

# Australia's gender pay equity legislation: how new, how different, what prospects?

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Australia's equal pay laws have recently been renovated through the Workplace Gender Equality Act 2012 and the Fair Work Act 2009. In light of these changes, it is timely to ask how effective Australia's legislative approach is likely to be for progressing pay equity. This article presents an analysis of Australia's current equal pay provisions, assessing their potential on the basis of their operation to date and through recent experience in Canada and the UK. Although focused on outcomes, we argue that Australia's new workplace-based mechanism under the Workplace Gender Equality Act may prove relatively ineffective in both diagnosing and remedying pay inequality. In comparative perspective the Fair Work Act provisions provide significant capacity to improve pay equity across large sectors of the labour market. To date the use of these provisions point to some practical limitations in realising this potential. Moreover, the inadequate legislative and policy integration between labour market, sectoral, workplace and individual approaches together with a wavering political commitment to equality legislation generally suggest gender pay inequity will remain a persistent feature of Australian employment.

*Key words:* Equal pay, Labour regulation, Workplace programmes, Australia  
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## 1. Introduction

The gender pay gap is frequently used as a measure of women's disadvantage in employment, and reducing the gap is a common goal of many nations' gender equality policies. Historically, Australia's gender pay gap was narrow in comparison with many other countries (Whitehouse, 2001). Recent estimates based on monthly gender pay gap data for 2009 suggest this is no longer the case. Amongst developed countries, the narrowest gender pay gaps are found in Europe in the Nordic countries (15–17%) and in France (17%), whilst the gender pay gap in Australia is estimated to be around 32% (Oelz *et al.*, 2013, p 14). Whilst the large proportion of women working part-time contributes to the size of this gap, Australia is one of only two developed countries where the monthly gender pay gap actually grew between 1995 and 2008/9.

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In the Australian policy context, full-time ordinary time weekly earnings provide the prevailing measure of the gender pay gap. In a country where almost half of all employed women are in part-time employment, the utility of a full-time pay gap measure is clearly limited. However hourly earnings data are only collected only for non-managerial employees in Australian earnings surveys, also limiting the value of the hourly measure used elsewhere. Australian weekly earnings data suggests a persistent and increasing gender pay gap for both full-time and total employees. In 2013 the gender gap in full-time ordinary time average weekly earnings was 17.5%. In contrast to trends elsewhere, the gender pay gap in Australia has grown over the past decade as shown in Table 1. Whilst the average full-time pay gap is much lower in the public sector than in the private sector, the rates of growth are similar. Averages are of course just that, and there are significant industry differences in the full-time gender pay gap, with the financial and insurance services industry recording the largest private sector full-time ordinary time earnings pay gap (31.4%) in 2013 (ABS, 2013).

The persistence and recent widening of the gender pay gap in Australia suggests that attention needs to be paid to mechanisms designed to address it, particularly in the private sector. In 2009, a House of Representatives (HOR) Inquiry made a series of recommendations to address what was seen to be the prevalence and systemic nature of gender pay inequity in Australia (HOR, 2009). Consistent with national inquiries in other developed economies, the committee advocated the co-ordination and integration of a number of policy measures. Legislative mechanisms that can tackle both remuneration practices at the workplace level and wage structures at the workplace, industry and labour market levels were seen as critical components of a multi-faceted approach. In particular, the committee placed great weight on more effective legislative provisions, including within the then-new Fair Work Act 2009 (FW Act), through

**Table 1:** *Australia: Average Adult Weekly Earnings Gender Pay Gap by Sector 2003–2013*

Adult Wage & Salary Earners									
Year	All			Public Sector			Private Sector		
	FT OT gap %	FT Tot Gap %	All Tot Gap %	FT OT gap %	FT Tot Gap %	All Tot Gap %	FT OT gap %	FT Tot Gap %	All Tot Gap %
2003	15.8	19.4	35.3	12.4	14.9	26.1	18.7	22.4	39.6
2004	15.2	18.8	34.4	12.4	15.2	26.4	18.0	21.7	38.7
2005	15.0	19.5	34.8	13.0	15.7	27.0	17.2	22.1	38.8
2006	15.2	18.8	34.4	12.7	15.6	27.2	18.0	21.7	38.5
2007	16.1	19.4	35.1	12.6	15.7	27.4	19.2	22.5	39.4
2008	15.8	19.4	35.1	11.8	14.8	26.0	18.7	22.4	39.2
2009	16.8	19.9	34.5	11.7	14.5	25.9	20.2	23.3	38.8
2010	17.2	20.2	35.3	12.2	15.1	26.5	20.8	23.7	39.8
2011	17.7	20.7	35.6	12.6	15.5	26.9	21.2	24.2	40.0
2012	17.6	21.5	36.0	13.1	15.8	27.0	21.0	24.8	40.6
2013	17.5	21.1	37.4	13.1	15.5	26.8	20.8	24.3	42.0

FT = Full-time employees; OT = ordinary time earnings; Tot = total earnings, including ordinary time earnings plus weekly overtime earnings; All = all employees, both full-time and part-time

Source: ABS Average Weekly Earnings, Australia, Cat. No 6302.0 (May 2011, May 2012, May 2013)

specific pay equity laws and more proactive anti-discrimination laws. The federal government only responded to the committee's recommendations in 2013 ([Australian Government, 2013](#)). By that time the former Equal Opportunity for Women in the Workplace Act 1999 (EOWW Act) had been replaced by the Gender Equality in the Workplace Act 2012 (WGE Act) and the government had established a Pay Equity Unit within the Fair Work Commission (FWC), the federal industrial relations tribunal.<sup>1</sup>

Today Australia has a multi-level legislative approach to gender pay equity. First, the FW Act contains three mechanisms that provide a potential basis for action at the labour market level and within specific industry sectors. Most focus has been on the FW Act's provisions for equal remuneration orders, which allow the FWC to make orders for increased wages across specific sectors ([Smith and Stewart, 2010](#); [Cortis and Meagher, 2012](#)). However, the FWC is also obliged to take the principle of equal remuneration into account in its annual minimum wage determinations. In addition, it has similar obligations with respect to the minimum safety net of terms and conditions established in national employment standards and industry awards. Second, equal remuneration is one of the key objects of the WGE Act, which requires all non-government employers with more than 100 employees to annually report progress against a number of gender equality indicators and, for the first time, to meet specific minimum standards, including an equal remuneration standard. Finally, federal, state and territory sex discrimination provisions provide a mechanism for individuals to lodge a complaint and seek a remedy if they believe they have been discriminated against with respect to their remuneration.

In this article we examine prospects for progressing pay equity in Australia through its current legislative framework, focussing in particular on provisions designed to affect the workplace, sectoral and labour market levels. We consider how far Australia's current legal framework goes in addressing the shortcomings of earlier approaches and the opportunities and challenges in progressing equal pay, drawing on relevant experience to date in Australia as well as that in Canada and the UK. In particular we focus on how effective the FW Act and WGE Act are likely to be in addressing the gender pay gap in the private sector.

Canada, the UK and Australia—along with the USA—can be broadly identified as liberal-welfare states ([Esping-Andersen, 1999](#)) or Anglophone regimes ([Gornick and Jäntti, 2010](#)), providing a basis for our particular country comparisons. In all three countries there has been considerable opposition to state intervention and a reliance on market processes to achieve gender equality or the adoption of economic rationales for action, as in 'business case' or efficiency arguments for pay equity ([Armstrong, 2007](#); [Dickens, 2007](#); [Strachan et al., 2007](#)). Equality legislation, as in most Anglophone states, has generally been characterised by reliance on individual complaint mechanisms rather than a collective burden of responsibility and generally underpinned by a narrow focus on equality as formal equality rather than equality of outcomes ([Zeigler, 2006](#); [Hepple, 2007](#)). However, national contexts vary considerably; in the UK the influence of the European Union (EU) has been significant in shaping regulation around gender equality and pay equity more specifically. For example, UK membership in the EU and the need to fulfil obligations under EU regulation and European Court of Justice (ECJ) determinations led to amendments to require equal pay for work of equal value, rather than just for the same or similar work, and the adoption

<sup>1</sup> Fair Work Australia was re-named the Fair Work Commission in 2013.

of analytic job evaluation processes (Dickens, 2007, pp 466–7). There are also differences between the countries in terms of regulatory mechanisms to address equal pay. For example, whilst pay inequity in Canada and the UK is generally the subject of specific equality or anti-discrimination law, in Australia the main legal response has been through labour law.

Our article unfolds as follows. In the next section we briefly outline individual complaint mechanisms under anti-discrimination regulation and the limited use and impact of these provisions in the Australian context, in contrast to experience in the UK and Canada. Then we turn to regulation that places obligations on employers to address pay equity within the workplace. We assess the likely effectiveness of the Australian workplace gender equality programme under the WGE Act, analysing its provisions in comparison to its predecessor programme, drawing on the findings of an International Labour Organization (ILO) study (Chicha, 2006) of proactive workplace-based pay equity programmes and on recent Canadian and UK experience of these types of programmes. Whilst workplace-based strategies are central to regulatory approaches to pay equity, there are limitations to what can be achieved through targeting within-organisation inequities, and there is a need to address gender pay gaps at a broader level. In the following section we examine both the potential and the practical operation of the FW Act to date in mainstreaming action to address gender pay inequity. Our focus is on the mechanisms the act provides for intervention in minimum wage determination, in safeguarding the ‘safety net’ of minimum terms and conditions as well as for the remedying of pay inequity at the sectoral and occupational levels.

## **2. Individual complaint mechanisms and the Australian experience**

One long-standing equal pay mechanism lies in anti-discrimination or specific pay equity laws, which have largely depended on individual women taking up complaints of unequal pay due to discrimination (OECD, 2008, p 162). These laws are often difficult to enforce and there can be numerous barriers to an individual bringing a case before the courts. In most countries analyses of anti-discrimination case law have highlighted the narrowness and complexity of their operation. In Australia, for example, the increasingly restrictive judicial interpretation of anti-discrimination laws, and sex discrimination laws in particular (Gaze, 2004), together with the individual complaints-based model and ineffectual enforcement processes have all emerged as major structural problems (Thornton, 2010).

In Australia, individuals can lodge complaints about a broad range of sex discrimination through state, territory and federal anti-discrimination laws. Equal remuneration is not specified in any of these laws. However, general provisions relating to discriminatory conditions and terms of employment allow an employee to lodge a complaint when she believes her remuneration was less than a male employee undertaking similar or comparable work. Despite such laws being in place for more than 25 years, there have been very few equal remuneration cases determined by courts or tribunals. Whilst a group of employees could make a complaint under most anti-discrimination laws, this has occurred infrequently. In the only relevant case to be decided by the High Court, a group of casual teachers claimed they were unable to access higher pay levels whilst performing work of equal value, and thus had been discriminated against on the basis of sex. The High Court rejected their claim, holding in effect that the historic (and arguably gendered) industrial distinctions between casual and permanent

employment in the teaching service with their different conditions were not discriminatory (Ronalds and Raper, 2012, pp 57–8).

Whilst individual complaint mechanisms under specific equal pay legislation in Canada and the UK have resulted in many more cases, similar structural problems have emerged with the complexity of their operation and ineffectual enforcement processes (Cornish, 2007; Fredman, 2011). In the UK, equal pay cases have proved complex, costly and lengthy. The UK has seen mass equal pay litigation in the public sector in recent years, following the entry of no-win no-fee lawyers into this area, but there have been virtually no private sector equal pay cases (Deakin *et al.*, 2011, p 1). Relatively few equal pay claims made to employment tribunals are successful, with the time taken to determine an equal value claim now stretching out in some cases up 8 to 10 years (Fredman, 2011, p 416). In addition, as Dickens (2007) points out, whilst the claims in the UK are increasingly collective rather than individual disputes, the legislative structure fails to recognise this. In Canada federal and provincial legislation provide individual complaint-based pay equity mechanisms. Although these laws display some of the same limitations as those in Australia, they have had a greater impact, due in part to the existence of pro-active pay equity programmes which can provide some impetus and tools for identifying unequal pay (Chicha, 2006), as well as the use of class actions. However, pay equity laws in both Ontario and Quebec have had limited impact in the non-unionised and private sector because of substantial employer non-compliance and evasion (Cornish, 2008, p 8). Canadian federal complaint-based regulation has delivered some substantial gains for large groups of women, including in the private sector, as unions and women's groups have supported single cases that can be applied to whole job classes. Nevertheless, cases have often taken many years and 'wins' have proven difficult to implement (Cornish, 2008, p 8).

In all three countries complaint mechanisms are largely limited to within-establishment comparisons and cases have overwhelmingly been pursued in the public sector, with the UK experience suggesting this is because of greater collective bargaining and pay transparency in the public sector (Deakin *et al.*, 2011). In comparison, Australia's sex discrimination provisions have proved particularly ineffective in providing a remedy for pay discrimination, even in the public sector, and have had no sectoral effect with the potential for class actions largely unrealised. This is mainly because unlike in Australia, Canada and the UK have had specific equal pay provisions, providing a focus for action and increasing the potential normative role of such laws, which depends on employees' and employers' awareness of them. In both countries, pay equity complaint mechanisms have employed recognised methodologies in assessing equal pay claims, and in the public sector this has been closely linked in practice with the conduct of workplace-based pay equity audits. In Australia there are no explicit provisions or practices that link individual complaints to broader organisational or sectoral review—unlike in the UK where the Equality Act 2010 enabled the Equalities and Human Rights Commission's (EHRC) inquiry into discrimination and unequal pay in the financial services sector (EHRC, 2009).

In most countries legal guidance and institutional support from a specialised equality body, trade union or other body has proved crucial in the effectiveness of individualised complaint mechanisms (OECD, 2008, p 168). However such support is dependent on government funding, and conservative governments have proved hostile to equality jurisdictions not only in terms of resources but in restricting access to remedies. In Australia when the last conservative Liberal-National coalition government came to

power in 1996, the federal Australian Human Rights Commission had its funding cut by 40% and its powers reduced (Maddison and Partridge, 2007, p 28). In the UK the Conservative–Liberal Democrat coalition government has cut the EHRC budget by 60% and introduced large fees to lodge complaints and pursue them to employment tribunals (McCoglan, 2012), curtailing practical access to making an equal pay claim. In the federal Canadian jurisdiction the introduction of the Public Sector Equitable Compensation Act 2009 (PSECA) denied federal public sector workers and those in the federally regulated private sector the right to claim pay equity under the Canadian Human Rights Act 1978 (Cornish, 2013, p 8) and has moved from a human rights–based approach to a model where pay equity is bargained by unions and employers (Fry, 2009).

### 3. Workplace-level approaches: the WGE Act

The enterprise level is a crucial point of intervention in progress towards pay equity because it ‘is at the workplace level that women’s jobs are actually given a value’ (Grimshaw and Rubery, 2007, p 141). There has been increasing recognition that an organisation’s internal valuation of jobs actively produces and reproduces gender pay inequity through grading processes and wages structures (Rubery *et al.*, 2005, p 204). Whitehouse (2003, p 124) also points to the importance of organisational processes and the gender bias on which they draw through which pay inequities are reinforced.

Workplace-level approaches to pay equity typically involve legislation or state policy that places requirements on employers to implement pay equity plans within their organisations. This type of ‘proactive’ approach now forms the central plank of demand-side strategies for pay equity in many developed countries (Chicha, 2006, p 9; Foubert *et al.*, 2010, pp 12–15). However, workplace level programmes vary significantly and produce varying levels of compliance by employers. Chicha (2006) found considerable variation in the structure and characteristics of these types of programmes. She identified three models that are useful in locating the potential that the WGE Act provides. Of the three models, the comprehensive model—found in Quebec and Sweden—was the only one that contained a clear objective and provided employers with ‘a structured, sequential and precise approach’ for identifying pay discrimination and eliminating any discriminatory pay gaps, combining the achievement of equal opportunities and equal results (Chicha, 2006, p 10, 26). The second model, of which the UK is an example, is typified by a partial and voluntary approach, which has more of a focus on ‘achieving equal opportunities rather than equal results’ (Chicha, 2006, p 15). Whilst it includes guidance for employers on the assessment of job evaluation and pay practices, the model does not specify actions or timelines for achieving pay equity where discrimination is identified. The third mixed-approach model, whilst typically compulsory, is a ‘highly flexible model which leaves significant discretion to organisations, does not incorporate all the elements necessary to determine whether pay discrimination exists’ and is without any specific requirement for the elimination of discriminatory pay gaps (Chicha, 2006, p 26). As we outline shortly, the WGE Act provides a pay equity approach that broadly conforms to the main features of this third model.

#### 3.1 *The Australian workplace-level approach*

At the end of 2012, the WGE Act replaced the EOWW Act. The WGE Act differs from both the EOWW Act and the original regulation, the Affirmative Action (Equal Opportunity for Women) Act 1986 in two key ways. First, the problem of the gender

pay gap is 'named' with equal remuneration included in the first of the act's five principal objects, which is 'to promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace' (section 2A). Second, the WGE Act represents a shift from a focus on procedural measures to a focus on substantive outcomes (Thornton, 2012) with an emphasis on progress to improved gender equality against clear standards. The WGE Act places new requirements on employers to report against a framework of gender equality indicators, including one of equal remuneration between women and men. Like its predecessor legislation, the WGE Act requires non-public sector organisations with 100 or more employees to report annually to a federal government body, now called the Workplace Gender Equality Agency (WGEA). As the agency administering the WGE Act, the WGEA is charged with providing assistance to employers and monitoring compliance with the act. Although historically this body has been poorly funded by successive federal governments (Thornton, 2012), in 2012 annual funding almost doubled to over \$5 million in anticipation of the agency's obligations under the new laws (EOWWA, 2012).

The earlier EOWW Act was seen by women's groups and scholars as highly ineffective as a means for progressing gender equality in workplaces (Senate EEWRLC, 2012, p 25; Thornton, 2012). A focus on outcomes in the WGE Act is a response to criticisms of the earlier legislation as having too much of a procedural focus. Some of the strongest criticisms of the operation of the EOWW Act concerned the high level of non-compliance by employers (Senate EEWRLC, 2012) and these are poorly addressed by the new legislative framework. It was estimated that more than a third of organisations to which the EOWW Act applied failed to report (KPMG, 2010, p 126). However, resistance from the then-opposition Liberal-National coalition and from business groups to the 'regulatory burden' imposed by the proposed WGE Act (Senate EEWRLC, 2012) meant no real changes were made to strengthen compliance (Charlesworth, 2013) and the WGEA's power to conduct random 'spot checks' is limited to seeking further information from an employer (section 18).

Specific minimum standards to improve gender equality outcomes and benchmarks for gender equality indicators are not set by legislation and are to be determined from time to time by the relevant minister. The reporting requirements that have subsequently been placed on employers relating to the equal pay objective are simply to provide a remuneration profile (Collins, 2013). The profile requires data on annualised average full-time equivalent base and total salaries by gender and 'workforce categories', which include employment status (employment on a part-time, full-time, permanent, casual or contract basis) and managers/non-managers. It does not, however, require any dis-aggregation of pay data by job or occupational groupings. Employers are also required to identify any gender pay equity objectives in the organisation's remuneration policy or strategy, whether any gender pay gap analysis has been undertaken and if so any actions taken as a result.

Under the WGE Act minimum standards were to apply from the 2014–2015 reporting year and from the 2016–2017 reporting period an employer could be found to have failed to comply on the basis of failure to improve against one of the specified standards (WGEA, 2012). The level at which these standards are set, including any standard on equal remuneration, will be a critical issue in the effectiveness of the new WGE Act. Early actions of the conservative coalition government suggest that the bar has been set very low and unlikely to provide the impetus for meaningful improvements towards

gender equality in the workplace over time. In 2014, as part of a ‘red tape’ review, the government deferred the application of the full reporting requirements under the WGE Act, including on equal remuneration, for employers covered by the WGE Act pending further consultation (Abetz and Cash, 2014). The new minimum standard put in place for organisations with 500 or more employees only requires these very large employers to select and put in place one or more policies or strategies to support and improve gender equality in the workplace, advance equal remuneration between male and female employees, implement flexible work arrangements for employees with caring responsibilities or prevent sex-based harassment and discrimination (Abetz and Cash, 2014). Rather than be required to meet minimum standards across all gender equality areas identified under the WGE Act, employers will be able to choose, for example, not to have a policy to address certain areas such as equal remuneration. Furthermore, the effective benchmark required under the new standard is the presence of a strategy rather than any demonstrated change over time as envisioned when the WGE Act was enacted.

The WGE Act can be seen as an example of the third model in Chicha’s typology. Whilst reporting is mandatory and larger private sector employers are covered, the WGE Act does not specify action to identify pay inequality, such as the use of gender bias-free job evaluation methods, nor does it require employers to take any specific action to address any discriminatory pay outcomes. Whilst the WGEA has put out guidance material on the equal remuneration gender equality indicator (WGEA, 2013), this does not have any status as a code of practice.

### *3.2 How different is the Australian approach?*

To better understand the likely effectiveness and limits of the WGE Act in practice, it is worthwhile briefly reviewing the Quebec and UK experiences relating to private sector workplaces. The 2006 ILO study by Chicha identified the Quebec Pay Equity Act 1996 as one of the most effective workplace programmes. The legislation, at that time applied to all public and private sector employers with 10 or more employees (Chicha, 2006, pp 12–14). Employers with fewer than 50 employees were required only to identify any discriminatory pay gaps and correct them. Employers with 50 or more employees were required to formulate and implement a pay equity action plan with the participation of employee representatives. Four stages were set down in the legislation and required: the identification of predominantly female and predominantly male jobs according to set criteria; the development of a method, tools and process for their evaluation; evaluation of jobs and calculation of pay disparities based on total remuneration; and the determination of a process for pay adjustments to be made within a maximum four-year period (Chicha, 2006, p 13).

Whilst the model adopted under Quebec’s Pay Equity Act was seen as producing a significant level of employer compliance compared with other models, Chicha identified possible weaknesses of this legislation as being a lack of any requirement for employers to report back and relatively weak sanctions acting as a limited deterrent (Chicha, 2006, p 14). In the period since, these concerns have proven to be justified. A 2008 parliamentary review process identified a substantial lack of employer compliance with the mandatory proactive model, and non-compliance was especially high in the non-unionised and private sector (Cornish, 2008, p 8), with apparently only one in every two enterprises having completed a pay equity exercise (Ménard-Cheng, 2009).

As a result of the review, the legislation was amended; changes extending coverage and aiming to raise compliance came into effect in 2009.

All enterprises with 10 or more employees in the calendar year are now subject to the requirements of the Pay Equity Act, bringing an estimated additional 10,500 enterprises within its reach (Thomas, 2010). In addition, all enterprises had to complete their first pay equity exercise by the end of 2010 if they had not already done so; employers were obliged to complete a pay equity audit every five years, and provision was made for employees to file complaints if they believe their employer had not complied with the legislation. The Pay Equity Commission was also provided with a significant budget increase to enable it to better support employees and enterprises (Chicha, 2009). The effectiveness of these new requirements has not yet been evaluated. The Quebec experience suggests, however, that reliance on programmes requiring employers to institute pay equity plans at the workplace level is limited without active monitoring and enforcement, confirming Chicha's (2006) assessment. It also points to the importance of political will in reviewing the effectiveness of the regulation and then acting on that review.

In the UK, although there have been no requirements on employers to adopt pay equity programmes, since 1997 a Code of Practice on Equal Pay provided guidance on processes and a range of publications by the Equal Opportunities Commission was made available to support employers (Chicha, 2006, pp 15–16). The code was updated as the Equal Pay Statutory Code of Practice (EHRC, 2011) explaining legal obligations relating to equal pay under the Equality Act. The code, which covers all employers regardless of size, does not impose any legal obligations but must be taken into account by tribunals and courts when considering an equal pay claim (EHRC, 2011). At the time of the ILO study it was recognised that relying on employers to voluntarily conduct equal pay reviews was an inadequate approach as only a few employers in the UK did so (Chicha, 2006, p 17). However, within many areas of the public sector pay equity audits were undertaken as a result of late 1990s initiatives responding in part or whole to the need to address equal pay issues. The UK's membership in the EU also played a role with the 1997 single status agreement in local government following a 1993 ECJ ruling that put pressure on public sector organisations, which previously had separate agreements, to establish 'single-source' bargaining arrangements and pay structures applying to their entire workforces and eradicating pay inequality (Conley, 2014). Local government job evaluation exercises over the following decade revealed discriminatory pay structures. However, these proved difficult to address in the context of a lack of additional funding from government to implement equal pay. This highlights the inadequacy of the UK approach, which, conforming to Chicha's second type of model, does not specify actions or timelines where discrimination is identified. Furthermore, as trade unions sought to balance their members' interests and provide protections against loss of income to male members, collective bargaining failed to deliver the full benefits to many women (Deakin *et al.*, 2011; Conley, 2014), thus highlighting the limits of equality bargaining outside a human rights framework.

The UK Equality Act included some changes designed to support pay equity within private sector workplaces. A prohibition on employers imposing pay secrecy clauses on employees with the objective of promoting greater transparency and dialogue about equal pay was included in section 77. This objective, a key strategy in addressing pay inequity and included in models conforming to Chicha's first type, is undermined in the Australian WGE Act. Indeed, employer remuneration data reports, unlike annual

reports to the WGEA, must not be made public, unless employers expressly request this (section 14). However, whilst the UK Equality Act placed an obligation on private sector employers with 250 or more employees to publish statistics on gender pay gaps within their organisations (section 78 (1)), the current government has not activated this provision despite the recommendations of a 2012 parliamentary inquiry that it do so (House of Commons, 2013, paras 63, 65). The government plans to legislate in 2014 for compulsory pay equity audits in organisations where an employment tribunal has found the employer to be in ‘clear breach of equal pay law’ (GEO, 2013, p 5). However, beyond this important linking of individual equal pay claims and workplace action, the UK government remains firmly committed to a voluntary approach to workplace pay equity programmes. In 2011 the Think, Act, Report programme was introduced to encourage employers to report, monitor and take action on key gender equality issues, including the gender pay gap (GEO, 2011).

The Australian WGE Act is mandatory and covers larger private sector employers unlike similar programmes in the UK. However, it is not as comprehensive or well designed as the Quebec laws, especially given the new coalition government’s decision to introduce one very weak minimum ‘standard’ that applies to only very large employers. Not only does the inclusion of employers with 10 or more employees give the Quebec legislation greater reach, it has stronger compliance mechanisms and tightened requirements for pay audits. One of the most important features of the Quebec model from an Australian perspective is the direct link made with social dialogue and collective bargaining for pay equity outcomes for employers with more than 50 employees. Wage increases have to be incorporated into collective agreements with gains to be maintained (Quebec, 2013). Pay equity plans for organisations with between 50 and 99 employees have to be formulated jointly by the employer and the relevant trade union, and organisations with 100 or more employees have to establish a pay equity committee consisting of two-thirds employee representatives, at least half of whom are women (Quebec, 2013). This approach provides both a mechanism for identifying pay discrimination and for eliminating pay gaps, identified by Chicha (2006) as key to a model that can achieve equal opportunities and equal outcomes. In comparison, the WGE Act only requires that employers make annual reports to the WGEA accessible to employees and shareholders and allow employees and employee organisations the opportunity to comment on reports (sections 16A and B). This obligation, as noted, does not extend to remuneration data provided by employers to the WGEA.

#### 4. Labour market and sectoral approaches: the FW Act

There are clear limitations to what might be achieved through within-workplace mechanisms as gender segregation and gender pay inequality can be ‘embedded in institutional arrangements, social norms, market systems and pay policies’ (Rubery *et al.*, 2005, p 185). Rubery *et al.* (2005, pp 184–5) have argued that substantial reductions in gender pay gaps require the gender mainstreaming of general pay policy as part of a demand-side approach to labour market problems. Thus interventions need to be directed to the design and development of wage structures, within organisations and as they create differentials across occupations, organisations, sectors and contractual arrangements. The Australian FW Act’s equal remuneration provisions provide significant potential to deliver more gender-equitable wage structures through the legislative capacity to address systemic gender-based under-valuation at a very broad level beyond that contemplated by legal provisions in either Canada or the UK.

#### 4.1 Taking equal remuneration into account into minimum wage setting

First, with respect of minimum wage setting, the FWC is required to regard the FW Act's 'minimum wages objective'. The minimum wages objective requires that the FWC—and its Minimum Wages Panel—'take account of' the principle of equal remuneration for work of equal or comparable value in setting minimum wages (section 284 (1) (d)). This includes the annual review of the national minimum wage that applies to employees not covered by an industry award or enterprise agreement and reviews of minimum award wages in the 122 awards that provide the rates for skills classifications applying to employees indifferent industries. This is important because in Australia, as in most developed countries (including the UK but not Canada) (Gerecke, 2013, p 22), women are more likely than men to be concentrated in minimum wage jobs<sup>2</sup> and in sectors where there is limited scope for collective bargaining (Rubery *et al.*, 2005, p 196). In Australia the minimum wage has historically been set at a relatively high level in OECD comparison. This factor, together with its centralised structure, has been generally supportive of pay equity through its capacity to narrow the wage distribution (Whitehouse, 2003, p 124). Whilst raising the minimum wage alone can have the effect of increasing pay equity (Grimshaw *et al.*, 2013), in the Australian case, this is especially so because bargained rates in many low-paid and feminised industries are closely tied to the award minimum rates (HOR, 2009). In contrast the UK minimum wage is an 'isolated minimum wage' that is unconnected to bargained rates due to weak collective bargaining coverage, and it is used as 'the going rate' in many low-paid industries (Grimshaw *et al.*, 2013, p 7, 10). In Canada minimum wage adjustments might be expected to have less impact on the gender pay gap because women are not over-represented in low-paid jobs to the same extent as elsewhere. The FW Act equal remuneration provisions have potential for extending and making the support offered by a high minimum wage and centralised wage structure more deliberate and targeted.

So what effect has the existing requirement to take equal remuneration into account in minimum wage setting had to date? A recent analysis suggests that in practice scant attention has been paid to the issue of equal remuneration in annual wage negotiations by the industrial parties or in determinations of the FWC's Minimum Wages Panel (Macdonald and Charlesworth, 2013, p 582). Indeed, the prevailing view of the FWC has been that, whilst increases in minimum wages are likely to assist in promoting pay equity, particularly for women who are more likely to be award-reliant, there are other more effective and direct means for doing so such as through equal remuneration orders discussed below (Macdonald and Charlesworth, 2013). This view was once again expressed in the latest FWC minimum wage decision (FWC, 2013, para 485).

A significant gap in the FW Act's equal pay provisions is that there are no equal remuneration obligations on the FWC in respect of enterprise bargaining. Whilst the FW Act restored the safety net role of industry awards, enterprise bargaining is designed to be the main mechanism to improve wages and conditions beyond the basic safety net (van Wanrooy, 2009) and is thus also a potentially important avenue through which to address pay inequality. The 2009 HOR inquiry recommended that the FW Act oblige the parties negotiating enterprise agreements to improve pay equity and that an enterprise agreement not be approved unless it implements pay equity (HOR,

<sup>2</sup> It is estimated that 18.5% of female and 13.6% of male employees receive minimum award-wages. These 'award-reliant' employees are more likely than other employees to work part-time, on a casual basis, in the service sector, in the private sector and in small business (ACTU, 2013, p 12).

2009, p 122). The former federal government refused to adopt this recommendation on the basis that the enterprise bargaining framework is ‘already conducive to pay equity outcomes’ (Australian Government, 2013, p 20).

#### 4.2 *Taking equal remuneration into account in the minimum safety net*

Second, the modern awards objective in the FW Act requires that the FWC must take account of a number of matters including the principle of equal remuneration in ensuring that modern awards together with the National Employment Standards ‘provide a fair and relevant minimum safety net of terms and conditions’ (section 134(1)). The award modernisation process under the FW Act involved the review and rationalisation of more than 1,500 industrial awards into just 122 awards and was undertaken by the Australian Industrial Relations Commission in 2009 and 2010. Although collective bargaining within the contemporary Australian industrial relations system is primarily conducted at the level of the individual enterprise, industry awards apply across entire industry sectors or occupations and provide a floor or safety net underpinning any bargained conditions (Creighton and Forsyth, 2012). This makes the obligation to take account equal remuneration in setting minimum award wages a potentially very powerful mechanism for addressing pay inequality at a systemic and sectoral level.

Early assessments of the award modernisation process suggest that the modern awards have been established without any comparable work value assessment, considered essential for equal remuneration (Junor *et al.*, 2009, p 6). There remains untested potential in the mandated four-year review of modern awards, which would allow the FWC to vary minimum award wages ‘if this is justified’ for work value reasons (section 156(3)). For such a variation to take place, however, work value would have to be raised as an issue in proceedings before the FWC. The traditional hostility of employers to such claims, competing claims pursued by unions in the modern award review process and the FWC’s obligations under the FW Act’s modern award objective to also consider the likely impact ‘of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’ and ‘on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’ (sections 134 (1) (f) and (g)) may limit consideration of equal remuneration within individual awards and across awards.

#### 4.3 *Gender-based under-valuation claims and equal remuneration orders*

The third, best-known equal remuneration mechanism in the FW Act empowers the FWC to ‘make any order it considers appropriate to ensure . . . there will be equal remuneration for work of equal or comparable value’ where an application has been made by an employee, a union or the federal Sex Discrimination Commissioner (sections 302 (1), 302 (3)). An equal remuneration order affecting an industrial award can shape the wages of a large group of employees across multiple organisations in both the private and public sector. Prior to the FW Act, there had been provisions in Australian federal and state industrial relations laws for equal pay claims to be made by groups of employees and their unions for several decades. However there had been no successful cases in the federal sphere since the 1970s (Smith, 2011, p 190). More recently there were some significant equal pay ‘wins’ in state industrial tribunals (Romeyn *et al.*, 2011, pp 30–40), most states’ industrial relations powers have now been referred to the federal jurisdiction, giving it the key role in employment and pay equity matters in Australia (Smith and Stewart, 2010).

Compared with earlier federal equal remuneration provisions, the FW Act provisions are broader and a number of barriers to the making of equal remuneration orders have been removed. There is now no requirement for reference to be made to a male comparator group, nor any requirement to demonstrate discrimination in the setting of pay rates (Smith, 2010, p 15). Hence, on paper at least, the FW Act allows for intervention to address unequal pay resulting from systemic gender inequalities. Earlier developments in the states of Queensland and New South Wales (NSW) had paved the way, with industrial tribunals in these states recognising pay inequity as the systemic gender-based under-valuation of work (Glynn, 1998; Queensland Industrial Relations Commission, 2001). The 1998 NSW pay equity inquiry first identified 'indicia' of such under-valuation as including 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 agreements; a large component of casual workers; inadequate recognition of qualifications; lack of access to training or career paths; small workplaces; new industry or occupation; service industry; and home-based occupations (Glynn, 1998). Following this inquiry, the concept of under-valuation was applied in several successful equal pay cases in state jurisdictions (Romeyn *et al.*, 2011, pp 30–40).

The FW Act provisions were tested in 2010 when an application for an equal remuneration order was made by unions representing employees in the female-dominated social and community services (SACS) sector. The case concluded in early 2012 with the FWC making an order providing for award pay increases of between 19 and 41%. In making their decision, the FWC rejected the indicia approach used in state equal pay cases but accepted that community services work had been subject to some gender-based under-valuation due to much of it being caring work (FWA, 2011, p 77). The SACS equal pay decision was very positive for a large number of low-paid community services workers and for the public profile and support it brought to the issue of equal pay (Cortis and Meagher, 2012). However it is debatable whether the FWC decision represents a shift to a more systemic understanding of gender pay inequity. One limitation of the case concerns the extent to which it has established any positive precedent for equal pay interventions in other female-dominated occupations. The FWC refused to establish a general principle for making equal remuneration orders and rejected much of the unions' argument about the nature and extent of under-valuation, effectively limiting any potential for the decision to act as a precedent other than for feminised occupations involving care work (Macdonald and Charlesworth, 2013, pp 577–8).

The circumstances of the SACS case also suggest the FWC's commitment to equal pay may be contingent on the support of key stakeholders. The case proceeded and pay increases were awarded in the context of strong support from the Australian government which—along with state governments—is the main funder of community services delivered by non-government agencies (Cortis and Meagher, 2012). At the outset the unions' equal pay application was made after an agreement had already been struck with the federal government that the latter would support the development of an equal remuneration principle and would support the FWC and the parties by providing relevant research and evidence (Australian Government and the ASU, 2009). Partway through the case the federal government committed to paying its share of any resulting pay increases, following which it joined with the unions to put forward a submission outlining claims for specific pay increases (ASU and the Australian Government,

2011). Without this support the SACS equal pay case may not have succeeded (FWA, 2012, p 12; see also Cortis and Meagher, 2012; Workplace Express, 2012). In its decision, the FWC also made much of the employers' expressed support for the claims (FWA, 2012, pp 13–14), leaving open to question of how prepared the FWC might be in the future to award pay equity increases in the face of employers' reluctance to pay.

The FWC's resolve will be tested by a second equal remuneration claim that has been lodged by the relevant unions for long day care child care workers in both the public and private sectors (United Voice and the Australian Education Union, 2013). In Australia, funding for child care is provided by the federal government. Given the new government's recent decision to abandon the \$300 million Early Years Quality Fund established by the former government to cover wage increases for child care workers (Heath and Anderson, 2013), it appears unlikely it will support the unions' application, as occurred in the SACS case, by guaranteeing to meet the costs of any wage increases awarded.

## 5. Conclusions

Specific pay equity provisions are only one strand of broader labour market regulation that structures the gender pay gap and shapes different strategies designed to address it. Working time regulation, employment protection, tax and social protection and labour market policies, trade unions and the structure of collective bargaining are all influential in different ways (Rubery, 2011, pp 1110–11). Nevertheless, the specific pay equity regulation now in place in Australia, particularly in the FW Act and the WGE Act, offers a multi-level framework that carries significant potential to address the widening gender pay gap. Importantly, these provisions provide for interventions in the private sector at the enterprise, sectoral and labour market levels and a platform for integrated equal pay action. Notwithstanding their potential, however, in practice each of these mechanisms has certain flaws which limit their effectiveness. Moreover, a lack of legislative and policy integration between these mechanisms restricts their individual and collective capacity to address the gender pay gap, as do policy tensions between gender equality and economic goals. Experience in Australia, the UK and Canada also points to the vulnerability of pay equity regulation to the prevailing political climate.

In comparison with the UK and Canada, individual complaint mechanisms in anti-discrimination provisions have been rarely used in Australia for individual or group equal pay claims, and there is no provision for links between complaints and any review of workplace practices, such as through pay audits. Indeed, whilst the 2009 HOR inquiry recommended greater proactive powers be given to the Sex Discrimination Commissioner to investigate pay discrimination within organisations (HOR, 2009), as is possible in the UK, this has not been taken up. At the same time, experience in both the UK and Canada, even in class actions, points to the limited impact individual complaint mechanisms have had in private sector workplaces, due in large part to employer non-compliance and ambivalent government enforcement.

The WGE Act as a workplace-based pay equity mechanism is potentially innovative in the international context. Although weaker than the Quebec model, the WGE Act's mandatory coverage of large non-government employers makes it potentially more effective in driving change in the private sector than the UK's voluntary workplace mechanisms. Nevertheless, a potential flaw of the Australian model, particularly as

it has been implemented to date, is the apparent assumption that the collection and analysis of data can drive progress towards pay equity. A recent Australian study points to the paradox of a persistent and gradually widening gender wage gap in a professional services firm committed to pay equity and which had put considerable effort into the collection and analysis of pay data (McGrath-Champ and Jefferson, 2013, p 114). As noted, much will depend on whether a minimum equal remuneration standard is set and, if it is, at what level any benchmark is set. As Chicha's (2006) analysis has indicated, unless such standards are rigorous and progress is closely monitored, it is unlikely that the reporting and benchmarking of aggregated remuneration data currently required under the WGE Act can 'create the incentive for organisations to detect and overcome the many and varied barriers to pay equity' (McGrath-Champ and Jefferson, 2013, pp 118–19). Recent Quebec experience suggests that beyond a compulsory regulatory framework and the support of a specialised body to provide technical assistance (Chicha, 2006, p 26), political commitment and support for active monitoring and enforcement are also crucial in influencing pay practices in the non-government sector.

The FW Act provisions promise (at least on paper) the necessary institutional scaffolding advocated by scholars and practitioners to advance pay equity at both the labour market and sectoral levels, including in the private sector (e.g. Cornish, 2007; Rubery and Grimshaw, 2009). The FW Act provides for sectoral equal pay claims and for the FWC to take equal remuneration into account in minimum wage setting and in its deliberations on the minimum safety net established in national employment standards and in industry awards. To date, the provision for equal remuneration orders has been important not only in delivering significant pay increases for community sector workers but in raising the policy and political profile of equal pay. Whilst the FWC SACS decision has limited direct 'flow-on' effect to other sectors, the new claim for child care workers suggests equal pay will remain on the industrial relations agenda for some time. The minimum wage objective represents a particularly crucial mechanism to address pay inequality. However, the principle of equal remuneration appears to have been given relatively superficial consideration by the parties and the FWC to date, and there are no obligations on the FWC to take account of equal remuneration in enterprise bargaining. Nevertheless, in Australia the ripple effects of annual minimum wage increases carry through to wage increases in industry awards and to enterprise bargaining and are an important means of gender mainstreaming pay (Rubery *et al.*, 2005). The challenge will be to ensure a more calibrated approach to setting minimum pay rates within and across awards so that they can contribute to a lessening of the gender pay gap.

There are no formal barriers in the FW Act preventing the FWC from taking a broader approach when it takes equal remuneration into account in its deliberations or when it makes decisions in response to applications for equal remuneration orders. Whereas to date this potential has not been fully realised, the recent establishment of a Pay Equity Unit (PEU) within the FWC may provide some impetus for the FWC and the industrial parties to focus in more depth on pay equity. The PEU is charged with undertaking pay equity-related research and providing information to the FW on annual minimum wage reviews, the four-yearly reviews of modern awards and equal remuneration cases (FWC, 2014). One of the first actions of the PEU was to commission a major review of equal remuneration under the FW Act from three of Australia's leading pay equity experts (Layton *et al.*, 2013), which is to contribute directly to

FWC deliberations. The experience of pursuing pay equity claims through the NSW and Queensland state jurisdictions suggests that industrial relations commissions can develop considerable pay equity expertise over time. Drawing on the wealth of evidence generated through pay equity inquiries and consecutive pay equity cases, state commissions became increasingly familiar with the systemic and multifaceted nature of gender undervaluation in wage structures, demonstrating their deepened understanding in what are still watershed pay equity decisions in the Australian context (see [Smith, 2010](#)).

Unlike in Canada and the UK, in Australia there is little legislative and policy integration between the pay equity mechanisms available in anti-discrimination laws, the WGE Act or the FW Act. If individual sex discrimination complaints or remuneration reports to the WGEA raise broader issues about enterprise or sectoral pay practices, there are no regulatory linkages in place that might enable consequent action, such as that currently being contemplated in the UK with compulsory pay equity audits where employers breach equal pay laws. Nor are there any regulatory linkages between the FWC's considerable equal remuneration powers and those under the WGE Act, despite recommendations of the 2009 HOR Inquiry that Australia's workplace-level mechanism be placed within the FWC not only to provide specialist assistance to the commission but also to monitor and enforce pay equity audits and the development of pay equity plans ([HOR, 2009](#), p 214).

Even with an improved legislative framework, effective regulatory action around equal pay depends on the industry parties, the commitment of the FWC and the WGEA, and the federal government in resolving the policy tensions that sit between equal remuneration and economic goals in both the FW Act and the WGE Act. In both the minimum wage and modern awards objectives, the obligation to take account of the principle of equal remuneration has to be balanced by the FWC with obligations to take other matters into account such 'the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth' (section 284(1)(a)). Likewise the commitment to equal remuneration in the objectives of the WGE Act sits alongside another object to 'improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace' (section 2A (e)). In the new political climate and in the face of ongoing employer concern about the compliance burden on businesses, the risk is that equal remuneration may be read as contingent on the other priorities of employers and government ([Macdonald and Charlesworth, 2013](#), p 570).

The resistance from both employers and government in the UK to introducing mandatory programmes in the private sector, despite more than a decade of various national inquiries and reviews into the gender pay gap, highlights the vulnerability of pay equity legislation to the prevailing political climate. More broadly the deregulatory discourse in the UK, even around relatively weak public sector equality mechanisms such as the Public Sector Equality Duty ([Cabinet Office, 2012](#)), was also present in the development of the WGE Act and its promotion as 'light touch' regulation to employers ([WGEA, 2012](#)). This discourse and the tensions between business interests and gender equality outcomes have gained momentum under the new Australian government. The 2014 decision by the government to promulgate a gender equality minimum 'standard' that only requires employers to put in place one or more gender equality strategies works to undermine the promise of the WGE Act to require employers to

demonstrate progress towards improved gender equality outcomes across specified areas. This recent intervention demonstrates that it is not only the development but also the implementation of equality legislation, including on pay equity, that is vulnerable to the prevailing political climate. Indeed, whilst the mandatory reporting requirements of the WGE Act currently remain in place, the shift towards relying once again on the benevolence or enlightened self-interest of employers to take workplace action is an inadequate basis for progress towards gender equality (Dickens, 2008, p 74).

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