



# DIRECTIONS

*Fair Work Act 2009*  
s.302—Application for an equal remuneration order

## **Equal Remuneration Case** (C2013/5139 and C2013/6333)

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT HATCHER  
VICE PRESIDENT CATANZARITI  
SENIOR DEPUTY PRESIDENT HARRISON  
COMMISSIONER CARGILL

MELBOURNE, 20 DECEMBER 2013

### **FINAL DIRECTIONS**

[1] The Full Bench has considered the submissions made in response to the draft directions released on 27 November 2013 and has decided to amend some of the dates specified in the draft directions. The Full Bench makes the following directions:

(i) all interested persons and organisations are to file submissions on the legislative and conceptual framework relevant to the conduct of the proceeding by **4:00 pm Monday 24 February 2014**. A list of the issues to be addressed is set out at Attachment A.

(ii) any submissions in reply are to be filed by **4 pm Monday 31 March 2014**.

(iii) oral submissions on the legislative and conceptual framework will be heard on **22 and 23 April 2014**, commencing at 10:00 am (AEDT) each day.

[2] Vice President Catanzariti will convene a conference to discuss the program for the subsequent hearing and determination of the evidentiary matters in the proceeding, on a date to be fixed.



# Attachment A

## Issues to be Addressed

### *Evaluating Gender Based Undervaluation*

1. Whether it is appropriate for the Fair Work Commission to develop guiding principles for the application of Part 2-7 of the *Fair Work Act 2009* (Cth) (The Act) and, if so, the content of such principles?
2. What is meant by the term "remuneration" in s. 302 of the Act?
3. Should the Commission take a different approach to Part 2-7 of the Act dependent upon whether the matter is an intra-enterprise claim, an inter-enterprise claim or an inter-industry claim?
4. Does Part 2-7 of the Act require the Commission to make a finding that the remuneration in a relevant modern award causes female employees covered by that modern award to be paid differently because of gender from male employees performing work of equal or comparable value covered by other modern awards?
5. Are comparisons within and between occupations and industries required in order to establish undervaluation of work on a gender basis?
6. Does Part 2-7 of the Act require the establishment of a reliable male benchmark or comparator to make a finding that female employees are being paid differently because of gender from male employees performing work of equal or comparable value?
7. If the answer to question 6 is yes, on what basis should such a reliable male benchmark or comparator be identified?
8. If the answer to question 6 is no, what principles should the Commission adopt to make a finding that female employees are being paid differently from male employees because of gender while performing work of equal or comparable value?
9. On what basis should the Commission assess the comparison of jobs within an enterprise or between different enterprises or industries in order to determine if the work is of equal or comparable value?
10. On what basis should factors not related to gender be identified and eliminated from any comparison?

11. Can the undervaluation of work be demonstrated by reference to factors or 'indicia' including the following:
- (i) the history of the award, including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers;
  - (ii) whether there has been some characterisation or labelling of the work as "female";
  - (iii) whether there has been some underrating or undervaluation of the skills of female employees;
  - (iv) whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;
  - (v) whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; and
  - (vi) whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.
12. How should any previous adjustments to predecessor award rates of pay made on the basis of gender undervaluation and/or work value considerations be taken into account in determining whether undervaluation exists or in measuring the extent of any such undervaluation?
13. Is there any limitation on the scope or type of order that might be made under s. 302 to ensure that there is equal remuneration for work of equal or comparable value.

### **Discretionary Factors**

14. If a case is made out which demonstrates differences in pay because of gender, what factors should be considered by the Commission in exercising its discretion to make an Equal Remuneration Order for increases to wages at a particular level?

### **Suitable Alternative Remedy**

15. On what basis should the Commission determine whether an adequate alternative remedy exists to an Equal Remuneration Order within the meaning of s.721 of the Act?

16. Does an adequate alternative remedy within the meaning of s.721 include a modern award, such as the Local Government Industry Award 2010, or an enterprise agreement?

### **Other Issues**

17. If the Commission was to make an Equal Remuneration Order should it only apply to the class of female employees for whom the inequity is found?
18. What is the relationship between the requirement in section 134 for modern awards, together with the National Employment Standards, to provide a fair and relevant minimum safety net of terms and conditions, and the Commission's power to make an Equal Remuneration Order?
19. To what extent is the equal remuneration principle referred to in paragraph 134(1)(e) relevant to an application for an Equal Remuneration Order, given that award rates have been set and varied taking into account this element of the modern awards objective?
20. To what extent is the equal remuneration principle referred to in section 284(1)(d) relevant to an application for an Equal Remuneration Order, given that award rates have been set and varied taking into account this element of the minimum wages objective?
21. Is the preservation of relativities across the classification structures in different awards relevant when determining an application for an Equal Remuneration Order?
22. To what extent is "work value" relevant to an application for an Equal Remuneration Order?
23. To what extent is the Act's emphasis on enterprise bargaining relevant to the Commission's discretion to make an Equal Remuneration Order?
24. Does the legislative intent of Part 2-7 of the Act contemplate that an equal remuneration order should be made if it will create unequal remuneration within an enterprise or industry between employees who are in the same classification under the same award and who perform the same duties?