0</td>
<td>80.4</td>
</tr>
<tr>
<td>Retail trade, etc.</td>
<td></td>
<td>48</td>
<td>64.8</td>
<td>85.0</td>
</tr>
</tbody>
</table>

* Unweighted average of 1966 and 1976 percentage, except for "Foundry, engineering, vehicles, etc." which is the 1966 percentage.

Sources: Gregory & Anstie, supra note 66, at Table 4.

### Table 4
Female-to-Male Mean Earnings by Broad Occupational Grouping For Full-Year, Full-Time Workers

<table>
<thead>
<tr>
<th>Broad occupational grouping</th>
<th>1968-69</th>
<th>1973-74</th>
<th>% increase from 1968</th>
<th>1978-79</th>
<th>% increase from 1968</th>
<th>% increase from 1973</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prof. &amp; Admin.</td>
<td>.48</td>
<td>.62</td>
<td>29</td>
<td>.67</td>
<td>40</td>
<td>8</td>
</tr>
<tr>
<td>Clerical</td>
<td>.57</td>
<td>.66</td>
<td>16</td>
<td>.71</td>
<td>25</td>
<td>8</td>
</tr>
<tr>
<td>Sales</td>
<td>.51</td>
<td>.52</td>
<td>2</td>
<td>.59</td>
<td>16</td>
<td>13</td>
</tr>
<tr>
<td>Trades &amp; Production</td>
<td>.52</td>
<td>.63</td>
<td>21</td>
<td>.70</td>
<td>35</td>
<td>11</td>
</tr>
<tr>
<td>Service, Sport &amp; Recreation</td>
<td>.57</td>
<td>.66</td>
<td>16</td>
<td>.66</td>
<td>16</td>
<td>0</td>
</tr>
<tr>
<td>Overall*</td>
<td>.56</td>
<td>.64</td>
<td>14</td>
<td>.72</td>
<td>29</td>
<td>13</td>
</tr>
</tbody>
</table>

* Includes other non-comparable occupational groupings

Sources: Australian Bureau of Statistics, Income Distribution 1968-69, Table 58 (Ref. No. 17.17); Income Distribution 1973-74, Table 24 (Ref. No. 17.6); Income Distribution Australia, 1978-79, Individuals, Table 18 (Cat. No. 6502.0).
III. WOMEN'S WAGES IN THE UNITED STATES—PERSPECTIVES FROM THE AUSTRALIAN EXPERIENCE

The female-to-male wage ratios in Australia and the United States were very similar when Australia's wage-setting tribunals explicitly discriminated against women. Beginning in 1969, when Australia began to do away with that explicit discrimination, the wage ratios of the two countries began to look quite different (Figure 1). The casual inference from these facts is that there is sex discrimination in wage setting in the United States. Even though sex discrimination in wage setting is not explicit in the United States, our wage ratio looked like Australia's when they clearly discriminated against women, and began to look much different when they did away with that discrimination. This section will begin by examining the legal doctrines used to increase the wage ratio in Australia: How similar were the efforts under

181. Despite the beneficial changes precipitated by the Equal Pay Decisions, women in Australia are still paid less than men. Some commentators in Australia believe that the difference results from continuing wage discrimination against women. Jane Stackpool-Moore, From Equal Pay to Equal Value in Australia: Myth or Reality?, 11 COMP. LAB. L.J. 273 (1990); Short, supra note 139. See also Gregory & Ansie, supra note 66, at 15-20 (pockets of wage discrimination persist, but the level is small at the aggregate level); Bruce J. Chapman & Charles Mulvey, An Analysis of the Origins of Sex Differences in Australian Wages, 28 J. INDUS. REL. 504 (1986)(analysis of 1982 data indicates some residual wage discrimination).
Figure 1


Sources: Australia: Australian Bureau of Statistics, Average Earnings and Hours of Employees (Cat. No. 6304.0).

the Equal Pay Decisions in Australia to equal pay and comparable worth in the United States? Next, the casual inference of discrimination arising from the Australian experience will be examined to see if it can withstand more rigorous analysis. Finally, this section will discuss the relevance of the Australian experience to women’s wages in the United States. Since the Australian method of increasing women’s wages—changing the policy of wage-setting boards—is clearly not directly applicable in this country, what are the lessons of the Australian experience for the United States?

A. Equal Pay and Comparable Worth in the United States: Are the Australian Equal Pay Decisions Equivalent?

The legal doctrines announced in the Australian Equal Pay Decisions bear a strong resemblance to the American legal doctrines of equal pay and comparable worth. The commentators say that the
Australian and American doctrines are equivalent. But are they? The Australian Equal Pay Decision in 1969 and the American Equal Pay Act of 1963 both seem to adopt the same antidiscrimination principle—the principle of “equal pay for equal work.” The 1969 Decision and the Equal Pay Act both require women to be paid the same as men for work that is the same in content. Neither requires women to prove that the jobs of men and women are identical to claim equal pay; substantial identity in the content of the jobs is sufficient.

Despite these similarities, however, the “equal pay for equal work” principle is not the same in the two countries. In one important respect, the Australian principle is broader than the American principle. In the United States, women can only compare their work with the work of men employed by the same employer in the same establishment. Under the 1969 Decision in Australia, women are not limited

182. See, e.g., Killingsworth, supra note 172, at 239-40 (the 1972 equal pay decision “is indeed a form of comparable worth”); Henry J. Aaron & Camman M. Lougy, The Comparable Worth Controversy 40 (1986)(through the 1972 decision, Australia “establish[ed] the principle of equal pay for comparable worth”); Mitchell, supra note 14, at 133 (the 1972 decision was “roughly equivalent to the ‘comparable worth’ notion currently under debate in the United States”).


187. In Australia, see, e.g., Federal Meat Industry Interim Award, 129 C.A.R. 743, 744 (1969)(complete interchangeability of jobs is not required) and Meat Processing Interim Award, 171 C.A.R. 561, 667-68 (1975)(citing several cases in which complete identity of jobs was not required). In the United States, see, e.g., Shultz v. Wheaton Glass Co., 421 F.2d 259, 265-66 (3d Cir. 1970), cert. denied, 398 U.S. 905 (1970)(Equal Pay Act requires only a showing of “substantially equal work”); and Corning Glass Works v. Brennan, 417 U.S. 185, 203 n.24 (1974)(jobs need not be identical in every respect for Equal Pay Act to apply). Similarly, the “least difference” principle, in which women are permitted to compare themselves to the male whose job duties are least different from those of the women, has been applied in both countries. See Storemen and Packers (Wool Selling Brokers and Re-Packers) Award, 139 C.A.R. 529, 530 (1971); Charles A. Sullivan et al., Employment Discrimination § 17.10.2 (2d ed. 1988).

188. The Equal Pay Act provides: "No employer . . . shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work." 29 U.S.C. 206(d) (1988).
to comparisons within the establishment where they work, or even to comparisons with other employees of their employer. Rather, women can make comparisons with anyone working under the award or determination which covers them and, since most awards and determinations are multi-establishment and multi-employer, the range of potential comparisons women can make in Australia is much broader than the range of possible comparisons in the United States.

In other respects the Australian principle is narrower than the American principle. First, the Australian principle, unlike the American principle, did not apply to female-dominated occupations. Thus, most women working in Australia—the women working in female-dominated occupations—were not entitled to equal pay even if men were paid more for performing the same work. Second, the obligation to provide equal pay in Australia did not extend to all pay received by women. Specifically, it did not extend to any pay differences between men and women attributable to differences in the "margins" and it did not extend to "overawards." Women were entitled to equal pay with men doing the same work only with respect to their "basic" wages. In the United States, when women perform the same work as men, they are entitled to the same pay with respect to all aspects of their remuneration, including fringe benefits. And third, in Australia women might not be entitled to equal pay even if they can prove that they perform the same work as men. The 1969 Decision required equal pay only where the work was both the same and of equal value. So, at least on a theoretical level, there may be situations in which women can prove equal work, but cannot prove the work is of equal value and, hence, are not entitled to equal pay. The American Equal Pay Act does not require any showing of equal value.


189. Principle 7 of the 1969 Decision reads as follows:

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


190. See supra notes 138-41 and accompanying text.

191. See supra notes 143-45 and accompanying text.

192. See 29 C.F.R. § 1620.10—1620.11.


194. We were unable to find any cases reaching this result. But see Wool Brokers Staffs Association, 177 C.A.R. 164, 167 (1976)(stating that the 1969 Decision requires a showing both of equal work and of equal value).

195. The American Equal Pay Act, however, does contain affirmative defenses—unequal pay for equal work is permissible where it results from a seniority system, a
It is difficult to assess whether and to what extent these differences between the 1969 Decision and the Equal Pay Act are important. The reaction of the female-to-male wage ratios in the two countries in response to the legal changes was dramatically different. In Australia, the wage ratio immediately began to increase significantly. The wage ratio increased 8 percent—from 58.4 percent to 63.2 percent—in the time between 1969 when the Decision was issued and 1972 when the next important Decision was issued. In the United States, the wage ratio did not change at all in response to the Equal Pay Act. But the difference in response in the two countries could have been caused by a number of factors other than the substantive differences between the two “equal pay for equal work” principles. For example, it may have been that this relatively narrow type of discrimination was much more common in Australia than in the United States or it may have been that the very different procedures for enforcing the substantive standards (through Commission processes in Australia and through litigation in the United States) resulted in more effective enforcement of the standard in Australia.

A comparison of the 1972 Equal Pay Decision in Australia and the concept of comparable worth in the United States presents ambiguities that are very similar to those presented by the comparison between the 1969 Equal Pay Decision and the American concept of merit system, a system which measures earnings by quantity or quality of production, or any other factor other than sex. 29 U.S.C. § 206(d)(1988). If an employer can prove one of the affirmative defenses, a woman may not be entitled to equal pay even though she is doing the same work as a man. The “equal value” element of cases under the 1969 Decision in Australia can be viewed as an attempt to address the same set of cases addressed by the inclusion of affirmative defenses in the Equal Pay Act. If that is an accurate way of viewing the “equal value” element, the 1969 Decision in Australia would not be narrower than the American Equal Pay Act in this respect.

196. See supra Table 1.
199. Comparable worth has been rejected as a discrimination theory by courts in the United States. See, e.g., International Union, UAW v. Michigan, 885 F.2d 766 (6th Cir. 1989); American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985). But see Jancey v. Everett School Committee, No. 89-3807 (Mass. Sup. Ct., Aug. 13, 1992)(finding liability under a state comparable worth statute). As a result, when comparable worth in the United States is discussed in this section, reference is to the concept of comparable worth as it has been articulated in the literature, a concept that has been generally rejected by the courts. See Weiler, supra note 10; Steven L. Willborn, A Secretary and A Cook: Challenging Women's Wages in the Courts of the United States and Great Britain 127-56 (1989); Carin Ann Clauss, Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation, 20 U. Mich. J.L. Ref. 7 (1988).
equal pay. At their core, the "comparable worth" principles in the two countries are quite similar. In the 1972 Decision, the Australian Commission announced that it was implementing the principle of "equal pay for work of equal value." The Commission said that the principle meant that wages should be established "by a consideration of the work performed irrespective of the sex of the worker." In other words, the principle was intended to remove the extent to which the sex of workers influenced wage rates, even for jobs which were not identical in job content. That central principle is the same as the comparable worth principle in the United States. Nevertheless, comparable worth in Australia is not the same as comparable worth in the United States. As with equal pay, comparable worth in Australia is narrower in some respects and broader in other respects than comparable worth in America.

The Australian conception of comparable worth is narrower than the American conception of comparable worth in several ways. First, the range of comparisons that can be made are generally narrower in Australia than in the United States. The normal range for comparable worth comparisons in Australia, as it is for equal pay comparisons, is the award (that is, workers can compare themselves with other workers working under the same award), while the normal range for comparisons in the United States is the employer (workers can compare themselves with other workers working for the same employer). Since awards in Australia generally cover workers doing quite similar types of work, this range of comparison ironically makes the range *broader* than in the United States for equal pay comparisons.

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201. See Willborn, supra note 199, at 127-36; Weiler, supra note 10, at 1777-79; Clauss, supra note 199.
203. Principle 5(b) of the 1972 Decision reads as follows:

> 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 classifications in other awards may be necessary.

National Wage and Equal Pay Cases, 147 C.A.R. 172, 180 (1972). Although the Principle permits comparisons with male classifications in other awards, no reported cases have actually made that type of comparison in an equal value case. See Short, supra note 139, at 325.
204. Every comparable worth case in the United States has made intra-employer comparisons; none have made inter-employer comparisons. See, e.g., International Union, UAW v. Michigan, 886 F.2d 766 (6th Cir. 1989); American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).
(because comparisons can be made across employers), but narrower than in the United States for comparable worth comparisons (because comparisons to workers doing different work, the essence of comparable worth comparisons, is more limited).

Second, the Australian conception of comparable worth is different and narrower than the American conception because the type of comparisons made is more limited. In comparable worth cases in the United States, analytical job evaluation procedures are used to compare male and female jobs. These procedures are designed to facilitate, and in fact do facilitate, comparisons between jobs with radically different job duties. In Australia, analytical job evaluation procedures are almost never used in equal value cases; instead, tribunals exercise "broad judgment" to determine whether male and female jobs are of equal value.

Federal industrial tribunals in Australia have been very reluctant to compare jobs with dissimilar job duties using this standard and this has been especially true in equal value cases, even though such comparisons are essential to implementation of the equal value principle. Consequently, the conception of comparable worth is more limited in Australia than in the United States because, in practice, jobs with dissimilar duties can be compared in the United States, but cannot be compared in Australia.

Third, comparable worth is narrower in Australia than it is in the United States because the principle in Australia did not require that all wage differences attributable to sex be eliminated. The principle in Australia only required that sex-based wage differences in the wages established by the wage-setting tribunals be eliminated. There

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205. This is not to say, however, that the procedures are value-free or uncontroversial. For good general discussions of job evaluation types and methodologies, see Richard W. Beatty & James R. Beatty, Some Problems with Contemporary Job Evaluation Systems, in COMPARABLE WORTH AND WAGE DISCRIMINATION 59 (Helen Remick ed., 1984); DONALD J. TREMAN, JOB EVALUATION: AN ANALYTIC REVIEW (1979); DOV ELIZUR, JOB EVALUATION: A SYSTEMATIC APPROACH (1980).

206. The "broad judgment" standard was explicitly endorsed by the Commission in the 1972 Equal Pay Case: "Implementation ... will call for the exercise of the broad judgment which has characterised work value inquiries." National Wage and Equal Pay Cases 1972, 147 C.A.R. 172, 179 (1972).

207. For a discussion, see Short, supra note 139, at 322-23.

208. See, e.g., National Wage Case 1983, 291 C.A.R. 3, 31 (1983)(women's groups contended that implementation of 1969 and 1972 decisions had been frustrated because appropriate work value—i.e., job comparison—exercises had not been conducted, but Commission rejected request for more extensive and frequent comparisons); Royal Australian Nursing Federation, 28 AUS. IND. L. REV. (CCH) ¶117 (1988)(Commission distinguished its equal value principles from "comparable worth" saying that comparisons of unrelated or dissimilar work that are permitted by comparable worth would "strike at the heart of long accepted methods of wage fixation in this country"); Short, supra note 139, at 324 (Commission relied on actual inspections of work in only two equal value cases between 1973 and 1981).
was no requirement that sex-based wage differences in other aspects of compensation be eliminated. Specifically, even if it could be proven that wage differences in overawards were the result of sex discrimination, there was no requirement that those wage differences be eliminated. In the United States, the comparable worth principle would require that sex-based wage differences in all aspects of compensation be eliminated.

Finally, comparable worth in Australia is narrower than comparable worth in the United States because, at least since 1986, tribunals in Australia have been prohibited from rectifying proven sex-based wage differences if any increases would have more than a negligible effect on the economy or if any increases to women would necessitate additional increases to other employees. In the United States, remedies for comparable worth violations are not subject to these limitations.

In other respects, the comparable worth principle in Australia is broader than the comparable worth principle in the United States. In the United States, the comparable worth principle applies only to employers with fifteen or more employees. As a result, the principle

209. For a discussion of overawards, see supra notes 79-90 and accompanying text. Although the wage adjustments required by the 1972 Decision were not as great as the wage adjustments that would be required in the United States, they were greater than the wage adjustments that were required under the 1969 Decision. The 1969 Decision only required basic wages to be equalized, while the 1972 Decision required total wages (basic wages and margins) to be equalized. See supra text accompanying notes 143-45, 160.

210. See supra note 192.

211. By “proven” sex-based wage differences, I mean wage differences that violate the “equal pay for work of equal value” principle of the 1972 Decision.

212. In 1986, the Australian Commission decided that claims for wage increases based on the 1972 Equal Pay Decision should be processed under a procedure designed to deal with wage anomalies and inequities. *Royal Australian Nursing Federation*, 28 Aus. Ind. L. Rev. (CCH) ¶117 (1986). Increases could be granted under that procedure only if there was no likelihood of flow-ons (i.e., no likelihood that employees other than the women who had proven discrimination would receive wage increases) and only if the economic cost was negligible. See also National Wage Case 1983, 291 C.A.R. 3, 53-54 (1983). For an application of the anomalies and inequities procedure to a case applying the 1972 Decision, see *Royal Australian Nursing Federation*, 29 Aus. Ind. L. Rev. (CCH) ¶215 (1987).

213. Although later reversed on appeal for other reasons, the District Court in *AFSCME v. Washington* rejected the State’s arguments that the remedy for a comparable worth violation should be limited because of its expense and the disruption that expense would create for the State or because the remedy would require the State to re-assess its entire wage structure. *AFSCME v. Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), rev’d, 770 F.2d 1401 (9th Cir. 1985). See generally Ruth Gerber Blumrosen, *Remedies for Wage Discrimination*, 20 U. Mich. J.L. Ref. 99, 152-59 (1986).

214. Title VII provides the legal basis for the comparable worth principle in the United States and it applies only to employers with at least fifteen employees. Title VII, § 701(b), 42 U.S.C. § 2000e(b)(1988). Smaller employers could be
applies only to about 20 percent of employers and to about 80 percent of employees in the United States. In Australia, the comparable worth principle applies to employers regardless of their size. Similarly, the comparable worth principle has broader applicability in Australia than in the United States because the marginal costs of enforcing the principle are much lower in Australia. In Australia, the principle is legally enforceable through a tribunal structure that is an integral part of the normal wage-setting process. In the United States, the principle is legally enforceable only by disrupting the normal wage-setting process—only by a costly legal action in a non-specialized court. In these respects, then, the comparable worth principle in Australia is broader both legally and practically than in the United States.

These differences between the Australian and American conceptions of equal pay and comparable worth both are and are not significant. The differences are significant to the extent one attempts to use the Australian experience to make precise predictions of what would happen in the United States if our conception of comparable worth were implemented. The doctrinal differences, as well as the very significant institutional differences between the two countries, indicate that such an enterprise is especially hazardous. On the other hand, the differences are not very significant to the extent one attempts to make more general comparisons, for example, as we will do in the next section of this article, to compare a "low" discriminator society (Australia) with a "high" discriminator society (United States). This more modest enterprise should permit us, first, to make progress in determining whether discrimination is present in the "high" discriminator society and, second, to make a lower-bound estimate of the extent of discrimination. Although the doctrinal differences may make it difficult or impossible to determine whether implementation of the American conception of comparable worth in the United States would eliminate only some, or all, or more than the amount of discrimination uncovered by the comparison, the more modest enterprise is worthwhile because there is considerable debate about the presence of wage discrimination in the United States and because the estimate of the extent of discrimination can help to confirm or undermine estimates that have been made in other ways.

reached under many state laws prohibiting discrimination, but the major comparable worth cases have all been filed under federal law. See, e.g., International Union, UAW v. Michigan, 886 F.2d 766 (6th Cir. 1989); American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).

B. Is There Sex Discrimination in Wage Setting in the United States?

Workers are paid to work and, in a world that operated strictly on neoclassical economic principles, the pay for a worker would reflect exactly that worker's economic contribution to her employer. Workers vary in their ability to make economic contributions; they vary in their education and training, work experience, effort, commitment to the labor market, and so forth. As a result, pay differences between workers and groups of workers are to be expected and do not by themselves indicate that some workers are paid "too little." Instead, workers or groups of workers, such as women, are paid "too little" only if pay differences do not reflect lower productivity. Discrimination exists in this neoclassical world when workers of equal productivity are paid differently.  

This conception of the labor market can be used empirically to analyze the earnings of workers. Although the economic contribution, or productivity, of workers is very difficult to measure, it is possible to measure worker characteristics that are likely to affect productivity. Workers with more education or more on-the-job training (that is, workers with more "human capital") are likely to be more productive than workers who have less human capital. Measurable worker characteristics, then, can be used as proxies for productivity. Using these proxies, the pay of workers can be broken down into a portion that is due to productivity (as measured by worker characteristics or human capital) and a difference that is due to other factors.

The difference in pay received by men and women can be analyzed using this conception of the labor market. If the pay difference between men and women is wholly attributable to differences in human capital, the inference from the gross pay differential that women suffer from discrimination in wage-setting is largely undermined.

Employers are discriminating not against women qua women, but against workers who are not as productive as other workers. Since women are

216. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39-40 (2d ed. 1971). Discrimination in this sense can also occur in other circumstances. Two corollaries of the definition of discrimination in the text, for example, would be 1) discrimination exists when workers of different productivity are paid the same, and 2) discrimination exists when differences in pay between workers are not commensurate with differences in productivity between those workers. See Morley Gunderson & Roberta Edgecombe Robb, Legal and Institutional Issues Pertaining to Women's Wages in Canada, 3 INT'L REV. COMP. PUB. POL'Y 129 (1991).


219. Women may, of course, still suffer from forms of discrimination other than discrimination in wage-setting, for example, discrimination that limits their opportunities to add to their stock of human capital.
not as productive as men on average, they are paid less. On the other hand, if the pay difference between men and women is not attributable at all to differences in human capital, the inference of discrimination in wage-setting is bolstered. Employers are paying men and women differently even though they have the same human capital and even though the productivity of the two groups is equal. The economic definition of discrimination has been met.

To illustrate, assume a simple society in which the only human capital that is valued in the labor market is years of schooling. Assume also that women are paid $5,000 and men are paid $6,000. To determine whether the pay difference is caused by discrimination, one needs to examine the difference in pay to determine whether it is caused by differences in human capital or by differences in the returns men and women receive for their human capital. One could do this by fitting the following equation to the data on earnings and years of schooling for men and women:

1) \[ \text{Earnings} = a + b(\text{years of schooling}) \]

If the average "years of schooling" for both men and women in our example were ten, one might receive the following results for men and women respectively:

2) $6,000 = $1,000 + $500(\text{years of schooling})

2A) $5,000 = $1,000 + $400(\text{years of schooling})

Thus, the earnings for employees in this society could be estimated as $1,000 plus $500 for each year of schooling for male employees or $1,000 plus $400 for each year of schooling for female employees. In this example, then, the human capital (or productivity) of male and female employees fails to explain any portion of the earnings difference. The entire difference in earnings is attributable to the returns men and women receive to their human capital. These results would create an inference of discrimination.

Alternatively, if the average "years of schooling" in our example were ten for men and eight for women, one might receive the following results for men and women respectively:

3) $6,000 = $1,000 + $500(\text{years of schooling})

3A) $5,000 = $1,000 + $500(\text{years of schooling})

In this example, differences in human capital (productivity) explain all of the earnings difference. The returns of men and women to their human capital are the same. Any inference of discrimination in wage-setting arising from the gross earnings differential has been largely undermined.

When the pay of men and women in the United States has been examined using this type of analysis, the inference of discrimination arising from the gross pay differential between the two groups has been bolstered. The study by Corcoran and Duncan is the leading
study of this type.\textsuperscript{220} It was able to attribute 44 percent of the wage gap between white men and white women to productivity factors: 2 percent was attributed to differences in formal education; 11 percent to years of training completed on current job; 28 percent to other aspects of work history; and 3 percent to indicators of labor force attachment. Fifty-six percent of the wage gap remained unexplained.\textsuperscript{221} The other studies of this type have been equally unsuccessful in explaining the wage gap. In the words of one reviewer, “after many empirical attempts spanning more than a decade, researchers are still unable to account for more than about half of the male-female difference in earnings through differences in productivity-related variables.”\textsuperscript{222}

The unexplained portion of the wage gap between men and women, however, poses interpretation problems. To the extent the studies have been able to measure the human capital variables perfectly and have included all relevant human capital variables in their models, a very strong inference of discrimination would arise. Unfortunately, no one contends that the studies have been able to do either.\textsuperscript{223} As a result, there are two competing interpretations of the wage gap that remain after accounting for productivity-related variables.\textsuperscript{224}

\textsuperscript{220} Mary Corcoran & Greg J. Duncan, Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes, 14 J. HUM. RESOURCES 3 (1979).

\textsuperscript{221} Id. at 18. Although Corcoran and Duncan do not directly attribute the unexplained portion of the wage gap to discrimination, they do say that “those who claim that the labor market treats workers ‘fairly’ in the sense that equally productive workers are paid equally, are likely to be wrong.” Id. at 19.

It should be noted that perhaps the most prominent article on women’s wages in the legal literature contends that women are treated almost fairly in this sense. Weiler, supra note 10, at 1779-93 (if entirely successful, comparable worth would reduce the female-to-male wage gap by only 2-3 percentage points). Professor Weiler’s analysis, however, is significantly flawed, in essence, because he fails to recognize the extent to which wage discrimination affects the employment decisions of women, such as decisions about how much to work and what kind of investments to make in training. For a full critique, see WILLBORN, supra note 199, at 137-46.


\textsuperscript{223} Researchers who have quite different ideas about the extent of wage discrimination in the labor market and the appropriateness of governmental intervention to deal with it, agree that application of the human capital model presents significant and difficult problems. See, e.g., Mincer, supra note 1, at S22-S23; Gregory & Ho, supra note 14, at 8-10. But see Joni Hersch, Male-Female Differences in Hourly Wages: The Role of Human Capital, Working Conditions, and Housework, 44 INDUS. & LAB. REL. REV. 746 (1991)(study claiming to control for all relevant productivity-related variables still finds a large portion of the wage gap to be unexplained).

\textsuperscript{224} The persistence of the gap may also indicate that the human capital theory is
First, the gap may be simply an artifact of imprecise research methods. It may be caused by the mismeasurement and omission of human capital variables. According to this interpretation, if we could precisely measure all of the relevant human capital variables, the gap would disappear. The second interpretation is that the gap is evidence of discrimination—the gap would not disappear even if all the relevant human capital variables could be measured perfectly. The gap, although subject to imprecision, indicates that men and women of equal productivity are paid differently—and that is the economic definition of discrimination.

To illustrate the problem with the mismeasurement of variables, consider the “years of schooling” example in a slightly more complex society. Suppose that the human capital actually valued by this society is not “years of schooling,” but instead a more complex notion of “education.” If the researcher examines the earnings disparity in this society using “years of schooling” as a proxy for education, the results may be significantly distorted. The researcher would not capture the value the society places, for example, on the quality of education (the researcher would rate equally the same number of years at Yale and at Podunk College) or on the subject matter studied (the researcher would rate equally X years of education leading to a medical degree and X years of education leading to a Ph.D. in English). If males (or females) disproportionately went to Yale or received medical degrees, the results might overstate (or understate) the extent of discrimination.

Similarly, the omission of variables can significantly distort results. Consider again the example above where men were paid $6,000, women $5,000, and both had, on average, ten years of schooling. Using that data, the results in Equations 2 and 2A would support an inference of discrimination because the returns of men and women to their human capital are different. But assume that the society actually valued two, not one, human capital characteristics—“years of schooling” and “years of work experience”—and that the researcher failed to include the latter variable in the equation. If men had ten years of work

flawed. The theory assumes a labor market in which wages are determined in accordance with the neoclassical theory of marginal productivity. To the extent that that theory does not apply very well to labor markets, and many contend that it does not, the results of studies of this type are subject to question. For studies that question application of the theory of marginal productivity to labor markets, see PAUL OSSEMAN, EMPLOYMENT FUTURES: REORGANIZATION, DISLOCATION, AND PUBLIC POLICY (1988); MICHAEL J. PIORE, UNEMPLOYMENT AND INFLATION: INSTITUTIONAL AND STRUCTURALIST VIEWS (Michael J. Piore ed., 1979); HENRY PHELPS BROWN, THE INEQUALITY OF PAY (1977). For a discussion of the implications of rejection of the human capital theory to the comparable worth debate, see infra notes 238-41 and accompanying text.

225. For a brief review of these measurement problems, see TREIMAN & HARTMANN, supra note 218, at 18-19.
experience and women had five, one might receive the following results for men and women respectively:

4) \[ \$6,000 = \$1,000 + \$300(\text{years of schooling}) + \$200(\text{years of work experience}) \]

4A) \[ \$5,000 = \$1,000 + \$300(\text{years of schooling}) + \$200(\text{years of work experience}) \]

Omission of the "years of work experience" variable distorted the results in Equations 2 and 2A creating the appearance of discrimination (differences in returns to human capital) when in fact there was none.

Intra-country analyses cannot make much headway against this interpretation problem. Economists have refined the manner in which they measure the human capital variables and attempted to include all relevant variables, but society is so complex that doubts about any inferences of discrimination arising from this type of analysis because of mismeasurement and omission of variables can never be definitively resolved.

A cross-country comparison with Australia, however, provides a mechanism for addressing this interpretation problem. It provides one measure of the extent to which the unexplained gap is caused by discrimination and the extent to which it is caused by measurement error. On the assumptions that Australia is a no- or low-discrimination comparator and that the work forces of Australia and the United States are sufficiently similar that omitted and mismeasured variables have a similar effect in the two countries, a comparison of the two countries can divide the gap in the United States that is unexplained by productivity variables into a portion that is due to the omission and mismeasurement of variables and a portion that is due to discrimination.

The first step in this process is to analyze the wage difference between men and women in the United States to determine how much of the difference can be accounted for by an (admittedly imperfect) analysis of productivity differences between men and women. The rest of the difference, then, is due to other factors—either to differences in the returns men and women receive for their productivity (which is the economic definition of discrimination) or to the omission and mismeasurement of variables.

To illustrate, assume that men are paid \$10,000, women \$6,000, and that we use "years of work experience" as our proxy for productivity. Assume also that men average 18 years of work experience and women average 14 years. Our analysis, then, might yield the following results for men and women respectively:

5) \[ \$10,000 = \$1,000 + \$500(\text{years of work experience}) \]

5A) \[ \$6,000 = \$1,000 + \$357(\text{years of work experience}) \]

Productivity differences, then, at least to the extent we were able to measure them accurately, explain some but not all of the difference in
male and female earnings. By substituting the average human capital of women (14 years of work experience) into the male equation, one can determine that women would be paid $8,000 if they received the same return to their human capital as men. Thus, one-half ($2,000) of the raw earnings gap of $4,000 can be explained by differences in the human capital of men and women.\(^{226}\) A $2,000 gap remains to be explained.

The second step of the process is to conduct a similar analysis of the earnings of men and women in Australia. To illustrate, assume that men in Australia earn $10,000 and women $8,000 and that men in Australia average 20 years of work experience while women average 17.5 years. The Australian analysis, then, might yield the following results for men and women respectively:

\[\begin{align*}
6) \quad \$10,000 &= \$1,000 + \$450(\text{years of work experience}) \\
6A) \quad \$8,000 &= \$1,000 + \$400(\text{years of work experience})
\end{align*}\]

Note that in this example men and women in Australia receive different returns to their human capital. If women received the same returns to their human capital as men (if the human capital of women is substituted into the male equation), women would earn $8,875—more than the $8,000 they actually earn, but less than the $10,000 earned by men. The example presents a situation in which there is either a degree of residual discrimination against women in Australia, or imprecision in the ability to measure returns to human capital.

The third step of the process is to place American men and women into the Australian wage structure to determine how they would be paid (relative to each other) in a wage structure that we are assuming to be a no- or low-discrimination structure. In our example, then, the human capital endowments of men and women in the United States (18 and 14 years of work experience respectively) would be placed into the Australian equations to yield the following equations for men and women:

\[\begin{align*}
7) \quad \$9,100 &= \$1,000 + \$450(18) \\
7A) \quad \$6,600 &= \$1,000 + \$400(14)
\end{align*}\]

If American men and women were paid according to the Australian wage structure, the female-male earnings ratio would be about 72 percent ($6,600/$9,100).

This type of analysis yields interesting results. The first step of the analysis determines the proportion of the unadjusted wage gap in the United States that is attributable to productivity differences between

\(^{226}\) Because differences in earnings caused by differences in human capital are assumed to be legitimate (that is, not to be caused by discrimination), this type of analysis is likely to lead to an underestimate of discrimination. Any discrimination suffered by women in the acquisition of human capital would not be captured by this type of analysis. See Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. Lab. Econ. S33, S42 (1985).
men and women. The analysis determines the wage structure for men (that is, it determines the returns men receive for their human capital), substitutes the human capital of women into the male wage structure, and then compares the actual earnings of women with the earnings women would receive if they enjoyed the same returns to human capital as men. Table 6 reports the results of this step of the analysis for our hypothetical. Fifty percent of the unadjusted wage gap between men and women ($2,000 of $4,000) was explained by differences in the human capital endowments of men and women, leaving a productivity-adjusted female-male earnings ratio of 80 percent ($8,000/$10,000).

The second step of the analysis uses the same model used in the first step to determine the wage structures for men and women in Australia, a comparator whose wage structures are assumed to be free of wage discrimination. The third step of the analysis places the human capital of American men and women into the “non-discriminatory” Australian wage structures. The difference between the female-male earnings ratios under the American versus the Australian wage structures is our measure of discrimination. In the hypothetical, once again as reported in Table 6, the female-male earnings ratio was 60 percent within the American wage structure and 72 percent within the Australian wage structure. Thus, 30 percent of the unadjusted wage gap between American men and women (12 percent of the 40 percent wage gap) was caused by differences in the “discriminatory” American wage structure and the “non-discriminatory” Australian wage structure.

The analysis, although an improvement over a non-comparative analysis, is still likely to leave a significant portion of the wage gap unexplained. In our hypothetical, as Table 6 indicates, 20 percent of the wage gap remained unexplained. The “unexplained” category captures two sources of differences between male and female wages. First, the category captures any degree of residual wage discrimination against women in Australia. The “discrimination” category was estimated by assuming that the Australian labor market was free of discrimination, by assuming that any differences in pay between men and women in Australia that were not explained by productivity differences were caused by the omission and mismeasurement of variables. If the Australian labor market is not actually free of discrimination, the estimate of discrimination in the United States will be too low by the magnitude of the discrimination in Australia and the “unexplained” estimate will be too high by that magnitude. Second, the “unexplained” category captures the effect of human capital variables that are omitted and mismeasured to the same extent in both countries. In both the United States and Australia, for example, men who work full-time work 9 percent more hours than women who
Table 6
Breakdown of U.S. Female-Male Earnings Ratio in a Hypothetical Case

<table>
<thead>
<tr>
<th>Female-Male Earnings Ratios</th>
<th>Adjusted for Productivity</th>
<th>Within Aus. Wage Structure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unadjusted</td>
<td>60%</td>
<td>80%</td>
</tr>
<tr>
<td>Adjusted</td>
<td>80%</td>
<td>72%</td>
</tr>
</tbody>
</table>

Proportion of Earnings Gap Explained By:

<table>
<thead>
<tr>
<th>Productivity</th>
<th>Discrimination</th>
<th>Unexplained</th>
</tr>
</thead>
<tbody>
<tr>
<td>50%</td>
<td>30%</td>
<td>20%</td>
</tr>
</tbody>
</table>

Table 6 shows the breakdown of U.S. female-male earnings ratio in a hypothetical case, adjusted for productivity and within Aus. wage structure. The table indicates that 60% of the earnings gap remains unadjusted, while 80% is adjusted for productivity. Within Aus. wage structure accounts for 72% of the earnings gap.

The analysis we have conducted using this methodology indicates that a significant portion—about one-third—of the wage gap between men and women in the United States is attributable to discrimination. Conceptually, we modelled the wage structures in the United States and Australia as follows:

\[
Earnings = a + b(\text{education}) + c(\text{work experience}) + d(\text{rural or urban worker}) + e(\text{presence of young children}) + f(\text{marital status}) + g(\text{public or private employment})
\]

The analysis yielded the results in Table 7. Almost one-third (32.8 percent) of the female-male earnings gap in the United States is attributable to sex discrimination. (For a more complete report of the analysis and results, see Appendix A.)

This type of analysis can be criticized in a number of ways. Most obviously, of course, its two major and explicit assumptions can be questioned. First, the analysis assumes that Australia is a non-discriminatory comparator. On the one hand, it could be (and has been) work full-time. If the equations do not account for this difference in human capital (as ours below do not), the results from the within country analyses in both countries will understate the extent to which human capital differences account for the pay differences between men and women. Differences in relative hours worked, however, do not account for relative pay differences between countries—those differences would be included in the “unexplained” category. Better measurement of human capital variables would result in an increase in the “productivity” category and a corresponding decrease in the “unexplained” category.

227. Gregory & Ho, supra note 14, at 19 n.11. These statistics are for 1981, the year we analyze later in this Article.
Table 7
Breakdown U.S. Female-Male Earnings Ratio, 1981

Female-Male Earnings Ratios

<table>
<thead>
<tr>
<th>Unadjusted</th>
<th>Adjusted for Productivity</th>
<th>Within Aus. Wage Structure</th>
</tr>
</thead>
<tbody>
<tr>
<td>61.3%</td>
<td>66.3%</td>
<td>74.0%</td>
</tr>
</tbody>
</table>

Proportion of Earnings Gap Explained By:

- Productivity: 12.9%
- Discrimination: 32.8%
- Unexplained: 54.3%

argued that, despite the improvements in relative female wages, wage discrimination against women in Australia has not been completely eliminated. To the extent this is true, it does not undermine the analysis; instead it indicates that the estimate of discrimination in the United States should be viewed as a lower-bound estimate.

On the other hand, it could be argued that the United States is the non-discriminatory comparator and that the Australian wage system discriminates in favor of women. If true, this argument would mean that the "discrimination" category which we have used to indicate the extent of discrimination against women in the United States is instead a measure of the extent of discrimination in favor of women in Australia. There are reasons from both sides of the Pacific, however, for doubting the validity of this criticism. In Australia, the history of women's pay indicates that the present relative parity between female and male earnings resulted from the elimination of explicit discrimination against women, rather than from attempts to discriminate in favor of women. To argue that the system discriminates in favor of women in Australia, one would have to reject this history and believe instead that when the industrial tribunals thought they were discriminating against women for three-quarters of a century, they in fact were not discriminating and when they thought they had eliminated sex discrimination from the wage-setting system, they in fact had only just recently begun to discriminate! Although less dramatic, the history of women's pay in the United States also casts doubt on this criticism. To accept the United States as the non-discriminatory norm, one would have to believe that Congress was addressing a mirage when it acted in 1963 and 1964 to address sex-based wage discrimination; that the states were also addressing a mirage when they passed antidiscrimination legislation and, especially, when they took spe-

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228. See, e.g., Stackpool-Moore, supra note 181; Short, supra note 139; Chapman & Mulvey, supra note 181.
229. See supra notes 91-168 and accompanying text.
230. Almost all of the states have antidiscrimination laws that are modelled after the federal Equal Pay Act and Title VII. See Virginia Dean et al., *Comparable Worth*
cial efforts to increase the pay of female public employees; and that the increase in the relative pay of women since 1979 is a troubling sign of growing discrimination in favor of women, rather than a welcome sign of increasing pay equity.

The analysis can also be criticized because of its assumption that omitted and mismeasured variables would have a similar effect in the two countries. It is true that to the extent these variables would not have the same effect in the two countries, shifts could occur between the unexplained, productivity, and discrimination categories. At the same time, however, it is not obvious what these variables would be. The omissions and mismeasurements would have to be sufficiently significant to explain a substantial difference in the relative earnings of women in the two countries. The omitted variables would have to be variables that are not commonly used in human capital equations. We use the standard variables, so it cannot be argued that the difference in pay between the two countries can be explained because Australian women possess much better educational credentials or have a great deal more work experience than American women. The mismeasurements would also have to be found in rather surprising places; we have already looked at the unsurprising places where mismeasurement error might arise and have not found it. Moreover, there is no a priori reason for believing that omitted and mismeasured variables would reduce the magnitude of the discrimination category; they could with equal plausibility increase it. At best, then, the criticism emphasizes that the analysis results in an estimate, rather than a precise measurement, of discrimination. The criticism does not provide any assistance in deciding whether the estimate of discrimination is too high or too low.

The analysis might also be questioned because of the relatively small proportion of the female-male wage gap in the United States that was explained by productivity. Our analysis explained 12.9 per-


231. All but five states have taken some action on pay equity for public employees and twenty states have actually made wage adjustments on pay equity grounds. NATIONAL COMMITTEE ON PAY EQUITY, PAY EQUITY ACTIVITY IN THE PUBLIC SECTOR, 1979-89, at 19-73 (1989).

232. See supra note 227 and accompanying text.

233. The analysis could also be questioned for a number of statistical reasons. See Ramona Paetzold, Statistical Model Building in Title VII Litigation: Further Regression Diagnostics are Needed (Jan. 1990)(available from Professor Willborn). The statistical questions are important, but we have not addressed them in this article; instead, we have used statistical techniques that are commonly accepted in human capital studies. As with omitted and mismeasured variables, to the extent the statistical criticisms are valid, they emphasize that the results are estimates, but do not provide any assistance in deciding whether the estimate of discrimination is too high or too low.
cent of the wage gap based on productivity differences; as indicated above, other researchers have explained as much as 44 percent of the wage gap based on productivity differences.\(^\text{234}\) This difference in the explanatory power of productivity, however, is not of major concern. The analyses in Australia and the United States both attributed very close to the same amount of the female-male wage difference to productivity. If the analyses in the two countries had explained more of the wage gap based on productivity, the magnitude of the figure in the "productivity" category would have increased and the magnitude of the figure in the "unexplained" category would have decreased. The figure in the category of most interest to us—the figure in the "discrimination" category—would have been unchanged.

Finally, the analysis might be questioned because of the different conceptions of equal pay and comparable worth in the United States and Australia.\(^\text{235}\) Criticism based on the different legal definitions of discrimination would have great weight if the analysis were intended to demonstrate what would happen in the United States if comparable worth were implemented. The analysis in this section, however, is not intended to do that. The analysis is intended to support the argument that wage discrimination is present in wage-setting in the United States and to provide an estimate of the extent of the discrimination. Except to the extent that the estimate may be on the low-side because the legal definition of comparable worth in Australia may be too narrow to ferret out all sex-based wage discrimination, differences between the legal definitions of comparable worth in the United States and Australia are largely irrelevant to the estimate of discrimination.\(^\text{236}\)

In summary, a more rigorous analysis of women's wages in Austra-

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\(^\text{234}\) See supra notes 220-21 and accompanying text.

\(^\text{235}\) See supra notes 182-215 and accompanying text.

\(^\text{236}\) The analysis might also be questioned because it is based on 1981 data that do not reflect more recent increases in the female-male earnings ratio in the United States. The U.S. ratio increased from 59.2 percent in 1981 to 71.1 percent in 1990. CENSUS BUREAU, U.S. DEPT OF COMMERCE, SERIES P-60 CURRENT POPULATION REPORTS (1981 & 1990). While a replication based on more recent data would be worthwhile (the most recent acceptable data from Australia is from 1986), it is unlikely that the estimate of discrimination would be significantly different. Studies of the increase in the earnings ratio in the United States during the 1980s have determined that the increase was caused, not by reductions in discrimination, but by increases in the human capital of women relative to men. June O'Neill, The Wage Gap Between Men and Women in the United States, 3 INT'L REV. COMP. PUB. POL'Y 353, 367 (1991); JAMES P. SMITH & MICHAEL P. WARD, WOMEN'S WAGES AND WORK IN THE TWENTIETH CENTURY (1984). Thus, one would expect an analysis based on more recent data to show that the portion of the unadjusted wage gap that could be explained by productivity differences to be lower and the portion attributable to discrimination to be basically unchanged (or, perhaps, a bit higher). But see Steven L. Willborn, Economic and Legal Perspectives on Women's Wages in Six Countries: An Overview, 3 INT'L REV. COMP.
lia and the United States tends to support the inference that women workers in the United States suffer from sex-based wage discrimination. The analysis tends to eliminate two possible explanations for the low relative wages of women—productivity differences and measurement error—while providing an independent estimate of the extent of discrimination. The estimate of discrimination—32.8 percent of the wage gap—translates into more than a $2,500 annual penalty for each full-time working woman in the United States.\footnote{During the ten-year period from 1981 to 1990, 32.8% of the wage gap between year-round, full-time male and female workers ranged from $2,608 (in 1983) to $2,968 (in 1988). For a woman who worked the entire ten-year period, the cumulative wage gap caused by discrimination (as measured by this study) would have been $27,879. \textit{Census Bureau, U.S. Dep't of Commerce, Series P-60 Current Population Reports} (1981-1990).}

C. Women's Wages in the United States—Messages from Australia

The Australian method of increasing women's wages—changing the policy of wage-setting boards—is clearly not directly applicable in the United States. Nevertheless, there are lessons to be drawn from the Australian experience—lessons that relate to women's wages in the United States, but also lessons that extend to broader debates that arise whenever governments contemplate intervening in the labor market.

The Australian experience, first and perhaps most importantly, contains important lessons about theoretical approaches to wages and the wage gap. The human capital model is by far the predominant model in use today. But the human capital model cannot explain the large difference in the relative levels of women's pay in Australia and the United States, nor can it explain the large and sudden increase in relative women's wages in Australia between 1969 and 1975. Alternative theoretical models—models that pay greater attention to institutions and rigidities in the labor market—must be developed to understand wage issues better and to provide better guidance to those making policy decisions about wages.

The importance of developing alternative theoretical models to explain wages (and indeed the labor market more generally) cannot be overstated. Economists in the United States, using the human capital model and its neoclassical cousins, have estimated that implementation of comparable worth would result in a "9.7% increase in the existing inflation rate" and a "substantial increase in unemployment."\footnote{Brief Amicus Curiae of the Eagle Forum Education and Legal Defense Fund at 37, \textit{AFSCME v. Washington}, 770 F.2d 1401 (9th Cir. 1985)(No. 84-3569). Others, of course, have predicted more modest effects. \textit{See, e.g., Killingsworth, supra note 172, at 280-82; Aldrich & Buchele, supra note 173, at 154-72.}
Similar predictions were made in Australia prior to their equal pay efforts. The predictions in Australia were very much wide of the mark. But, although the absence of such dire adverse consequences in Australia is some evidence that those consequences would not occur in the United States if the relative level of women's wages were increased here, there is no guarantee. The predictions in Australia were in error because they did not adequately consider the effects of institutions and rigidities in the labor market, but to the extent labor market institutions are different in the United States and Australia (and they are very different, but we do not know to what extent the differences matter) and to the extent there are rigidity differences, Australia is not a reliable guide. The Australian experience undermines our confidence in the human capital model (and other models based on neoclassical economics), but it has not yet generated a replacement. Alternative theoretical models are needed so that the consequences of intervening in the labor market can be better assessed. The need to make such assessments, and their importance for deciding whether interventions should be made, includes interventions with women's pay in mind, but it also extends to interventions for a wide range of other purposes.

The Australian experience also helps us to identify elements of a successful public program designed to deal with women's wages. Although the focus in this article has been on Australia, the United States has also had an active public program to reduce the extent of wage discrimination against women and, hence, to increase women's wages. The Equal Pay Act of 1963 requires men and women who are performing virtually identical work to be paid the same, and Title VII makes it illegal for employers to discriminate against women in wages, as well as in other aspects of the employment relationship.

240. See supra notes 174-79 and accompanying text.
241. Governments intervene in the labor market for a wide variety of purposes. They might intervene, for example, to require employers to pay minimum wages, to provide a certain level of maternity benefits, to provide a safe workplace, to supply information about plant closings, to pay severance pay, to provide a certain level of health insurance, and so on. For citations to examples of all of these types of interventions, see Steven L. Willborn, Individual Employment Rights and the Standard Economic Objection Theory and Empiricism, 67 NEB. L. REV. 101, 109-10 (1988). Leading commentators in the United States predict that these interventions will continue and increase. Summers, supra note 13, at 24-27.
244. The courts have uniformly rejected challenges to women's wages under Title VII that have relied exclusively on job evaluation studies to prove discrimination. See supra note 199. Plaintiffs, however, have had modest success in wage discrimination cases under Title VII using more sophisticated evidence, such as econometric studies. See, e.g., Melani v. Board of Higher Educ., 561 F. Supp. 769 (S.D.N.Y. 1987).
Most states have equivalent laws. The efforts in the United States, however, have, at best, reduced only marginally the portion of the earnings gap between men and women caused by wage discrimination. What explains the dramatic success of the efforts in Australia and the relative lack of success in the United States?

One explanation for the difference in results is the difference in enforcement procedures that were used in the two countries. In the United States, the principal enforcement mechanism was litigation. To be effective as an enforcement mechanism, litigation requires a number of conditions to be present that may not be present in the real world. For example, it requires that potential plaintiffs have information about both the law and the wage-setting practices of their employers, that potential plaintiffs be protected adequately from reprisals, and that some type of correction be made for the "public goods" problem with equal pay recoveries. Even if these conditions are met, litigation as an enforcement mechanism has a relatively high marginal cost. Litigation as the principal enforcement mechanism for equal pay efforts, then, may well lead to significant under-enforcement of laws designed to address the problem of women's wages.

In Australia, by contrast, the policies designed to address women's wages were implemented through the industrial tribunals as part of the normal wage-setting process. Equal pay policies were not a foreign and disruptive element in the process. Further, the marginal cost of enforcement was low since the parties would have been before the industrial tribunals discussing wages even in the absence of any equal pay policies. Incorporating equal pay policies into the normal wage-setting process—and avoiding litigation to the extent possible—enhances the likelihood that the policies will have their intended effect.


245. Dean et al., supra note 230.
246. See supra note 236. The increases in Australia and the United States were distributed across women quite differently. In Australia, the gains were distributed to women quite equally by income, industry, occupation and age. See supra note 180 and accompanying text. In the United States, the gains came from increased wages for white, young, unmarried and well-educated women. The wages of all other subgroups of women remained relatively stable. VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 82-83 (1988).

248. WILLBORN, supra note 199, at 154.
249. Litigation as an enforcement mechanism for policies designed to increase the relative level of women's wages has failed not only in the United States, but also in a number of other countries. See Willborn, supra note 236, at 1, 7-9.
250. This has been true not only in Australia, but also in a number of other countries. The female-to-male wage ratios in Sweden and the United Kingdom, for example, increased when the countries incorporated equal pay principles into their normal wage-setting processes. Willborn, supra note 236.
For the United States, this does not mean that it should consider wage-setting tribunals. Rather, it means that if the United States is to address the issue of women's wages seriously, it must take steps designed to incorporate equal pay principles, broadly defined, into the normal wage-setting processes in this country. The goal would be to create incentives, on the demand side, for employers to reconsider their wage structures with pay equity in mind\(^\text{251}\) and, on the supply side, for women to participate more fully in the labor market.\(^\text{252}\) Litigation would still have a role to play,\(^\text{253}\) but it would not be the principal vehicle for changing the wage ratio between men and women.

Another element of a successful public program to deal with women's wages is "visibility" or "transparency" of the wage system and of the wage inequity the program is designed to address. Compared with the United States, the wage system in Australia is very centralized and public. Employers in Australia are required to pay minimum wages that are established by industrial tribunals after public hearings and, more often than not, the actual wages paid are the established minima. By contrast, in the United States the responsibility for setting wages is primarily within the control of individual firms.\(^\text{254}\) In addition, prior to 1969 in Australia the industrial tribunals explicitly discriminated against women, so the wage inequity to be addressed was quite "visible." In the United States, perceptions of wage inequities rest on differences in the average earnings of male and female

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251. Employers might be encouraged to do this by extending contract compliance requirements to include a pay equity component or by offering tax incentives to employers that provide benefits of special interest to women (for example, childcare subsidies or parental leaves). See Weiler, \textit{supra} note 10, at 1805-07; Fuchs, \textit{supra} note 246, at 117-38. More drastically, employers could be required to engage in self-studies of their wage structures (including the extent to which wages flow to men and women), to disclose and discuss the study with current employees, and to disclose the study to prospective employees. The province of Ontario in Canada has already enacted a program along these lines. See Gunderson & Robb, \textit{supra} note 216.


253. For example, litigation would still be useful for addressing isolated but severe discrimination, and as a public statement of our society's commitment to eradicating sex discrimination. See Willborn, \textit{supra} note 199, at 144-46.

254. The government exerts some control over wage-setting through laws such as the minimum wage laws, but such laws affect only a small minority of the labor force. Unions could also serve as a centralizing force and a mechanism for making wage-setting more public, but the proportion of the work force represented by unions is relatively small.
workers, differences which are well-known, but which can be attributed to factors other than discrimination.

Visibility was an important element in the Australian effort on women's wages. It made it possible to identify a major source of the pay discrepancy between men and women, to reach a societal consensus that that source was improper, to determine the appropriate response, and to act on that response. Other countries, most notably Canada and the countries of the European Community, have recognized that increasing visibility is an important first step in dealing with the issue of women's wages.

Once again, the existence of visibility as an element of a successful program to deal with women's wages does not mean that the United States should increase visibility by adopting Australia's labor market institutions. But it does mean that if the United States is to address the issue of women's wages seriously, it must take steps designed to increase visibility that will mesh well with our labor market institutions. One possibility would be to adopt the European Community's approach and encourage employers to increase the visibility of their wage structures by shifting the burden of proof in wage discrimination cases to employers if their wage structures do not meet certain standards of visibility. Or, more intrusively, the approach in Ontario could be adopted, which would require large employers to conduct a job evaluation and develop a pay equity plan.

The message from Australia is most direct and most clear on the issue of the visibility of wage inequities in the United States. Analysis of the Australian experience solves the insurmountable measurement problem of within-countries studies and discloses more clearly than ever before that a significant portion of the wage gap in the United States is caused by discrimination. The question that remains, however, we must address without Australia's help: Do we care?

255. Gunderson & Robb, supra note 216.
257. See supra note 256.
APPENDIX

Sample: Full-time wage and salary earners ages 15-54 drawn from the Household Sample File of the Australian Bureau of Statistics' Census of Population and Housing (1981 Census) and the March, 1982 Current Population Survey of the U.S. Department of Commerce, Bureau of the Census (reporting on the status of individuals in 1981). There were 5,801 males and 4,719 females in the Australian sample and 8,787 males and 5,162 females in the U.S. sample (only half of the U.S. dataset was used).

Equation:

\[ E_i = \alpha + \sum \beta_{ij} X_{ij} + \sum \mu_{ij} X_{ij}^F + U_i \]

where \( E_i \) is the log of earnings of the \( i \)th person, \( \alpha \) is a constant term, \( X_{ij} \) are human capital variables, the superscript \( F \) refers to female individuals, and \( U_i \) is an error term. Consequently, male workers earn \( \beta_j \) for each human capital variable, while female workers earn \( (\beta_j + \mu_j) \) for each variable.

The dependent variable for our regressions is the natural log of weekly earnings. Hourly earnings were not used because good hourly data was not available from the Australian census. The coefficients are interpreted as percent changes in earnings with a one-unit increase in the value of the independent variable.

The constant term in the U.S. equation measures the average log earnings of a male high school graduate, urban residence, never married, private sector, northern residence, and white. In the Australian equation the constant term is the same as that for the United States, except that there are no dummy variables for northern residence and white. The coefficient for the variables that measure male endowments estimate the additional payoff for men over the constant term. The estimated coefficient for the variables that measure female endowments estimate the difference in payoffs between a man and a woman in the same category. For females, then, additional payoffs for a variable are determined by adding together the male and female coefficients for that variable.

Results and variable definitions follow.
### Earnings Equations for U.S. and Australian Full-time Workers, 15-54 years, 1981.  
*(t-statistics appear in parentheses)*

<table>
<thead>
<tr>
<th></th>
<th>U.S.</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>( R^2 )</td>
<td>.37</td>
<td>.37</td>
</tr>
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<td>Dependent Variable: In ( W )</td>
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**Note:** Dummy variables for North/South and White/Minority were included in the U.S. equation, but are not reported.
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**Experience**

Age - school - 6  
Number of years of schooling assigned a numerical value according to classifications above.