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SUBMISSIONS IN RESPONSE TO THE APPLICATION OF UNITED VOICE AND THE AUSTRALIAN EDUCATION UNION TO HOLD A PRELIMINARY HEARING TO DEAL WITH A QUESTION CONCERNING A COMPARATOR.

Equal Remuneration Case

(C2013/5139 and C2013/6333)

Submissions are filed on behalf of:

1. **Australian Childcare Alliance (ACA), ACA NSW, ACA VIC, ACA QLD, ACA SA, ACA WA**
2. **Australian Business Industrial**
3. **Australian Chamber of Commerce and Industry**
4. **New South Wales Business Chamber Limited**

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1. These Submissions consider a discrete question namely whether the Fair Work Commission (the **Commission**) should conduct a hearing to determine the answer to a specific question before proceeding further with the applications before it.

2. The question is posed by the United Voice and is in the following form:

> *"Are the C5 and C10 classifications under the Manufacturing and Associated Industries and Occupations Award 2010 a suitable comparator in this application for the purposes of section 302 of the Fair Work Act 2009 (Cth)?"*

3. In these submissions we only deal with whether this question should be the subject of a preliminary hearing and do not make any comment (at this stage) as to whether or not the C5 and C10 classifications are a "suitable comparator" or whether they can constitute a comparator.

4. We oppose the question being heard as advanced by the United Voice.

5. Relevantly in its earlier decision in this matter (*Equal Remuneration Decision 2015* [2015 FWCFB 8200]) at paragraph 290 and 291 the Commission said as follows:

> *[290] In summary, in order for the jurisdictional prerequisite for the making of an equal remuneration order in s.302(5) to be met, the Commission must be satisfied that an employee or group of employees of a particular gender to whom an equal remuneration order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. This is essentially a comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees. We do not accept that s.302(5) could be satisfied without such a comparison being made. Section 302(5) could not be satisfied on the basis that an employee or group of employees of a particular gender are considered not to be remunerated in accordance with what might be considered to be the intrinsic or true value of their work. In this respect, we accept the submission made by the Victorian Government (and broadly supported by the Commonwealth and NSW Government and the various employer groups) concerning the first step in the process of analysis required by s.302, and we do not accept the submissions of the various unions to the contrary. We emphasise that in adopting this approach, we are not, as United Voice and AEU put it in their submissions, 'confin[ing] the evidentiary means by which the*

jurisdictional fact may be demonstrated[219]*, but determining what the jurisdictional prerequisite or fact actually is on the basis of the text of the statute. In reaching this conclusion, we respectfully depart from the decision in the SACS Case No 1, in which the issue was not treated as one primarily of statutory construction. We consider that there are cogent reasons for doing so.*

[291] It is not necessary for the purpose of this decision to attempt to prescribe or establish guidelines in respect of how an appropriate comparator might be identified. It will ultimately be up to an applicant for an equal remuneration order to bring a case based on an appropriate comparator which permits the Commission to be satisfied that the jurisdictional prerequisite in s.302(5) is met. 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 comparators that are large, diverse, and involve significantly different work under a range of different conditions. But in principle there is nothing preventing the comparator groups consisting of large numbers of persons and/or persons whose remuneration is dependent on particular modern awards.

6. Further in that decision in its Summary at paragraphs 6 and 7 the Commission said as follows:

6. Satisfaction of the jurisdictional fact in s.302(5) requires a conclusion that the employee(s) the subject of the application for an equal remuneration order receive less remuneration than identified employee(s) of the opposite gender who perform work of equal or comparable value. Where an application for an equal remuneration order concerns a group of female employees, a male comparator group is therefore necessary.

7. Individuals or groups of employees of any size may, in principle, be used as comparators. However it is likely that the larger and more diverse the comparator groups are, the more difficult it will be to draw the conclusion that the two groups perform work of equal of comparable value. Ultimately the selection of a valid comparator will be a matter for the applicant for an equal remuneration order.

7. As the Full Bench says in its decision, the choice of a comparator is a matter for the applicant.

8. This should be an entirely uncontroversial proposition:

   (a) as the moving party must determine by itself how to structure and prosecute its case; and

   (b) because of the internal logic of an equal remuneration claim.

9. At its simplest, a claim for equal remuneration would materialise because a person of one gender observes a person of another gender whom they believe performs work of equal or comparable value but receives different remuneration (and one assumes that they believe that there is no good reason for this). It is inherent in this that the comparator in effect becomes the trigger for the grievance that is sought to be remedied.

10. In the United Voice's case, the union seems to be seeking to materially increase rates of pay in the industry through the imposition of an equal remuneration order and are now searching for a comparator.

11. In this context the question should be seen for what it is, an attempt to ask the advice of the Full Bench of the Commission as to whether or not the United Voice are 'getting warm' in their selection of a comparator.

12. If the question is heard as a preliminary point and is answered in the negative does the applicant simply try again and again?

13. This is an entirely improper question to pose and answer.

14. The Commission clearly has a role to play in making various findings associated with a comparator but those are limited to determining whether or not the individuals in the aggrieved group when compared to the comparator group:

   (a) are of different genders;

   (b) are performing work of equal or comparable value; and

   (c) are being remunerated differently.

15. In a contested matter (such as this) evidence will be required to give this factual context rather than allow these important issues to float in a hypothetical vacuum.

16. These findings are necessary to establish the jurisdictional prerequisite for making an equal remuneration order.

17. Beyond this proper exercise of the functions (and powers) in Part 2-7 of the *Fair Work Act 2009 (Cth.)* (the **Act**), the Commission is required to consider whether (assuming the

jurisdictional prerequisite has been made out) it will exercise its discretion to make an equal remuneration order.

18. Therefore the question as formed does not arise from a proper exercise of the functions of Part 2-7 of the Act.

19. Clearly how the Commission exercises its functions (refer to section 576 of the Act) and its powers within those functions of Part 2-7 is conditioned by section 577 and 578 of the Act.

20. Posing and answering a question which is essentially calling upon the Commission to assist an applicant in framing their case, could not on any proper characterisation be said to be fair and just, or accord with the principles of equity or good conscience.

21. Accordingly to the extent that sections 577 and 578 are relevant and relied upon, they do not support a hearing on the question posed by the United Voice.

22. Accordingly for the above reasons we submit that the Commission should not entertain the question in a preliminary hearing as sought by the United Voice.

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