

EQUAL PAY UNDER THE *FAIR WORK ACT 2009* (CTH): MAINSTREAMED OR MARGINALISED?

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I INTRODUCTION

In 2012 the first equal pay case following changes to equal remuneration provisions in the *Fair Work Act 2009* (Cth) (*FW Act*) saw many in the highly feminised and low-paid social and community services ('SACS') workforce awarded significant pay increases. This outcome was widely welcomed as a win for the cause of equal pay for women and seen as a sign that Australia finally had an effective regulatory framework in place to secure pay equity. In the light of this case and drawing on problem representations of gender pay inequity we assess the prospects for progressing pay equity through federal employment regulation. In particular, we critically examine the broader legal framework in place to 'deal' with equal pay, relevant decisions by Fair Work Australia ('FWA') and recent government and parliamentary inquiries. We argue that despite the apparent prominence given to equal remuneration in federal regulation, commitment to the goal of equal pay remains contingent and marginalised.

The gender pay gap is a key indicator of gender inequality¹ and reducing this gap has long been a focus of action for feminists in Australia and elsewhere. However, while it is over 40 years since the concept of equal pay was first adopted in the federal industrial relations jurisdiction,² the gender pay gap is now wider than it has been in nearly two decades: average female weekly ordinary time earnings are 17.5 per cent less than average male weekly ordinary time earnings.³ While ordinary full-time earnings is the measure most commonly used, the gap is much larger when *total* average weekly earnings are considered.⁴

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1 Hilary M Lips, 'The Gender Pay Gap: Concrete Indicator of Women's Progress toward Equality' (2003) 3 *Analyses of Social Issues and Public Policy* 87.

2 *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1969) 127 CAR 1142 ('*Equal Pay Case*'); *National Wage and Equal Pay Case* (1972) 147 CAR 172.

3 In November 1994, this gender pay gap stood at 16 per cent: Australian Bureau of Statistics, *Average Weekly Earnings, Australia Nov 2012* Cat No 6203.0 (2012).

4 The current full-time total earnings gap is 27 per cent: *ibid.*

Further, this measure does not take account of the pay rates of the 47 per cent of female employees who work part-time.⁵ As such the full-time ordinary time pay gap measure is clearly an imprecise indicator of the nature and extent of gender pay inequity in the Australian labour force.⁶ A similar level of imprecision exists when it comes to understandings of and approaches to addressing pay inequity in the Australian context.

Over the last decade or so there have been some significant developments in some Australian states' industrial relations jurisdictions related to addressing gender pay inequity.⁷ However, it is only recently that the issue has been a renewed focus of public policy and regulatory reform at the federal level: a parliamentary inquiry into pay equity was held in 2008–9, new equal remuneration provisions were included in the *FW Act* and improving equal remuneration is an object of the new *Workplace Gender Equality Act 2012* (Cth) ('*WGE Act*').

Our aim in this paper is to assess the practical potential of the provisions in the *FW Act* that address gender pay inequity. While equal remuneration provisions have existed in industrial relations legislation since 1993, the concept of equal remuneration remains contested and what is required to demonstrate *unequal* remuneration has shifted over time. The understanding of equal pay that we adopt as the benchmark for our evaluation of contemporary regulation is consistent with the definition used by the Queensland Government in its submission to the federal House of Representatives inquiry into pay equity ('the Pay Equity Inquiry'):

Pay equity is simply the notion that women should be fairly remunerated for their contribution in paid work and that gender should not influence remuneration. The concept of pay equity, however, has a larger application than ... equal pay for the same work ... in that it attempts to consider the wide range of issues underlying and contributing to the earnings gap between men and women. These issues include entrenched historical practices, the invisibility of women's skills, the lack of a powerful presence in the industrial system, and the way that 'work' and how we value work is understood and interpreted in the industrial system.⁸

5 Australian Bureau of Statistics, *Labour Force, Australia Dec 2012* Cat No 6202.0 (2012).

6 Patricia Todd and Alison Preston, 'Gender Pay Equity in Australia: Where Are We Now and Where Are We Heading?' (2012) 38 *Australian Bulletin of Labour* 251.

7 The terms 'equal pay', 'pay equity' and 'equal remuneration', which are variously employed in Australian regulation, are all used in this paper to refer to 'equal pay for work of equal value'.

8 Queensland Government, Submission No 135 to House of Representatives Standing Committee on Employment and Workplace Relations, Parliament of Australia, *Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce*, 25 November 2008, 4.

This description may not capture the full range of factors that contribute to the pay gap between men and women.⁹ Nevertheless it is in keeping with our understanding of the pay equity ‘problem’ as one of the undervaluation of work performed by women – *because* it is performed by women – that has institutional bases and is part of broader structural discrimination and systemic gender inequality. The above description also suggests some of the ways in which conceptions of the problem of unequal pay may differ and highlights the centrality of the industrial relations jurisdiction, both of which are central to our evaluation of current policy approaches and legislative frameworks.

The method we adopt in undertaking our analysis and assessment of current policy and legislative provisions draws on the work of feminist theorists who adopt discursive approaches to politics and policy-making which provide theoretical tools for considering discursive constructions of concepts such as equal pay and unequal pay. Carol Bacchi’s approach to policy analysis is based on critical discourse analysis and asks ‘what is the problem represented to be’?¹⁰ Bacchi sees her approach as distinguished from conventional policy analysis by its lack of any assumption that policies are ‘responses’ to fixed problems; rather, she argues policy actors give shape to problems in the ways they describe them and in the proposals they put forward to ‘solve’ them.¹¹ Thus ‘problem representations’ are actively created by governments and others and they constitute a form of political intervention. From this perspective, policies are constitutive or productive. The policies themselves create different impressions of what a ‘problem’ entails and offer particular solutions, and they have effects on how people think about the issues. By probing representations of both the concerns and the causes of a problem it is possible to expose the meaning-creation in policy processes and policy design, bringing taken-for-granted assumptions and silences into the open and widening agendas to include neglected implications.¹² In this view the meanings of social problems and policies are not fixed but are subject to differing interpretations due to continual political pressures and it is important to analyse the ways in which social problems are represented.

9 Such factors include social expectations and gendered assumptions about the role of women as workers, parents and carers; women’s disproportionate participation in part-time and casual employment; the invisibility of women’s skills and under-recognition of their qualifications; women’s more precarious attachment to the workforce; industry and occupational composition and segregation; women’s concentration in award-reliant employment with less opportunity to collectively bargain for higher wages; and treatment by industrial tribunals and regulation. See, eg, House of Representatives Standing Committee on Employment and Workplace Relations, Parliament of Australia, *Making It Fair: Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce* (2009) 8–10.

10 Carol Bacchi, *Women, Policy and Politics: The Construction of Policy Problems* (Sage, 1999) 1. See also Carol Bacchi, *Analysing Policy: What’s the Problem Represented to Be?* (Pearson Education, 2009) 1–24; Carol Bacchi and Joan Eveline, *Mainstreaming Politics: Gendering Practices and Feminist Theory* (University of Adelaide Press, 2010) 111 ff.

11 Bacchi, *Analysing Policy*, above n 10, 1 ff.

12 *Ibid* 5–8.

Following Bacchi, European feminist scholars have adopted some additional dimensions of problem representation in their discursive analyses of gender equality policies and policy-making. In addition to asking ‘what is the problem represented to be’, Verloo, Meier and Lombardo identify a range of other representations including: ‘who caused the problem’, ‘who is deemed to face the problem’, ‘who should solve it’ and ‘to what extent are gender and intersectionality ... related to the problem and its solution’.¹³ A crucial aspect of this approach is the identification of who has a voice in defining problems and solutions.¹⁴

While we draw on these approaches to analyse problem representations of pay inequity, our evaluation of legislative frameworks also requires the articulation of an idea of gender equality against which to assess both the frameworks and their practical potential. The normative understanding of gender equality adopted here is of a substantive equality that requires attention to the institutional bases of inequality through identification and remediation of systemic inequality to transform current gendered arrangements which disadvantage women.¹⁵

In this paper we analyse the problem representations of gender pay inequity evident in the various federal regulatory frameworks that govern employment arrangements in Australia. Policies relating to equal pay are not confined to this sphere, reflecting understandings of the unequal pay problem as part of a broader gendered social and economic structure. For example, long-standing strategies directed to changing girls’ and women’s career and job choices construct gendered occupational segregation as partly a problem of social norms governing individual choices.¹⁶ Nevertheless, employment regulation is a key site for interventions around unequal pay.

We consider the representation of the equal pay problem in equal remuneration provisions in the *FW Act*, in some key decisions of the industrial tribunal, FWA,¹⁷ in the implementation review of the *FW Act* and in written submissions by the industrial parties, the federal government and women’s civil society organisations. However, we first briefly consider other federal gender equality regulation that can deal with the issue of pay inequity.

13 Mieke Verloo, Petra Meier and Emanuela Lombardo, ‘Stretching and Bending Gender Equality: A Discursive Politics Approach’ in Emanuela Lombardo, Petra Meier and Mieke Verloo (eds) *The Discursive Politics of Gender Equality: Stretching, Bending and Policy-Making* (Routledge, 2009) 9–10.

14 Ibid 10.

15 Linda Dickens, ‘Re-Regulation for Gender Equality: From “Either/Or” to Both’ (2006) 37 *Industrial Relations Journal* 304; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 177–80.

16 See, eg, Abigail Powell, Andrew Dainty and Barbara Bagilhole, ‘Gender Stereotypes among Women Engineering and Technology Students in the UK: Lessons from Career Choice Narratives’ (2012) 37 *European Journal of Engineering Education* 541.

17 Fair Work Australia was renamed the Fair Work Commission in January 2013.

II FEDERAL GENDER EQUALITY REGULATION AND GENDER PAY INEQUITY

A *The Sex Discrimination Act 1984 (Cth)*

The *Sex Discrimination Act 1984 (Cth)* ('*SDA*') is the main federal regulation that explicitly addresses gender (in)equality in the area of employment and provides remedies for discriminatory actions against individuals or groups of employees. The enactment of the *SDA* was prompted by Australia's ratification in 1979 of the *Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*').¹⁸ Nevertheless the *SDA* drew on a more formal conception of gender equality than in *CEDAW*, constituting the problem of direct sex discrimination as 'unequal opportunity' measured in terms of 'less favourable' treatment where women and men are similarly situated.¹⁹ The concept of indirect sex discrimination recognises that discrimination can be structural rather than individually based.²⁰ However it also takes the male pattern of life as the norm, making it very difficult to tackle deep-rooted causes of inequality,²¹ including the production and reproduction of pay inequity.

The *SDA* has had some success, particularly in the normative role it has played and in providing redress for many individual employees who have been discriminated against.²² However, analyses of case law have highlighted the narrowness and complexity of its operation. The increasingly narrow judicial interpretation of anti-discrimination laws including the *SDA*,²³ together with the individual complaints-based model (it is the complainant who must establish discriminatory behaviour has occurred) and ineffectual enforcement processes have all emerged as major structural problems.²⁴

While the *SDA* explicitly prohibits discriminatory conditions of employment, including those that have a discriminatory effect,²⁵ it has played almost no role in addressing gender pay inequity. An employee would only be able to seek a remedy under the *SDA* where she alleges her remuneration was less than a male employee who was employed by the *same* employer and undertaking similar or comparable work. Unlike in United Kingdom ('UK') law, which also limits pay

18 Opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). For a detailed critique of the enactment and operation of the *SDA*, see Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010).

19 *SDA* s 5(1).

20 *SDA* s 5(2).

21 Sylvia Walby, 'Gender (In) Equality and the Future of Work' (Working Paper No 55, Equal Opportunities Commission, 2007).

22 For a recent evaluation of the effectiveness of the *SDA* from a variety of perspectives, see Thornton, *Sex Discrimination in Uncertain Times*, above n 18.

23 Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914; Thornton, *Sex Discrimination in Uncertain Times*, above n 18; Belinda Smith, 'What Kind of Equality Can We Expect from the Fair Work Act?' (2011) 35 *Melbourne University Law Review* 545.

24 Thornton, *Sex Discrimination in Uncertain Times*, above n 18.

25 *SDA* s 14 (direct discrimination in employment) and s 7B (indirect discrimination).

equity complaints to those concerning the same employer,²⁶ there have been very few pay inequity or unequal remuneration cases run under the *SDA*.²⁷ Even where action has been taken by a large group of employees employed by the same employer, such as in *New South Wales v Amery* (2006) 230 CLR 174 ('*Amery*'), which originated in the New South Wales ('NSW') anti-discrimination jurisdiction, judicial constructions of the 'problem' of pay inequity have not supported positive outcomes.²⁸ The High Court decision in *Amery* reflects an unquestioned acceptance of the primacy of historic and gendered industrial distinctions between casual and permanent employees, which ultimately trump any rights employees have to pay equity under anti-discrimination law.²⁹

While a 2008 Senate Committee inquiry into the effectiveness of the *SDA* acknowledged fundamental limitations of the enforcement of the *SDA* by individual complainants, it deferred any changes for further inquiry and review.³⁰ Employment-related evidence before the committee also raised the persistence of pay inequity as a key gender equality issue.³¹ However, pay equity was not addressed in the Senate Committee recommendations.

B The Workplace Gender Equality Act 2012 (Cth)

While the *WGE Act* was enacted in November 2012, the reporting requirements of the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ('*EOWW Act*') effectively remain in place until early 2014. An overview of the operation of the earlier legislation provides a good basis for evaluating the likely effectiveness of the new *WGE Act*. In a government issues paper developed for the review of the *EOWW Act*, the problem of unequal employment opportunity for women is represented first as a problem of women's lower participation in the workforce and secondly as a problem of the gender pay gap or women's low earnings compared to men's.³² The *EOWW Act* identified direct and indirect discrimination and a lack of merit-based treatment of women as the problems requiring resolution. These problems were framed in very narrow terms

26 This occurs under both the current *Equality Act 2010* (UK) and the former *Equal Pay Act 1970* (UK).

27 One of the few is *Australian Public Service Association v Australian Trade Commission* (1988) EOC 92-228. In this case five women unsuccessfully claimed they had been indirectly discriminated against on the ground of sex because they did not have access to superannuation benefits and a housing loan subsidy scheme that their male colleagues who were in a higher classification with permanent employment did. The President found that the discrimination was not gender-based, but was based rather on financial, qualification and efficiency considerations and therefore lawful.

28 For details on this case and critiques of the High Court decision, see Smith, above n 23; Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31.

29 Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 28, 47; Smith, above n 23, 554.

30 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report of the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (2009). Nor does the Human Rights and Equal Opportunity Bill 2012, which consolidates the five federal human rights and anti-discrimination laws, including the *SDA*, and extends the reach of federal anti-discrimination law beyond the individual complaints system.

31 Senate Standing Committee on Legal and Constitutional Affairs, above n 30, 53 ff.

32 Department of Families, Housing, Community Services and Indigenous Affairs, 'Review of the *Equal Opportunity for Women in the Workplace Act 1999*' (Issues Paper, 1 September 2009) 3.

in the objects of the *EOWW Act* which were to ‘promote’ the principle of merit, to ‘promote’ the elimination of discrimination and provision of equal employment opportunity and to ‘foster workplace consultation between employers and employees’ on these matters.³³ Thus the problem to be addressed was represented as employers’ lack of understanding or awareness, with the solution to the problem being to increase this awareness.

This representation of the problem of gender inequality was reflected in the operations of the *EOWW Act* and in the role played by the administering body, the Equal Opportunity for Women in the Workplace Agency (‘EOWA’). The *EOWW Act* had a procedural focus, requiring employers to report on programs rather than outcomes and there were few penalties for failing to lodge a report.³⁴ EOWA has described itself as a ‘light touch regulator’ that ‘works collaboratively with employers’.³⁵ The agency has strongly emphasised ‘the business case’ for equal opportunity for women; it has taken an educative approach, including through developing a pay equity tool for organisations wishing to undertake pay equity audits, and it has provided awards as incentives to employers meeting the reporting requirements.³⁶ In 2011 organisations which sought to be designated an Employer of Choice for Women by EOWA were required to have undertaken a pay equity analysis of their employees.³⁷ However, results of analyses have not been made publically available.

There is little evidence to suggest that the *EOWW Act* has had much positive impact on the gender pay gap and there are reasons for thinking that it is unlikely to have led to any significant gains in this regard. First, the *EOWW Act*, as does the *WGE Act*, applied only to large organisations with 100 or more employees and there is a high level of non-compliance with a reported 34.6 per cent of these employers apparently failing to report.³⁸ Second, the nature of the reports provided by employers suggests some equal opportunity programs may be

33 *EOWW Act* s 2A.

34 *EOWW Act* ss 13, 19. Many scholars pointed to the Act’s weak enforcement mechanisms; see, eg, Margaret Thornton, ‘Proactive or Reactive? The Senate Report on the Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth)’ (2012) 25 *Australian Journal of Labour Law* 284, 286–7.

35 Equal Opportunity for Women in the Workplace Agency, *About EOWA* (June 2012) <http://www.eowa.gov.au/About_EOWA.asp>.

36 Glenda Strachan, John Burgess and Lindy Henderson, ‘Equal Employment Opportunity Legislation and Policies: The Australian Experience’ (2007) 26 *Equal Opportunities International* 527; Equal Opportunity for Women in the Workplace Agency, Submission No 113 to House of Representatives Standing Committee on Employment and Workplace Relations, Parliament of Australia, *Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce*, 24 September 2008, 13.

37 Equal Opportunity for Women in the Workplace Agency, *Annual Report 2009/10* (2010) 30.

38 KPMG, *Review of the Equal Opportunity for Women in the Workplace Act 1999 Consultation Report* (Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs, 2010) 126.

notional, and where they address pay equity issues, may do so in a minimal fashion.³⁹

In the principal objects of the WGE Act the primary ‘problems’ addressed are expanded and an explicit reference to gender equality – and to pay inequity as an aspect of this – is included in the first object: ‘to promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace’.⁴⁰ This suggests a representation of the problem as not simply one of awareness, as the goal is not only for promotion of gender equality and equal remuneration but also for their *improvement*. This revised representation of the problem is apparent in a shift to more of an outcomes focus in employer reporting requirements. Under the *WGE Act*, from 2014 employers will be required to report against a framework of ‘gender equality indicators’, which includes equal remuneration between women and men.⁴¹ While the compliance framework has arguably been strengthened through some increased transparency of reporting there are no new penalties for non-compliance.⁴²

The new requirement for employers to report on equal remuneration outcomes suggests a representation of the problem as the persistence of a gender pay gap requiring active intervention beyond simply ‘promotion’ to employers. At the same time, there is a new emphasis on gender inequality as a barrier to economic efficiency with a principal object of the *WGE Act* being ‘to improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace’.⁴³ As Margaret Thornton notes, an economic rationale, which has been present as an element of Australia’s equal opportunity legislation since its inception, has now ‘become more insistent’.⁴⁴ This framing of gender inequality as a problem impeding the pursuit of competitiveness and productivity, rather than as a social justice concern or human rights obligation, provides a clear space for compromises to be made in setting standards for equality indicators where businesses or employer groups see equality targets as competing with their own business goals. In the *WGE Act* the goals of addressing unequal pay and gender inequality are represented as contingent on the other priorities of employers and

39 Erica French and Glenda Strachan, ‘Equal Opportunity Outcomes for Women in the Finance Industry in Australia: Evaluating the Merit of EEO Plans’ (2007) 45 *Asia Pacific Journal of Human Resources* 314, 323–6; *ibid* 48–52.

40 *WGE Act* s 2A(a).

41 *WGE Act* s 3. See *Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument (No 1) 2013* (Cth).

42 Employer reports to the WGEA are to be made accessible to employees and shareholders, and employees and employee organisations are to be provided with opportunity to comment on them: *Workplace Gender Equality Act 2012* (Cth) ss 16, 16A, 16B. As under the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), non-compliant employers may be deemed ineligible for government grants or other assistance and may be excluded from government contracts: *Workplace Gender Equality Act 2012* (Cth) s 18. See also Leah Ferris, *Bills Digest: Equal Opportunity for Women in the Workplace Amendment Bill 2012*, No 147 of 2011–12, 8 June 2012, 17.

43 *Workplace Gender Equality Act 2012* (Cth) s 2A(e).

44 Thornton, ‘Proactive or Reactive?’, above n 34, 288.

government, and employers have already represented them as (unnecessarily) increasing red-tape and the compliance burden on businesses.⁴⁵

III THE *FW ACT* AND THE CONSTRUCTION OF THE PROBLEM OF UNEQUAL REMUNERATION

In Australia the industrial relations jurisdiction has been the main site of regulatory intervention in respect to equal pay. While developments in the states' industrial relations systems have been significant in this regard, the federal jurisdiction has taken on an increased importance with the referral of the main industrial relations powers by all of the states except Western Australia to the federal government.⁴⁶

The Pay Equity Inquiry conducted in 2008–09 provides a useful reference point for considering the ways in which the problem of unequal pay is represented in the *FW Act*. The Pay Equity Inquiry adopted a broad approach that acknowledged the complexity of the issues underlying the gender pay gap. It produced 63 recommendations in the areas of industrial relations legislation, anti-discrimination legislation, the establishment of a pay equity unit, administrative approaches to pay equity (for example, relating to superannuation and industry assistance), data collection and research, 'women's choices' and cultural dimensions.⁴⁷ Of these recommendations, 11 related to changes in what was at the time a proposed *FW Act* and another seven were directly concerned with the operation of the Act. They included recommendations for the adoption of an unambiguous and broad definition of equal remuneration for work of equal or comparable value, the inclusion of equal remuneration as an explicit object of the Act and the clear articulation of means for advancing pay equity through the Act.⁴⁸ Other recommendations were directed to the valuing of skills in traditionally feminised jobs and the inclusion of an equal pay goal in the modern awards that underpin employees' pay and conditions and in the collectively bargained enterprise agreements that are the primary instruments establishing many employees' actual wages and conditions. These recommendations construct unequal pay as a problem that is embedded within industrial

45 See, eg, Australian Chamber of Commerce and Industry, 'Industry Support for Gender Equality Cautioned by Reporting Requirements' (Media Release, MR 183/12, 2 March 2012) <<http://www.acci.asn.au/Research-and-Publications/Media-Centre/Media-Releases-and-Transcripts/Workplace/Industry-Support-for-Gender-Equality-Cautioned-by->>.

46 Meg Smith and Andrew Stewart, 'A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the *Fair Work Act*' (2010) 23 *Australian Journal of Labour Law* 152, 160.

47 House of Representatives Standing Committee on Employment and Workplace Relations, above n 9, xxiv–xxxiii. For a critical appraisal of the Inquiry, see Anne Junor, Suzanne Hammond and Lucy Taksa, 'Forward with (Gender Pay) Fairness?' (Paper presented at Labour, Capital and Change: The 23rd Conference of the Association of Industrial Relations Academics of Australia and New Zealand, Newcastle, Australia, 4–6 February 2009).

48 House of Representatives Standing Committee on Employment and Workplace Relations, above n 9, xxiv–xxvii.

arrangements, including through industrial and occupational segregation, historical undervaluation, women's lack of bargaining power and high levels of part-time employment. The recommendations of the Pay Equity Inquiry are directed to resolving this problem by centrally locating an equal pay goal in the *FW Act*.⁴⁹

The drafting of the *FW Act* does not appear to have been influenced by the Pay Equity Inquiry process and, by the time the inquiry report was published in November 2009, the *FW Act* had been in place for some months.⁵⁰ The report recommendations do not appear to have been considered in the recent *FW Act* review⁵¹ and the Government did not formally respond to the inquiry until May 2013.⁵²

Nevertheless, the *FW Act* contains provisions that have provided some cause for optimism for the advancement of pay equity, particularly in the light of the success of the first equal remuneration case, the *Application by the Australian Municipal, Administrative, Clerical and Services Union and Others for an Equal Remuneration Order in the Social and Community Services Industry* ('the *SACS Equal Remuneration Case*').⁵³ This led to the first equal remuneration order made under section 302 of the *FW Act*: the *Social, Community and Disability Services Industry Equal Remuneration Order 2012*. Part 2-7 of the *FW Act* includes broader equal remuneration provisions than those in previous federal legislation.⁵⁴ This enables the Fair Work Commission (previously FWA) to 'make any order ... it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value'⁵⁵ and removes any requirement to prove discrimination was involved in the setting of pay.⁵⁶ In addition, the 'minimum wages objective' of the *FW Act* includes that FWA must take the principle of equal remuneration into account in establishing the safety net of minimum wages. The 'modern award objective' includes the same requirement in relation to modern awards and the statutory National Employment Standards.⁵⁷ Administrative changes to support

49 Arguably this would also require attention to the regulation of working arrangements that structure pay – not only the classifications in the modern awards to which pay rates are attached but also to working time arrangements and standards and employees' contractual status. See Sara Charlesworth and Alexandra Heron, 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?' (2012) 54 *Journal of Industrial Relations* 164.

50 Most of the provisions of the *FW Act* were operational by mid-2009.

51 Department of Education, Employment and Workplace Relations, 'Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation' (Report, 15 June 2012).

52 Australian Government, 'Making It Fair, Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce' (Response to the House of Representatives Standing Committee on Employment and Workplace Relations Report, May 2013).

53 Marian Baird and Sue Williamson, 'Women, Work and Industrial Relations in 2008' (2009) 51 *Journal of Industrial Relations* 331, 336–8.

54 Remuneration is not defined in the *FW Act* but the Explanatory Memorandum suggests it encompasses wages and other monetary entitlements: Explanatory Memorandum, Fair Work Bill 2008 (Cth) 189 [1190]; Smith and Stewart, above n 46, 163.

55 *FW Act* s 302(1).

56 Explanatory Memorandum, Fair Work Bill 2008 (Cth) 189 [1192].

57 *FW Act* ss 134(1)(e), 284(1)(d).

FWA in equal remuneration matters were only put in place much later with the establishment in 2013 of a pay equity unit to assist with research associated with any equal remuneration applications.⁵⁸

The *FW Act* equal remuneration provisions seemingly represent the problem of unequal pay as a problem of industry and occupational segregation and of the undervaluation of women's work, in that they embed a concern for equal remuneration in some of the key wage-setting mechanisms of the Act. Assessing the practical potential of these provisions requires some examination of their operation, and of the problem representations adopted by FWA in their decisions and by the other parties engaged in the industrial relations processes. In the remainder of this article we draw on published documents concerning the *SACS Equal Remuneration Case*, the FWA's annual minimum wage reviews, the award modernisation process and the recent *FW Act* review to evaluate the prospects for advancing equal pay through the *FW Act*.

A The History of Equal Pay in Industrial Relations Frameworks

A brief overview of the historical development of equal pay initiatives in state and federal industrial relations jurisdictions provides some context for assessing current federal provisions and for shedding some light on the development of contemporary constructions of the equal pay problem. Within the federal jurisdiction an equal pay concept was first adopted in 1969 and this rested on a narrow construction of the problem of unequal pay as a problem of unequal pay for equal work.⁵⁹ Thus remedies to the problem were limited to women working alongside men performing the same jobs. In 1972 the then Conciliation and Arbitration Commission adopted a broader concept of equal pay for work of equal value.⁶⁰

Australia's approach at this time contrasted with early approaches taken in Canada, the United States and the UK in that it allowed for claims to be made on a collective rather than individual basis and for comparisons to be made not only within organisations and industries but across industrial awards.⁶¹ As such, in Australia the pay equity problem was represented as a systemic problem – not limited to inequities *within* organisations but to inequities in the classification of jobs across multiple organisations.

These early measures and the extension of the male minimum wage to women in 1974 have been seen as significant for improvements in the full-time

58 Peter Garrett, Kate Ellis and Bill Shorten, 'Boost for Quality Early Childhood Education' (Media Release, 19 March 2013) <<http://ministers.deewr.gov.au/garrett/boost-quality-early-childhood-education>>.

59 *Equal Pay Case* (1969) 127 CAR 1142.

60 *National Wage and Equal Pay Case* (1972) 147 CAR 172.

61 Meg Smith, 'Statement of Meg Smith', Submission in attachment to: ASU and Others, 'Applicants' Submissions', Submission in *SACS Equal Remuneration Case*, C2010/3131, 3 June 2010, 7.

adult gender pay gap in Australia over the 1970s and 1980s.⁶² However, there were also limitations with the application of the equal remuneration principle during this time. A legislative entitlement to equal remuneration for work of equal value as a minimum employment entitlement was first introduced into federal industrial relations legislation in 1993, giving effect to Australia's obligations under international conventions it had ratified.⁶³ This provision contained limitations, including that the resolution of equal remuneration claims needed to be by reference to a male comparator group and, due to what is arguably a reading down of the requirements of the International Labour Organisation's *Equal Remuneration Convention*,⁶⁴ required that discrimination be proved as the cause of unequal remuneration. While such a test was difficult to apply to collective industrial instruments,⁶⁵ it was further complicated by the fact that there was little clarity about just what constituted discrimination.⁶⁶ Nevertheless, unequal pay was constructed as a problem of less favourable treatment of women relative to men and, as in the first case run under the provisions of the *Industrial Relations Act 1988* (Cth), as requiring evidence of direct discrimination in the setting of wage rates.⁶⁷ Perhaps not surprisingly, no equal remuneration orders were ever made under the 1993 provisions.⁶⁸

Additional barriers to pay equity in the federal industrial relations jurisdiction were erected with the 'Work Choices' amendments to the *Workplace Relations Act 1996* (Cth) in 2006.⁶⁹ An explicit requirement for reference to a comparator group was introduced⁷⁰ and the Australian Industrial Relations Commission ('AIRC') was prevented from reviewing pay rates set down in pay scales made by the Australian Fair Pay Commission, a body established as part of the

62 R G Gregory and R C Duncan, 'Segmented Labor Market Theories and the Australian Experience of Equal Pay for Women' (1981) 3 *Journal of Post Keynesian Economics* 403, 426; Gillian Whitehouse, 'Recent Trends in Pay Equity: Beyond the Aggregate Statistics' (2001) 43 *Journal of Industrial Relations* 66, 66.

63 Changes were introduced via the *Industrial Relations Reform Act 1993* (Cth) which amended the *Industrial Relations Act 1988* (Cth). The main international conventions are the *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force May 23, 1953) and the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 11, which imposes an obligation to eliminate discrimination to ensure the right to equal remuneration.

64 *Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force May 23, 1953); Jane Romeyn, Shannon-Kate Archer and Elizabeth Leung, *Review of Equal Remuneration Principles* (Research Report 5/2011, Minimum Wages and Research Branch – Fair Work Australia, 2011) 22.

65 Meg Smith and Michael Lyons, '2020 Vision or 1920s Myopia?: Recent Developments in Gender Pay Equity in Australia' (2007) 13(2) *International Employment Relations Review* 27, 28.

66 Meg Smith, above n 61, 14.

67 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries Pty Ltd* (1998) 94 IR 129. The Commission found that that gender segmentation of the HPM Industries workforce did not in itself establish indirect discrimination. See Romeyn et al, above n 64, 17–19.

68 Meg Smith, 'Limits and Possibilities: Rights-Based Discourses in Australian Gender Pay Equity Reform 1969–2007' (2011) 18(S1) *Gender, Work & Organization* 180e, 190e.

69 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

70 Smith, above n 61, 15.

industrial relations reforms and with responsibility for reviewing minimum wage rates.⁷¹

However, from the late 1990s onward, there were some significant positive developments in state industrial jurisdictions with government-led pay equity inquiries conducted in several states.⁷² A broad understanding of the problem of unequal pay and the multiple and complex factors contributing to it were articulated in these inquiries and, in NSW and Queensland, given effect through the formulation of equal remuneration principles by those states' industrial tribunals and some subsequent successful equal pay cases.⁷³

As others have noted, the NSW and Queensland initiatives overcame some of the limitations of past approaches to advancing equal pay by framing the problem as in part an issue of systemic gender-based undervaluation, which did not require evidence of discrimination or a specific male comparator.⁷⁴ The NSW inquiry into pay equity referred to the wider dimensions of undervaluation as the low rates of unionisation, high rates of part-time and/or casual employment and the high incidence of consent industrial agreements typically associated with female occupations.⁷⁵ The equal remuneration principle adopted by the NSW Industrial Relations Commission ('NSWIRComm') emphasised undervaluation of work as the basis for unequal pay for women.⁷⁶ As Smith has pointed out, the equal remuneration principle formulated by the Queensland Industrial Relations Commission ('QIRComm') was more expansive, including that it could be applied to any industrial instrument.⁷⁷ Equal remuneration was included as an element of the principal object of the *Industrial Relations Act 1999* (Qld) which, it has been argued, made pay equity 'a priority in itself and constitutive of the "public interest"'.⁷⁸ Whitehouse and Rooney argued that in the Queensland Dental Assistants' equal pay case,⁷⁹ this enabled the QIRComm to consider and

71 Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 2008) 186.

72 NSW: Leonie Glynn, *Pay Equity Inquiry: Reference by the Minister for Industrial Relations Pursuant to Section 146(1)(d) of the Industrial Relations Act 1996* (Industrial Relations Commission of New South Wales, 1998); Qld: Queensland Industrial Relations Commission, *Worth Valuing: A Report of the Pay Equity Inquiry* (2001); WA: Trish Todd and Joan Eveline, *Report on the Review of the Gender Pay Gap in Western Australia* (Report for the Government of Western Australia, 2004) <http://www.commerce.wa.gov.au/labourrelations/pdf/Publications/Gender_Pay_Final_Rep.pdf>.

73 Equal remuneration principles: *Re Equal Remuneration Principle* [2000] NSWIRComm 113 (30 June 2000); *Equal Remuneration Principle* (2002) 114 IR 305 (29 April 2002). For a summary of key equal pay cases see Romeyn et al, above n 64, 30–40; Smith and Lyons, above n 65; Gillian Whitehouse and Tricia Rooney, 'The Queensland Dental Assistants' Equal Remuneration Case: Advancing Gender Pay Equity at State Level?' (2007) 18(2) *Labour and Industry* 85.

74 Romeyn et al, above n 64, 43; Meg Smith, above n 61, 20–1; Whitehouse and Rooney, above n 73, 86 ff.

75 Glynn, above n 72, vol 2, 179.

76 *Re Equal Remuneration Principle* [2000] NSWIRComm 113 (30 June 2000).

77 *Equal Remuneration Principle* (2002) 114 IR 305 (29 April 2002) [9]–[211]; Meg Smith, above n 61.

78 *Industrial Relations Act 1999* (Qld) s 3(d); R Hunter, G Whitehouse and D Zetlin, Submission to Queensland Industrial Relations Commission, *Pay Equity Inquiry* (2000) s 3.1, cited in Whitehouse and Rooney, above n 73, 88.

79 *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v The Australian Dental Association (Queensland Branch) Union of Employers* (2005) 180 QGIG 929.

rectify inequities between the Dental Assistants' award rates and the rates in bargained enterprise agreements of other groups of workers.⁸⁰

In Queensland, in a case that underpinned the pay equity claim in the recent federal *SACS Equal Remuneration Case*, the Queensland Services Union successfully applied for a new award for community services workers. The QIRComm awarded pay increases to address the historical undervaluation of work, concluding gender undervaluation was at the core of the work value that had been applied to this work.⁸¹

B Equal Remuneration Orders in the *FW Act* and the *SACS Equal Remuneration Case*

The provision in the *FW Act* for the making of an equal remuneration order was brought into play in 2010 with an application by five unions, led by the Australian Municipal, Administrative, Clerical and Services Union ('ASU'), representing SACS employees covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* ('*SCHCDS Award*').⁸² The vast majority of SACS workers are women employed by one of approximately 4000 different organisations,⁸³ mainly small not-for-profit agencies that are heavily reliant on government funding to provide services to various groups in the community.⁸⁴

In October 2009, a 'heads of agreement' was struck between the Australian government and the ASU that provided, among other things, that the government would support the development of an 'appropriate' federal equal remuneration principle and support FWA and the parties by providing relevant research and evidence.⁸⁵ The unions' primary contention in their application, reflecting the QIRComm SACS equal pay decision in 2009, was that SACS work was performed by a predominantly female workforce and had been subject to gender-based undervaluation compared to similar work performed in the government sector.⁸⁶ In arguing that the work was subject to undervaluation, the unions drew on the elements first identified in the NSW pay equity inquiry as possible indicia

80 Whitehouse and Rooney, above n 73, 96–7.

81 *Queensland Services, Industrial Union of Employees and Queensland Chamber of Commerce and Industry Ltd, Industrial Organisation of Employers* (Award, Queensland Industrial Relations Commission, Award No A/2008/5, 6 May 2009) 33.

82 Australian Municipal, Administrative, Clerical and Services Union and Others, 'Applicants' Submissions', Submission in *SACS Equal Remuneration Case*, C2010/3131, 28 February 2011.

83 Australian Government, 'Outline of Contentions', Submission in *SACS Equal Remuneration Case*, C2010/3131, 7 June 2010, 16.

84 Australian Municipal, Administrative, Clerical and Services Union and Others, above n 82, 191–3 [473]–[476].

85 Australian Services Union, *Heads of Agreement, Australian Government and the Australian Services Union* (October 2009) <<http://www.asumembers.org.au/downloads/SACS/Heads-of-Agreement-signed.pdf>>.

86 Australian Municipal, Administrative, Clerical and Services Union and Others, 'Applicants' Outline of Contentions', Submission in *SACS Equal Remuneration Case*, C2010/3131, 7 June 2010, 16.

of gender-based undervaluation.⁸⁷ These elements include: work that is female-dominated, characterised as female and may not have been subject to a work value exercise, a union that is weak and has few members, consent awards/agreements, a large component of casual workers, lack of/inadequate recognition of qualifications, deprivation of access to training or career paths, small workplaces, new industry or occupation, service industry and home-based occupations.⁸⁸

In an interim May 2011 decision FWA found limitations with the indicia approach adopted by the applicants, stating that ‘undervaluation can be the result of a range of factors, not only gender’.⁸⁹ FWA did, however, accept that ‘to the extent that work in the industry is undervalued because it is caring work, the undervaluation is gender-based’ and sought submissions on the extent of this undervaluation in the award rates of pay.⁹⁰ In response, a joint submission from the unions and the Australian government – one of the main funders of SACS services along with state governments – put forward a claim based on the rates in the Queensland award. The claim was validated by estimating the percentage of direct and indirect ‘care work’ at relevant levels of the SCHCDS Award classification structure and by making a comparison with rates for employees doing similar work in the public sector.⁹¹ The ultimate estimate of the proportion of caring work undertaken by SACS workers ranged between 56 per cent and 96 per cent, with the higher proportions applying in lower classifications. In February 2012, in a majority ruling, FWA made an order providing for increases of between 19 and 41 per cent to the SCHCDS Award weekly wage rates from level two, to be phased in over an eight-year period, along with an additional four per cent to compensate for employees’ loss of opportunity to bargain during this time.⁹²

The benefits of the decision for most SACS workers are significant. More generally, as FWA did not require that discrimination needed to be proved, only that the gender-based undervaluation identified had inhibited wages growth, the decision was regarded as highly significant; in the words of some academic

87 Australian Municipal, Administrative, Clerical and Services Union and Others, ‘Applicants’ Submissions’, above n 82, 67–196.

88 Glynn, above n 72, vol 1, 46 ff.

89 *Australian Municipal, Administrative, Clerical and Services Union* (C2010/3131) [2011] FWA FB 2700, [248] (‘*SACS Equal Remuneration Case – 16 May 2011 Decision*’).

90 Ibid [253].

91 Australian Municipal, Administrative, Clerical and Services Union and the Australian Government, ‘Joint Submission of the Applicants and the Australian Government on Remedy’, Submission in *SACS Equal Remuneration Case*, C2010/3131, 17 November 2011, 7–25.

92 *Australian Municipal, Administrative, Clerical and Services Union* (C2010/3131) [2012] FWA FB 1000, [66]–[69] (‘*SACS Equal Remuneration Case – 1 February 2012 Decision*’). The FWA decision is based on the joint submission on remedy agreed by the unions and the Federal Government, apart from an extension of the agreed six year phase-in period for wage increases to eight years.

observers it was ‘the most important equal pay decision since ... 1972’.⁹³ FWA’s acknowledgement of gender-based undervaluation and of the link between care work performed by women and undervaluation of female-dominated work in the SACS sector as the problems to be targeted signalled recognition of the underlying systemic gender inequality that is manifested in unequal pay. FWA did not require the unions making the application to prove discrimination nor did it require them to provide a male comparator group.⁹⁴

However, on closer assessment and when considering how the decision in the *SACS Equal Remuneration Case* might progress the equal pay cause more generally, there are aspects of the decision that are less positive. FWA’s considerations in the *SACS Equal Remuneration Case* do not demonstrate the same understanding of gender inequality apparent in the earlier equal pay developments in Queensland and NSW. In the *SACS Equal Remuneration Case* the unions’ submission drew on the wide range of factors named in NSW and Queensland as relevant to the identification of gender-based undervaluation but FWA considered most of these to be controversial, stating ‘their significance in terms of gender is debatable’.⁹⁵ FWA’s acceptance of the work as undervalued on the basis of gender was based entirely on the fact that the work bears a female characterisation in that much of it is care work and that this characterisation can disguise the level of skills and experience required, leading to devaluation.⁹⁶ However, as the Women’s Organisations argued in their final submission in the *SACS Equal Remuneration Case*, factors ‘other than gender’ do in fact reflect gender influences:

The genesis of the social and community services industries in domestic and community environments, using unpaid labour, largely provided by women, has been intrinsic to the development of funding models that fund services below the cost of provision. To a significant degree the real costs of providing the services, including wages, have never been explicit and evident, nor have they been funded.⁹⁷

In relation to funding, while FWA conceded that the operation of the highly competitive market for government funding along with ‘historical inertia’ and the high level of volunteer labour underpinned the low wages rates in the SCHCDS Award,⁹⁸ in terms of wage increases it limited any remedies to gender undervaluation based on caring work. This very narrow framing effectively

93 Rhonda Sharp, Ray Broomhill and Jude Elton, *‘Modern’ Labor and the Fair Work Act 2009: Challenging the Male Breadwinner Gender Order?* (Australian Workplace Innovation and Social Research Centre, University of Adelaide, 2012) 13.

94 *SACS Equal Remuneration Case – 16 May 2011 Decision* [2011] FWAFB 2700, [231]–[234].

95 *SACS Equal Remuneration Case – 16 May 2011 Decision* [2011] FWAFB 2700, [258]. See also Siobhan Austen, Therese Jefferson and Alison Preston, ‘Contrasting Economic Analyses of Equal Remuneration: The Social and Community Services (SACS) Case’ (2013) 55 *Journal of Industrial Relations* 60 for an analysis of some opposing arguments presented by the parties in the *SACS Equal Remuneration Case* about what constituted undervaluation.

96 *SACS Equal Remuneration Case – 16 May 2011 Decision* [2011] FWAFB 2700, [253].

97 National Pay Equity Coalition and the Women’s Electoral Lobby (the Women’s Organisations), ‘Final Submissions on Remedy’, Submission in *SACS Equal Remuneration Case*, C2010/3131, 21 July 2011, 5.

98 *SACS Equal Remuneration Case – 16 May 2011 Decision* [2011] FWAFB 2700, [270].

excludes the gendered underpinnings of government funding decisions that are reflected in the QIRComm's 'global approach'⁹⁹ to the same problem, where it was recognised that 'gender factors [are], perhaps unconsciously, reflected in the purchasing models for community services'.¹⁰⁰

FWA's rejection of the broad indicia approach to gender undervaluation used in the QIRComm SACS case and other equal pay cases in the Queensland and NSW jurisdictions suggests the *SACS Equal Remuneration Case* will establish only a limited precedent for workers in female-dominated industries in which the work is not primarily care work. There are further indications of a narrower representation of the problem of gender pay inequity by FWA than in state-based equal pay cases. For example, while FWA accepted that it was not necessary to have a male comparator group, this was clearly indicated to be FWA's preference.¹⁰¹ FWA also proved reluctant to use the case to establish an equal remuneration principle setting down general principles for the making of equal remuneration orders, although this had been widely anticipated. Indeed without the federal government's commitment to funding their share of any increases awarded,¹⁰² the SACS claim may not have succeeded.¹⁰³

Despite more robust equal remuneration provisions in the *FW Act* than existed in earlier federal legislation, FWA's approach in the *SACS Equal Remuneration Case* suggests a limited reading of the potential of these provisions. This approach has more in common with that of the Australian Industrial Relations Commission ('AIRC') under the 1993 provisions than with the approaches taken in more recent cases in the NSW and Queensland jurisdictions, where in effect 'judicial notice' is taken of both the factors that contribute to gender undervaluation in pay rates and the remedies. Further, the *SACS Equal Remuneration Case* suggests that the potential of the equal remuneration provisions is highly constrained within a jurisdiction which places a strong emphasis on workplace-based bargaining for setting terms and conditions of work. FWA made clear in their deliberations that 'there is no justification for establishing a nexus between an equal remuneration order and market rates in state and local government'.¹⁰⁴ In their May 2011 decision, the FWA Full Bench, having emphasised the role of minimum wages in modern awards as a safety net, stated:

99 Romeyn et al, above n 64, 39.

100 *Queensland Community Services and Crisis Assistance Award – State 2008* [2009] QIRComm 3316.

101 See *SACS Equal Remuneration Case – 16 May 2011 Decision* [2011] FWAFB 2700, [286].

102 Explanatory Memorandum, Social and Community Services Pay Equity Special Account Bill 2012 (Cth); Explanatory Memorandum, Social and Community Services Pay Equity Special Account (Consequential Amendments) Bill 2012 (Cth), 1.

103 *SACS Equal Remuneration Case – 1 February 2012 Decision* [2012] FWAFB 1000, [55]. See also 'AiG Delivers Scathing Critique of IR Changes', *Workplace Express* (online), 16 November 2012 <<http://www.workplaceexpress.com.au>>; Natasha Cortis and Gabrielle Meagher, 'Recognition at Last: Care Work and the Equal Remuneration Case' (2012) 54 *Journal of Industrial Relations* 377, 378; Todd and Preston, above n 6, 261.

104 *SACS Equal Remuneration Case – 1 February 2012 Decision* [2012] FWAFB 1000, [58].

Given the basis on which minimum rates are fixed, it is not possible to demonstrate that modern award wages are too low in work value terms by pointing to higher rates in enterprise agreements, or in awards which clearly do not prescribe minimum rates. In order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards.¹⁰⁵

Thus FWA explicitly rejected a representation of the problem of unequal pay as a problem of *actual* reward for work, confining it to a problem of inequity between minimum rates specified in awards. The fact that most SACS workers are employed on or just above the ‘safety net’ wage rates provided in the SCHCDS Award and have been unable to gain pay increases through collective bargaining at the enterprise level¹⁰⁶ is not a part of the problem as it has been represented by FWA. The decision seeks to maintain enterprise bargaining as the key mechanism for workers to gain pay increases.¹⁰⁷ While it could be argued that the problem of award reliance can be dealt with through the multi-enterprise bargaining stream for low-paid employees in the *FW Act*,¹⁰⁸ a recent appraisal suggests this option is unlikely to be a mechanism for more equitable pay for the many female workers in ‘minimum conditions’ industries such as the SACS and other low-paid female dominated areas where bargained pay rates may differ little from award rates due to the emphasis given to the importance of single-enterprise bargaining.¹⁰⁹

Further, the *FW Act* contains no requirement specifically relating to equal remuneration in enterprise bargaining. While it is possible that an equal remuneration order could be made in relation to an enterprise agreement, this does not appear likely,¹¹⁰ and there is no requirement within the industrial relations system for employers to be proactive with regard to pay equity. As Pat Armstrong has argued, the omission of equal pay requirements from bargaining reduces the problem of unequal pay to an issue of need only rather than rights.¹¹¹ The implication is that only vulnerable groups such as low-paid women are subject to the systemic discrimination that underlies unequal pay. The problem is framed in a way that excludes issues such as occupational segregation for large

105 *SACS Equal Remuneration Case – 16 May 2011 Decision* [2011] FWAFB 2700, [261].

106 Australian Government, ‘Outline of Contentions’, Submission in *SACS Equal Remuneration Case*, C2010/3131, 2010, 93–4 [5.35]–[5.39].

107 *SACS Equal Remuneration Case – 1 February 2012 Decision* [2012] FWAFB 1000, [58].

108 *FW Act* div 9.

109 Sara Charlesworth, ‘Decent Working Conditions for Care Workers? The Intersections of Employment Regulation, the Funding Market and Gender Norms’ (2012) 25 *Australian Journal of Labour Law* 107.

110 Smith and Lyons have noted that, under the provisions introduced in 1993 into the *Industrial Relations Act 1988* (Cth) – provisions which remained in the *Workplace Relations Act 1996* (Cth) – the AIRC ‘appeared reluctant to exercise arbitral powers over actual as opposed to minimum rates of pay’ as ‘neoliberal policy settings increasingly confined [its] role to an arbiter of “safety-net” wages’: Smith and Lyons, above n 65, 28.

111 Pat Armstrong, ‘Back to Basics: Seeking Pay Equity for Women in Canada’ (2007) 18(2) *Labour and Industry* 11, 28–29.

sections of the workforce from consideration.¹¹² Thus, the right of all women to equal pay for work of equal value remains unrealised.

The decision in the *SACS Equal Remuneration Case* demonstrates reluctance on the part of FWA to allow the goal of equal remuneration to challenge the dominance given to the market as the main determinant of wages within the industrial relations system. This reluctance is in keeping with the provisions for equal remuneration orders within the *FW Act*, which permit an order to be made only following an application by an employee, an employee organisation or the Sex Discrimination Commissioner.¹¹³ Thus the advancement of pay equity through equal remuneration orders is left up to employees and their unions, who must initiate cases, collect evidence and put forward the legal arguments. This is no small task as shown in the *SACS Equal Remuneration Case*, which ran over a period of 18 months and faced significant opposition from employer groups. Indeed, the process under the *FW Act* may be seen by some unions as far too costly for the likely benefits it will deliver.

C Annual Wage Reviews, Award Modernisation and Equal Remuneration

The Minimum Wages Panel of FWA ('the Panel') undertakes annual reviews of award wages under Part 2-6 of the *FW Act* and in doing so is required to have regard to the *FW Act* 'minimum wages objective' and the 'modern awards objective'. Both of these objectives also require that FWA take into account 'the principle of equal remuneration for work of equal or comparable value'.¹¹⁴

The 2009–10 Annual Wage Review was the first review of minimum wages under the *FW Act*. In undertaking this review the Panel noted the requirement to take into consideration the principle of equal remuneration. However the Panel's considerations were not extensive.¹¹⁵ A submission by the Queensland Government called for the Panel to formulate an equal remuneration principle similar to the one applied by the QIRComm,¹¹⁶ while the federal government and one of the main employer bodies argued that pay equity was best addressed through other parts of the *FW Act*. In its submission the federal government referred to individual pay equity or work value cases, enterprise bargaining and the low paid bargaining stream of the *FW Act* and the Australian Chamber of Commerce and Industry ('ACCI') also referred to 'other provisions that are intended to specifically address pay equity'.¹¹⁷ In arguing that the equal remuneration 'solution' be confined to the making of equal remuneration orders the parties represent the problem as marginal to one of the key operations of the

112 Ibid.

113 *FW Act* s 302(3). To date, the Sex Discrimination Commissioner has made no such application.

114 *FW Act* ss 134, 284.

115 *Annual Wage Review 2009–10* (C2010/1) [2010] FWAFB 4000, [303]–[319].

116 Queensland Government, Submission to Fair Work Australia, *Annual Wage Review 2009–10*, 19 March 2009, 12 [43].

117 Australian Government, above n 82, 93–4 [6.16]; Australian Chamber of Commerce and Industry, Submission to Fair Work Australia, *Annual Wage Review 2010*, 2010, 40 [207].

FW Act. On the basis of submissions it received the Panel concluded that ‘an increase in minimum wages is likely to assist in promoting pay equity given the relatively high proportion of women among the award-reliant, although it may not be the most effective means for achieving this end’,¹¹⁸ and pointed to a need for research to identify the extent and composition of the award-reliant sector.¹¹⁹ The Panel’s considerations in the subsequent 2010–11, 2011–2012 and 2012–13 reviews were similar. For example, the Panel’s conclusion in 2010–11 was that ‘an increase in minimum wages is likely to assist in some measure in promoting pay equity, although in our view other means are available under the *FW Act* to address such issues more directly’.¹²⁰

In its submission to the 2010–11 review the federal government asserted the gender pay gap was best addressed through other mechanisms in the *FW Act*, while also submitting that minimum wage increases may have a negative effect on overall gender pay equity as wage increases act as a floor for wages through bargaining, with men tending to benefit more from bargaining.¹²¹ In the following year the government submission identified equal remuneration orders and enterprise bargaining as better suited to addressing pay equity,¹²² despite the historical failure of enterprise bargaining to address equal remuneration.¹²³ In the government’s submissions to the four annual wage reviews, progressively less consideration is given to equal remuneration each year. The 100-page submission in 2010 devotes a chapter to each of the five matters – including equal remuneration – the Panel must take account of in establishing minimum wages.¹²⁴ An equally lengthy 2011 submission includes only a sub-section on pay gap trends within a chapter on social inclusion and workforce participation, and the 2012 and 2013 submissions do not include any discussion or analysis of the gender pay gap at all.¹²⁵ Thus, despite being one of the matters that must be considered by the Panel, unequal remuneration is represented as a problem that is outside the scope of considerations for the annual wage reviews altogether, something which is also apparent in employer submissions.¹²⁶

118 *Annual Wage Review 2009-10* (C2010/1) [2010] FWAFB 4000, [319].

119 Research undertaken by the Minimum Wages and Research Branch of FWA includes recent papers by Miranda Pointon et al, *Award Reliance and Differences in Earnings by Gender* (FWA, 2012) and Romeyn et al, above n 64, both of which were cited by the Panel in its 2012 decision.

120 *Annual Wage Review 2010-11*(C2011/1) [2011] FWAFB 3400, [296].

121 Australian Government, Submission to Fair Work Australia, *Annual Wage Review 2010-11*, 18 March 2011, 2 [9].

122 Australian Government, Submission to Fair Work Australia, *Annual Wage Review 2012*, 16 March 2012, 10 [16].

123 See, eg, Whitehouse, above n 62; Charlesworth and Heron, above n 49, 170.

124 Australian Government, Submission to Fair Work Australia, *Annual Wage Review 2010*, 19 March 2010.

125 Australian Government, Submission to Fair Work Australia, *Annual Wage Review 2011*, 18 March 2011, 36–7; Australian Government, above n 122; Australian Government, Submission to Fair Work Commission, *Annual Wage Review 2013*, 28 March 2013.

126 See, eg, Australian Chamber of Commerce and Industry, Submission to Fair Work Australia, *Annual Wage Review 2012*, 16 March 2012, 25 [125]–[128].

The annual wage reviews are conducted by the Panel in accordance with the requirement to ‘tak[e] into account’ equal remuneration.¹²⁷ However, to date, the Panel’s considerations and the parties’ submissions suggest the marginalisation of equal pay as anything more than a peripheral consideration confined to concerns that the award rates system should not worsen or might improve the gender pay gap. This falls far short of a commitment to a system of award classification rates that would support equal remuneration.

The modern awards objective of the *FW Act* requires that FWA, in ensuring that modern awards, along with the National Employment Standards, ‘provide a fair and relevant minimum safety net of terms and conditions’, must take account of a number of matters including the principle of equal remuneration.¹²⁸ The award modernisation process – which involved the review and rationalisation of over 1500 industrial awards into 122 modern awards – also required the AIRC to promote the principle of equal remuneration.¹²⁹ However, assessments of this process suggest that overall a minimalist approach was taken and that there was little time for the AIRC to meet all its requirements or to review rate relativities.¹³⁰ There is no evidence that attention was paid to equal remuneration, either in the award modernisation process or subsequently, nor that this process, which was finalised in the main by the end of 2010, was informed by the Pay Equity Inquiry which was completed in 2009. The new modern awards have been established without a comparable work value assessment, considered to be essential for equal remuneration.¹³¹ The lack of attention to equal remuneration in the award modernisation process and the way in which this issue has been presented in award wage review processes as something of a ‘technical’ problem best addressed under the provision for making equal remuneration orders do not auger well for equal pay considerations in the current modern award review.¹³²

D The *FW Act* Review

Our assessment that equal pay has been marginalised in the operation of the *FW Act* is further reinforced when we take into account the 2012 implementation review of the Act. The Review Panel made reference to the provision for equal remuneration orders in their considerations although they made no

127 *FW Act* s 284(1)(d).

128 *FW Act* s 134(1).

129 Julia Gillard, ‘Request under Section 576C(1) – Award Modernisation’, 2 April 2008 <http://www.fwc.gov.au/awardmod/download/award_modernisation_request.pdf>. The request was amended a year later to reflect the inclusion of comparable worth in the *FW Act* equal remuneration principle (see Julia Gillard, ‘Request under Section 576C(1) – Award Modernisation’, 2 May 2009 <http://www.fwc.gov.au/awardmod/download/am_request_con.pdf>).

130 Charlesworth and Heron, above n 49, 172; Junor et al, above n 47; Marian Baird and Sue Williamson, ‘Women, Work and Industrial Relations in 2009’ (2010) 52 *Journal of Industrial Relations* 355, 363.

131 Junor et al, above n 47, 6.

132 A review of modern awards is being conducted over 2012–13 as required by *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) pt 2, sch 5. The first full review of modern awards is due to occur in 2014.

recommendations for any relevant changes to the Act.¹³³ In the wake of the *SACS Equal Remuneration Case*, submissions to the review from employer associations sought to make it more difficult for equal remuneration orders to be made under the *FW Act*.¹³⁴ Unions were supportive of the existing provisions with the Australian Council of Trade Unions ('ACTU') submitting that the outcome of the *SACS Equal Remuneration Case* 'shows that equal remuneration provisions are now working properly'.¹³⁵ However, a number of submissions sought to strengthen pay equity provisions along the lines of the Pay Equity Inquiry recommendations, including making equal remuneration an object of the *FW Act*, taking account of it in enterprise bargaining negotiations,¹³⁶ and requiring FWA to establish a set of equal remuneration principles to provide the framework around how these matters are to be addressed.¹³⁷ The ACTU also noted in a list of 'technical issues' that equal remuneration was not, but should be, a criterion in the FWA four-yearly reviews of modern awards.¹³⁸

However, the Review Panel refers only to the employer submissions indicating 'a level of concern' about the operation of the equal remuneration provisions and the contrasting positive submissions from unions regarding the outcome of the *SACS Equal Remuneration Case* in stating it is 'not convinced of the need to amend the existing provisions'.¹³⁹ The voices of those calling for improved equal pay provisions appear to have been silenced in the context of these opposing views of the main industrial relations protagonists. For the Review Panel the equal remuneration 'problem' appears to be whether or not the current provision for the making of equal remuneration orders is likely to lead to too many successful equal pay cases. The Review Panel expressed no opinion on any submissions relating to the equal remuneration principle that forms part of the modern award and minimum wages objectives of the *FW Act*. In a very recent development the federal government has explicitly rejected calls to make equal remuneration an object of the *FW Act* in its formal response to the Pay Equity Inquiry, pointing to the existing equal remuneration provisions as adequate to provide the necessary regulatory framework to address pay equity.¹⁴⁰

133 Department of Education, Employment and Workplace Relations, above n 51, 116.

134 Australian Chamber of Commerce and Industry, Submission to Department of Education, Employment and Industrial Relations, *Fair Work Act Review*, 22 February 2012, 15, 120–6; Australian Federation of Employers and Industries, Submission to Department of Education, Employment and Industrial Relations, *Fair Work Act Review*, 17 February 2012, 28; Australian Industry Group, Submission to Department of Education, Employment and Industrial Relations, *Fair Work Act Review*, February 2012, 83–7.

135 Australian Council of Trade Unions, Submission to Department of Education, Employment and Industrial Relations, *Fair Work Act Review*, 17 February 2012, 55.

136 See, eg, Work and Family Policy Roundtable, Submission to Department of Education, Employment and Industrial Relations, *Fair Work Act Review*, 17 February 2012, 10.

137 Australian Institute of Employment Rights Inc, Submission to Department of Education, Employment and Industrial Relations, *Fair Work Act Review*, February 2012, 27.

138 Australian Council of Trade Unions, above n 135, 60.

139 Department of Education, Employment and Workplace Relations, above n 51, 116.

140 Australian Government, above n 52, 11.

IV CONCLUSION

A regulatory response to the complex issues that produce gender pay inequity can at best be only partial. Nevertheless, in cross-national comparison Australia has a unique and potentially powerful legal mechanism in the *FW Act* to progress gender pay equity, a mechanism that could provide fairer wages to workers across whole industry sectors. We suggest, however, that the current responses to equal remuneration in the *FW Act* by FWA, the industrial parties and the federal government fall short of addressing pay inequities that reside at the heart of the operation of the industrial relations jurisdiction. Our analysis of representations of the 'problem' has shown that, far from being recognised as systemic undervaluation of women's work, unequal remuneration is represented as a somewhat narrow and technical issue that has little to do with substantive gender equality. In practice, there is little acceptance of gender pay inequity as linked to, for example, women's historical lack of bargaining power or industrial representation, their over-representation in part-time and casual employment structures, or gender segregation. Further, the problem is represented as being confined to the weekly pay rates of women who are award-reliant and as unrelated to inequitable outcomes from bargaining.

The *FW Act* improved the safety net and re-prioritised collective over individual bargaining, all of which represent positive changes for gender equality in employment in their potential to increase women's pay and conditions. However, the pay inequity problem continues to be represented as being outside the core concerns of the *FW Act*. As we have argued in this paper, despite the specific references to equal remuneration in some of the main wage-setting mechanisms of the *FW Act*, the key working arrangements that structure pay such as working time arrangements and contractual status are not considered to be part of the problem of unequal pay. Gender inequities between awards in regard to these matters are also left outside the scope of equal remuneration concerns. As Charlesworth and Heron point out, the working time minima in awards in feminised industries such as the SCHCDS Award are poorer than those that exist in awards in male-dominated industries.¹⁴¹ These differences have tangible pay equity effects, not least in the wider span of ordinary hours in many feminised awards which decrease wage premia attached to working outside these hours.¹⁴² Further, with single enterprise bargaining the means for improving pay and conditions over awards priority is given to a market-based logic that sidelines any concern for gender equality.

Drawing on the approach taken by Verloo and colleagues to problem representation outlined earlier in the paper,¹⁴³ our analysis suggests that, while FWA and the industrial parties have a clear voice in defining the problem of pay inequity under the *FW Act*, ultimately no one is seen to be responsible for

141 Charlesworth and Heron, above n 49.

142 Ibid 175–7.

143 Verloo et al, above n 13.

remedying the problem which is represented as having little to do with minimum wage setting or with modern awards. A vast wealth of knowledge was generated in the 2008–09 Pay Equity Inquiry, state-based pay equity inquiries and pay equity cases in NSW and Queensland about the production and reproduction of gender pay inequity generally and about the mechanisms available within industrial relations jurisdictions to provide some tangible remedies. Yet this knowledge was substantially discounted in the *SACS Equal Remuneration Case* and in the quarantining of pay equity concerns from the mainstream operation of the *FW Act*. As Lips argues:

One way to resist acknowledging that the pay gap is a problem that requires serious attention is to keep searching for explanations for it other than pervasive, often implicit, unacknowledged and unintentional, discrimination against women.¹⁴⁴

The ongoing search for further explanations in the Australian context has been highlighted recently in the role of a new Pay Equity Unit to be established within the Fair Work Commission. The new unit is to

assist the Fair Work Commission with data and research collection, and specialist pay equity information associated with any equal remuneration applications made under s 302 of the Fair Work Act, the four yearly modern award review and annual minimum wage decisions.¹⁴⁵

The provision of specialist pay equity expertise within the Fair Work Commission is to be welcomed and may well provide some impetus for it to be considered seriously in the exercise of the Commission's duties. To do so, however, will require a deeper understanding of the pay equity problem than the Commission has demonstrated to date.

While the recent legislative changes and the *SACS Equal Remuneration Case* have brought the issue of equal remuneration to public attention, our analysis suggests that the practical potential for advancing pay equity through the *FW Act* is limited. United Voice has just announced that it intends to run a pay equity case for child care workers under the equal remuneration provisions of the *FW Act*.¹⁴⁶ This case will provide a fresh opportunity to test the equal remuneration provisions and for the Fair Work Commission to develop a pay equity principle to inform future cases. However, as the *SACS Equal Remuneration Case* demonstrates, progress towards pay equity will remain a matter of political will until the problem and its solutions are represented as central to the objects of the industrial relations regulatory system.

144 Hilary M Lips, 'Acknowledging Discrimination as a Key to the Gender Pay Gap' (2013) 68 *Sex Roles* 223, 228.

145 The Pay Equity Unit's rationale and roles were first spelt out in the government's belated response to the Pay Equity Inquiry: Australian Government, *Making It Fair Report*, above n 52, 9.

146 'United Voice Launches Equal Pay Claim for Childcare Workers', *Workplace Express* (online), 15 July 2013 <<http://www.workplaceexpress.com.au>>. The claim is for a \$10 per hour increase for early childhood educators in long day care centres, estimated to number 68 000 workers.