



Submission pursuant to: Directions of the Fair
Work Commission made on 13 September 2017

Matter No.: C2013/5139

8 November 2017

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BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009

Title of matter: Application for an Equal Remuneration Order

Section: 302

Matter number: C2013/5239

Applicants: United Voice (UV) and Australian Education Union (AEU)

Respondents: The Australian Federation of Employers and Industries (AFEI) & Ors

SUBMISSIONS OF AFEI IN RESPONSE TO THE PRELIMINARY QUESTION

1. On 6 July 2017 the Full Bench posed a preliminary 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 Australian Industrial Relations Commission Full Bench decision of 13 January 2004 (Print PR954938) and the subsequent alignment in award rates for the respective classifications?”¹ (the **preliminary question**)*

2. For the reasons addressed in these submissions, the answer to the preliminary question is no.

¹ [2017] FWCFB 2690, [25].

Conclusive satisfaction requires contemporary evidence of work performed

3. Conclusive satisfaction about the work performed by the relevant employees requires probative evidence of substantial weight and significance. Evidence of that quality and nature would be contemporary evidence of work performed. The AIRC Decision of 13 January 2005² (and the subsequent alignment of rates) does not provide the Full Bench with evidence having these critical qualities. This is so for two reasons.
4. First, the witness evidence before the AIRC was considered in December 2003 and May 2004.³ That evidence is not contemporary evidence about work performed in the present day.
5. Second, it appears from the 2005 Decision that there was no evidence from any witness about work performed under the relevant classifications in the Metals Industry Award⁴ or within any of the industries now covered by the Manufacturing Award.⁵ In this regard, it can be readily appreciated from the list of the 34 witnesses who gave evidence in those proceedings⁶ and the consideration of evidence at paragraphs [193]-[363] of the 2005 Decision, that the witness evidence came from individuals employed in (or associated with) the childcare industry and not otherwise.
6. Thus the 2005 Decision cannot be relied upon as establishing that the value of the work performed by employees at the C5 and C10 classifications in the Manufacturing Award is of equal or comparable value to the work performed by the CIII and diploma qualified employees in the Children's Services Award.⁷

The AIRC did not determine or compare the value of work performed across industries

7. The particular conclusions of the AIRC were not judgments upon the equivalence or comparability of the value of the work performed by employees engaged on the one hand, by employees engaged in the children's services industry and on the other hand, employees

² Print PR954938 (the **2005 Decision**).

³ 2005 Decision, [193].

⁴ *Metal, Engineering and Associated Industries Award 1998* AW789529; 2005 Decision, [193].

⁵ *Manufacturing and Associated Industries and Occupations Award 2010*; 2005 Decision, [193].

⁶ 2005 Decision, [193].

⁷ *Children's Services Award 2010*.

engaged in the metals industry. In this regard, it is instructive to recall that the AIRC expressed two broad conclusions in the 2005 Decision.⁸

8. The first conclusion was to the effect that, by virtue of demonstrated changes in the nature of work in the children's sector, there had been a significant net addition to the work requirements of employees covered by the children's services awards.⁹ This conclusion was informed by the experience of the work of employees in the child care industry.¹⁰ The conclusion was not informed by a comparison between the value of work performed by child care industry employees and the value of work of employee within any other industry.
9. The second conclusion was to align two classifications in the children's services awards with two classifications in the Metals Industry Award.¹¹ The outcome of the alignment was that the diploma level in the children's services awards was aligned to the diploma level in the Metals Industry Award;¹² and the alignment of the certificate III levels in the children's services awards with the C10 level in the Metal Industry Award.¹³ It was the similarity (or comparability) in qualification that explains the alignment – and the critical elements in the AIRC reasoning are disclosed at paragraphs [172], [179], [181]-[185], [367], [371]-[372] of the 2005 Decision. The alignment was not explained in terms of the value of the work performed by employees engaged in those classifications.
10. It should be uncontroversial that there are many modern awards containing a rate (or rates) which correspond with rates within the Manufacturing Award - most frequently this is the C10 rate. The reason for this is succinctly explained by the following observation of a Full Bench of the AIRC in 2009 (footnotes omitted):

“The basic concept that employees who have obtained and utilise relevant skills in their work should have those skills recognised and paid for within the classification structure is well established. It was an element of the structural efficiency principle of the late 1980's which was directed, amongst other things, to “establishing skill related career paths which provide an incentive for workers to continue to participate in skill formation”. The classification of Certificate III qualified employees at the trades level

⁸ 2005 Decision, [365].

⁹ 2005 Decision, [365]-[366]; PR957259, [2].

¹⁰ 2005 Decision, [193]-[363].

¹¹ 2005 Decision, [367].

¹² 2005 Decision, [367]; PR957259, [72].

¹³ 2005 Decision, [367].

is reflected in a range of modern awards, across a diverse range of industries and occupations.”¹⁴

11. The ‘*diverse range of industries and occupations*’ covered by modern awards with rates so aligned reinforces the conclusion that the alignment of rates is not a result of a determination that the work performed by employees in the respective classifications is of equal or comparable value.

Australian Federation of Employers and Industries

Dated: 8 November 2017

¹⁴ [2009] AIRCFB 967, [33].