



Fair Work
Commission

SIR RICHARD KIRBY ARCHIVES

EQUAL PAY



A history of women's wages
and the Commission

EXHIBITION BOOKLET

The Sir Richard Kirby Archives

The Sir Richard Kirby Archives was established in 2002 under the leadership of then Australian Industrial Relations Commission President, the Hon. Justice Geoffrey Giudice AO.

Based in the Commission's Melbourne premises, and named after the tribunal's longest-serving president, its purpose is to preserve and catalogue materials important to the history of the Commission and its antecedent and successor bodies.

Since 2002, the Kirby Archives collection has grown to include photographs, documents and memorabilia as well as a series of oral history interview recordings with former Commission members, Registry staff and other key industrial relations figures.

The collection has also been used to stage public exhibitions on themes highlighting the role of the Commission in Australian industrial relations and society.

The following excerpt from a speech by the Hon. Prof. Joseph E Isaac AO, opening the archives on 25 October 2002, illustrates the Archives' value.

'Why have archives?

There are several points in answer to this question. One, the need for an important public institution, subject to changing personnel and function, to have a memory bank for the use and enlightenment at least of its changing personnel, so that they may have a sense of the history of the body to which they belong. Just as a person without a memory, effectively without functioning brains, is deficient, so an important institution without a memory bank is incomplete.

Another perfectly valid justification, even if seemingly somewhat self-promoting, is that its archives represent a celebration of the institution itself, by displaying its extraordinary history for all to see.

A further justification is that such a facility has an obvious and enduring educational function not only for its personnel but also for the community generally and scholars in particular. It is to be hoped that the many students from schools and universities who sit in on Commission hearings from time to time, may be encouraged to visit the archives and draw from them a fuller appreciation of our industrial relations system.'

Equal Pay

A history of women's wages and the Commission

The ninth exhibition of the Sir Richard Kirby Archives explores the important role Australia's workplace relations tribunal has played in addressing the gap between male and female wages.

It is a long story involving a number of landmark cases from the 1912 Fruit-pickers Case to the 2022-24 Aged Care Work Value Case, which shows the continuing re-evaluation of the equal pay deficit in work dominated by women.

The 1969 and 1972 equal pay cases are frequently cited as the most significant cases. They established the principles of equal pay for equal work and equal pay for work of equal value.

As significant as they were, these cases did not resolve the issue of gender pay equity in award minimum rates of pay for reasons including that:

- Historical inequities in wage fixation for men and women were entrenched in the system in the 60 years prior to the equal pay cases which primarily addressed issues of different rates for men and women performing similar or equivalent work **within** an award and, did not adequately deal with differentials in rates for work of equal or comparable value **between** awards.
- The impact of historical inequities has been greater in industries where work is predominantly performed by women.
- Legal, economic and practical constraints have meant that an *ab initio* approach to addressing historical inequities in women's wages by way of a fundamental reassessment of work value has not been available under generally applicable wage fixing mechanisms such as annual wage reviews, wage fixing principles and award modernisation.
- The C10 Metals Alignment Approach for award classification structures, based on masculine skills, was not appropriate to describe and reward work in feminised industries.

This booklet provides complementary information to the exhibition. It is drawn from a research paper prepared by Fair Work Commission staff for consideration in the Annual Wage Review 2023-24.

The **Stage 2 report: Gender pay equity research** deals with cases handled by the national tribunal over more than a century that show the extent to which gender-segregated occupations, industries and classifications may have been subject to gender undervaluation.

The full report can be found at: <https://www.fwc.gov.au/documents/consultation/stage-2-report-gender-pay-equity-research-2024-04-04.pdf>

Harvester decision (1907)

Ex parte H V McKay [1907] CthArbRp12, 2 CAR 1

- Concept of a basic wage in the federal system was first conceived.
- Created the dual concept:
 - basic wage – for unskilled works based on needs for ‘humblest’ class
 - secondary wage – additional wages based on skill and other necessary qualifications.
- Assumed typical worker was male, married with three children and required a wage to cover the normal needs of the average employee who was regarded as a human being needing to live in a civilised society.

Fruit-pickers decision (1912)

Rural Workers’ Union and United Labourers’ Union v Mildura Branch of the Australian Dried Fruits Association and Others [1912] CthArbRp 33, 6 CAR 61

- Making of first award for fruit-pickers and fruit-packers.
- Wages set on basis that work was unskilled and cost of living was the primary consideration.
- Fruit-pickers were primarily male and their basic wage was set by reference to Harvester decision.
- Fruit-packers were predominately female and assumed to be not under any obligation to maintain a domestic life except in exceptional cases.
- Only awarded the same rate of pay to men and women ‘fairly in competition’ working as fruit-pickers, on the assumption that if women were paid less than men, employers would prefer to employ them, thereby undercutting wages paid to men.
- Assumptions for setting wages:
 1. Basic wage for any particular category or group of workers was dependent upon the predominant gender of the category or group.
 2. Where the category or group was predominantly male, basic wage was set according to the Harvester decision model, which would also apply to women in that category or group to ensure there was no undercutting of men by women based on wages.
 3. Where the gender was predominantly female, the basic wage was set based on the presumption that the worker had no dependents irrespective of their circumstances.
 4. The work performed itself and the skills involved were regarded as being gendered with certain types of work suited to men and others suited to women.
- On this basis wages for the female fruit-packers were set at 75 per cent of the (male dominated) fruit-pickers rate.

Clothing Trades Case (Archer) (1919)

The Federated Clothing Trades of the Commonwealth of Australia v J A Archer and Others [1919] CthArbRp 99, 13 CAR 647

- Claim to establish minimum pay rates and conditions for employees in tailoring industry which sought lower rates of pay for women than for men.
- Established the norm for women's basic wages up until World War II as being set at around 54 per cent of the male basic wage for a range of occupations and industries.
- Included the concept of women's work based on assumptions about certain female traits.
- Setting of basic wage for men was different to women for the same category of work.
- Decision prescribed the minimum wage for an adult female as 'on the basis of the reasonably necessary requirements of a woman living in a civilised community', taking into account the cost of living for female workers.
- Decision illustrates how the federal award system was based on the settlement of interstate industrial disputes, where ambit claims were made by male dominated unions, reflecting gender assumptions made established.

1943 Munitions Case

Arms Explosives and Munition Workers Federation of Australia v Director-General of Munitions [1943] CthArbRp 379, 50 CAR 191 at [191]-[213]

- Concerned potential industrial unrest in small arms manufacturing, where the percentage of women employed had greatly increased due to the war. These women were paid 60 per cent of adult male rate pursuant to a 1940 agreement.
- Anomaly arose between the 60 per cent rate in the agreement and a decision of the Women's Employment Board which set the adult female rate (after probation) at 90 per cent of the male rate in other areas of arms manufacturing employing women for the first time during the war. In setting the 90 per cent rate, the Women's Employment Board had considered relative efficiency and productivity of women compared to men, inconsistent with method traditionally used by industrial tribunals to assess minimum wages.
- The Commonwealth Court of Conciliation and Arbitration found that the wages for female workers in small arms manufacture were not anomalous since they had been set according to the general rules of wage assessment.

Inquiry into Female Minimum Rates (1945)

Inquiry into Female Minimum Rates [1945] CthArbRp 195, 54 CAR 613 at [623] per O'Mara J

- Minimum wage rates set by fixing basic wage with marginal additions added having regard to relevant considerations including, skill and experience of the employee and physical conditions where work was done.
- Both implicit and explicit gender assumptions were applied in the fixing of marginal rates.
- Fixation of rates for 'women's work' in the Metal Trades Award before World War II used to illustrate in this inquiry,. Treated the skills exercised by women as inherent in their gender ('found to be adept') and having lesser value than a tradesman.
- Found female workers performing women's work in a masculine industry were paid well above predominantly feminine industries.
- In some awards margins for females in different classifications of female work were not assessed, instead a flat margin was applied to all female workers regardless of relative skills.
- In other awards, such gender discrimination was more explicit, set without any apparent justification.

Basic Wage Inquiry 1949–1950

[1950] CthArbRp 558, 68 CAR 698 at [816]-[840]

- Unions sought a uniform basic wage for all adults irrespective of gender.
- The Commonwealth Court of Conciliation and Arbitration rejected the claim for a uniform basic wage and established a female basic wage set at 75 per cent of the male basic wage.
- This outcome was a partial departure from previous approach which was to set the female basic wage by an assessment of the needs of a single adult female with no dependants.
- Appears to have been a pragmatic assessment: the highest amount which the economy could sustain.

Clothing Trades Decision 1950

Clothing and Allied Trades Union of Australia v A H Abbott and Co & Ors [1950] CthArbRp 208, 66 CAR 481

- By this time different margins for male and female workers performing work of the same nature and skill had been established despite guiding principle in Fruit-pickers decision.
- Considered union claim that margins between men and women be equalised.
- Decision did not resolve all gender-based differences in margins for the precursor to the Clothing Trades Award 1964.

Basic Wage, Margins and Total Wage Cases 1966

[1966] CthArbRp 368, 115 CAR 93 at [107] per Wright J, 129 per Gallagher J and 229 per Winter C

- Economic considerations such as inflation and national productivity became the primary determinant in adjusting both basic wages and margins.
- Practice of considering and adjusting both basic wages and margins conjointly in the same proceedings development.
- Adult minimum wage introduced, concept of the basic wage became largely redundant.

National Wage Case 1967

[1967] CthArbRp 504, 118 CAR 655

- Abolished dual concept of a basic wage to meet employee needs and (where applicable) margins based on skill (or work value).
- Replaced with total wage approach to express award wages as a single total wage.
- Adjustments of wages applied annually, with increases for economic reasons.
- The lower female basic wages were incorporated into a separate, total wage for females.
- Migrated the 25 per cent wage differential for gender that was established at the Basic Wage Inquiry of 1949-45.

Clothing Trades decision 1967

Clothing and Allied Trades Union of Australia re Clothing Trades Award 1964 [1967] CthArbRp 406, 118 CAR at [286]-[290], [677]

- Re-consideration of rate differentials for men and women for the same classifications in the Clothing Trades Award 1967.
- Restatement of equal pay principle.
- Principle had, historically, not been applied.
- Principle only concerned work that was performed by both men and women.
- Did not address margins set for predominantly female work.
- Rectification process still approached comparisons of work based on gender assumptions Clothing Trades Award retained separate classifications and marginal rates for male and female workers.

Metal Trades Award Work Value Inquiry decision 1967

Metal Trades Employers' Association & Ors re Metal Trades Award, 1952 [1967]

CthArbRp 1144, 121 CAR 587

- The assessment of work value for the metal industry was first conceived.
- Assessment included the following indicia:
 - ‘...qualifications, training and skill, technological changes, changed conditions, changes in metals, alterations of methods of work, increased tempo of work, responsibilities individually and as a member of a team, availability for skilled work and the length of time which has elapsed since previous fixations...’
- Included a description of the ‘The Work of Females’ in the decision described using gender-based assumptions about the work of women’ [Ibid at 536-537; cited in Laura Bennett, ‘Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission’ (1988) 30(4) Journal of Industrial Relations 533].

1969 Equal Pay Case

[1969] CthArbRp 278, 127 CAR 1142, at [1142]–[1159]

- Union applications to vary the Meat Industry Award and certain Commonwealth Public Service determinations.
- Sought to eliminate differences in current rates ‘represented by the difference between the former male and female basic wages’.
- Should be equal pay for equal work and remaining anomalies dealt with individually by awards and determinations.
- Accepted principle of equal pay for equal work but identified implementation difficulties due to the complexity of the wage system.
- Established 9 principles including:
 - male and female adult employees should be working under the same terms of the same determination or award (1)
 - work covered is performed by both males and females (2)
 - work covered and performed by both males and females is the same, or of like nature and of equal value (3)
 - equal pay should not be provided where work in question is usually or essentially performed by female workers but where men may also be employed (9).
- Implementation of any determination for equal pay was to be staggered up until 1 January 1972.
- Case did not seek to address or remedy gender differentials in different awards or in awards where work was predominantly performed by females.
- Did not seek to address historical gender disparities in margins.
- Approximately 18 per cent of females in workforce received a pay increase by 1972.

1972 Equal Pay Case

[1972] CthArbRp 1420, 147 CAR 172, at [177]–[180]

- Further development of principles established in 1969 Equal Pay Case.
- Established a further principle: 'award rates for all work should be considered without regard to the sex of the employee'.
- Full Bench believed the community was prepared to accept the concept of equal pay for females and should therefore be prepared to accept the economic consequences of this decision.
- Male/female pay gap 'in awards generally is greater than the gap, if any, in the comparative value of work performed by the two sexes because rates for female classifications in the same award have generally been fixed without a comparative evaluation of the work performed by males and females'.
- Where work in the award is performed exclusively by females, then a work value comparison with female classifications, or even male classifications, in different awards may be necessary (Principle 5b).
- Recognised that there may be differences in male and female rates of pay which were not justified based on work value and required rectification.
- Phasing in of increases over just over two and a half years.
- Following this case, most federal awards were amended so that they contained no gender-based classification or pay rates (although this occurred later than contemplated in the decision for some awards).
- Application of the new principle was more complex in the case of classifications or awards where the work was performed exclusively by females. This required work value comparisons within and across awards with other female or male classifications. Recognised the absence of a proper valuation of women's work.
- Scant evidence that this aspect of the new Principle 5 was ever implemented.

National Wage Case 1983

[1983] CthArbRp 400, 291 CAR 3, 4 IR at [429]-[473]

- Followed a period of extensive wage claims being prosecuted outside of wage indexation systems.
- Re-established wage fixation principles, coincided with the commencement of the Prices and Incomes Accord.
- Intended to restrict wage increases.
- Women's groups submitted that implementation of the Commission's equal pay decisions had not been accompanied by a proper work value exercise.
- Such a work value exercise was rejected in this case, in part for economic reasons.
- Restated the work value principle of 1975-81 (Anomalies and Inequities) except that the datum point became the last work value affecting the award,

but no earlier than 1 January 1978.

- Equal pay cases could only be prosecuted under the Anomalies and Inequities Principle which only applied in exceptional circumstances.
- ‘This restriction on the datum point did not allow for the type of fundamental work value reassessment in female-dominated occupations and industries contemplated by the 1972 Equal Pay Case and sought by women’s groups in the National Wage Case 1983’.

Nurses Comparable Worth Case 1986

Royal Australian Nursing Federation & Anor re Private Hospitals’ and Doctors’ Nurses (ACT) Award, 1972 [1986] CthArbRp 64, 300 CAR 185, 13 IR 108, Print G2250 at [185]-[191]

- Concerned wage claim for private nurses in ACT for equal pay for equal worth (comparable worth).
- Argued that the 1972 equal pay decision had not been applied to nurses
- ‘Principle allowed, in the case of female-dominated work, for comparisons to be made with female and male classifications in other awards, and with rates outside a particular occupation where such comparisons are not available within the occupation on the basis of “comparable worth”’.
- Full Bench rejected notion of comparable worth based on gender neutral criteria as being inconsistent with the traditional concept of work value in the Australian industrial arbitration context.
- Equal pay claims could still be pursued, this had to occur within the framework of the wage-fixing principles as ‘anomalies’ having regard to the risk of ‘flow-on’, the risk of flow in this case was viewed as likely.
- The claim on behalf of nurses was subsequently prosecuted pursuant to the Anomalies and Inequities Principle.

National Wage Case August 1989

[1989] AIRC 525, 30 IR 81, Print H9100 at [81]-[94]

- Implementation of structural efficiency principles and the modernisation of awards was based on five awards covering the building industry, metal industry, storemen and packers, transport workers and clerks.
- Intended to provide a ‘stable basis for wage fixation’.
- Established the minimum classification rate and a supplementary payment for a metal industry and a building industry tradesperson.
- Each classification rate would be set relative to the tradesperson rate based on their relative skill, responsibility and conditions under which the work is normally performed.
- The new 14-level classification structure introduced into the then Metal Industry Award 1984 (Metal Industry Award) [AW819234, Print F8925] on

20 March 1990 with the tradesperson set as the C10 rate [[1990] AIRC 239, Print J1935].

- C10 rate required employee hold a recognised trade certificate or a relevant Certificate III qualification under the Australian Qualifications Framework (AQF).
- Setting across award-alignments with the C10 rate is now referred to as the C10 Metals Framework Alignment Approach [[2022] FWCFB 200, 319 IR 127].
- Process of varying awards to establish alignments with C10 was known as the minimum rate adjustment (MRA) process.
- Any 'structural efficiency exercises' in awards should incorporate all past work value considerations.

National Wage Case April 1991

[1991] AIRC 281, 36 IR 120, Print J7400

- Work Value Changes Principle established.
- Modified previous work value principle to establish new datum point requirements:
 - the date of operation of the second structural efficiency allowable under the 7 August 1989 National Wage case decision (unless there are extraordinary circumstances)
 - should ensure any previous work value adjustments or structural efficiency exercises are not included in any work valuation under this principle.

Paid Rates Review decision 1998

[1998] AIRC 1413, 123 IR 240, Print Q7661

- Set out the correct approach to setting 'properly fixed minimum rates' in awards.
- Convert a number of paid rates awards to minimum rates as part of the award simplification process.
- Application of the C10 Metals Framework Alignment Approach was a condition of an award being properly fixed minimum rates award awards requiring review would be reviewed.

ACT Child Care decision 2005

Re Australian Liquor, Hospitality and Miscellaneous Workers Union [2005] AIRC 28, PR954938

- Engaged in a comprehensive consideration of the work of early childhood education and care workers covered by awards applicable in the ACT and Victoria.
- Applied Work Value Changes Principle where consideration of work value was confined to the identification of changes occurring since a datum point of 1990 and did not permit an ab initio assessment of the work value of early childhood education and care workers.
- Found ‘significant net addition to work requirements’.
- Applied principles for the proper fixation of minimum rates set out in the Paid Rates Review decision 1998 (now known as the C10 Metals Framework Alignment Approach).
- As a result, the rates were set by linking the classification rates in the ACT Award and Victorian Award to the classification levels in the Metals Industry Award.
- This was despite the fact that the Full Bench found ‘the nature of the work performed by child care workers and the conditions under which that work is performed suggest that they should be paid more, not less, than their Metal Industry Award counterparts’ [Ibid at [182]–[183]].
- Employees should be receiving the same rate of pay for the same AQF levels [Ibid at [91]].
- Decision only considered qualifications and training in its work value assessment.
- Did not compare the nature of the work or the level of skill and responsibility involved in performing the work.

Work Choices 2006

- Regime of wage-fixing principles came to an end when *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) commenced on 27 March 2006.
- Australian Industrial Relations Commission stripped of minimum wage fixing functions.
- Wage fixing powers transferred to a new statutory body: the Australian Fair Pay Commission although awards system remained.

Award modernisation 2008–09

- Wage fixing powers returned to the Fair Work Commission in July 2009.
- Established the current modern award system.
- Process conducted in 2008–09 pursuant to Part 10A of the *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).

- Not constrained by previous wage fixing principles.
- In theory could involve a full *ab initio* work value assessment of any female-dominated occupation or industry in a modern award. Not possible in practice as award modernisation required consolidation and streamlining of thousands of former federal and State awards into what became 122 modern awards by the end of 2009.
- 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.
- Where the C10 Metals Framework Alignment Approach had previously been applied, this was retained. In some cases, it was applied for the first time.
- Meant that historical gender biases that became embedded in federal awards migrated into modern awards.

Equal Remuneration Case 2011–12

Application by Australian Municipal, Administrative, Clerical and Services Union and others [2011] FWA 2700 and [2012] FWA 1000

- Application for an equal remuneration order (ERO) in the social, community and disability services industry throughout Australia (the SACS industry).
- In its May 2011 decision, the Full Bench accepted propositions including that: the work was caring, this characterisation can disguise level of skills and experience required and contribute to devaluing the work; and that because caring work has a female characterisation any undervaluation is gender based.
- In the February 2012 decision the majority ultimately concluded that for employees in the SACS industry there was not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment, and that while not solely attributable to the gap, gender had been an important influence.
- The Full Bench majority decided that any ERO should be based on the wages in the modern award and set out a range of percentage increases to those wages. The majority said that importantly, the percentage additions to the modern award wages, as varied from time to time, would provide an ongoing remedy for the part gender has played in inhibiting wages growth in the SACS industry and that the ERO would ensure that for the employees to whom the order applied, there will be equal remuneration for work of equal or comparable value.
- Significantly, the rate determined by the majority of Full Bench in this case, is the rate that the Full Bench adopted in the Aged care stage 3 decision, as an appropriate benchmark rate for employees with Certificate III and that the rates in the ERO issued by the majority have been authoritatively determined to be rates which ensure equal remuneration for work of equal value.

- **Work value case – Aged care industry stage 1 decision 2022**

[2022] FWCFB 200, 319 IR 127, at [50]-[54]

- Case dealt with to increase wages affecting the aged care sector in three modern awards:
 - Aged Care Award 2010
 - Nurses Award 2020
 - Social, Community, Home Care and Disability Services Industry Award 2010.
- Case dealt with in three stages.
- Stage 1 decision found that modern award minimum wage rates for ‘direct care employees’ in the aged care sector do not properly compensate for the value of the work performed.
- Determined that an interim increase of 15 per cent in modern award minimum wages for ‘direct care employees’ was justified by work value reasons.

Secure Jobs, Better Pay 2022

- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) made a number of amendments to the FW Act to give greater emphasis to issues of gender equality.
- Included amendments to the minimum wages objective (s 284(1)) and the modern awards objective (134(1)) with broader concepts of gender equality than previously.
- Section 157(2) also amended – any consideration of a work value assessment must be free of assumptions based on gender (contemporary and historical).
- Amendments took effect 7 December 2022.

Work value case – Aged care industry stage 2 decision

[2023] FWCFB 40 and reasons [2023] FWCFB 93

- Considered timing and phasing in of interim pay increase decided in stage 1 for direct care employees.
- Considered whether increase was necessary to achieve both the modern awards objective (s 134(1) and minimum wages objective (s 284(1)).
- Reached same conclusion for Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers under the Aged Care Award.

Annual Wage Review Decision 2022–23

[2023] FWCFB 3500 at [134]

- Found that, the proper alignment of degree qualified employees with a theoretical C1 classification with relativities to C10 in the rate of 180-210 per cent was never carried through for most degree-qualified classifications in awards.
- Employees were never placed in the appropriate relativity to C10.

Work value case – Aged care industry stage 3 decision 2024

[2024] FWCFB 150

- Determined whether further wage adjustments are justified on work value grounds for aged care sector employees not dealt with in stage 1 (indirect care employees).
- Provided more detailed consideration of the classification definitions and structures in the three awards.



The Hon. Michael Kirby AC CMG, the Hon. Colin Polites, and the Hon. Geoff Giudice AO at the dinner that resulted in the creation of the Sir Richard Kirby Archives, circa early 2000s

