

**INITIAL SUBMISSION  
ANNUAL WAGE REVIEW 2023–24**

**28 March 2024**

## 1. BACKGROUND

- 1.1 By a Statement issued by Justice Hatcher on 27 February 2024, the Draft Timetable for the Annual Wage Review 2023-2024 was confirmed.<sup>1</sup> Pursuant to that timetable, parties are to lodge initial submissions by 28 March 2024.
- 1.2 Two research reports have been issued pursuant to the Draft Research Program:
- (a) “*Characteristics of employees on the National Minimum Wage*”, February 2024 (the **Research Report**); and
  - (b) “*Gender-based Occupational Segregation: A National Data Profile*”, 6 November 2023 (the **Stage 1 Report**).<sup>2</sup>
- 1.3 On 15 March 2024, the *Stage 3 Decision* in the Aged Care Industry Work Value Case was published.<sup>3</sup> Relevantly, that decision makes findings and observations in relation to gender undervaluation.<sup>4</sup>
- 1.4 By this initial submission, we addresses the following:
- (a) the Research Report;
  - (b) the Stage 1 Report; and
  - (c) gender undervaluation and the *Stage 3 Decision*.

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<sup>1</sup> [2024] FWC 278 at [9].

<sup>2</sup> [2023] FWC 3384, Annexure A.

<sup>3</sup> [2024] FWCFB 150 (**Stage 3 Decision**).

<sup>4</sup> [2024] FWCFB 150 at [10]-[135].

## 2. THE RESEARCH REPORT

### Overview

- 2.1 The Research Report was produced with the aim to “*update our understanding of employees on adult rates of pay who have their pay set by the National Minimum Wage (NMW)*”.<sup>5</sup>
- 2.2 By reference to Australian Bureau of Statistics (**ABS**) data, namely the May 2021 Survey of Employee Earnings and Hours (**EEH**),<sup>6</sup> the report considered the characteristics of the following groups:
- (a) employees who do not have their earnings set by an award or a collective agreement and are earning the National Minimum Wage (**NMW**) (described as “*NMW-reliant*”) and compare them to modern award-reliant employees earning the NMW;
  - (b) all employees on the *Miscellaneous Award 2020*; and
  - (c) employees on individual arrangements earning within 10 per cent above the NMW.
- 2.3 A summary of the conclusions made appear below:
- (a) changes in the coverage of the Miscellaneous Award do not appear to have made a significant decrease to estimates of the number and proportion of employees earning the NMW rate that are award and agreement free;<sup>7</sup>
  - (b) almost half of all employees earning the NMW or less were paid by an award, with the majority of the remaining employees paid by an individual arrangement;<sup>8</sup>
  - (c) some characteristics of NMW-reliant employees were found to be similar to the characteristics of NMW employees whose pay is set by modern awards and all employees on the *Miscellaneous Award*;<sup>9</sup>

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<sup>5</sup> Research Report 4.

<sup>6</sup> The Research Report also considered data derived from the Melbourne Institute’s Household, Income and Labour Dynamics in Australia (**HILDA**) survey.

<sup>7</sup> Research Report 40.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

- (d) greater differences arise in their occupations and the size of their employer, with a lower proportion of NMW-reliant employees classified as Labourers and a much higher proportion employed in small and micro businesses compared to the other two groups;<sup>10</sup>
- (e) employees earning up to 10 per cent above the NMW were found to be less similar than the other groups, with the results showing they are older (on average), less often employed on a casual basis, work longer hours and for larger businesses and tend to work in different industries compared to NMW-reliant employees;<sup>11</sup> and
- (f) analysis of the EEH survey also identified that over one-third of NMW employees have hourly earnings below the NMW (i.e. earning equal to or less than 95 per cent of the NMW).<sup>12</sup>

2.4 In addressing the limitations of the EEH data, the Research Report said:

*“despite the EEH survey being perhaps the best data source for this type of research given its large sample size and multiple survey questions related to method of setting pay, there are still limitations to the data. The EEH is not designed to specifically identify employees whose pay is set by the NMW order. There are no prompts for employers to respond to paying the NMW, which only exists for other methods of setting pay, such as modern awards, enterprise agreement and individual arrangements. While this paper provides a detailed analysis of the characteristics of employees who are on an individual arrangement and earning the NMW and therefore considered to be award/agreement free, the data in isolation cannot provide explanations for why this group of employees, albeit small, exists.”<sup>13</sup>*

## **Observations**

2.5 Any reflections upon the NMW need to be seen in the context of the review of the entry level modern award rates in C2019/5259.

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 41.

### 3. THE STAGE 1 REPORT

#### Overview

- 3.1 The Stage 1 Report focused on 29 “*priority occupations*” said to be affected by high levels of feminisation, where undervaluation and pay equity issues are most likely to occur.
- 3.2 Those “*priority occupations*” met the following criteria:
- (a) large (containing over 10,000 people);
  - (b) very highly feminised (over 80% female); and
  - (c) located within feminised industry classes (over 60% female).
- 3.3 By reference to ABS data,<sup>14</sup> those occupations were observed to be “*large, highly feminised occupations in feminised industries employ over 1.1 million workers, constituting over 9% of the workforce*”.
- 3.4 Thirteen modern awards were identified as relevant to pay of those priority occupations. For ease of reference, those awards (and corresponding occupations) are listed below:
- (a) *Nurses Award 2020 (Nurses Award)* (Midwives, Registered Nurses, Enrolled and Mothercraft Nurses, Nurse Managers);
  - (b) *Educational Services (Teachers) Award 2020* (Early Childhood (Pre-Primary School) Teachers; Primary School Teachers);
  - (c) *Children’s Services Award 2010* (Child Carers);
  - (d) *Health Professionals and Support Services Award 2020* (Dental Assistants, Receptionists in Hospitals and General Practice, Medical Technicians, Psychologists);
  - (e) *Educational Services (Schools) General Staff Award 2020* (Education Aides);
  - (f) *Hair and Beauty Industry Award 2020* (Hairdressers and Beauty Therapists);
  - (g) *General Retail Industry Award 2020 (Retail Award)* (Clothing Retail Sales Assistants and Retail Managers);
  - (h) *Aged Care Award 2010 (Aged Care Award)* (Nursing Support and Personal Care Workers; Aged and Disabled Carers);

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<sup>14</sup> Australian Bureau of Statistics 2021 Census of Population and Housing; 2021 Survey of Employee Earnings and Hours.

- (i) *Social, Community, Home Care and Disability Services Industry Award 2010 (SCHADS Award)* (Aged and Disabled Carers);
- (j) *Pharmacy Industry Award 2020* (Pharmacy Sales Assistants);
- (k) *Legal Services Award 2020* (Conveyancers and Legal Executives);
- (l) *Animal Care and Veterinary Services Award 2020* (Veterinary Nurses); and
- (m) *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Award 2020* (Dental Assistants).

3.5 The Stage 1 Report sets out “*workforce characteristics*” and data relevant to pay for several “*feminised occupations*” (and industries) using ABS data.

### Observations

3.6 Without wishing to question the validity of the data underpinning the findings in the Stage 1 Report, there is a need to be careful about conflating “*characterisations*” without an appropriate level of analysis and consideration.

3.7 Throughout the Stage 1 Report, reference is made to “*highly feminised occupations*”,<sup>15</sup> “*feminised industries*”<sup>16</sup> and “*priority occupations*” (there is also one reference to “*female-dominated industries*”). Except for the criteria set out for identifying “*priority occupations*”, those terms are not clearly defined. By contrast, in the *Stage 3 Decision*, a further set of references are used to describe “*women’s work*”,<sup>17</sup> the female characterisation of work of “*caring work*”,<sup>18</sup> “*female-dominated industries and occupations*”<sup>19</sup> and “*female-dominated work*”.<sup>20</sup>

3.8 We would be concerned that the Commission do not commence from an assumption that those propositions (namely, “*highly feminised occupations*”, “*women’s work*”, “*caring work*” and “*female-dominated work*”) are one in the same. In particular, whether the arbitral history of “*women’s work*” can be comfortably associated with an arbitrary

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<sup>15</sup> 47 references in the Stage 1 Report.

<sup>16</sup> 37 references in the Stage 1 Report.

<sup>17</sup> [2024] FWCFB 150 at [36], [40], [41], [42], [51], [67], [86], [89], [90].

<sup>18</sup> [2024] FWCFB 150 at [71], [160], [163], [170], [173].

<sup>19</sup> [2024] FWCFB 150 at [19], [75], [156].

<sup>20</sup> [2024] FWCFB 150 at [73], [92], [105].

percentage of female vs male workers in an industry is something that will need to be explored.

- 3.9 Certain presumptions may be more easily accepted with limited inquiry when the percentage of female workers in a female-dominated occupation is objectively very high (e.g. nurses). However, the same presumption may not necessarily be available where the “*female-dominated*” workforce comprises of a much lower percentage such as 55% female workers.

## 4. GENDER UNDERVALUATION AND THE STAGE 3 DECISION

### Overview

- 4.1 The Stage 1 Report suggests that undervaluation is “*most likely to occur*” in industries affected by “*high levels of feminisation*”. In light of that observation, we turn to the most recent commentary by the Commission on the topic of gender undervaluation: the *Stage 3 Decision* in the Aged Care Industry Work Value Case.<sup>21</sup> In many respects, that decision settles the overarching philosophical debate as to “*gender undervaluation*” and the setting of award minimum rates.<sup>22</sup>
- 4.2 The broader concept of gender undervaluation was brought to the forefront of the Expert Panel’s considerations in the Aged Care Industry Work Value Case due to the insertion of subsection (2B) into s 157 of the *Fair Work Act 2009* (Cth) (**FW Act**).
- 4.3 That subsection is extracted below:
- “(2B) The FWC’s consideration of work value reasons must:
- (a) be free of **assumptions based on gender**; and
- (b) include consideration of **whether historically the work has been undervalued because of assumptions based on gender**.”<sup>23</sup>
- 4.4 The Expert Panel consider the construction of the new provision at [10]-[23] (noting that neither “*assumptions based on gender*” or “*undervalued*” are defined by the FW Act).
- 4.5 The observations and findings of the Expert Panel in the *Stage 3 Decision* with respect to “*assumptions based on gender*” and historical gender undervaluation have application in three distinct contexts (or categories):
- (a) direct care employees covered by the *Aged Care Award 2010*, *SCHADS Award 2010* and *Nurses Award 2020* (**direct care employees in the aged care sector**);
  - (b) “*female-dominated ‘caring’ work*”;<sup>24</sup> and
  - (c) general.

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<sup>21</sup> [2024] FWCFB 150 (**Stage 3 Decision**).

<sup>22</sup> [2024] FWCFB 150 at [10]-[135].

<sup>23</sup> *Fair Work Act 2009* (Cth) s 157(2B) (emphasis added) (**FW Act**).

<sup>24</sup> [2024] FWCFB 150 at [173].



- 4.6 A consideration of each category demonstrates that the findings in the *Stage 3 Decision* may not have universal application to all female-dominated industries: a universal standard is not the effect of the decision.
- 4.7 Whilst the *Stage 3 Decision* plainly provides an essential starting point for a discussion of historical gender undervaluation in female-dominated industries subject to modern awards, the specific findings with respect to gender undervaluation and direct care employees in the aged sector are confined to female dominated “caring” work and changes to the nature and demographics of the specific sector.
- 4.8 The relevant findings are summarised below.

### **Category 1: Direct care employees in the aged care sector**

#### **Key Findings for direct care employees**

- 4.9 The *Stage 3 Decision* determined that “*the work of aged care sector employees has historically been undervalued because of assumptions based on gender*”.<sup>25</sup>
- 4.10 More specifically, the following findings were made with respect to gender undervaluation and direct care employees in the aged care sector:
- (a) the historical analysis of the federal award rates of pay for personal care workers (**PCWs**), home care workers (**HCWs**) and assistants in nursing (**AINs**)<sup>26</sup> was held to show “*that that they have never been the subject of a work value assessment by the Commission or its predecessors*”;<sup>27</sup>
  - (b) the alignment of the Certificate III PCW, HCW and AIN to the C10 classification “*has meant that the award rates of pay for PCWs, HCWs and AINs have never properly comprehended the exercise of the ‘invisible’ skills involved in aged care work identified in the expert report of Associate Professor Anne Junor*”,<sup>28</sup>

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<sup>25</sup> [2024] FWCFB 150 at [24].

<sup>26</sup> See at [2024] FWCFB 150 at [96]-[135].

<sup>27</sup> [2024] FWCFB 150 at [156].

<sup>28</sup> [2024] FWCFB 150 at [156].

- (c) the “invisible skills”<sup>29</sup> were “effectively disregarded by the simplistic use of the masculinised C10 benchmark as the basis for the award pay structures for PCWs, HCWs and AINs”;<sup>30</sup>
- (d) the disregard of “invisible skills” lies “at the heart of the gendered undervaluation of work” and to represents “a continuation of the history ... of treating the skills exercised in female-dominated industries and occupations as merely feminine traits and not representative of work value in the traditional, narrowly-defined sense”;<sup>31</sup> and
- (e) neither the “professionalism of the nursing occupation” (that occurred across the 1990s) or the “invisible skills” exercised in the aged care sector were factored into the setting of minimum award rates in the Nurses Award.<sup>32</sup>

**The new “benchmark pay rate” for direct care employees**

- 4.11 In light of the conclusions with respect to PCWs, HCWs and AINs, the Expert Panel held that the appropriate course forward was to “identify a benchmark pay rate for a key classification and then construct a new and uniform classification structure on the basis of that benchmark rate, consistent with the approach outlined in paragraph [965] of the Stage 1 decision”.<sup>33</sup>
- 4.12 As to the “new” benchmark rate, the Expert Panel observed:

*“The benchmark rate which we set must be one which is justified by work value reasons, as required by s 157(2)(a), and our determination of this rate must be free of assumptions based on gender in accordance with s 157(2B)(a). Within these statutory constraints, we also consider it desirable to establish a rate which is consistent with minimum rates for like work and which will be conducive to a stable award system which, while free of gender bias, does not encourage leapfrogging.*

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<sup>29</sup> Such as interpersonal and contextual awareness, verbal and non-verbal communication, emotion management and dynamic workflow coordination.

<sup>30</sup> [2024] FWCFB 150 at [156].

<sup>31</sup> [2024] FWCFB 150 at [156].

<sup>32</sup> [2024] FWCFB 150 at [156].

<sup>33</sup> [2024] FWCFB 150 at [157].

*In respect of this last consideration, there is a difficulty in that much of our earlier analysis as to how historic gender assumptions have vitiated the proper fixation of award rates based on work value for the aged care sector is also likely to equally apply to award rates for other types of female-dominated ‘caring’ work. This makes problematic the search for an award comparator. Certainly, an appropriate comparator is not to be found in the C10 classification framework currently found in the Manufacturing Award.”<sup>34</sup>*

4.13 The observations of the Expert Panel in the preceding extract demonstrate that considerations of gender undervaluation do require some specificity that is informed by the statutory framework, namely, regard must be had to the following:

- (a) work value reasons (s 157(2A));
- (b) considerations under s 157(2B), including:
  - (i) the impact of gender assumptions upon the work, in this case, caring work in the aged care industry; and
  - (ii) the identification of historical gender undervaluation throughout wage fixing principles that carried through to the modern award system (which may bring in consideration both beyond and specific to caring work in the aged care sector); and
- (c) the modern awards objective and minimum wage objective.

4.14 Focusing upon the need to avoid gender assumption (etc), in setting a new benchmark rate the solution identified by the Expert Panel was to adopt *“the minimum rate established by the SCHADS Award operating in conjunction with the equal remuneration order (ERO) applicable to Certificate III-qualified social and community service employees.”*<sup>35</sup>

4.15 Accordingly, the benchmark rate determined by the Expert Panel was \$1,223.90 per week (rounded to the nearest 10 cents). That rate is to apply to Certificate III-qualified PCWs, AINs and HCWs.<sup>36</sup>

4.16 The primary reason for selecting the Equal Remuneration Order (**ERO**) rate as the basis of the new benchmark rate was set out as follows:

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<sup>34</sup> [2024] FWCFB 150 at [159]-[160].

<sup>35</sup> [2024] FWCFB 150 at [161].

<sup>36</sup> [2024] FWCFB 150 at [170].

***“[T]he ERO rates have been authoritatively determined to be rates which ensure equal remuneration for work of equal or comparable value. They can therefore be relied upon as being free of assumptions based on gender. We are satisfied that, in our consideration of the work value reasons set out in paragraph [156] above, the adoption of \$1223.90 per week as the benchmark rate for Certificate III-qualified PCWs, AINs and HCWs will be demonstrative of compliance with the requirement in s 157(2B)(a). The total wage increase which will be produced by the adoption of this benchmark rate, inclusive of the interim increase, will be 23 per cent. This is in our view a wage rate which is appropriately justified by the work value reasons which we have identified and will ensure that aged care sector employees at the Certificate III level have an entitlement to a minimum award wage rate which properly reflects the value of their work, including their exercise of ‘invisible’ skills, and which has been assessed on a gender-neutral basis.”***<sup>37</sup>

- 4.17 The reference to “authoritatively determined” appears to refer to the fact that the ERO was based on the Queensland State award applicable to public sector social and community service employees, which had itself been subject to an equal remuneration decision of the Queensland Industrial Relations Commission in 2009.<sup>38</sup>
- 4.18 Notwithstanding the determination to grant the ERO to rectify the gender undervaluation identified, some caution should be applied with respect to history that informs the setting of any rate. In the context of the ERO, it is relevant that the award it was applied to was a public sector award.
- 4.19 At the time of adopting the rates, with what appears to be minor adjustments with respect to loading and phasing-in, the Commission acknowledged the concerns raised by multiple employer and industry stakeholders with respect to carrying over of “public sector” rates:

*“A number of parties proposed methods for estimating the extent to which the gap between wages in the SACS industry and wages in the public sector is attributable to gender. The Joint Submission refers to a number of studies which identify a proportion of the gender pay gap which is unexplained by factors other than gender. Particular emphasis was placed on a study which found that 60 per cent of the gender pay gap is attributable to gender considerations. Other studies*

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<sup>37</sup> [2024] FWCFB 150 at [172] (emphasis added).

<sup>38</sup> [2024] FWCFB 150 at [162].

*estimated other percentages, mostly higher than 60 per cent. ABI submitted that 60 per cent was an appropriate proportion of the gap between wages in the SACS industry and wages for comparable work in the public sector to attribute to gender.*

*Ai Group submitted that gender influences can be removed from public sector rates by discounting for factors not related to gender. It relied on a study which estimated that the appropriate discount ranges from 25 per cent at the 25th percentile to 15 per cent at the 75th percentile, although the difference at the 90th percentile is much less.*

*As we have already explained, we do not think that it is appropriate to fix a relationship between the rates derived from the equal remuneration order and public sector rates. It is worth pointing out, however, that if historical differences in rates of growth in award rates and public sector agreement rates are maintained, it is likely that by 2020, at most levels, the wages resulting from the order will account for less than 60 per cent of the difference between the rates for the modern award classifications and the public sector comparator classifications used in the Joint Submission. Equally, on the same assumptions, the public sector discount proposed by Ai Group is likely to be achieved at most levels. While we are aware of various criticisms made of the public sector comparator rates selected, those criticisms do not affect the overall growth rates in public sector wages.”<sup>39</sup>*

- 4.20 Whether this benchmark rate becomes automatically adopted for a class of employee akin to the original C10 rate is a matter that will require further submission and consideration. It is not something that should, respectfully, be assumed to be correct in all circumstances for female-dominated occupations given that the rate set in the *Stage 3 Decision* rested heavily on very specific aged care sector work value findings.
- 4.21 Further support for that submission can be gleaned from the separate conclusions reached by the Expert Panel for both *direct care workers* and *indirect care workers* in the aged care sector; noting that the distinct and respective increases must necessarily factor in the considerations *vis-à-vis* gender undervaluation. However, having regard to the specific eccentricities of the work performed by the different classifications in the aged care sector separate and distinct outcomes were reached.

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<sup>39</sup> [2012] FWAFB 1000 at [70]-[72].

## Category 2: Female-dominated “caring” work

4.22 As the broader implications arising from the findings in relation to direct care employees in the aged care sector, the Expert Panel expressly address the confined scope of their findings.

4.23 At [173] the Expert Panel state:

*“We anticipate, having regard to what was said concerning gender undervaluation in paragraphs [124]–[139] of the Annual Wage Review 2022–23 decision and in the Stage 1 decision, and our analysis and conclusions in this decision, **that there is likely to be further consideration of the question of whether female-dominated ‘caring’ work covered by other modern awards has been the subject of gender undervaluation. In that context, our identification of a benchmark rate for Certificate III-level PCWs, AINs and HCWs in aged care which aligns with the Certificate III level starting rate in the ERO applying to social and community services employees provides appropriate guidance as to the rectification of historic gender undervaluation in respect of female-dominated ‘caring’ work. The adoption of such a benchmark rate for work of this nature, in replacement of the C10 rate, would provide a stable anchor point for a modern award system which ensures gender equality in the valuation of work.**”<sup>40</sup>*

4.24 That observation indicates that the “*benchmark rate*” established at [161] of the *Stage 3 Decision* should not be approached as *universal* benchmark to address the impact of historical gender undervaluation across all female-dominated industries.

4.25 Rather the application of the analysis and conclusions of the Expert Panel is confined to the rectification of historic gender undervaluation in respect of “*female-dominated ‘caring’ work*”. It is in that particular context that the “*benchmark rate*” may provide “*appropriate guidance*”. Noting the determination of the benchmark must also be linked to work value reasons and may differ occupation to occupation and sector to sector.

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<sup>40</sup> [2024] FWCFB 150 at [173] (emphasis and underlining added).

### Category 3: General

- 4.26 The *Stage 3 Decision* recognises a “wider context of gender assumptions which have pervaded the federal industrial relations system since its inception in the early 20<sup>th</sup> century”. This is addressed by reference to the following:
- (a) historical gender assumptions in award wage fixations between 1907 and 1967;<sup>41</sup>
  - (b) the “unfinished business” of the *Equal Pay Cases*; <sup>42</sup>
  - (c) the implementation (and non-implementation) of the C10 Metals Framework Alignment Approach;<sup>43</sup> and
  - (d) the award modernisation process.<sup>44</sup>
- 4.27 As a summation of the relevant industrial history that precedes the current modern awards system, each consideration must necessarily have relevance to broader considerations of the impact of gender undervaluation on the modern awards system.
- 4.28 Having regard to the broader history of gender assumptions and/or gender undervaluation in the context of wage fixing (etc) is of course not the end of the consideration, but an appropriate starting point (that also goes some way to addressing s 157(2B)(b)).

#### **Historical gender assumptions in award wage fixations between 1907 and 1967**

- 4.29 The following observations of the Expert Panel are highlighted as demonstrating the “gender assumptions” that impacted wage fixing between 1907 and 1967:
- (a) This initial wage-fixing model established in the *Harvester decision* of the Commonwealth Court of Conciliation and Arbitration (**CA Court**) was affected by gender assumptions reflective of the social and economic norms of the time. The Expert Panel observed that the “*the basic wage*” revealed explicit discrimination between genders based on their perceived social roles.<sup>45</sup>

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<sup>41</sup> [2024] FWCFB 150 at [25]-[53].

<sup>42</sup> [2024] FWCFB 150 at [54]-[75].

<sup>43</sup> [2024] FWCFB 150 at [76]-[94].

<sup>44</sup> [2024] FWCFB 150 at [95].

<sup>45</sup> [2024] FWCFB 150 at [27].

- (b) The “*discrimination on the basis of sex*” was also observed in the setting of wages in the 1912 *Fruit Pickers decision*. The following assumptions based on gender were identified:
- (i) “*the basic wage for any particular category or group of workers was dependent upon the predominant gender of the category or group*”;
  - (ii) “*where the gender of the category or group was predominantly male, the basic wage was to be set according to the Harvester decision model of the cost of living which assumed the worker was a man with a dependent wife and children. This assumption was applied notwithstanding the doubtless existence of single men, or men without children, in this category. It was also applied to women in this predominantly male category in order to prevent women ‘undercutting’ men on the basis of lower wages*”;
  - (iii) “*where the gender was predominantly female, the basic wage was to be set on the presumption that the worker had no dependants, irrespective of the actual position*”; and
  - (iv) “*it is clear that Higgins J regarded work itself, and the skills involved, as being gendered, so that certain types of work were suitable only, or more suitable, for men or for women. The reference in particular to ‘women with their superior deftness and suppleness of fingers’ is an early example of manual dexterity being treated as an inherently female trait rather than a work skill to be valued irrespective of gender*”.<sup>46</sup>
- (c) The concept of “*women’s work*” was based on assumptions about certain female traits. This in turn impacted the fixation of award minimum wages.<sup>47</sup> This was illustrated via multiple extracts from the 1919 *Archer decision*, including the following observation by Higgins J:

*“If the girls will have their finery at the sacrifice of other things more necessary, that is their business; but probably it is not fair to force the employers to pay for all that a girl may fancy as being for necessary human requirements. At the same time, we must not forget the important*

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<sup>46</sup> [2024] FWCFB 150 at [29].

<sup>47</sup> [2024] FWCFB 150 at [36].



*social function of girls' dress as a bulwark for self-respect; and it is for women who can afford it to show the way of simplicity and good taste".*<sup>48</sup>

- (d) The female basic wage set in the *Archer decision* was 54 per cent of the basic wage for men in the same decision.<sup>49</sup>
- (e) The position in relation to the fixation of margins for skill in addition to the basic wage for employees for different gender was far less transparent and consistent. Because the arbitral function of the CA Court was confined to those matters claimed which remained in dispute after conciliation, many awards were made as a result of settlements reached by the parties. In these cases, the basis for the award wage rates which resulted is usually not apparent.<sup>50</sup>
- (f) The rationale behind setting the "*male basic wage*" had direct ties to the concept of a "*family wage*".<sup>51</sup> This view continued to prevail in 1943, with the Full Court in the *Arms Explosives and Munition Workers Federation of Australia v Director-General of Munitions* observing:

*"The man's basic wage is more than sufficient for his personal needs; it purports to provide him with enough to support some family. The woman's, on the other hand, purports to be enough for her to maintain herself only."*<sup>52</sup>

The following passage was given particular emphasis by the Expert Panel:

*"the Court will not, in the exercise of its function of adjudicating between opposing interests, raise the general level of women's minimum wages in occupations suitable for women, and in which they do not encounter considerable competition from men, according to a comparison of their efficiency and productivity with the efficiency and productivity of men doing substantially similar work."*<sup>53</sup>

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<sup>48</sup> [2024] FWCFB 150 at [35]. See also the observations of the Expert Panel at [40]-[42].

<sup>49</sup> [2024] FWCFB 150 at [37].

<sup>50</sup> [2024] FWCFB 150 at [38].

<sup>51</sup> [2024] FWCFB 150 at [44].

<sup>52</sup> [2024] FWCFB 150 at [46].

<sup>53</sup> [2024] FWCFB 150 at [46].

- (g) Following the *Basic Wage Inquiry 1949-1950*, the CA Court determined it should establish a female basic wage set at 75 per cent of the male basic wage.<sup>54</sup> In refusing to create a “*uniform basic wage*” the reasoning of the Forster J made “*explicit the gender assumptions involved*”.<sup>55</sup> Those assumptions included:
- (i) “*it was socially preferable to provide a higher wage for the male because of his social obligations to fiancée, wife and family*”;
  - (ii) “*while single females were said to be anxious to receive the higher wage their interest changed on their marriage which occurred in Australia at the average age of about 25. As married women they became concerned that their husbands should bring home the largest possible pay envelope*”; and
  - (iii) “*the productivity, efficiency and the needs and the responsibilities etc. of females were substantially less than that of males in this community*”.<sup>56</sup>
- (h) The issue of gender inequalities in marginal rates was considered in the context of the *Clothing Trades Award*. Despite there being “*no dispute between the parties that persons performing the same work should be paid the same margins for skill irrespective of sex*” – the application of the principle was met with difficulties. The Expert Panel observed:
- “the rectification process contemplated still approached comparisons of work for the purpose of assessing whether the work was the same on a gendered rather than gender-neutral basis. The result was that the new Clothing Trades Award rates of pay established by the Full Bench retained separate classifications and marginal amounts for male and female workers, with a number of female classifications having no male equivalent because the work of the classification was apparently only performed by female workers.”*<sup>57</sup>
- (i) “*The introduction of the total wage concept [in the 1960s] meant that, in awards containing lower female basic wages, those lower wages were incorporated into a separate, and lower, total wage for females. The 25 per cent gender differential*

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<sup>54</sup> [2024] FWCFB 150 at [47].

<sup>55</sup> [2024] FWCFB 150 at [47].

<sup>56</sup> [2024] FWCFB 150 at [47].

<sup>57</sup> [2024] FWCFB 150 at [51].

*established by the Basic Wage Inquiry 1949–1950, thus migrated into the new total wage system (as did any gender differences in marginal amounts). However, the abandonment of the concept of the basic wage assessed on the basis of needs fatally undermined the original rationale for lower female wages”.*<sup>58</sup>

### **The “unfinished business” of the Equal Pay Cases**

4.30 As mentioned, the *Stage 3 Decision* addressed limited impact of the “*Equal Pay Cases*” upon rectifying gender undervaluation. The following observations are noted:

- (a) *“Whilst undoubtedly of historic importance, the outcome of the 1969 Equal Pay Case was subject to significant limitations. The principles it established were carefully confined to gender differentials in pay rates within awards only for work of the same or like nature and of equal value where that work was performed by both males and females. It did not seek to address or remedy gender differentials in pay rates between different awards, or in awards where the work was predominantly performed by females”.*<sup>59</sup>
- (b) Following the *1972 Equal Pay Case* most federal awards were amended (principally by consent and in some cases by arbitration) so that they contained no gender-based classification or pay rates (albeit for some awards this occurred later than the timeframe contemplated in the decision). The cumulative effect of the two equal pay cases over the period 1969–1974 was that average hourly wage rates for females increased by 44 percentage points more than for males.<sup>60</sup>
- (c) Notwithstanding the *Equal Pay Cases*, the work value comparisons for work that was performed “exclusively by females” was met with complication, requiring “work value comparisons with other female, or male, classifications on an intra—award or, if necessary, inter-award basis”. The Expert Panel observed “[t]here is scant indication that this aspect of the new principle was ever implemented”.<sup>61</sup>
- (d) The ‘equal pay for work of equal value’ principle established in the *1972 Equal Pay Case* was never formally abolished, but it was not incorporated into the wage-fixing principles which applied from 1975 to 1981 and from 1983 to 2006.

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<sup>58</sup> [2024] FWCFB 150 at [53].

<sup>59</sup> [2024] FWCFB 150 at [60].

<sup>60</sup> [2024] FWCFB 150 at [66].

<sup>61</sup> [2024] FWCFB 150 at [67].

The position applied was that equal pay cases could only be prosecuted under the 'Anomalies and Inequities' provisions of the wage principles, which were only ever applied in exceptional cases.<sup>62</sup>

- (e) The Expert Panel observed, *"it is apparent that the imposition of the requirements of the Anomalies and Inequities principle on any equal pay claims, which included that there must be no likelihood of flow-on, negligible economic cost and no reliance on any notion of comparative wage justice, operated in practice as a substantial impediment to the pursuance of equal pay cases for female-dominated industries and occupations. As a result, the 1972 Equal Pay Case principle was never fully implemented."*<sup>63</sup>

### **The C10 Metals Framework Alignment Approach**

4.31 Turning to the implementation (and non-implementation) of the C10 Metals Framework Alignment Approach, the Expert Panel observed:

*"As stated in the Stage 1 decision, the C10 Metals Framework Alignment Approach did not in principle mandate that wages for employees with qualifications equivalent to C10 must be equal to the C10 wage rate, nor did it require that qualifications be the only means for considering appropriate relativities. The National Wage Case August 1989 never expressly required cross-award alignments to be based simply on equivalent qualifications and required that 'relative skill, responsibility and the conditions under which the particular work is normally performed' be taken into account. **However, in practice, the implementation of the C10 Metals Framework Alignment Approach usually involved no more than identifying the 'key classification' in any award as that for which a Certificate III qualification under the AQF, or the equivalent, was required and then aligning that with the C10 classification rate in the Metal Industry Award. This was most commonly done in consent arrangements by which the structural efficiency principle was implemented in the early 1990s but, as will be demonstrated in respect of the Aged Care Award, this continued to be done up until and during the award modernisation process conducted in 2008–9. This represented the***

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<sup>62</sup> [2024] FWCFB 150 at [72].

<sup>63</sup> [2024] FWCFB 150 at [75].

***abnegation of the type of cross-award work value comparisons contemplated by the 1972 Equal Pay Case.***<sup>64</sup>

4.32 The *Stage 3 Decision* also stated that the C10 Metals Framework Alignment Approach “operated to inhibit the proper valuation of women’s work” in the *ACT Child Care Case*.<sup>65</sup>

The Expert Panel said:

*“... the C10 Metals Framework Alignment Approach constrained the proper work value assessment of female-dominated work by requiring, as at least as the prima facie position, alignment with the classifications for male-dominated work in the Metal Industry Award based on a bare comparison of training qualifications. The Full Bench in the ACT Child Care decision made it tolerably clear, in our view, that unconstrained by the C10 Metals Framework Alignment Approach it would have assessed the key classifications in the early childhood education and care awards under consideration as having higher work value than the identified equivalents in the Metal Industry Award.”*<sup>66</sup>

4.33 Additionally, the Expert Panel observed:

*“The failure to properly implement the C1 classification rate as part of the C10 Metals Framework Alignment Approach particularly disadvantaged female workers for two reasons. First, women are more award-reliant than men, with the proportion of female award-reliance being at its largest at higher-paid award classifications including those requiring undergraduate qualifications. Second, there is a considerable overlap between those awards containing classifications requiring an undergraduate degree and those applying to female-dominated industries.”*<sup>67</sup>

**Award modernisation**

4.34 In closing off historical considerations, the *Stage 3 Decision* also addressed the award modernisation process and shed light on the limitations of that process.

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<sup>64</sup> [2024] FWCFB 150 at [84] (emphasis added).

<sup>65</sup> [2024] FWCFB 150 at [90].

<sup>66</sup> [2024] FWCFB 150 at [92].

<sup>67</sup> [2024] FWCFB 150 at [94].

- 4.35 Whilst, not constrained by the preceding wage fixing principles and *“in theory, could have involved a full ab initio work value assessment of any female-dominated occupation or industry that was to be the subject of a modern award”* – that assessment did not occur.
- 4.36 By way of explanation, the Expert Panel said:
- (a) *“in practice, this was not possible because the statutorily-mandated process required the consolidation and streamlining of thousands of former federal and State awards into what ultimately became 122 modern awards by the end of 2009”*.<sup>68</sup>
  - (b) further, in practice, *“the classifications and rates of pay in most major modern awards were based on a precursor federal award, or in some cases a State award, and where the C10 Metals Framework Alignment Approach had previously been applied, this was retained”*.
- 4.37 As a result, *“[t]his meant that, to the extent that gender biases had historically been embedded in federal awards for all the reasons we have earlier discussed, this generally migrated into the modern award system.”*<sup>69</sup>

### **Observations**

- 4.38 Accordingly, notwithstanding the steps made to address and remove gender assumptions and the adoption of a modern award system, the minimum award rates in female-dominated industries (such as aged care) are likely impacted by historical gender undervaluation; that is a general proposition that industrial parties now have to accept based on the Expert Panel’s conclusions in the *Stage 3 Decision*.
- 4.39 Having said this, we raise that following:
- (a) The C10 framework materially assisted lifting Australian industrial relations out of the economically unsustainable challenges manifesting from leapfrogging and created an important period of stability. The modern awards objective itself reinforces the need for this stability<sup>70</sup> and if the C10 framework in its original form is no longer fit for purpose for a stable modern award system, that invites the Commission to consider further what should replace it to avoid lapsing into the challenges of history.

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<sup>68</sup> [2024] FWCFB 150 at [95].

<sup>69</sup> [2024] FWCFB 150 at [95].

<sup>70</sup> FW Act s 134(1)(g).

- (b) With the introduction of the new forms of bargaining, including the new supported bargaining regime, the Commission should operate with some sensitivity where female-dominated industries are utilising the machinery of that regime in substitution for variation to the modern award. The most obvious case in point concerns the childcare industry (B2023/538), where employers and unions are utilising the process to constructively engage with the Commonwealth as the principal funding body to lift wages. The complexity involved in securing mutually acceptable outcomes in these government funded female-dominated industries is significant and the industries involved in such supported bargaining activities may see the finalisation and translation of such arrangements across a sector as being of a higher priority than a consideration of modern award minimum wages. As such, in considering any particular modern award in relation to gender undervaluation, the Commission should place weight on the preference of the parties especially where no application has been made to vary a modern award.
- (c) We do hold legitimate anxiety about the possibility of female-dominated awards ultimately operating with higher minimum rates of pay than male-dominated awards reflected through the prism of the Australian Qualifications Framework (AQF), which on its face would appear to be gender-neutral, and for this to lead to catch-up claims or parity claims seeking restoration of historical relativities which will have an obvious material economic impact across the Australian economy as a whole.

**Filed on behalf of Business NSW and Australian Business Industrial by Australian Business Lawyers & Advisors:**

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**28 March 2024**