FAIR WORK COMMISSION

Fair Work Act 2009

Section 302 – Application for an Equal Remuneration Order

Application by United Voice and Australian Education Union

Matter No: C2013/5139

SUBMISSIONS IN REPLY OF UNITED VOICE AND AUSTRALIAN EDUCATION UNION IN SUPPORT OF THEIR APPLICATION TO HOLD A PRELIMINARY HEARING TO DEAL WITH THE COMPARATOR ISSUE

Introduction

1. These submissions respond to the submissions filed by:
   (a) The Commonwealth of Australia;
   (b) Australian Business Lawyers & Advisers (**ABLA**);
   (c) The Chamber of Commerce and Industry of Western Australia (**CCIWA**);
   (d) The Australian Federation of Employers and Industries (**AFEI**); and
   (e) Community Connections Solutions Australia (**CCSA**).

General Response

Conflation of procedural and substantive issues

2. The submissions of the parties who oppose the determination of a preliminary hearing on the comparator issue generally conflate the procedural issue with the substantive issue.

3. Thus, for example, there are complaints about not knowing the substance of the arguments which the unions will advance or how they will seek to make out their case or the merits of that case.[1] These complaints go to the substance of the question and it

[1] See: (a) Submissions of the Commonwealth at [6] – [18]; (b) Submissions of ABLA at [14] – [18]; (c) Submissions of AFEI at [8] – [22].

is expected that the Commission would make directions which would ensure that all parties spell out their case before any preliminary hearing.

4. The immediate question is whether the Commission should deal with the comparator issue as a preliminary matter. It is not unusual in courts and in the Commission for issues to be so dealt with if it is judged to be an effective and efficient means of progressing a case.

5. The unions contend that to do so in this case is the most effective and efficient means of proceeding with the case. This proposition may be tested by asking whether, if one of the respondents sought to challenge the amended application on the basis that the alleged comparator did not meet the test in the legislation, the Commission would put the parties and itself to the trouble and expense of conducting the whole case before ruling on the cornerstone issue of the case.

6. The Commission could move to do so as a preliminary issue, of its own motion, in the interests of getting to the core of the litigation quickly and efficiently.

7. There is no prejudice to any party in deciding the preliminary issue. Depending on the outcome, it might bring the case to an end, or alternatively, sharply focus the conduct of the remainder of the case. In both instances, the Commission and all parties benefit.

The 2015 Jurisdictional Decision

8. The submissions of the parties who oppose the determination of a preliminary question on the comparator issue, submit that sufficient preliminary matters were dealt with by the *Equal Remuneration Order – Jurisdictional Decision* [2015] FWCFB 8200.[2]

9. The position of United Voice and the Australian Education Union is in response to that decision. They propose a comparator that they submit meets the test established by the *Jurisdictional Decision.* That comparator was not considered in the *Jurisdictional Decision.*

10. As set out above, that comparator is the cornerstone of the balance of the case. It is efficient and logical that it be determined prior to the balance of the case.

[2] See: (a) submissions of CCIWA at [5]-[8];

11. Further, the decision to conduct the *Jurisdictional Decision* as a separate hearing was based on considerations that continue to apply. In that matter the Full Bench stated at [8]:

> *Early in the course of proceedings it became apparent from the submissions of the parties that there would be some utility in providing greater clarity around the relevant legal and conceptual framework issues and in addressing those issues first. Accordingly, the Commission has conducted the proceedings in this matter on the basis that it would first consider the legal and conceptual issues relevant to the applications, and then consider the evidentiary case of the parties. The purpose of clarifying the legal issues first was to ensure that parties did not run their evidentiary case on a particular premise, particularly in relation to the comparator issue, only to discover later that we had come to a different view on that premise.*
> (Footnotes omitted)

12. Prior to the hearing of the *Jurisdiction Decision* the President stated (on 24 September 2013 at transcript PN323):

> *We would certainly have to consider that issue at some point, and I see the force in the argument that the parties might be assisted by a decision from us in relation to the appropriateness of whatever comparators are put forward. Otherwise you might end up putting the whole of an evidentiary case only at the end to discover the bench has a different view to the applicant about what the appropriate comparators were.*

13. It is also apparent that the approach, in the *Jurisdictional Decision*, of determining the question of comparators before the balance of the matter, was supported by a number of the employer parties. For example, in their written submissions dated 27 September 2013 (in response to directions from the Full Bench on 24 September 2013) the CCIWA, Business SA and the Australian Capital Territory and Region Chamber of Commerce and Industry stated at paragraph 3:

> *We have concerns that if the below matters [including the comparator issue] are not addressed whilst the matter is still in its infancy, all parties will inevitably invest considerable time and resources into the matter unnecessarily.*

14. Further, on 24 September 2013 before the Commission, Mr Ward (of ABLA), dealing with the comparator and other issues, stated at PN322:

> *…The applicants today, they've indicated they don't intend to identify those occupations or industries until they file their evidence, and we believe that's an unreasonable inefficient approach to adopt.*

15. Those comments were endorsed by Mr Forster (for AFEI) at PN388.

Failure to recognise new legislative area

16. The submissions of the parties who oppose the determination of the preliminary question on the comparator issue, with one exception[3], fail to acknowledge that the making of an equal remuneration order under section 302 of the *Fair Work Act 2009* (Cth) (in its present form) is a new and developing area of law. Further, the proposed comparator is a new proposal that has not previously been ruled upon. In those circumstances a clarification of the approach will necessarily assist the parties and the Commission.

Specific responses

The Commonwealth submission

17. The Commonwealth's complaints go to the merits of the application. It complains that, despite its request, certain information was not provided to it. United Voice and the Australian Education Union responded to the Commonwealth's request on 31 October 2016 by stating:

> *The matters you raise go to the merits of the preliminary matter, rather than the question of whether the preliminary matter ought to be dealt with in a separate and preliminary hearing.*
>
> *We confirm that we will address those matters if and when the Commission agrees to our preliminary issue.*

CCIWA

18. The CCIWA assert that the conduct of the matter to date has caused uncertainty. That is a reason United Voice and the Australian Education Union seek a preliminary hearing on the comparator issue. Resolving the uncertainty in the method of

[3] See submissions of AFEI at [5].

comparators must add to the overall efficiency of the application and reduce uncertainty.

CCSA

19. The CCSA obtusely refer to the 'other major part' of the matter and the other 'matter C2013/6333.' There is no requirement that the two applications be linked in the resolution of preliminary matters. However, clarification of the comparator in the application of United Voice and the Australian Education Union may assist the other application. Even if that is not so, that is no basis to not hear the preliminary matter. It is not sound to say that if the preliminary matter cannot resolve *all* issues in *all* applications it should not be heard.

Dated 7 November 2016

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