

FAIR WORK COMMISSION

FULL BENCH C2013/6333

INDEPENDENT EDUCATION UNION OF AUSTRALIA

Applicant

AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

First Respondent

and others named in the Schedule

COMMONWEALTH OF AUSTRALIA

An Interested Party

SUBMISSIONS OF THE COMMONWEALTH

The Commonwealth's role in this proceeding

1. In the Independent Education Union of Australia's (**IEUA**) amended application filed on 27 September 2017 (**Application**) the 'Commonwealth Government, Department of Employment' is described as an Interested Party. The IEUA seeks no orders with respect to the Commonwealth. The Commonwealth does not take a position either way as to whether or not an order should be made. Accordingly, the Commonwealth does not support or oppose the Application.
2. The Commonwealth's role is confined to assisting the Full Bench on questions of law and the approach to be taken in applications of this kind under the *Fair Work Act 2009* (Cth) (**FW Act**).

Response to the parties' opening submissions

3. The IEUA and the Respondent Employer Parties' opening submissions address the key issues concerning the operation of Part 2-7 of the FW Act to this Application which will be the subject of the hearing, namely:

Lodged on behalf of the Commonwealth

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1903

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- (a) consideration of the IEUA's comparators¹ and their appropriateness² within the Part 2-7 framework;
 - (b) the determination of the work performed by each of these groups and its respective value. This will require a careful assessment of the lay and expert evidence including:
 - i. the nature of the work performed by male and female employees in the respective groups;
 - ii. the level of skill and responsibility involved in doing the work by male and female employees in the respective groups;
 - iii. the conditions under which the work is done by male and female employees in the comparative groups (including where over-award payments are provided, evidence of the reasons for this and whether the payments arise from higher work value);³ and
 - iv. whether male and female employees are unequally remunerated.⁴
 - (c) the discretionary factors to be taken into account in relation to applications of this kind;⁵ and
 - (d) the form of orders sought in the Application.
4. The Commonwealth does not presently wish to add anything further save in two respects.
 5. *First*, the determination of equality or comparability between the work value of the comparative groups necessarily includes consideration of the basis upon which the individuals within the respective groups are paid and the reasons for the receipt of those payments.
 6. The IEUA and Employer Respondent Parties rely on lay and expert evidence with respect to actual or hypothetical remuneration rates and their causes including market-forces. The Commonwealth does not make any submission as to the evidence on either side but notes the importance of the particular stages at which the Full Bench will consider this evidence. The Full Bench is required to consider actual or hypothetical remuneration rates and their causes both as part of determining the work value of the comparative groups⁶ as well as when discretionary factors are taken into account, if the Full Bench is thereafter satisfied that the work is work of equal or comparable value.

¹ IEUA Application and IEUA submissions [2]-[7].

² IEUA submissions [2]-[7], [19]-[24], [36]-[50], the AFEI submissions [6]-[10], [49]-[73] and [74]-[75] and ACA submissions [2]-[14].

³ See [2018] FWCFB 177 at [48].

⁴ See *Equal Remuneration Decision 2015* [2015] FWCFB 8200; 256 IR 362 at [18].

⁵ IEUA submissions [167]-[185], AFEI submissions [76]-[91] and ACA submissions [23]-[28].

⁶ *Application by United Voice and the Australian Education Union* [2018] FWCFB 177 at [48].

7. *Secondly*, the IEUA, the Australian Federation of Employers and Industries and the Australian Childcare Alliance all appear to rely on job evaluation evidence in support of their respective positions concerning the equality and comparability of the work value of the comparative groups and the remuneration of those groups. The Commonwealth submits that such evidence, like all other evidence, must be rigorously tested and even if accepted by the Full Bench may inform but cannot be a substitute for the Full Bench's own assessment of the evidence. In this regard we draw the Full Bench's attention to the NSW Industrial Relations Commission's consideration of the utility of job evaluation evidence in *Re Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle* (2002) 111 IR 48 at 56 to 58.

Commonwealth's participation in the hearing

8. The Commonwealth will appear at the hearing. However, it is unlikely to play any significant role with respect to the evidence and the examination of witnesses.
9. The Commonwealth reserves its rights to make further submissions in writing and orally in the 3 days set aside in September 2018 for closing submissions including, but not limited to, the matters referred to in paragraph 3 above.

Date: 4 July 2018

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Schedule

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Respondents

First Respondent	Australian Chamber of Commerce and Industry
Second Respondent	Australian Childcare Centres Association
Third Respondent	Australian Community Children's Services
Fourth Respondent	Australian Community Services Employers Association - Union of Employers
Fifth Respondent	Australian Federation of Employers and Industries
Sixth Respondent	Association of Independent Schools of South Australia
Seventh Respondent	Association of Independent Schools of Tasmania
Eighth Respondent	Association of Independent Schools of Western Australia (Inc)
Ninth Respondent	Australian Childcare Alliance New South Wales
Tenth Respondent	Australian Childcare Alliance Victoria Inc
Eleventh Respondent	Australian Childcare Alliance QLD Inc
Twelfth Respondent	Australian Childcare Alliance South Australia
Thirteenth Respondent	Australian Childcare Alliance Western Australia
Fourteenth Respondent	Community Connections Solutions Australia
Fifteenth Respondent	New South Wales Business Chamber Ltd
Sixteenth Respondent	Association of Independent Schools of NSW
Seventeenth Respondent	Independent Schools of Victoria
Eighteenth Respondent	Independent Schools of Queensland
Nineteenth Respondent	Catholic Commission for Employment Relations
Twentieth Respondent	The Crèche and Kindergarten Association Limited