

From: Sophie Ismail [<mailto:sismail@actu.org.au>]
Sent: Wednesday, 4 September 2019 4:01 PM
To: Chambers - Hatcher VP
Subject: RE: Applications by the Independent Education Union of Australia - C2013/6333 & AM2018/4576

Dear Associate,

I attach an amended submission correcting a small typographical error.

Yours sincerely,

Sophie

Sophie Ismail
Legal and Industrial Officer

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We acknowledge the Traditional Owners of country throughout Australia and recognise their continuing connection to land, waters and culture. We pay our respects to their Elders past, present and emerging.

From: Sophie Ismail
Sent: Wednesday, September 4, 2019 3:59 PM
To: 'Chambers - Hatcher VP' <Chambers.Hatcher.VP@fwc.gov.au>
Cc: Tom Roberts <troberts@actu.org.au>; 'Michael Wright' <michael@ieu.asn.au>
Subject: Applications by the Independent Education Union of Australia - C2013/6333 & AM2018/4576

Dear Associate,

I **attach** a short submission from the ACTU in support of the IEU applications in this matter.

Yours sincerely,

Sophie

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Legal and Industrial Officer

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IN THE FAIR WORK COMMISSION

AT SYDNEY

Applications by the Independent Education Union of Australia

(C2013/6333 & AM2018/4576)

**SUBMISSION BY THE
AUSTRALIAN COUNCIL OF TRADE UNIONS**

Introduction

1. On 15 July 2013 United Voice and the Australian Education Union (Victorian Branch) (**AEU**) made an application seeking an equal remuneration order (**ERO**) pursuant to s.302(3)(b) of the *Fair Work Act 2009* (Cth) (the **FW Act**) for 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*, excluding local government employees. On 8 October 2013, the Independent Education Union of Australia (**IEU**) lodged an additional application seeking an ERO for early childhood teachers (including early childhood teachers appointed as directors) working in a long day care centre or preschool covered by the *Educational Services (Teachers) Awards 2010*, excluding state or territory government employees. These applications were heard by the Full-Bench of the Fair Work Commission concurrently (the **Equal Remuneration Case**).
2. On 30 November 2015 the Full-Bench issued a decision in relation to the legal and conceptual framework for the Equal Remuneration Case. The Full-Bench determined, inter alia, that a 'male comparator group' was necessary for the making of an ERO under s.302(5), but that this would not exclude the capacity to advance a gender-based undervaluation case under the FW Act.¹ On 28 September 2016 United Voice and the AEU filed an amended application providing details of a possible comparator group, and seeking a preliminary hearing to determine whether the comparator group was suitable for the purposes of s 302(5). On 6 February 2018 the Full-Bench determined that it could not be satisfied conclusively that the work performed by employees in the proposed comparator group was of equal or comparable value to the work of the employees in question, and dismissed the application.

¹ Equal Remuneration Case [2015] FWCFB 8200, at [290] and [292]

3. In July 2018, the ACTU was permitted by the Full-Bench to make a brief appearance during the hearing of the matter in Sydney in support of the IEU's ERO application. On 27 July 2018 the Full-Bench issued a statement noting that the IEU proceeding might give rise to an issue as to whether the minimum rates of pay for early childhood teachers in the *Educational Services (Teachers) Award 2010* were properly set having regard to the value of the work performed, noting the Commission's powers under s 157 of the FW Act and inviting the parties to give consideration to these matters for the future conduct of the proceedings. On 17 August 2018 the IEU lodged an application for a variation to the *Educational Services (Teachers) Award 2010* (**the Award**) pursuant to s 158 of the Act (AM2018/4576). The Full-Bench determined that the IEU's ERO and work-value applications would be heard together (**the IEU applications**).

Leave to intervene

4. The ACTU seeks leave from the Full-Bench to make this brief written submission in support of the IEU applications. The Commission has a broad discretion to determine how it may inform itself in any proceedings, including who it may hear from and on what terms.²
5. The ACTU is a peak council within the meaning of s 12 of the FW Act. Since its establishment in 1927, the ACTU has been the only national confederation representing Australian unions in the Fair Work Commission and its predecessor tribunals. The ACTU consists of affiliated unions and trades and labour councils from across the country, representing workers from all major industries, occupations and sectors. The IEU is affiliated to the ACTU.
6. Equal pay issues are of significant interest to the ACTU and its affiliates. The ACTU has long advocated for equal pay for equal work in proceedings before this Commission and its predecessor tribunals, and has played a key role in the development of regulatory measures aimed at eliminating the gender pay gap. Employee organisations are one of only three categories of persons with standing to make applications for equal remuneration orders.³ The legal and conceptual framework relevant to equal pay matters is complex, as the Commission has recognised.⁴ The ACTU is concerned to ensure that its affiliates have effective recourse to provisions of the FW Act which are intended to ensure that the work of women and men in Australia is appropriately and equally valued. The conduct and outcome of the present matter is likely to have a significant bearing on any future matters brought under relevant provisions of the FW Act by ACTU affiliates. The IEU applications are also relevant to Australia's gender pay gap more broadly, which arises in large part because of the historical undervaluation of work predominantly done by women because of the discriminatory

² Section 590 of the Act.

³ Section 302(3)(b).

⁴ *Equal Remuneration Decision* op cit at [183].

view that it is less skilful or valuable than work predominantly done by men.⁵ The increases sought by the IEU will contribute to the reduction of Australia's gender pay gap, supporting equality, productivity and economic prosperity.⁶

The IEU applications

7. The IEU applications seek to address the gender pay gap in early childhood education in two stages. Firstly the IEU applies under s 157 to raise the minimum Award rates for *all* teachers. As noted by the IEU, this application is largely uncontested. Secondly, the IEU applies under s 302 to lift the rates of pay of Early Childhood Teachers (**ECTs**) specifically, the majority of whom are women, in order to ensure they are paid at least as much as male primary school teachers, or alternatively at least as much as the lowest paid quartile of professional engineers in their first 5 years of work.
8. As submitted by the IEU, the Award currently contains rates of pay that are manifestly unfair and inadequate and considerably below the rates necessary to achieve the modern awards objective. There have been significant changes in the work of ECTs over the past two decades due to increased professionalism and increased work complexity and work intensity in the sector. Award rates have not shifted to consider work value changes in the sector since at least 1996. Most ECTs are paid at or only marginally above the Award rate, and therefore significantly less than their primary and secondary school teacher colleagues who are covered by enterprise agreements. ECTs have not maintained pay parity with other teachers, despite the fact that industrial tribunals have recognised the value of their work. The IEU outlines the gender-related factors which contribute to this undervaluation, namely gendered assumptions about the role of early childhood teachers as 'nurturers' and 'carers' of preschool age children rather than teachers; an undervaluation of early childhood teaching skills on the basis that they are skills that 'naturally' occur in women rather than that are learned or developed; and the discriminatory view that the work of ECTs is not skilful or valuable. The undervaluation of the work of ECTs is not only unfair, but contributes to high turnover and low tenure in the sector, which reduces the quality of educational outcomes for children in their crucial first five years of life.
9. The ACTU strongly supports the IEU applications and urges the Full-Bench to grant the increases sought.

ACTU

4 September 2019

⁵ Australia's gender pay gap has persisted at around the same level since the 1980s, and is currently at 14%: Workplace Gender Equality Agency, *Australia's Gender Pay Gap Statistics*, August 2019

⁶ KPMG, *She's price(d)less: the Economics of the Gender Pay Gap*, October 2016; DCA/KPMG 2009, *Understanding the Economic Implications of the Gender Pay Gap In Australia*, November 2009, p2.