**FAIR WORK COMMISSION**

***Fair Work Act 2009* (Cth) s 302 – Application for an Equal Remuneration Order**

**Matter C2013/5139**

**Application by United Voice and the Australian Education Union**

# SUBMISSIONS OF UNITED VOICE AND THE AUSTRALIAN EDUCATION UNION IN REPLY TO THE SUBMISSIONS OF THE COMMONWEALTH, THE AUSTRALIAN CHILDCARE ALLIANCE, AND THE AUSTRALIAN FEDERATION OF EMPLOYERS AND INDUSTRIES

## Introduction

1. These submissions are filed in reply to the submissions of the Commonwealth of Australia, the Australian Childcare Alliance (**ACA**) and the Australian Federation of Employers and Industries (**AFEI**) (together, the Respondents), and in accordance with the directions of the Full Bench of the Fair Work Commission (**the Commission**) dated 13 September 2017.

2. The parties have been asked to address the following question:

> *Can the Commission be satisfied conclusively that the work performed by employees under the C5 and C10 classifications in the Manufacturing and Associated Industries and Occupations Award 2010 is of equal or comparable value to the work of employees under the Diploma Level and Certificate III classifications in the Children's Services Award 2010 respectively solely on the basis of the decision of the AIRCFB decision of 13 January 2005*[1] *(Print PR954938) and the subsequent alignment in award rates for the respective classifications?*[2]

---

1 The reference to this decision in [2017] FWCFB 2690 and the parties' submissions wrongly states the date of the decision. It is 2005, not 2004.

2 [2017] FWCFB 2690, [25].

3. In submissions dated 11 October 2017, United Voice and the Australian Education Union set out the process of reasoning, and the findings, of the Full Bench of the Australian Industrial Relations Commission (**AIRC**) in the Work Value decision,[3] and the subsequent consideration of the nexus produced by that decision between the applicable classification levels in the *Childcare Industry (Australian Capital Territory) Award 1998* (**the *ACT Award***) and the *Children's Services (Victoria) Award 1998* (**the *Victorian Award***), and the *Metal, Engineering and Associated Industries Award 1998 – Part I* (**the old *Metals Award***). On the basis of these matters, the unions submitted that the C5 and C10 classifications under the *Manufacturing and Associated Industries and Occupations Award 2010* (**the Metals Award**) are a suitable comparator to the *Children's Services Award 2010* (**the Children's Services Award**) in the Application for the purposes of s 302 of the *Fair Work Act 2009* (Cth), and satisfy paragraph 290 of the *Equal Remuneration Order – Jurisdictional Decision* [2015] FWCFB 8200 (***Jurisdictional Decision***). Accordingly, the answer to the preliminary question should be yes.

4. The Respondents contend that the answer to the preliminary question is no. The proposition which underlies the Respondents' submissions is that the comparison undertaken by the AIRCFB in the Work Value decision is not appropriate for use in the context of this application under s 302 of the FW Act, because:

   (a) the Work Value exercise took place in a different statutory setting, and applied to a limited proportion of employees now covered by the modern awards;

   (b) the relevance of the findings of the AIRCFB in the Work Value decision are eroded on close examination of the reasoning, and/or the passage of time; and

   (c) the comparison is not relevant given that the equal remuneration order sought by the Applicants is to remedy the difference between award rates paid in the award-reliant Children's Services industry, and the bargained rates of remuneration for employees covered by the Metals Award,

5. Each of these issues is addressed below.

---

[3] The Work Value decision was defined in the submissions of United Voice and the Australian Education Union dated 11 October 2017 (**Applicants' submissions**) at [7], and comprises the decision of the AIRCFB on 13 January 2005 (PR954938) and the decision of the AIRCFB on 13 April 2005 (PR957259).

## The statutory context

6. The Commonwealth submits that the Work Value decision is not relevant to this application, taking into account the comments of the Full Bench at paragraph 291 of the *Jurisdictional Decision*, and the need to view the nexus established by the Work Value decision in the statutory context applicable at the time.[4]

7. Whilst the statutory context that applied to the AIRC's task in the Work Value case is different to the requirements of Part 2-7 of the FW Act, it does not follow that the underlying task performed by the AIRC is *only* relevant in the context of the Work Value decision. If this were the case, then the comparison undertaken by the AIRCFB in the Work Value decision could not have been adopted or approved by the AIRC during award modernisation, which was also a "different legislative context".[5] The statutory context does not exclude the possibility that the comparator exercise undertaken by the AIRC in the Work Value case is relevant in other contexts. This is for two reasons.

8. First, on each occasion that the AIRC, Fair Work Australia (**FWA**) and then the Commission has been required to modernise (in 2008) and review (in 2012 and 2014) awards, the tribunal has been required by statute to take into account the principle of equal remuneration for work of equal value, which is at the centre of Part 2–7 of the FW Act.

9. The AIRC conducted the award modernisation process pursuant to Part 10A of the *Workplace Relations Act 1996* (Cth). In performing the award modernisation functions under the Workplace Relations Act, the AIRC was required to have regard to, relevantly, the promotion of "the principle of equal remuneration for work of equal value".[6] As set out in the unions' submissions dated 11 October 2017 at paragraphs 46–49, no party sought to revisit the work value nexus established between the applicable classifications in the old Metals Award and Victorian and ACT Awards during the award modernisation process. In fact, the ACA submitted that the modern Children's Services Award should adopt the relevant provisions of the Victorian and

---

4 Commonwealth submissions, [7]–[11].

5 Commonwealth submissions, [11.1].

6 *Workplace Relations Act 1996* (Cth), s 576B(2)(e).

ACT Awards on the basis of the findings in the Work Value decision as to the proper comparator, and the value of work performed by childcare workers.[7] These submissions were accepted by the award modernisation Full Bench.[8] The proposal by ACA at award modernisation, and the subsequent acceptance by the Full Bench of that proposal, negates the submission now made by ACA that the award modernisation process "disregarded" or "set aside" conceptions of work value in the pre-modern children's services awards.[9]

10. The transitional review of modern awards was conducted by FWA pursuant to Item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). Item 6(2)(a) of that Act required the tribunal to conduct a review of all modern awards and consider, relevantly, whether the modern awards met the modern awards objective. The modern awards objective is set out in s 134(1) of the Act. Section 134(1)(e) of the FW Act requires the Commission to ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions of employment, taking into account the principle of equal remuneration for work of equal or comparable value. As set out in the Union submissions, no amendments were made or proposed by any interested party or the tribunal that would have or did have any impact on classification levels or hourly rates of pay in the applicable awards.[10]

11. Any differences between the various statutory contexts are not distinguishable for the purposes of assessing the relevance of the comparators established by the Work Value decision.[11]

12. Similarly, in conducting the four yearly review of modern awards, the Commission must ensure that modern awards meet the modern awards objective, and include terms only to the extent necessary to achieve that objective.[12] The nexus between the

---

7 See Applicants' submissions [48].
8 Applicants' submissions, [50].
9 ACA submissions, [2.5(c)], [7.2], [7.24].
10 Applicants' submissions, [52].
11 See Commonwealth submissions, [11].
12 Per ss 134, 138 and 156 of the FW Act.

Children's Services Award and the Metals Award has not been disturbed by the four yearly review.[13]

13. The tribunal's obligation to consider these matters is prescribed by the legislature and is separate from any submission made or position put by any interested party, including any consent position.[14] This is the case despite ACA's submission that the creation of the Children's Services Award occurred absent "any reasoned or judicial process".[15]

14. In conducting the four yearly review, the Commission has proceeded on the basis that each modern award being reviewed achieved the modern awards objective at the time it was made.[16] Although this application is not made in the context of the four yearly review, the presumption of compliance with the modern awards objective at the time of modernisation, the requirement to consider the equal remuneration principle as part of the transitional and four yearly review of modern awards, and the absence of any issue arising in the reviews of the Children's Services Award or the Metals Award that would challenge or disturb the nexus established by the Work Value decision, must be taken to mean that the Commission is satisfied that the nexus between the two awards continues to be appropriate.[17]

15. Second, in order for the Commission to make an equal remuneration order under Part 2-7 of the Act, it must be satisfied that it is appropriate to ensure that there will be 'equal remuneration for work of equal or comparable value' for the relevant employees.[18] In the *Jurisdictional Decision*, the Full Bench stated that "the expression 'work of equal or comparable value' refers to equality or comparability in 'work value' ", and the "established industrial conception of that term... is the primary source of guidance in this regard".[19] The principal criteria established by the industrial history are the "nature of the work, skill and responsibility required, and the

---

13 See Applicants' submissions, [53].

14 See *Workplace Relations Act* at Part 10A and *Fair Work Act* at Part 2-3 as discussed at [8]–[11] of these submissions.

15 ACA submissions, [7.2].

16 *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* (2014) 241 IR 189, [24].

17 Contrary to the ACA submissions at [8.19].

18 FW Act s 302(1).

19 *Jurisdictional Decision*, [280].

conditions under which the work is performed".[20] These are precisely the matters that were considered by the AIRC in the Work Value decision.

16. Accordingly, there is no sound reason to be found in the current or historical statutory provisions that would support a submission that the nexus established by the AIRC in the Work Value case cannot be applied in this application.

The comparison exercise undertaken by the AIRCFB in the Work Value decision

17. AFEI submit that the Work Value decision was not made on the basis of comparing the work done by employees under the *Victorian Award* and *ACT Award* and old *Metals Award*,[21] and accordingly the nexus established by the Work Value decision cannot function as the proper comparator for the purposes of this application. This assertion is not borne out by the Work Value decision.

18. The Work Value decision determined that the work done by childcare workers employed under the *ACT Award* and the *Victorian Award* was undervalued, and that it was appropriate to value that work by reference to the work done by employees under the old Metals Award. This is acknowledged and relied on by AFEI.[22] As set out in the Union submissions,[23] the nexus established by the Work Value decision was determined as a result of the Full Bench having regard to detailed evidence of "the skill, responsibility and the conditions under which [childcare] work is performed",[24] and considering "comparable classification levels"[25] and detailed evidence of the "conditions under which the work of child care workers is performed".[26] The submission by AFEI that it was the "similarity (or comparability) in qualification that explains the alignment"[27] between the classifications in the two awards ignores the fact that the qualifications describe and explain the work done by the respective groups of employees, the value of which was assessed by the AIRC after hearing

20 *Jurisdictional Decision*, [280].
21 AFEI submissions, [7].
22 AFEI submissions, [8]–[9].
23 See in particular, [8], [21] and [25].
24 PR954938, 13 January 2005, [193]–[363].
25 PR954938, 13 January 2005, [371].
26 PR954938, 13 January 2005, [372].
27 AFEI submissions, [9].

considerable evidence concerning the work performed by childcare workers with comparable qualifications, among other relevant matters.[28]

19. The AFEI complains that the AIRCFB did not hear any evidence from workers under the old Metals Award, and submits that the Work Value decision cannot be relied on to establish that the value of work performed by employees under the relevant classifications in the Metals Award is of equal or comparable value to the work performed by employees in the Children's Services Award.[29] This submission is misconceived, and the Commission should proceed on the assumption that such evidence was not necessary for the Work Value tribunal to perform its task, for three reasons.

20. First, the AIRCFB used the classification descriptions in the old Metals Award as the benchmark for the purposes of comparison against the work of childcare workers (which was the subject of extensive evidence at the hearing). There was no need to hear evidence from workers under the old Metals Award because the classification descriptions in clause 1.2 of Schedule D to the old Metals Award contained a high level of detail of the skills, qualifications, and work performed by each worker under the applicable classification, and the reasons in the Work Value decision do not record any submission by any party that the classifications in the old Metals Award were incomplete or out of date such as to render any comparison redundant.

21. Second, the employer parties, who were represented by numerous counsel, did not ask the AIRCFB to hear evidence from workers under the old Metals Award or indeed present such evidence themselves. Instead they were content to call evidence from 12 childcare centre employers.[30] Absent evidence to the contrary, it should be assumed that the decision to proceed on this basis was made by the employer parties acting in the best interests of their clients, taking into account the task of the AIRCFB in hearing and determining the Work Value application. Their approach corroborates the validity of the unions' contention.

---

28 See PR954938, 13 January 2005 at [370].

29 AFEI submissions, [5].

30 The list of witnesses called by the parties is at [193] of PR954938 (13 January 2005).

22. Third, despite the numerous opportunities to do so, no employer party has *ever* asked the AIRC, FWA, or this Commission to revisit the nexus established by the Work Value decision between the C5/C10 rates in the Metals Award and the Certificate III/Diploma rates in the Children's Services Award, either on the basis that the Work Value decision did not consider evidence from metalworkers, or for any other reason.

23. Rather, the opposite has occurred, namely, the specific request by the ACA to the award modernisation Full Bench to apply the findings of the Work Value decision to the newly created Children's Services Award on the basis that the *Victorian Award* and the *ACT Award* "were subject to an extensive work value/pay equity hearing and decision of the Full Bench of the AIRC", and that the "proper fixation of rates required the aligning of the AQF Diploma level to a C5 Level in the Metal Industry Award" and that it was "appropriate for there to be a nexus between … the Certificate III level [in the Victorian and ACT Awards], and the C10 level in the Metal Industry Award".[31]

24. Accordingly, the failure of employer parties to call evidence from workers under the old Metals Award during the Work Value hearing[32] does not invalidate the nexus established by the Work Value decision, nor its continued relevance to this Application.

25. Finally, the fact that many modern awards contain rates which correspond with the Metals Award does not mean that the comparison exercise undertaken by the AIRC and described in the Work Value decision was not properly conducted and no longer applies.[33]

Coverage of the old Children's Services and Metals awards

26. ACA submitted that because the *ACT Award* and the *Victorian Award* did not cover or represent the majority of the childcare industry, the applicability of the Work Value decision is limited.[34] This submission does not advance the ACA's case, because

31 Submissions of the Australian Childcare Centres Association and Australian Community Services Employers Association dated 24 June 2009, at [7.2.2], available at http://www.airc.gov.au/awardmod/databases/child/Submissions/ACCAandACSEA_pre_amend.pdf

32 See AFEI submissions, [5].

33 AFEI submissions, [10].

34 ACA submissions, [4.6].

(a) the Work Value decision was applied to the equivalent awards in Western Australia, South Australia and the Northern Territory prior to award modernisation,[35] (b) the *Victorian Award* was a Common Rule award, and (c), the classifications and rates of pay set by the Work Value decision were imported into the new Children's Services Award, thus ensuring that the findings in the decision have, from at least 2010, applied to and covered the industry as a whole.[36]

**The relevance of the evidence on which the Work Value decision is based**

27. Both the ACA and the AFEI submit that the findings in the Work Value decision are no longer relevant.

28. The submissions of AFEI about the nature of the evidence before the AIRCFB in the Work Value decision are made in the context of AFEI contending, wrongly, that the Commission in this preliminary hearing is required to be "conclusively satisfied" that the Applicants have or will adduce "probative evidence of substantial weight and significance" of the work performed by the comparator groups, and that the evidence be "contemporary".[37]

29. As to 'conclusive satisfaction', see paragraph 37 and following below.

30. As to the issue of 'contemporary evidence', the AFEI submissions disregard the functions of the AIRCFB in conducting the work value exercise, and of the AIRC and later FWA and the Commission, in conducting the statutory tasks of award modernisation, the transitional review of modern awards, and the four yearly review of modern awards. It is not the case that the matters relevant to the Work Value decision were considered in 2004 and have remained unexamined since that time, for the reasons already described in paragraph 8 to 13 above, and in the Union submissions at paragraphs 44 to 54.[38]

---

[35] See Applicants' submissions, [48].

[36] Which is a complete answer to the ACA submission at [7.7].

[37] AFEI submissions, [3].

[38] The same point applies in response to the ACA submissions at [9.1]–[9.2].

**The ultimate orders sought by the unions in the Equal Remuneration Order application**

31. The Commonwealth complains that:

    (a) the Applicants have not identified the "actual comparative groups of women and men for the purposes of identifying unequal remuneration";[39] and

    (b) the comparators relied on by the Applicants "do not appear to be the true comparators" because the Applicants have foreshadowed that the question of whether the two groups are unequally remunerated will involve an assessment of the bargained rates received by employees under the Metals Award.[40]

32. Similar complaints are made by ACA in their submissions.[41]

33. These submissions ignore the scope and purpose of this preliminary hearing, and the findings of the Full Bench in the *Jurisdictional Decision.*

34. The characterisation of the "the actual comparative groups of men and women" for the purposes of identifying unequal remuneration as a 'question' is misconceived or alternatively mistakes the effect of the unions' application. The groups of men and women are, self-evidently, employees under the Children's Services Award (ie, women) and employees under the Metals Award (ie, men). The Applicants identified the data and sources for that submission at Annexure B of the submissions dated 11 October 2017. The jurisdictional prerequisite for the making of an equal remuneration order in s 302(5) will be met where the Commission is satisfied that, relevantly, a group of female employees to whom an equal remuneration order would apply do not enjoy remuneration equal to a group of male employees who perform work of equal or comparable value.[42] There is nothing in Part 2-7 of the FW Act, which should be interpreted in a manner consistent with its beneficial or remedial status,[43] that would preclude the groups identified by the Applicants as functioning as a comparator for the purposes of s 302(5) of the Act.

---

39 Commonwealth submissions, [13].

40 Commonwealth submissions, [15], [19]

41 See Part 11 of the ACA submissions.

42 *Jurisdictional Decision*, [290].

43 *Jurisdictional Decision*, [177]–[181].

35. The question of whether employees covered by the Children's Services Award are underpaid compared to employees covered by the Metals Award is not part of this preliminary hearing. In determining to conduct this hearing, the Full Bench expressly limited the terms of the preliminary question to the comparability of the C5 and C10 classifications in the Metals Award to the Diploma and Certificate III classifications in the Children's Services Award.[44] The employers' submissions misunderstand the function of the preliminary question. The preliminary question is designed to determine whether the work performed by employees under the relevant classifications of the Metals Award is comparable to the equivalent classifications under the Children's Services Award, as determined by the Work Value decision, for the purposes of determining whether the two groups function as a comparator as required by s 302 of the FW Act.[45] If the answer to that question is yes, then it is incumbent on the Applicants to establish the relevant underpayment as an evidentiary base for the determination of the quantum of the equal remuneration order sought by the Applicants.[46] If the answer to the comparator question is no, then the application will be dismissed.[47]

36. Nevertheless, while it is not part of the task of the Full Bench in assessing the preliminary question to consider matters of remuneration, it is relevant that the Full Bench determined in the *Jurisdictional Decision* that "there is nothing in Part 2-7 which suggest that it is concerned only with remuneration produced by modern awards… and no party submitted otherwise", and further, that "Part 2-7 operates upon actual labour market outcomes for the employees under consideration, not the minimum rates of pay and conditions provided for such groups through modern awards …".[48]

44 If the Commission is satisfied that the nexus established by the Work Value decision holds for the purposes of this application, then other matters including "how the jurisdictional prerequisite is ... discharged for the other classifications in the Children's Services Award may then be dealt with subsequently": [2017] FWCFB 2690, [24].

45 *Jurisdictional Decision*, [290]; and see [2017] FWCFB 2690, [18].

46 See [2017] FWCFB 2690, [16].

47 [2017] FWCFB 2690, [17], [26].

48 *Jurisdictional Decision*, [277], and see [275]–[276].

## Other matters

37. AFEI have submitted that in order for the Full Bench to answer the preliminary question in the affirmative, it must reach a state of "conclusive satisfaction" that can only be achieved by the provision of "probative evidence of substantial weight and significance" about the work performed by the relevant employees.[49]

38. The Commission's task is to decide the answer to the preliminary question according to the ordinary standard of proof or persuasion that normally applies in the Commission. Namely, satisfaction on the balance of probabilities.[50]

39. In the decision to conduct the preliminary hearing, the Full Bench indicated that it was prepared to conduct the hearing on the basis of the question set out in paragraph 2 above, subject to any modifications agreed to by the parties.[51] On 27 July 2017, and in response to the invitation by the Full Bench to comment on the preliminary question,[52] United Voice and the Australian Education Union wrote to the Full Bench, stating that they wished to proceed with the preliminary hearing on the question proposed by the Full Bench, on the basis that the phrase 'satisfied conclusively' did not "apply or require a higher standard of proof or persuasion than that which normally applies in the Commission". No party made any submission, either written, or orally at the hearing on 13 September 2017, proposing any standard of satisfaction other than that which normally applies.

24 November 2017

H Borenstein

C W Dowling

K Burke

Counsel for United Voice and the Australian Education Union

---

49 AFEI submissions, [3].

50 See *Brinks Australia Pty Ltd v TWU*, PR922612, Giudice J, Acton DP and Hingley C, 18 September 2000, where the Full Bench stated at [7]: "It is beyond doubt that the standard of proof to be applied in Commission proceedings is proof [or satisfaction] on the balance of probabilities". That decision was recently cited with approval in *Wong v Taitung Australia Pty Ltd* [2017] FWCFB 990 at [37].

51 [2017] FWCFB 2690, [25]–[26].

52 [2017] FWCFB 2690, [26]–[27].