DECISION

Fair Work Act 2009
s.302 - Application for an equal remuneration order

Application by United Voice and the Australian Education Union
(C2013/5139)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER SAUNDERS

SYDNEY, 6 FEBRUARY 2018

Application for an equal remuneration order.

Introduction

[1] United Voice and the Australian Education Union (applicant unions) have made an application to the Commission for an equal remuneration order pursuant to s 302(3)(b) of the *Fair Work Act 2009* (FW Act) in relation to the children's services and early childhood education industry. Specifically, the application relates to employees working in long day care centres or preschools covered by the *Children's Services Award 2010*, the *Educational Services (Teachers) Award 2010* or the *Educational Services (Schools) General Staff Award 2010*. A separate equal remuneration application has been made by the Independent Education Union of Australia (IEU) in respect of early childhood teachers working in long day care centres or preschools covered by the *Educational Services (Teachers) Award 2010*, but that application is not the subject of this decision and has separately been set down for hearing later this year.

[2] The power to make equal remuneration orders is conferred on the Commission by s 302 of the FW Act, which provides:

> **302 FWC may make an order requiring equal remuneration**
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> *Power to make an equal remuneration order*
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> (1) The FWC may make any order (an ***equal remuneration order***) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.
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> *Meaning of* ***equal remuneration for work of equal or comparable value***
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> (2) ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.
>
> *Who may apply for an equal remuneration order*

(3) The FWC may make the equal remuneration order only on application by any of the following:

(a) an employee to whom the order will apply;

(b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;

(c) the Sex Discrimination Commissioner.

FWC must take into account orders and determinations made in annual wage reviews

(4) In deciding whether to make an equal remuneration order, the FWC must take into account:

(a) orders and determinations made by the FWC in annual wage reviews; and

(b) the reasons for those orders and determinations.

Note: The FWC must be constituted by an Expert Panel in annual wage reviews (see section 617).

Restriction on power to make an equal remuneration order

(5) However, the FWC may make the equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.

[3] In relation to both applications, a differently constituted Full Bench issued a decision on 30 November 2015[1] (2015 Decision) addressing a number of preliminary issues in the matters including the identification of the jurisdictional prerequisite for the making of an order under s 302 and the considerations relevant to the exercise of the Commission's discretion once that jurisdictional prerequisite was satisfied. The conclusions reached in that decision were summarised by us in an earlier decision issued on 6 July 2017[2] (2017 Decision) as follows:

"[18] The "comparative exercise" which is required as a jurisdictional prerequisite to the making of an equal remuneration order under s.302(5) to be carried out between the group of employees to be covered by the proposed order and an identified comparator group has three elements:

(1) the two groups must perform work of equal or comparable value;

(2) they must be of the opposite gender; and

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[1] [2015] FWCFB 8200, 256 IR 362

[2] [2017] FWCFB 2690, 268 IR 36

(3) they must be unequally remunerated.

[19] Once this jurisdictional prerequisite is demonstrated, the Commission has a discretion as to whether to make an equal remuneration order. The circumstances which may be relevant to the exercise of the discretion include:

(i) the circumstances of the employees to whom the order will apply;

(ii) eliminating gender based discrimination;

(iii) the capacity to pay of the employers to whom the order will apply;

(iv) the effect of any order on the delivery of services to the community;

(v) the effect of any order on a range of economic considerations, including any impact on employment, productivity and growth;

(vi) the effect of any order on the promotion of social inclusion by its impact on female participation in the workforce; and

(vii) the effect of any order on enterprise bargaining."

[4] After the 2015 Decision was issued, the applicant unions on 28 September 2016 lodged a "*third further amended application*" which, among other things, identified a comparator, namely that the Diploma level (Level 4.1) and Certificate III level (Level 3.1) classifications under the *Children's Services Award* applied to work of equal or comparable value to that performed under the C5 and C10 classifications respectively in the *Manufacturing and Associated Industries and Occupations Award 2010* (*Manufacturing Award*). It was contended in this amended application that this equality or comparability in work value had been established in a decision issued by a Full Bench of the Australian Industrial Relations Commission (AIRC) on 13 January 2005[3] (2005 Decision) in applications to vary the *Child Care Industry (Australian Capital Territory) Award 1998* (*ACT Award*) and the *Children's Services (Victoria) Award 1998* (*Victorian Award*), and the alignment had continued since that decision by the maintenance of the parity in the award rates of pay for the respective classifications.

[5] In correspondence to the Commission which accompanied the amended application of 28 September 2016, the applicant unions sought timetabling of a hearing to determine a preliminary question as to whether its proposed comparator satisfied the jurisdictional requirement identified in paragraph [290] of the 2015 Decision (that is, the first element of the jurisdictional prerequisite summarised in paragraph [18] of the 2017 Decision set out above). The applicant unions' proposed question was as follows:

> "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)?"

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[3] PR954938

[6] This proposed preliminary hearing was opposed to various degrees, and it was this interlocutory application which was the subject of the 2017 Decision.

[7] In the 2017 Decision, we formed the view that while it was possible to deal with the issue of whether the comparator groups of employees performed work of equal or comparable value on a discrete basis, this would not be a procedurally convenient course if the proposed preliminary hearing became a lengthy one because the employer respondents wished to adduce extensive evidence in relation to this issue. Our conclusions were, for relevant purposes, as follows:

> "[23] We consider that a preliminary hearing could only be of value if it were confined to the question of whether the 2005 AIRC Decision, and the subsequent alignment in rates, are capable *alone* of *conclusively* demonstrating equality or comparability of work value (and, as a corollary, that no evidence that might conceivably be adduced by any party could demonstrate otherwise). It seems to us that the preliminary question would need to be framed in that way in order for a separate hearing to be justifiable in procedural terms.
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> . . .
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> [25] For these reasons, we consider that a workable preliminary question would be expressed as follows:
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>> 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 2005 (Print PR954938) and the subsequent alignment in award rates for the respective classifications?
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> [26] We therefore reject the proposition that we should conduct a separate hearing to determine the preliminary question framed by the Unions, but we are prepared to conduct such a hearing on the basis of the question we have formulated (subject to any modifications agreed to by the parties). It would be necessary for the Unions to accept that the necessary consequence of a negative answer to the above question would be the dismissal of their application in accordance with the indication given by their counsel at the hearing on 16 May 2017.
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> [27] We will allow the Unions 21 days to provide written advice as to whether they wish to proceed to a hearing on the basis of the question we have formulated. If the response is in the affirmative, a directions hearing will be listed to program the conduct of the preliminary hearing. If the answer is in the negative, we will simply await further advice from the Unions as to how they wish to proceed with their application."

[8] In a letter sent by the applicant unions to the Commission dated 27 July 2017, they stated:

> ". . .

> We have given consideration to the proposed preliminary question as outlined at paragraph [25] of the decision.
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> We note that the proposed question refers to the Commission being 'satisfied conclusively'. We do not read that phrase as intending to apply or require a higher standard of proof or persuasion than that which normally applies in the Commission. On that basis United Voice and the Australian Education Union advise that they wish to proceed with the preliminary hearing on the question proposed by the Full Bench in the decision.
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> We request that the Commission list the matter for a Directions Hearing at its earliest convenience. Prior to that hearing, we will seek to formulate consent directions with the other parties to put before the Commission."

[9] Directions were subsequently made for the filing of written submissions in relation to the preliminary question identified in paragraph [25] of the 2017 Decision, and a hearing was conducted on 30 November 2017.

The 2005 Decision

[10] The 2005 Decision concerned applications to insert new classification structures and minimum rates of pay in the *ACT Award* and the *Victorian Award.* The applicant in respect of both applications was the Liquor, Hospitality and Miscellaneous Union (as United Voice was then named). It is clear from the 2005 Decision that the applicant advanced a substantial evidentiary case to support the proposition that there had been a change in the work value of employees covered by the two awards, including expert evidence concerning the Australian Qualifications Framework (AQF) governing the training qualifications for the industry[4] and direct evidence from employees and other industry participants concerning the nature of and changes to the employees' work (including the content of the training required for that work).[5] It is equally clear that the applicant's case also critically relied upon the proposition that the rates of pay in the two awards should be adjusted on the basis that the classifications for Diploma-qualified and Certificate III employees should be aligned with the C5 and C10 classifications in the then *Metal, Engineering and Associated Industries Award, 1998 - Part I* (*Metal Industry Award*).

[11] Before it turned to its findings made on the evidence, the Full Bench engaged in an extensive discussion of the principles then applying to the proper fixation of minimum rates of pay.[6] The critical principles identified by the Full Bench were as follows:

> **"**[155] In the context of the matter before us, the principles established in the *Paid Rates Review decision* mandate a three step process for the determination of properly fixed minimum rates:
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> > 1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in

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[4] Ibid at [173]-[180]

[5] Ibid at [193]-[194]

[6] Ibid at [142]-[172]

accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.

2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.

3. If the existing rates are too low they should be increased so that they are properly fixed minima."

[12] The Full Bench then connected the application of these principles to the AQF:

"[172] A comparison of the qualifications required at particular classification levels with those in awards which have been adjusted in accordance with the MRA process is one method for establishing properly fixed minimum rates. In that context the Australian Qualifications Framework (the AQF) is relevant."

[13] The Full Bench considered, and accepted, evidence adduced concerning the AQF, including evidence that qualifications in different industry sectors which were placed on the same one of the eight AQF levels were able to be aligned as being of an equivalent competency standard.[7]

[14] The findings ultimately made on the extensive evidence presented were summarised by the Full Bench in the following terms:

"**6. Summary of findings**

[364] For convenience we have decided to set out the findings made in the previous sections of our decision before setting out our conclusions.

6.1 The proper fixation of rates of pay

1. The rate at the AQF Diploma level in the *ACT* and *Victorian Awards* should be linked to the C5 level in the *Metal Industry Award*.

2. There should be a nexus between the CCW level 3 on commencement classification in the *ACT Award* (and the Certificate level III in the *Victorian Award*) and the C10 level in the *Metal Industry Award*.

6.2 Children's services sector

1. There has been significant growth in the children's services sector since 1999.

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[7] Ibid at [173]-[180]

2. Between 1999 and 2002 the average number of children per service has increased markedly in all service types. The capacity utilisation of child care services has also increased, and utilisation patterns of the users of long day care have changed over time. For example, in 1997 in Victoria some 63 per cent of child care attendance hours in private long day care centres were less than 30 hours per week. By 2002 this had increased to 73 per cent.

3. The growth in the private long day care component of the children's services sector has been particularly significant in recent years and it is the dominant means of providing long day care in Victoria.

4. In recent years publicly listed corporate chains have become a significant presence in the long day care component of the sector.

6.3 Work value considerations

6.3.1 General

1. The nature of the work of child care workers and the conditions under which that work is performed has changed over time.

6.3.2 Shift in utilisation patterns

1. The utilisation patterns of the users of long day care have changed over time.

2. This change in utilisation patterns has increased the workload of child care workers.

6.3.3 Supervision and training of workers

1. Since the introduction of the AQF system children's services training packages have incorporated on-the-job training and assessment.

2. This development has increased the work of team leaders and others who supervise employees undertaking further study.

6.3.4 Programming

1. Changes in programming and documentation requirements have increased the workload of child care workers and have, to a limited extent, increased their accountability and responsibility.

6.3.5 Children from non-English speaking backgrounds

1. Children from culturally diverse backgrounds comprised 13 per cent of users in long day care schemes as at May 2002 (compared to 11 per cent in August 1997).

2. Dealing with children from differing cultural backgrounds creates particular challenges for child care workers.

6.3.6 Children with special needs or "at risk" children

1. The evidence suggests that there has been an increase in the number of children with special needs or `at risk' children in childcare centres, and that this has impacted on the work undertaken by childcare employees in all services.

6.4 From child minding to child development

1. The conceptualisation of children's services has changed over time from the notion of child minding or child care to one of early child development, learning, care and education.

2. Recent neuroscience research into brain development supports the fundamental influence of the early years of children's development.

3. The available research supports the proposition that there are clear links between the provision of early childhood programs and children's subsequent achievement. This has implications not just for individual opportunities but also for broad social outcomes such as mental health and crime.

4. The available research supports the proposition that the provision of quality child care is directly related to better intellectual/cognitive and social/behavioural outcomes in children. The quality of care, and hence outcomes for children, is positively related to the level of the qualifications of the staff working with children.

5. The available research suggests that money directed to the early years of children's development results in positive long term outcomes and is cost effective.

6. The shift in the conceptualisation of children's services towards early childhood development, learning, care and education has increased community expectations of child care workers and has led to changes in their training and development.

6.5 Accreditation

1. Accreditation has increased the workload of child care workers and has, to a limited extent, increased their accountability and responsibility for their work.

6.6 Qualifications and training

1. Child care workers have a strong commitment to continuing professional development.

2. There have been significant changes to the structure and content of the courses offered in children's services since 1990.

3. The current Certificate III in Child Care bears little relationship to the former TAFE Child Care Practices Certificate. A number of new modules have been developed in response to changes in community expectations and the regulatory environment.

4. The Diploma of Child Care replaced the Associate Diploma in 1997. It contains a number of new modules and is competency based.

5. There is a general preference in the industry for employing qualified staff or staff undertaking further study, and the evidence supports a finding that undertaking further training in children's services has a positive impact on work value.

6.7 Recruitment and retention

1. The child care sector is facing a critical shortage of qualified staff and this impacts on the ability of child care services to meet minimum legislative and quality standards.

2. The shortage of qualified staff has the potential to jeopardise the future of quality child care in Australia.

3. Limited career path options and low pay have contributed to the current recruitment and retention problems."

[15] The Full Bench then stated a number of overall conclusions, of which the most pertinent are as follows (footnotes omitted):

"[365] We have reached two broad conclusions in respect of the claims before us. The first relates to work value change. In this regard the time from which work value changes should be measured is the date of operation of the 1990 Full Bench decision. This decision directly effected the classification structure in the *ACT Award* and was clearly instrumental in the determination of the classification structure in the *Victorian Award*.

[366] We are satisfied that the changes in the nature of the work which are detailed in section 5 of this decision constitute a significant net addition to work requirements within the meaning of the work value principle.

[367] The second broad conclusion concerns the proper fixation of rates for the key classification levels in the child care awards. In our view the rate at the AQF Diploma level should be linked to the C5 level in the *Metal Industry Award*. Further, it is appropriate that there be a nexus between the CCW level 3 on commencement classification in the *ACT Award* (and the certificate III level in the *Victorian Award*), and the C10 level in the *Metal Industry Award*.

. . .

[369] ... the fact that wage increases will lead to fee increases and hence there will be less access to accredited child care is only one consideration. And, of course the question of where the public interest lies in a particular matter will often depend on balancing interests, including competing interests. The whole of the circumstances in a

particular matter must be weighed in order to determine where the public interest lies. Two other general considerations are also relevant.

[370] The first relates to the Commission's statutory obligation to establish and maintain *"fair minimum wages"*. In setting such wage rates the *WR Act* and general principle requires the Commission to have regard to the skill responsibility and the conditions under which the work is performed. The Commission's approach to the proper fixation of minimum rates is dealt with at section 4 of our decision.

[371] A consequence of the employer's contentions is that the minimum award rates applicable to child care workers would be set at a level which is below that applicable to comparable classification levels (in terms of AQF qualification levels) in other awards. Such an outcome is neither fair nor equitable.

[372] Prima facie, employees classified at the same AQF levels should receive the same minimum award rate of pay unless the conditions under which the work is performed warrant a different outcome. Contrary to the employer's submissions the conditions under which the work of child care workers is performed do not warrant a lower rate of pay than that received by employees at the same AQF level in other awards. Indeed if anything the opposite is the case. Child care work is demanding, stressful and intrinsically important to the public interest."

[16] The Full Bench directed the parties to confer and engage in conciliation as to appropriate classification structures for each award to give effect to its conclusions. The parties were able to reach a substantial measure of agreement about this. In a further decision issued on 13 April 2005[8], the Full Bench endorsed the agreement reached and determined the outstanding issues. In a final decision issued on 10 May 2005[9], the Full Bench determined transitional arrangements for the introduction of the new rates in the two awards. These involved four incremental increases, with the first on 1 July 2005 and the last intended to be on 1 January 2007.

[17] The enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* disrupted the finalisation of the transitional arrangement and, because the awards were categorised differently by that legislation, meant that a complete alignment in rates was never achieved and a small disparity remained in relation to the Diploma level/C5 classifications.[10] When the modern *Children's Services Award 2010* was developed during the award modernisation process conducted by the AIRC pursuant to Pt 10A of the *Workplace Relations Act 1996* (WR Act), the classifications and rates were taken from the *ACT Award* and the *Victorian Award* which had been the subject of the 2005 Decision. Since 1 January 2010, when the modern *Children's Services Award* and the *Manufacturing Award* came into effect, the pay rates in the two awards have been subject to uniform pay increases as a result of Annual Wage Reviews conducted under the FW Act.

[8] PR957259

[9] PR957914

[10] The manner in which this occurred was explained in detail in the applicant unions' submission in a manner which was not the subject of any contest.

[18] The pay rates on commencement for a Certificate III-qualified employee (Level 3.1) and a Diploma-qualified employee (Level 4.1) in the *Children's Services Award* are currently as follows:

Classification	Minimum weekly rate $	Minimum hourly rate $
Level 3.1	809.10	21.29
Level 4.1	953.00	25.08

[19] The current C10 and C5 rates under the *Manufacturing Award* are:

Classification level	Minimum weekly wage $	Minimum hourly rate $
C10	809.10	21.29
C5	946.50	24.91

Submissions

The applicant unions

[20] The applicant unions submitted that:

- the nexus established by the 2005 Decision between the AQF Diploma and Certificate III rates in the *ACT Award* and the *Victorian Award* and the C5 and C10 rates in the *Metal Industry Award* was made following a full assessment of the work value of children's services workers in 2005 and a benchmarking of classifications and rates of pay in those awards to the *Metal Industry Award*;

- the outcome in the 2005 Decision was followed in the equivalent awards in Western Australia, South Australia and the Northern Territory prior to the award modernisation process, so that it applied to the majority of childcare workers;

- the 2005 Decision was made having regard to detailed evidence of the skill, responsibility and conditions under which childcare work was performed and a comparison of comparable classification levels;

- the fact that the AIRC Full Bench did not hear any evidence from workers under the *Metal Industry Award* was not necessary for it to reach the work value conclusions that it did because, firstly, the classifications descriptions in clause 1.2 of Schedule 6 to the *Metal Industry Award* contained a high level of detail as to the skills, qualifications and work performed by each worker under the applicable classifications, secondly, the employer parties did not ask the Full Bench to hear such evidence or present it themselves and, thirdly, despite numerous opportunities since, no employer party has ever asked for the nexus established in the 2005 Decision to be revisited, but instead submitted that the *Children's Services Award* should be based on the conclusion reached in the 2005 Decision;

- although the 2005 Decision was made in a particular statutory context, that does not exclude the possibility that it could be used in other statutory contexts;

- in the period since the 2005 Decision, including during the Work Choices phase, the award modernisation process, and the transitional and four yearly review of modern awards, there have been numerous opportunities to revisit and reconsider the appropriateness of using the *Metal Industry Award* as a comparator to the work performed by childcare workers under the *Children's Services Award*, and at each stage the conceptual nexus has held and the numerical nexus has remained deliberately comparable;

- the award modernisation process in particular required the AIRC to have regard to "*the principle of equal remuneration for work of equal value*", and the award modernisation Full Bench accepted submissions that the *Children's Services Award* adopt the relevant provisions of the *ACT Award* and the *Victorian Award* on the basis of the findings in the 2005 Decision as to the proper comparator and the value of the work;

- the 4 yearly review proceeded on the basis that each modern award being reviewed achieved the modern awards objective at the time it was made, and no party had sought to disturb that presumption with respect to the rates of pay for the relevant classifications in the *Children's Services Award* or the *Manufacturing Award*; and

- employees who perform work in a long day care centre or preschool covered by the award the subject of the applicant unions' application are overwhelmingly female (91-97%) and employees employed under the *Manufacturing Award* are overwhelmingly male (72-74%).

IEU submissions

[21] The IEU supported the applicant unions' application and submissions, although they did not affect the IEU's separate application because the comparators identified were not university degree qualified. The IEU submitted that it was permissible, consistent with paragraph [288] of the 2015 Decision, to establish equality or comparability of work value "*on the papers*" by looking at award classification descriptors and duty statements and analysing the work performed.

Submissions of the Australian Childcare Alliance (ACA), Australian Business Industrial (ABI) and the NSW Business Chamber (NSWBC)

[22] The ACA, ABI and the NSWBC submitted that the preliminary question should be answered in the negative. They submitted that:

- work value has been assessed by the Commission's forerunners consistent with the principles stated in the 1968 *Vehicle Industry Award* decision[11] of Senior Commissioner Taylor and the wage fixing principles established by the Accord process in the 1980s;

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[11] (1968) 124 CAR 295 at 308

- s 156(3) provided the adjustment of modern awards for "*work value reasons*" as part of the 4 yearly review, and the definition of that expression in s 156(4) is similar to the historically applied principles for work value assessments, except for the lack of a reference to a datum point;

- in relation to the 2005 Decision, the *ACT Award* and the *Victorian Award* were respondency-based instruments which did not apply to all relevant employers in their respective areas of coverage;

- the *Metal Industry Award* was also a respondency-based instrument which did not apply to all employers in Australia;

- the *Children's Services Award* was developed in the award modernisation process on a consensual basis, and while the award modernisation Full Bench made reference to the 2005 Decision and the need to preserve its effect, no substantial consideration or critical assessment was made in respect of the work of the sector;

- furthermore the *Children's Services Award* superseded 27 federal and State childcare awards, each with distinct and varying methods of determining coverage, classification structures and descriptors and wage rates;

- the result of the award modernisation process was to set aside all previous conceptions of work value in all but two (the *ACT Award* and the *Victorian Award*) of the awards which the *Children's Services Award* replaced, in circumstances where a number of those awards had been the subject of work value cases;

- the *Metal Industry Award* was one of 160 predecessor awards which was replaced by the *Manufacturing Award* in the award modernisation process, which was again conducted on a consensual basis and cast aside the work value history of many of the awards which were replaced;

- the *Manufacturing Award* has significantly broader coverage than the *Metal Industry Award*, in that it covers a broader range of manufacturing sectors and has also taken in mechanical and electrical tradespersons on an occupational basis who were previously covered by discrete industry awards;

- it was not safe or possible for the Commission to conclude that work under the *Manufacturing Award* has the same value as that under the *Metal Industry Award* given this shift in coverage; and

- the passage of 12 years since the 2005 Decision, and well-known developments in computing power, robotics and other innovations in manufacturing reinforced that the preliminary question should be answered in the negative.

Submissions of the Australian Federation of Employers and Industries (AFEI)

[23] The AFEI also submitted that the preliminary question should be answered in the negative for the following reasons:

- conclusive satisfaction about the work performed by relevant employees required probative evidence of substantial weight and significance that was contemporaneous in nature;

- the witness evidence the subject of findings in the 2005 Decision dated back to December 2003-May 2004;

- it appears from the 2005 Decision that there was no evidence from any witness about work performed under the relevant classifications in the *Metal Industry Award*;

- the conclusions of the Full Bench in the 2005 Decision were not judgments about the equivalence or comparability of the value of the work performed by employees covered by the *Victorian Award* and the *ACT Award* on the one hand and the *Metal Industry Award* on the other hand;

- rather, the Full Bench reached two broad conclusions: firstly, there had been a significant net addition to the work of employees covered by the *Victorian Award* and the *ACT Award* and, secondly, the two relevant classifications in the *Victorian Award* and the *ACT Award* were to be aligned to the two relevant classifications in the *Metal Industry Award* based upon the similarity or comparability in qualifications; and

- the alignment was not explained in terms of the value of the work performed by employees engaged in those classifications.

Submissions of the Commonwealth

[24] The Commonwealth did not take a position either way in relation to the preliminary question, but advanced the following propositions in its submissions as part of its role to assist the Commission on questions of law and the approach to be taken in applications of this kind under the FW Act:

- the determination of a comparator cannot occur in isolation and requires consideration of the particular facts and circumstances;

- the relevance of the 2005 Decision was not apparent, and the nexus relied upon by the applicant unions had to be viewed in their proper and distinguishable context;

- the legislative context was different, in that the 2005 Decision concerned the variation of minimum safety net award rates under the WR Act whereas the current applications were made under Pt 2-7 of the FW Act, which was not concerned with rates of pay in modern awards at all or the minimum wages objective;

- the Full Bench accepted an historical agreement between the parties for an alignment between the Child Care Worker Level 3 after one year's service and the Engineering Tradesperson Level 1;

- the Full Bench made the 2005 Decision in accordance with the then established approach to properly fixing minimum wages, and in that context undertook a

rigorous assessment of the contemporaneous evidence to determine the appropriate work value;

- the 2015 Decision required an evidence-based comparative exercise in which the remuneration and value of the work of a female employee or group of female employees is compared to that of a male employee or group of male employees;

- the approach taken by the applicant unions did not properly identify the comparator group, which was a hypothetical group of men employed under the C5 and C10 classifications of the *Manufacturing Award*;

- although the 2015 Decision contemplated that if the comparison was between groups of modern award-dependent employees, then established award relativities might be sufficient, at least on a prima facie basis, to establish equal or comparable value, here the hypothetical male comparator groups are not award-dependent but rather enjoy wages derived from bargained outcomes;

- determining work value entirely based on award relativities (where the male comparator is not award-dependent) would exclude from the analysis factors considered relevant in the 2015 Decision;

- applying the applicant unions' comparators in this case would mean the Commission would be unable to properly consider the true circumstances and all facets of the application; and

- finally, in the 12 years since the 2005 Decision there have been a number of relevant developments not referred to by the applicant unions, such as the introduction of the National Quality Framework and changes in the staff-child ratios.

Consideration of the preliminary question

[25] The preliminary question which was formulated in the 2017 Decision and accepted by the applicant unions as appropriate referred to the male comparator group – "work performed by employees under the C5 and C10 classifications in the *Manufacturing and Associated Industries and Occupations Award 2010*" – in a way that reflected the terminology used in the applicant unions' amended application and the preliminary question which they had earlier proposed. However the written and oral submissions made by the parties – particularly those of the Commonwealth – exposed a substantial degree of imprecision in the identification of the proposed male comparator group which we had not earlier appreciated. The real issue in this respect concerned when an employee could be said to be *under* the C5 and C10 classifications in the *Manufacturing Award*. It was always clear that the applicant unions' proposed comparator group extended beyond award-dependent employees under the *Manufacturing Award* - that is, employees who fell within the classification descriptions for C5 and C10 and who were actually paid the minimum wage rates prescribed by the *Manufacturing Award* for those classifications. As the applicant unions made plain, the purpose of the selected comparator was to demonstrate an inequality in remuneration between the award-dependent female-dominated employees under the *Children's Services Award* and employees covered by the *Manufacturing Award* who were predominantly male and paid above-award wages in order to justify the making of the equal remuneration order it sought.

[26] However, it became apparent that the applicant unions did not intend that the male comparator group be constituted by all employees "*covered*" by the *Manufacturing Award* and who would be classified as C5 or C10 according to the classification descriptors. Section 48(1) of the FW Act provides that a modern award "*covers*" an employee if the award is expressed to cover the employee. The coverage of a modern award is to be distinguished from its application; thus s 47(1) provides that a modern award applies to an employee if it covers the employee, the award is in operation and no other provision of the FW Act provides or has the effect that the award does not apply. Thus when an enterprise agreement applies to an employee, s 57(1) provides that a modern award does not apply to the employee even though it still covers him or her.

[27] Senior counsel for the applicant unions made clear in the following exchange that it was not intended that the comparator group include those employees whose employer did not actually apply the relevant classifications in the *Manufacturing Award*:

> "VICE PRESIDENT HATCHER: I'm just trying to tease out again what the question is asking us to do. So in the - for example, in the steel industry at Port Kembla they're covered by an enterprise agreement. The employer doesn't use the classification structure in the award, it has its own long established internal pay structure. Is anybody down there employed under C5 and C10? I mean there's no doubt the award would cover the work but what does it mean to say someone's employed under those classifications?
> . . .
> MR BORENSTEIN: But your Honour it may come down to this, just as for example in the situation that your Honour gave there has been a negotiation where the classifications in the award have been departed from and there's been a site specific or industry specific classification structure, different from this.
>
> VICE PRESIDENT HATCHER: It's a structure that pre-dates them coming into this award.
>
> MR BORENSTEIN: Well, however that arises, it couldn't be said that those people are employed under this classification structure.
> . . .
> VICE PRESIDENT HATCHER: So you'd have to just find people who were explicitly employed under these classifications.
>
> MR BORENSTEIN: Because it's the consequence of the premise. If the premise is that the comparator is the group that works under these classifications then when you come to the point of determining the equal remuneration or the differential, you obviously must confine your inquiry to those people who are employed under these classifications. Otherwise it's illogical. We readily accept that. We also accept that, as your Honour points out, there are a number of work places, perhaps even industries, where differential classification structures are in place. That's just a fact of the industry.
>
> It will be that those people who are not caught within this classification structure can't be argued to be the subject of the comparison, because the comparison that was made in 2005 and the comparison that we seek to make now is based on that group. We accept that. That's clear limitation. We accept that. But we say that within that group

you have a situation where the value of the work that was being performed by the childcare workers was fixed by reference to the value that was put on the minimum rate for the work of the other people. So the work was a comparable value."[12]

[28] That response indicates, as we understand it, that the proposed male comparator group is made up of employees covered by the *Manufacturing Award* to whom their employer applies the C5 or C10 classifications in that award. They may include employees to whom the award actually applies who are paid at the award rate or who are paid on an over-award basis. Also included may be employees covered by the *Manufacturing Award* to whom an enterprise agreement applies, where the agreement reproduces or incorporates by reference the C5 and C10 award classifications. So expressed, the comparator group may not be entirely "*hypothetical*", as the Commonwealth submitted, since in theory at least it consists of a real group of employees, but the identification of who is in the class for any practical purpose would be significantly problematic.

[29] That presents an initial difficulty in being able to determine conclusively that there is equality or comparability between the work value of this group and employees covered by the Diploma Level and Certificate III classifications in the *Children's Services Award* on the basis solely of the 2005 Decision and the subsequent alignment of award rates which we have earlier summarised. A practical incapacity to identify the employees who comprise the comparator group makes it hard to reach any definitive conclusion about the value of the work performed by the group. However, we consider that there are four even greater impediments to us reaching a definitive conclusion that there is equality or comparability in work value between the female and male comparator groups proposed by the applicant unions based on the 2005 Decision and the subsequent pay nexus said to have been established by that decision.

[30] First, there was no actual finding in the 2005 Decision that the Certificate III and Diploma Level employees under the *Victorian Award* and the *ACT Award* performed work of equal or comparable value to that of C5 and C10 employees under the *Metal Industry Award* that could be relied upon to satisfy the jurisdictional prerequisite for the making of an equal remuneration order under s 302 of the FW Act. It was not possible for such a finding to have been made because the Full Bench in that matter did not receive any evidence about the work performed by employees under the *Metal Industry Award* (including the conditions in which it was performed).

[31] We broadly accept the analysis of the 2005 Decision contained in the submissions of the AFEI. The Full Bench itself said that it had reached "two broad conclusions" about the application before it. The first was that there had been since 1990 a significant net addition to work requirements within the meaning of the work value principle. This conclusion itself said nothing about the comparative work value vis-a-vis employees under the *Metal Industry Award*. The second was that the rates for the "key classifications" in the *ACT Award* and the *Victorian Award*, namely the Diploma Level and the Certificate III Level, should be linked to the C5 and C10 classifications in the *Metal Industry Award* respectively. The second conclusion was based on the proposition that employees classified at the same AQF level should receive the same minimum rate of pay unless the conditions under which the work was

[12] Transcript 30 November 2017 PNs315-327.

performed warranted a different outcome, and the Full Bench did not consider that the conditions under which childcare work was performed warranted any different outcome.

[32] That second conclusion was based upon one traditionally important aspect of the assessment of work value, namely the training qualifications required, but it did not take into account the full range of considerations traditionally considered relevant to work value. The 1968 *Vehicle Industry Award* decision of Senior Commissioner Taylor[13] (referred to in the submissions of ACA, ABI and the NSWBC) was a seminal authority as to the considerations relevant to the proper assessment of work value (albeit in a manufacturing context). The Senior Commissioner identified the relevant considerations as being:

> "1. The qualifications necessary for the job;
>
> 2. The training period required;
>
> 3. Attributes required for the performance of the work;
>
> 4. Responsibility for the work, material and equipment and for the safety of the plant and other employees;
>
> 5. Conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;
>
> 6. Quality of work attributable to, and required of, the employee;
>
> 7. Versatility and adaptability (e.g. to perform a multiplicity of functions);
>
> 8. Skill exercised;
>
> 9. Acquired knowledge of processes and of plant;
>
> 10. Supervision over others or necessity to work without supervision; and
>
> 11. Importance of work to the overall operations of plant."

[33] The development of formal and binding wage-fixing principles in the 1980s resulted in a codification of the process for the assessment of work value in the *Work Value Changes* principle. At the time of the 2005 Decision, the *Work Value Changes* principle was as stated in the *Safety Net Review – Wages – May 2004*.[14] Paragraph (a) of the principle stated the critical considerations as follows:

> "(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute

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[13] (1968) 124 CAR 295

[14] (2004) 129 IR 389 at 473-4

such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle."

[34] In the FW Act, modern award minimum wages may be varied in or outside of a 4 yearly review under ss 156(3) and 157(2)(a) if the Commission is satisfied that this is justified by "*work value reasons*". That expression is defined in s 156(4) as follows:

> (4) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;
>
> (b) the level of skill or responsibility involved in doing the work;
>
> (c) the conditions under which the work is done.

[35] It is readily apparent that an assessment of work value has involved commonly-accepted considerations from the 1968 *Vehicle Industry Award* decision through to the current statutory context. It is equally apparent that the 2005 Decision, insofar as it compared the work of childcare workers and employees under the *Metal Industry Award*, only considered the qualifications and training required, and did not purport to otherwise compare the nature of the work or the level of skill and responsibility involved in performing the work. The Full Bench's finding that the conditions under which childcare workers performed their work did not disqualify them from the rate they were otherwise entitled to based on comparative AQF levels was of course relevant to an assessment of work value, but it was not a finding that involved a comparison between the working conditions of the relevant classifications of child care workers and those of the C5 and C10 classifications under the *Metal Industry Award*. No such comparison could be made because no evidence was adduced about the working conditions of the latter group.

[36] That is not to say that the 2005 Decision would not be relevant to a consideration of whether employees under the current Diploma and Certificate III Level classifications in the *Children's Services Award* perform work of equal or comparable value to employees under the C5 and C10 classifications in the *Manufacturing Award*. It is, arguably, a highly persuasive consideration in favour of the conclusion that there is equality or comparability of work value. However it cannot by itself support the positive answer to the preliminary question sought by the applicant unions.

[37] Second, the findings in the 2005 Decision are in any event based on evidence that is more than 13 years old, and that gives rise to the real possibility that the relative work value

of the comparator groups has altered over that period. The employer parties and the Commonwealth have pointed to changes in the regulatory framework applicable to childcare, including staff-child ratios and the introduction of the National Quality Framework, and dynamic developments in manufacturing. The applicant unions' own third further amended application contained the following contentions:

> "*Changes to work value*
>
> 60. Previous work value assessments of the work in the Sector only addressed the work value issues identified at the time of those assessments.
>
> 61. The Sector has undergone significant changes since those assessments. The current wages and conditions do not reflect the changes to the value of the work over time."

[38] The third further amended application went on to particularise these changes, which included changes to the extent of utilisation of long day care service, the attributes of children in care and the expectations of clients, and the introduction of the National Quality Framework, and to conclude:

> "74. These changes to the skills, responsibilities and qualifications required to perform the work constitute a significant net increase in work value. This work value is not recognised in the present pay of employees in the Sector compared to the wages and entitlements of employees in other occupations and/or other industries with comparable skills, responsibilities and qualifications."

[39] That is, the applicant unions themselves contend that the rates of pay in the *Children's Services Award* do not properly reflect the work value of employees covered by that award.

[40] In the absence of any evidence about these matters, we could not positively be satisfied that, even if there had been an equivalence in work value established in the 2005 Decision, that equivalence remains 13 years later. Indeed the contentions of the applicant unions in their third further amended application to which we have referred give rise to the possibility that the proper conclusion might be that employees under the Diploma-level and Certificate III classifications in the *Children's Services Award* now perform work of *greater* - not equal - value than employees under the C5 and C10 classifications of the *Manufacturing Award*.

[41] The submission made by the applicant unions that because employer parties have had various "opportunities" - under the Work Choices phase of the operation of the WR Act, during the award modernisation process conducted under Pt 10A of the WR Act, during the transitional review conducted pursuant to Sch 5 Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and during the 4-yearly review of modern awards conducted under s 156 of the FW Act - to challenge the pay nexus established by the 2005 Decision, but did not do so, the nexus remains demonstrative of an equality or comparability, is not persuasive. A variety of inferences may be drawn from that history, including that prior to the current proceedings employer parties had no cause to turn their minds to the question of equivalence in work value. It is correct that in the award modernisation process the predecessor organisation to the ACA submitted, and the award modernisation Full Bench accepted, that the classifications and rate structure for the new

Children's Services Award should be derived from those existing in the *ACT Award* and the *Victorian Award*. However there is no indication that in taking this approach the Full Bench formed any view about equivalency in work value with employees under the *Metal Industry Award*. The entirety of the Full Bench's reasoning (in its decision issued on 25 September 2009[15]) as to the adoption of the classification structure in the *ACT Award* and *Victorian Award* was as follows:

> "[93] We publish a draft Children's Services Award 2010. The classification structures for childcare employees have, in recent times, been the subject of work value assessments by the Commission and this is reflected in the exposure draft. The structure includes family day care co-ordinators. We recognise that these classifications may also be included in the exposure draft for the Social, Community, Home Care and Disability Services Industry Award 2010. Award coverage will depend on the industry of the employer."

[42] While it may be excessive to describe the award modernisation process, as the ACA/ABI/NSWBC did, as "*brutal*", it was certainly a pragmatic process in which it was necessary to achieve the ambitious outcomes mandated by Pt 10A of the WR Act in a short period of time. There is no basis to read into the Full Bench's reasoning any broader conclusion than that expressly stated, nor was it necessary for the Full Bench to reach any implicit conclusion about equivalency in work value with employees under the *Metal Industry Award*, or the *Manufacturing Award* developed during the same process, in order to discharge its award modernisation functions under Pt 10A.[16]

[43] We also do not accept the applicant unions' submission that the fact that the nexus it relies upon has not been disturbed in the 4 yearly review by any action of the Commission, independent of application or submissions made by interested parties, necessarily means that the nexus can still be taken to demonstrate conclusively equality or comparability in work value. It is correct to say that, under s 156 of the FW Act, the Commission has the obligation to discharge the functions of the 4 yearly review independent of any submissions or application made, or not made, by any interested party. It is also correct to say that the Commission has proceeded from the presumption (as it did in relation to the Transitional Review) that the deeming of awards made as a result of the award modernisation process as modern awards for the purpose of the FW Act under item 4 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* involved an implicit legislative acceptance that the terms of the modern awards were consistent with the modern awards objective at the time they were made.[17] However it cannot be concluded from this that because the modern awards objective requires, in s 134(1)(e), that "*the principle of equal remuneration for work of equal or comparable value*" be taken into account, that the Commission's non-disturbance of the pay nexus represents a continued satisfaction that there remains equality or comparability in the work value of the relevant classifications in the *Children's Services Award* and the *Manufacturing Award*. This is so for at least the following reasons:

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[15] [2009] AIRCFB 865

[16] The considerations required to be taken into account under s 576B(2) of the WR Act in the conduct of the award modernisation did not include equal remuneration for work of equal or comparable value.

[17] See *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, 241 IR 189 at [24]

(1) The presumption referred to was that modern awards met the modern awards objective *at the time they were made*, not at the time the review was being conducted. That is, it was *not* presumed that subsequent events had not altered the position.

(2) The 4 yearly review of modern awards (including the review of the *Children's Services Award*) has not yet been completed, so that it is unsafe to assume that the Commission has reached the conclusion posited by the applicant unions.

(3) Section 134(1)(e) does not require positive satisfaction that the principle of equal remuneration for work of equal or comparable value has been met in respect of any particular modern award, only that it has been taken into account.

(4) In any event, on one view the s 134(1)(e) consideration is only to be taken into account in a way that is internal to the modern award under consideration – that is, it only requires regard to be had to whether the classifications and minimum rates of pay within a particular modern award provide for equal remuneration for work of equal or comparable value amongst the employees covered by the particular award. The applicant unions' submissions imply that s 134(1)(e) has a broader application, but if so that would put into question the separate purpose of equal remuneration orders under Pt 2-7. However because this issue was not the subject of submissions or contest before us, we do not propose to express any final view about it.

[44] Third, the coverage of the *Manufacturing Award* is significantly different to that of the *Metal Industry Award* which was said by the applicant unions to be the subject of an equivalency of work value finding in the 2005 Decision. Part I of the *Metal Industry Award* (in which the C5 and C10 classifications were located) covered "*the engineering, metal working and fabricating industries in all their branches*", and this was taken to include 62 identified industry sectors and any "*operation, process, duty and function carried on or performed in or in connection with or incidental to any of the foregoing industries*" (subject to various specific exceptions). That this coverage was extended in the *Manufacturing Award* developed as part of the award modernisation process to a broader range of industries and occupations was made clear in the award modernisation Full Bench's decision of 12 September 2008[18], in which it said:

"[54] Manufacturing and Associated Industries and Occupations incorporates the following priority industries – the glue and gelatine industry, the metal and associated industries, the rubber, plastic and cable making industry and the vehicle manufacturing industry.

[55] The exposure draft of the *Manufacturing and Associated Industries and Occupations Award 2010* (the draft manufacturing award) applies to employers and employees currently covered by around 90 federal awards, common rule declarations and NAPSAs.

[56] The draft manufacturing award extends to numerous industries and occupations. The industries include the metal, engineering and associated industries, the rubber, plastic and cablemaking industry, the brass, copper and non-ferrous metals industry

[18] [2008] AIRCFB 717

and the glue and gelatine industry. The occupations include maintenance employees, draughtspersons, production planners, technical workers, engine drivers and trainee engineers and scientists, where no other modern industry or occupation award applies to such employees."

[45] The coverage provision of the *Manufacturing Award* reflected, with some modifications which are not presently relevant, the coverage clause in the exposure draft published in conjunction with the above decision. It is not necessary for present purposes to identify every feature of this expanded coverage; one example is sufficient. At the time of the 2005 Decision, the rubber, plastic and cable making industry was not, in the federal system, covered by the *Metals Award*, but by the *Rubber, Plastic and Cable Making Industry – General - Award 1996*. That industry is now covered by the *Manufacturing Award*, as clause 4 - *Coverage* of that award makes clear.

[46] To the extent that the 2005 Decision represented a conclusion concerning equivalency of work value as between the relevant classifications of the *ACT Award* and the *Victorian Award* on the one hand and the *Metal Industry Award* on the other, we think it would be unsafe to automatically apply any such conclusion to the *Children's Services Award* and the *Manufacturing Award* because the latter award (including its C5 and C10 classifications) now covers significant classes of employees who were not covered by the *Metal Industry Award* at the time of the 2005 Decision and accordingly could not have been the subject of any work value equivalency finding made in that decision.

[47] Again, to state that is not to say that, with the assistance of some appropriate evidence, the conclusion might not be reached that the expansion in coverage of the *Manufacturing Award* did not affect the value which might be assigned to the work of all persons under the C5 and C10 classifications. However we do not consider that it can simply be assumed that there was no effect simply because the new areas of coverage were brought within the same classification structure as that contained in the *Metal Industry Award* which was the subject of the pay nexus established in the 2005 Decision. Certainly in the absence of any finding to that effect we could not assume that the award modernisation Full Bench had work value equivalency with the *Children's Services Award* in mind when it developed and made the *Manufacturing Award*.

[48] Finally, the applicant unions' proposed comparator group is to a significant degree composed of persons who, as earlier discussed and was not in dispute, are in receipt of over-award payments either through formally bargained enterprise agreements or less formal arrangements. In the absence of any evidence about the basis for the payment of those over-award payments, we would not be prepared to assume that those over-award payments do not include any element of work value that is not included in the classification descriptors for the C5 and C10 classifications in the *Manufacturing Award*. For example, it may be that an over-award payment is reflective of some aspect of the conditions under which the work is performed which is not dealt with in the classifications descriptors, such as a remote work location or unpleasant working conditions, or that it is paid for the exercise of some special skill unique to a particular workplace. That may mean, whatever was found in the 2005 Decision, that members of the comparator group under the C5 and C10 classifications on over-award payments in fact perform work of a greater value than those under the relevant classifications in the *Children's Services Award*, notwithstanding the pay nexus in award minimum rates.

[49] In the 2015 Decision, the Full Bench contemplated that a fairly straightforward work value comparison between male and female *award-dependent* groups might occur on the basis of relativities in pay rates:

> "[288] The means by which equal or comparable value may be established will depend on the groups of male and female workers being compared. In some cases it may be quite straightforward. If, as submitted by United Voice and AEU, the comparison is between groups of modern award-dependent employees, then established award relativities originating in the restructuring of awards as part of the Structural Efficiency process may be sufficient, at least on a *prima facie* basis, to establish equal or comparable value. Each case will have to turn on its own facts."

[50] However that passage is not relevant here where the male comparator group under the *Manufacturing Award* is not award-dependent and, indeed, was chosen for the very reason that it was not. In this context the following warning given by the Full Bench in the 2015 Decision is apposite (emphasis added):

> "[291] ... 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."

[51] The comparator group chosen by the applicant unions is clearly of the more difficult type referred to in the emphasised part of the passage above. The applicant unions suggested in their oral submissions that at some later stage in the proceedings, *after* it had been established that the two comparator groups of opposite gender performed work of equal or comparable value, the Commission could then look at the value of the work actually being performed when it undertook the required comparison of remuneration. Thus senior counsel for the applicant unions submitted:

> "MR BORENSTEIN: ... We say, your Honour, that the starting point is to look at what they are required to do at a minimum and that if there is a finding of comparable worth between the two groups at that level, then we say that's sufficient to establish a comparator for the purposes of the section. If in the subsequent - in the stage 3 as the Bench has it, there is a need to look at whether remuneration is different for work of equal or comparable value, then at that point one may look to see whether there is a disparity or a significant disparity between the work described in the award and work actually performed and if there is, how that is reflected in the remuneration."[19]

[52] The "*stage 3*" referred to we understand to mean the third element of the jurisdictional prerequisite identified in paragraph [18] of the 2017 Decision (set out in paragraph [3] above).

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[19] Transcript 30 November 2017 PN95

So understood, this submission is tantamount to the "discounting" approach which was specifically considered and rejected in the 2015 Decision.[20] In that respect, the Full Bench said:

> "[305] As we have earlier discussed, the use of the word 'may' in s.302(1) indicates that the making of an equal remuneration order is discretionary. In exercising the discretion, the Commission must take into account the matters identified in s.302(4). However, as earlier stated, if an order is made, it must be one which *ensures* equal remuneration as between the female and male employees being compared. Consequently the function of *equalising* remuneration in the prescribed circumstances is a somewhat narrow one; it does not involve a general discretion for the *setting* of a level of remuneration that the Commission may consider to be appropriate in the circumstances. Once it is established that a first group of employees of one gender are performing work of equal or comparable value to that of a second group of employees of the opposite gender but are receiving less remuneration for it, any equal remuneration order which the Commission decides to make must *equalise* the remuneration of the two groups. Because s.303(2) prohibits achieving this by reducing the remuneration of the second group to that of the first group or at all, equalisation can only be achieved by raising the remuneration of the first group to that of the second group. Section 303(3) allows such an increase to be implemented in stages if the Commission considers that it is not feasible to apply the entire increase from the date the equal remuneration order comes into effect. But the Commission is simply not empowered to make an equal remuneration order which increases remuneration of the first group to a level below that of the second group, since such an order would not discharge the statutory purpose of ensuring equal remuneration.
>
> . . .
>
> [307] Under s.302(5), once the Commission has concluded that the employees or groups of employees being compared are performing work of equal or comparable value, the Commission only has to be satisfied that 'there is not equal remuneration' in order to establish the requisite jurisdictional fact. We have earlier discussed what that expression means. There is no warrant in the text of the section for the imposition of a further requirement to dissect any difference in remuneration, to determine the causes of the various elements of the difference, and to dismiss the application if the difference cannot be concluded to be 'gender-related'."

[53] Although the applicant unions' submissions before us did not go so far as to say that any difference in remuneration between the comparator groups had to be demonstrated to be gender-related, they did suggest that there needed to be some further step, once a difference in remuneration was identified, to analyse the extent to which the pay gap might by justified by work value considerations not accounted for in the award classifications and the associated minimum rates of pay. That approach is incorrect, for the reasons stated in the 2015 Decision. If the value of the *actual* work performed by the male comparator group is higher than that of the female group, regardless of what the applicable award classifications may say, then the comparator groups simply do not perform work of equal or comparable value in the first place, and the case fails at the outset.[21]

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[20] [2015] FWCFB 8200 at [295]-[311]

[21] See ibid at [311]

[54] For the above reasons, we conclude that the preliminary question must be answered in the negative.

Disposition of the application

[55] The applicant unions accepted, consistent with paragraph [26] of the 2017 Decision and their correspondence to the Commission of 27 July 2017, that the logical consequence of a negative answer to the preliminary question was that their application had to be dismissed.[22] However, lest it be said that in light of this outcome the system for the achievement of equal remuneration established by the FW Act is ineffective, we consider it necessary to make three observations. The first is that the applicant unions elected to place all their forensic eggs in one basket by seeking to demonstrate the required equality or comparability in work value between its selected male and female comparator groups by reference only to the 2005 Decision and the subsequent historical pay nexus without calling any evidence whatsoever. They could have taken a different course, such as relying on the 2005 Decision and the subsequent pay nexus together with contemporary evidence concerning the work of employees in the two comparator groups to demonstrate the necessary equivalency in work value. As we have earlier stated, although the 2005 Decision and the pay nexus do not alone conclusively demonstrate this, they may nonetheless have formed significant and persuasive elements of a case of much larger evidentiary dimensions. However by deciding to eschew the need for evidence and have the matter determined, as the IEU put it, "*on the papers*"[23], the applicant unions have necessarily fallen short in attempting to satisfy the jurisdictional prerequisite for the making of an equal remuneration order.

[56] The second observation is that the applicant unions' third further amended application included a contention that the wages paid to employees in the childcare sector - which are primarily at the award level - have been subject to gender-based undervaluation. In this respect the applicant unions' third further amended application included the following contentions:

> "**GENDER BASED UNDERVALUATION**
>
> 57. The wages paid to employees in the Sector do not adequately reflect the:
>
>   a. skills, responsibilities and qualifications required to perform the work;
>
>   b. environment in which the work is performed; and
>
>   c. social and economic benefit arising from the work,
>
>   when compared to work requiring equal or comparable skills and responsibilities in other occupations and/or other industries.
>
> 58. This is caused by factors including:
>
>   a. structural undervaluation of the work;

[22] Transcript 30 November 2017 PNs368-9

[23] Transcript 30 November 2017 PN158

. . .

Structural undervaluation

59. The undervaluation of the work performed in the Sector has been caused by a variety of structural factors that result from the predominance of women working in the Sector including:

a. social undervaluation of the skills and responsibilities required to perform the work as:

i) "soft" skills;

ii) an extension of the unpaid work performed by women in the domestic sphere;

iii) skills that "naturally" occur in women rather than are learnt or developed;

b. a history of industrial regulation characterised by consent awards without adequate assessment of work value or correction of external award relativities;
and

c. limited bargaining power of employees in the Sector to achieve recognition of the skills, responsibilities, qualifications and benefit of the work through enterprise bargaining."

[57] We pointed out in the 2017 Decision, and do so again here, that the 2015 Decision expressly contemplated that a case of the nature pleaded above could be advanced under s 156(3) or s 157(2) (rather than under Pt 2-7):

"[292] Our conclusion that Part 2–7 requires a comparator group of the opposite gender does not exclude the capacity to advance a gender-based undervaluation case under the FW Act. We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2). Those provisions allow the variation of such minimum rates for 'work value reasons', which expression is defined broadly enough in s.156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily

> be accommodated under s.156(3) or s.157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding."

[58] Additionally, the contentions in the third further amended application concerning changes to the work value of employees under the *Children's Services Award* to which we have referred earlier in this decision could equally have been advanced as a conventional work value case under s 156(3) or s 157(2). However, for reasons which they have not explained, the applicant unions have chosen not to progress these aspects of their application in the current proceedings.

[59] The third observation is that it is open to the applicant unions to lodge a fresh application to take up the aspects of its pleaded case which it chose not to advance before us.

[60] We order that the applicant unions' application is dismissed.

VICE PRESIDENT

Appearances:

H Borenstein QC and *K Burke* of counsel on behalf of United Voice and the Australian Education Union.
L Andelman of counsel on behalf of the Independent Education Union of Australia.
N Ward and *N Roucek* on behalf of the Australian Childcare Alliance NSW, VIC, QLD, SA and WA and Australian Business Industrial and the NSW Business Chamber.
RS Warren of Counsel on behalf of the Australian Federation of Employers and Industries.
K Eastman SC and *E Raper* of counsel with *V Masters* on behalf of the Commonwealth of Australia.
J Gunn on behalf of Community Connection Solutions Australia.

Hearing details:

2017.
Sydney;
30 November.

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