Gender Pay Equity: Challenges and Contradictions

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15th December 2015
Outline

- Persistence of the gender earnings gap
- Relevance of regulation to gender pay equity
- Key conceptual challenges and impediments that continue to recycle through stages of equal remuneration reform
- Conceptual questions that arise from the most recent decision of the FWC
Gender Pay Equity Ratios, Australia, 1967 - 2014

Source: ABS, Employee Earnings and Hours, Australia, Cat no 6306.0 (and predecessor series)
Persistence of Pay Inequity

- Pay inequity is evident in the persistent plateau in gender pay equity ratios since the immediate gains following the 1969 and 1972 equal pay principles.
- This persistence invites consideration of explanations for the earnings gap.
- Allowing for the significant weaknesses in human capital approaches (Austen, Jefferson, Preston, 2013), only a small degree of earnings difference can be explained by differences in education, work experience or other productivity related characteristics.
- On the matter of formal credentials, women are beginning to outrank men in terms of educational attainment. The earnings gap is apparent even for graduates although the gap is highest among higher income earners.
- ‘Choice’ frequently arises as an issue of contest as women are still most likely to bear responsibly for caring responsibilities. Yet ‘choice’ is impacted by social and workplace practices; see too the absence of consistent practices across the labour market that would support effective work and family balance for both women and men.
What Place Regulation?

- Regulation remains important to gender equity outcomes (Peetz, 2015), yet the commitment to equality legislation/regulation, is a highly contested one (see for example equal remuneration, paid parental leave, equality reporting, child care).

- The questions directed to regulation lie not only in the individual instruments of regulation but in the adequacy of the legislative and policy integration between labour market, sectoral, workplace and individual approaches (Charlesworth & Macdonald, 2015).

- Some acknowledgment is required also of the regulatory challenge given trends towards individualised pay arrangements, weakening of collective action, gender inequalities emerging in new forms (Rubery & Grimshaw, 2015).

- There has been some attention to the merit of labour law measures, yet labour law mechanisms such as awards underpin other wage setting practices, including enterprise agreements and individual arrangements. Labour law mechanisms also have the capacity to generate widespread reform given the nature of the wage setting in Australia.
ER Regulatory Stages & Cycles

- Pattern of reform showcases cyclical changes, the barriers to the effective valuation of feminised work and the complexities in identifying gendered pay practices and separating gender from a range of reinforcing factors and influences

- Equal pay in the Arbitration Commission
  - 1969 – equal pay for equal work
  - 1972 – equal pay for work of equal value

- Entitlement to equal remuneration given a legislative foundation by IR Reform Act 1993
  - equal remuneration defined, as per ILO Convention No 100, to mean rates of remuneration established without discrimination based on sex

- Inquiries in State jurisdictions, leading to Equal Remuneration Principles in NSW (2000), and Queensland (2002)
  - undervalueation, rather than discrimination, the basis of claims for equal remuneration
  - no requirement for comparators – comparisons may be utilised but are not a necessary precondition
**ER Regulatory Stages & Cycles**

- *Fair Work Act 2009* FWA (and now FWC) empowered to make orders to ensure ‘equal remuneration for men and women workers for work of equal or comparable value’
  - No requirement to establish discrimination
  - Concept of equal remuneration broadened by reference to concept of ‘comparable value’

- Provisions tested by an application for equal remuneration orders in the social and community services sector (SACs case)
  - there is no need to establish that rates were established on a discriminatory basis, acceptance of undervaluation (see state approaches)
  - there is no need for applications to rest on a male comparator
  - requirement for applicants to identify the extent to which undervaluation of work is based on gender
A New Stage?

- Applications for ER order for certain childcare workers lodged by United Voice and AEU (Jul 2013) and later IEU (Oct 2013)
- Full Bench sought submissions on ‘the legislative and conceptual framework relevant to the conduct of the proceeding’ (Dec 2013)
  - The scope for applications: industry award-based (intra, inter); enterprise based (intra, inter)
  - The prerequisites for an equal remuneration order
  - Requirement to identify/quantify gender-based undervaluation; a stipulated methodology
  - Utility of/requirement for comparator-based assessments
  - Relationship of gender-based undervaluation to work value claims
  - Relationship of equal remuneration provisions to the modern award and minimum wages objectives
Full Bench Decision 30 Nov

- Confirmation that the decision to issue an ERO is a discretionary one - the decision identifies relevant considerations
- The discretion is only enlivened if the Commission is satisfied that ‘there is not equal remuneration for men and women workers for work of equal or comparable value’ (jurisdictional fact)
- There is a requirement for applicants to reference comparators, specifically a male comparator in the case of an application involving women workers (statutory construction) (timing of orders)
- Once the Commission is satisfied that the objective of equal remuneration is not met, there is no requirement to dissect gender-related differences in remuneration
- Traditional work value criteria to be relied on but other criteria may also be relevant
- Rejection of gender undervaluation approach for the purpose of issuing equal remuneration orders
- Gender undervaluation approaches more germane to the pursuit of work value claims
On Comparators

- No prescription as to scope of comparators but ‘it is likely that the task of determining whether s.302(5) is satisfied will be easier with comparators that are small in terms of the number of employees in each, are capable of precise definition, and in which employees perform the same or similar work under the same or similar conditions, than with compactors that are large, diverse, and involve significantly different work under a range of different conditions’. [291]
Conclusion

- Pattern of pay equity regulation illustrates a pattern of cyclical challenge
- Full impact of most recent decision will not be understood until the substantive case is heard, and the framework tested by way of other applications.