



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

VICE PRESIDENT HATCHER

s.302 - Application for an equal remuneration order

**Independent Education Union of Australia
and**

**Commonwealth of Australia as represented by the Department of Education,
Employment and Workplace Relations; Australian Chamber of Commerce
and Industry; Australian Childcare Centres Association; Australian
Community Children's Services; Australian Community Services Employers
Association, Union of Employers; Australian Federation of Employers and
Industries; Association of Independent Schools of South Australia; The
Association of Independent Schools of Tasmania Incorporated; Association
of Independent Schools of Western Australia (Inc); Association of Quality
Child Care Centres of NSW Inc; Australian Childcare Alliance Victoria;
Childcare Queensland Inc; Childcare South Australia; Child Care
Association of Western Australia; Community Connections Solutions
Australia; Australian Municipal, Administrative, Clerical and Services
Union-New South Wales and ACT (Services) Branch; NSW Business
Chamber Limited; The Association of Independent Schools of New South
Wales Limited; Catholic Commission for Employment Relations
(C2013/6333)**

Sydney

10.05 AM, TUESDAY, 16 MAY 2017

PN1

VICE PRESIDENT HATCHER: Yes, can I take the appearances, please. Mr Borenstein, you appear with Mr Dowling for United Voice and the AEU?

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MR H BORENSTEIN: I seek permission to do that, thank you, your Honour.

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VICE PRESIDENT HATCHER: Yes. Mr Taylor, you appear with Mr Wright for the IEU?

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MR I TAYLOR: I do, if it please.

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VICE PRESIDENT HATCHER: Yes. Ms Eastman, you appear with Ms Raper for the Commonwealth?

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MS K EASTMAN: That's correct, if the Commission pleases.

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VICE PRESIDENT HATCHER: Mr Ward, there you are. My eyesight is failing. You appear for who?

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MR N WARD: Your Honour, we appear for a large number of employer associations and continue to appear for them, effectively the Australian Childcare Alliance and its state branches, Australian Business Industrial, Australian Chamber of Commerce & Industry and the New South Wales Business Chamber Limited.

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VICE PRESIDENT HATCHER: Yes. Right, and Mr Gunn?

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MR J GUNN: Your Honour, CCSA, if the Commission pleases.

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VICE PRESIDENT HATCHER: Yes. Is that all the appearances in Sydney? Yes, and we have one appearance in Perth, is that right? Mr Moss?

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MR P MOSS: Yes, sir, it is. Mr Moss, on behalf of the Chamber of Commerce & Industry of Western Australia.

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VICE PRESIDENT HATCHER: All right. And I understand there's no actual appearances in Melbourne, is that right?

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SPEAKER: No (indistinct).

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VICE PRESIDENT HATCHER: Yes, all right. Before we begin, Saunders C just has one matter that he wishes to raise with the parties.

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COMMISSIONER SAUNDERS: I do not anticipate there will be any difficulty with this but I want to disclose to the parties that my sister is employed as a director in a Melbourne day care centre. She is covered by the Educational Services Teachers' Award 2010 and will be impacted by any decision we make in these proceedings.

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VICE PRESIDENT HATCHER: All right, thank you. Mr Borenstein?

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MR BORENSTEIN: I don't anticipate that that will be a problem, your Honour, but perhaps we could just reserve our position for a few minutes.

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VICE PRESIDENT HATCHER: Yes, all right.

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MR BORENSTEIN: As we understand the purpose of the hearing this morning it is to deal with the application which our clients have made for the hearing of a preliminary question.

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VICE PRESIDENT HATCHER: That's correct.

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MR BORENSTEIN: And we have articulated or identified that question in the written submissions which we have filed and which I am hoping the Commission has had an opportunity of seeing. We filed two sets of submissions pursuant to directions by President Ross, the first on 26 October of last year and then in response to that there were a number of written submissions from other parties, and then we filed reply submissions on 7 November of 2016. Has the Commission had a chance to look at those?

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VICE PRESIDENT HATCHER: Yes, we've got those and we've read those submissions.

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MR BORENSTEIN: Yes. I'm struggling to see what I can usefully add to those submissions.

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VICE PRESIDENT HATCHER: Perhaps I can give you some guidance. What do you anticipate would be the issues and the scope of the evidence, if any, to be dealt with in the proposed preliminary hearing? And I ask that because, speaking

for myself only, I'm having trouble understanding what the substantial difference would be between the proposed preliminary hearing and the final hearing, assuming the comparators were deemed to be acceptable.

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MR BORENSTEIN: Yes. I was going to say, your Honour, that that was one matter that I was going to speak to this morning.

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VICE PRESIDENT HATCHER: Right.

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MR BORENSTEIN: The position which we have adopted, and we've articulated in our submissions is that there has been a work value comparison done between employees under the award that covers our clients' members and particular levels in the Metal Trades Award, back in 2005 and the Full Bench in that hearing took evidence and made a decision about the comparable work value of people at a particular level in the Metal Trades Award and the particular level in the awards we're dealing with here. And so we have identified that as a finding of the Commission of a comparator for the purposes of the exercise we're engaged in, in this proceeding. In the reply submissions, at least with one of the other parties, an issue was raised about whether the validity of that work value comparison still stands today because of the various changes to which reference is made, and that may be a matter that that party wishes to ventilate in the course of the preliminary hearing. For our part, we would start from the proposition that the comparative work value assessment has been made and stands, based on the decision of the Full Bench in 2005 and depending on what objection is taken to that proposition by other parties there may be a need to some degree or another to venture into an examination of the work value considerations that need to be adjusted from 2005.

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VICE PRESIDENT HATCHER: So you do say that Full Bench decision establishes that the - - -

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MR BORENSTEIN: Yes.

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VICE PRESIDENT HATCHER: Your client group and the comparator group perform work of equal or comparable value?

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MR BORENSTEIN: That's our argument.

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VICE PRESIDENT HATCHER: So what does that leave if that's correct?

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MR BORENSTEIN: Well, it does leave – I don't know if the Bench has available to it the jurisdictional decision in this matter but at paragraph 204, and we have copies if the Bench doesn't have it - - -

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VICE PRESIDENT HATCHER: We have it.

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MR BORENSTEIN: Yes. The Full Bench on the last occasion dealt with the matters that needed to be considered, commencing at paragraph 195 under the title, "The discretion," and at paragraph 204 they said:

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It seems to us that the considerations which may be relevant to the exercise of the discretion, that is the discretion - - -

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That is, the discretion to make the order:

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Include, 1) the circumstances of the employees to whom the order will apply; 2) eliminating gender based discrimination; 3) the capacity to pay of the employers to whom the order will apply; 4) the effect of an order on the delivery of services to the community, 5) the effect of any order on a range of economic considerations including any impact on employment productivity and growth; 5) the effect of any order on the promotion of social inclusion by its impact on the female participation in the workforce; and 7) the effect of any order on enterprise bargaining.

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These are all matters which, according to the Full Bench in this decision are matters that the Full Bench would need to take into account in the exercise of the discretion to make the equal remuneration order, and so they are all matters that would form part of the merits hearing if the case proceeded. And the Bench will see that they are not matters of small compass. You can readily see the extent of evidence and argument that may be involved in every one of these. And then there's another matter that we would also point out on top of those, and that is the matter of quantification.

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The argument is that once you establish the comparator for the purpose of seeing whether there's work of comparable value, as we say was done in the 2005 decision, it is then a matter of determining what the remuneration or what the value is that's in the market that's now put on the two sets of workers in order to establish whether the workers in one group are indeed underpaid compared to the workers in the other group even though there's been a decision that the two are doing work of comparable value. That will involve a survey of bargaining outcomes in the metal trades area and bargaining outcomes in the area we're dealing with to see how people are remunerated in the two segments and to see whether there is a significant difference that would then form an evidentiary base for the determination of the quantum of an equal remuneration order. That too is not a small task.

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Now all of these tasks are contingent on initially establishing that there is a relevant comparator for the purpose of the Act. And as we've said, and pointed out in extracts from the previous decision in our written submissions, the previous Full Bench was alive to this issue and determined that it was appropriate to establish whether or not the comparator issue is properly and validly established for the purposes of the Act before venturing into a very large case involving all these other matters.

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VICE PRESIDENT HATCHER: It seems to me that you've adopted a particular approach to how you would demonstrate that - - -

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MR BORENSTEIN: Yes.

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VICE PRESIDENT HATCHER: The comparator is appropriate. But it seems to me quite likely that the employee's main response, and no doubt they'll elaborate on this, seek to make out an evidentiary case by reference to evidence about the work being performed that they're not comparable.

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MR BORENSTEIN: Yes.

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VICE PRESIDENT HATCHER: That is, it may end up being a fairly detailed survey of the work of the two groups being compared.

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MR BORENSTEIN: It may be.

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VICE PRESIDENT HATCHER: And that may lead to a considerable overlap with the sort of considerations you have identified in paragraph 204 of the Full Bench decision.

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MR BORENSTEIN: Well, some of the items in paragraph 204 are expressed in very general terms and so one can't deny that there might be some degree of overlap. But in terms of, for example, item 3, the capacity to pay, which in itself is not a small issue in an industry like this, it's hard to see how there's an overlap. In terms of item 4, the effect of any order on the delivery or services to the community, again, not a small item, and again, hard to see any overlap.

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In terms of item 5, again, the effect on various economic considerations, et cetera, again, not easy to see an overlap; 6), the effect on promotion of social inclusion, et cetera, it's hard to see an overlap. So there are large parts of this case where there wouldn't be an overlap and in any event, to the extent that there is some overlap and the Commission makes some finding, that finding wouldn't be lost or wasted if we had to go to the second stage of the case. But if the Commission made a

finding against us then none of these other large matters would need to take up anybody's time or resources and that's really the benefit which we identify of determining whether the first hurdle is a proper hurdle to jump and whether it is jumped in the way in which we say it is, before you venture into these other matters.

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As we say, the previous Full Bench thought that there was merit in determining the comparator issue at the outset, before all of the other resources have to be applied to the case and we would say that that's a reasonable and, with respect, a sensible approach to take given the parameters of what would still need to be proved and which would amount to a very substantial case.

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But coming back to your Honour's point about the work value argument that might be had, true it is it may be that it will need to be had. We're not quite sure of the extent of the argument at this stage because nobody has descended to any sort of particulars as to how they actually say the circumstances have changed. But even if the matter took a day or two days, or even three days, it would still be a very much smaller allocation of resources than to hear the whole case including all of these items on the off chance that the first item is found in a particular way.

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So we might run this whole case and the Commission might say at the end of the case, well, you haven't got a proper comparator and all of that effort is wasted. That's really our problem and the foundation for the application to have the first question decided separately. We would expect that if you had to run this whole case, the case would take many, many, many days of court time and, of course, preparation time and resources and the Commission's time in addressing it and writing a decision and so on, and it would be a shame for all of that to be done when the ultimate decision is that the applicants fall at the first hurdle.

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VICE PRESIDENT HATCHER: Mr Borenstein, could I just take you to paragraphs 290 through to 292 of the November 2015 decision?

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MR BORENSTEIN: Yes, I have that.

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VICE PRESIDENT HATCHER: No doubt you will have seen that paragraphs 290 and 291 summarise the conclusions reached about how a case under section 302 is to be advanced.

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MR BORENSTEIN: Yes.

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VICE PRESIDENT HATCHER: And then in paragraph 292, there's sketched out an alternative pathway by which a gender base case might be run as an

undervaluation case under section 1563 or 1572. Do I take it that the case your clients want to advance does not involve any element of the type of case in paragraph 292?

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MR BORENSTEIN: The case that we are seeking to advance is a case which - - -

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VICE PRESIDENT HATCHER: Solely a 302 case?

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MR BORENSTEIN: Yes.

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VICE PRESIDENT HATCHER: All right. Does it follow then that if we had the preliminary hearing and we determined that the proposed comparator was not appropriate that that's the end of the case, that is, your application will be dismissed?

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MR BORENSTEIN: The application that we presently have before the Commission as I understand it, yes.

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VICE PRESIDENT HATCHER: That is, you wouldn't be coming back with another go at a different comparator or – to try to run the case on a different basis, that would end the case?

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MR BORENSTEIN: That would end this case. The Act doesn't preclude, and I'd simply want to say this so that there's no misunderstanding, the Act doesn't preclude an application being made by any party on different grounds and on a different basis at any time. The case we are advancing at the moment and the case that we are here to prosecute is the case that's formulated on this comparator. The Commission, depending on the decision of the – let's take the example of what happened in 2015. The case was run on the broad basis in the same way as the SAC's(?) case was run and in reliance on the decision in the SAC's case. This Full Bench decided that that wasn't the correct approach and indicated that that wasn't an appropriate basis to go forward.

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VICE PRESIDENT HATCHER: Under section 302?

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MR BORENSTEIN: Yes. And so the organisations in question formulated a different approach to comparator. I can't anticipate what this Bench will say about our case. Depending on what it says, it may point to some other approach which commends itself to the Bench and which the organisations may seek to take up or may not. It is hypothetical at this stage. All I can say to the Bench at the moment is that our case is the case that we've put forward. If the Bench rules against us on that then that case fails.

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VICE PRESIDENT HATCHER: Right. Thank you.

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MR BORENSTEIN: But I can't say properly to the Bench that the Act doesn't allow someone to come along and bring a new case on a different basis.

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VICE PRESIDENT HATCHER: Yes. All right, thank you. Mr Taylor?

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MR TAYLOR: The Commission would be aware that our application has a very similar scope to the application of UV in that it falls within the UV scope. Our application is limited to teaches. When UV proposed in October 2016 the procedural application that it is advancing today we took the position then and we remain of this position that we don't oppose that course being taken on the understanding that that allowed their application to proceed in an efficacious and quick manner. Our position remains that at this stage. If, as it turns out, the matter was to take much longer than UV has suggested it would then our position might change at some future point.

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But effectively at this stage, while the matters were travelling together, that is, our application was travelling with it, we have effectively been content for our matter to abide this procedural approach and to, in effect, await the outcome of it. Some significant time has already lapsed but our position at this stage hasn't changed. It may change if, for whatever reason, another significant period were to elapse without the matter progressing.

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VICE PRESIDENT HATCHER: So does your client embrace the comparative proposed by the other unions? Or alternatively, how ultimately does your client see how it would advance this case, particularly having regards to paragraphs 290 to 292 of the November 2015 decision?

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MR TAYLOR: The comparators that my friend has identified are comparators to diploma and certificate III level classifications. They are not comparators to a professional classification and so those comparators will not affect our application, one way or the other. We, in paragraph 31 of our application, made clear that our case will advance on comparators to other teachers and to other professionals and we would intend to advance a case based on that which we've set out in our application in due course.

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VICE PRESIDENT HATCHER: So my question is, does your case, does it or will it involve any element of the type of case described in paragraph 292?

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MR TAYLOR: No, it will not. It will not. It would be a 302 case.

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VICE PRESIDENT HATCHER: Yes, all right. So it seems to me that regardless of the outcome of a proposed preliminary hearing your application is still there to be determined and won't be affected by it?

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MR TAYLOR: That is correct. It may be practically affected by it in that if the preliminary application that UV makes is successful it may well be that our case continues to abide the outcome of the other matter because for the reasons that I've identified, the ultimate outcome of the UV application clearly has the capacity to affect our application but it's certainly, an unsuccessful application by UV would not affect our application.

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VICE PRESIDENT HATCHER: Mr Ward, are you next?

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MR WARD: Can I start by saying that we have no issue with Commissioner Saunders sitting in the matter. I suspect all of us, at some stage, have an interest in childcare so we wouldn't be too worried about that. I'm a little nonplussed as to what the IEU just said, so I'm struggling to comment on it. My client would not want to be travelling down a path, whatever that path is and I'll come to it, thinking it's responding to the unions in a combined way, only to find out it effectively might have to run a very similar case separately, later on. So I think all I can say about the IEU is that the sooner they tell us what that really means, the better off we'll all be.

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In terms of why we're here today, as we understood why we were here today, it was to comment on the UV's application for this Commission to comment on whether or not what they assert to be a comparator might be a good one, not to deal with the comparator question at large. We had assumed that there would be two limbs to the case. Those limbs could be run separately or they could be run together. That is, we had assumed that the applicant would identify a comparator and I'll come to that in a minute, that obviously would require evidence and submissions of a particular nature. If successful then one moves into the discretionary questions as to whether or not orders should be made. We don't have a view as to whether or not those should be run separately or together. We're content to deal with those either way. Obviously if there is a chance that the comparator part might stop the case it will be preferable to deal with that first, not putting my clients to the cost of preparing for the second part of the case unnecessarily, but given that this is relatively new territory I'm somewhat in the hands of the Full Bench.

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VICE PRESIDENT HATCHER: Mr Borenstein has said that if there was that initial hearing they would intend to satisfy the relevant jurisdictional requirement on the basis of the previous Commission decisions aligning the workers, the subject of the application with classifications in the Manufacturing Award. So how would you envisage your clients or member organisations responding to a case of that nature?

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MR WARD: With respect to the applicants we find what they're proposing to be an intriguing notion. We don't even concede that that could constitute a comparative for the purposes of a 302 case. I don't want to cavil with that. It seems to us that currently if that is what they propose, the comparator man or group of men is effectively nebulous. If they'd decided to refer, instead, to an award classification which is a broad classification setting minimum rates only. They picked a classification that would relate to potentially hundreds of industries and an extraordinarily diverse set of circumstances where men and women work, so good luck to them in terms of bringing the evidence in relation to those matters. We don't concede that the broad conclusion reached in 1998 or reached in 2005 is sufficient to prove that the persons I've just explained, be they male, are doing work of equal or comparable value of female employees in the childcare sector. We don't concede that. And then lastly, in terms of paragraph 290 of the - - -

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VICE PRESIDENT HATCHER: So before you move on, Mr Ward, I was really inquiring what sort of case, assuming for the purpose of the argument we had a preliminary hearing, what sort of case would you organisations be running in opposition to the union to prove that it wasn't a proper comparative? On one view you could just make the submission you've just made, but on the other view you might call dozens of witnesses from the two groups to set out work value reasons why they're not comparable. I mean - - -

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MR WARD: I am very keen to avoid, in effect, being forced to carry almost a reverse onus but the nature of the case, subject to what the applicant brings, is going to be of the nature you just described. I suspect it will be expert evidence about the diversity of the industries under which the Manufacturing Award operates. It will probably bring work value type evidence between the childcare industry and those industries. We might even bring expert evidence from respected work valuation experts to actually look at their methodologies and how they would compare the work. So we would challenge both the construct of it as a comparator, we would challenge the equal or comparable remuneration question, and then of course one has to look at the very question of what are they actually paid, and we'd have to obviously go to that, as well. So it will be a very sizeable case.

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VICE PRESIDENT HATCHER: All right, thank you.

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MR WARD: That's probably all we can say at this stage. In relation to the original question which is, should the Commission tell the UV whether or not it's getting warm in suggesting a minimum rates classification as a comparator, we just don't think that's the proper thing to be done. They should decide how they want to run their case and run it. At the end of the day if the Bench decide to run it in two parts we're content with that. If the Bench decided it's more appropriate to run it as one, we're content with that, as well.

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VICE PRESIDENT HATCHER: Sorry, Mr Ward, I interrupted you but you were about to say something about paragraph 292 of the decision?

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MR WARD: We did ask the applicants very early on whether or not, if they run successful here they would then back up with a work value case. We were told by the applicants that that wouldn't be the case. My clients are just keen to understand whether or not they're going to face this case, possibly succeed in it, and then all of a sudden be facing a work value case, and it's just a question my clients asked of the applicants at the beginning of the proceedings. They were told, no, there's going to be no work value case. I just was concerned that Mr Borenstein suggested that if they lost here there might be one. I prefer them to pick which one they want we'll get on with it.

PN91

VICE PRESIDENT HATCHER: All right, thank you. I might deal with the other employer groups first. Mr Gunn?

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MR GUNN: Your Honour, our main concern is, as you say, it is the fact the comparators don't cover the entire range of professions that are included in the equal remuneration application, and it goes to a matter that was touched on by the IEU. We have unqualified workers, we have childcare workers that have Certificate III's, those that have diplomas, those that have early childhood teaching degrees, and it's only those second and third groups that have actually been included so far by UV. We'd take the view that it isn't an efficient use of resources to split between those two areas to leave the unqualified and the early childhood teachers no in there, deal with the comparators but only part of the case and then leave the remainder untouched. I would agree with the IEU that no matter what decision was made around the certificate III and the diploma qualified staff, there would still be the whole matter of the early childhood teachers to be resolved and so therefore that wouldn't be the end of this if we were to reach that point where the comparator is considered unacceptable for cert III and diploma.

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VICE PRESIDENT HATCHER: All right, thank you. Mr Moss?

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MR MOSS: Thank you, sir, and my apologies, we're having a little bit of audio problems at this end so I've not heard the full comments. But to put it very succinctly our position would be that the full claim should be brought on rather than dealing with the comparator as a further preliminary matter. In particular, one of the concerns that we have is the need to seek multiple advice from our members on particular elements of the claim. In putting our case forward, having to seek evidence from members on multiple occasions to deal with specific elements of the claim, we'll be of significant disadvantage and result in the application being dealt with in a more disjointed fashion. We note that the referencing to the previous work value case is over ten years old so it would be our particular position that we don't believe that that could be dealt with on the papers. It would effectively need further evidence to explore how the positions

related not only with respect to changes in the work that's being done but also with respect to how section 302 of the Act applies to this type of matter based on the preliminary decision that's already been handed down.

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VICE PRESIDENT HATCHER: All right, thank you. Ms Eastman?

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MS EASTMAN: If the Commission please, we have prepared some written submissions which I trust that you've had an opportunity to read.

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VICE PRESIDENT HATCHER: Yes.

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MS EASTMAN: They're dated, I think, the 2nd of the 11th.

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VICE PRESIDENT HATCHER: Yes.

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MS EASTMAN: And there is little that I can add to the matters set out in those submissions. The commonwealth's position was that it was a matter for the Full Bench as to whether to deal with the matter on a preliminary basis, and the commonwealth's position as a matter of principle it to support what would ever achieve the efficient running an operation of this proceeding.

PN101

VICE PRESIDENT HATCHER: Thank you. Anything in reply, Mr Borenstein?

PN102

MR BORENSTEIN: Just one brief matter, your Honour. The position of the IEU seems to be that they are concerned with different comparators and with different employee cohorts, and the case that they will run will be a different case based on different evidence and different arguments than ours. And we would simply say that although we have no criticism of the position they've taken, the Full Bench should deal with this particular application on the basis of what will be involved in the United Voice AEU application for this particular comparator as it applies to their members and the people in their application rather than being concerned with might happen in the IEU case.

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VICE PRESIDENT HATCHER: So with the passage of time, I've forgotten but there's an overlap between the two applications, isn't there, or not?

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MR BORENSTEIN: I don't think there's an actual overlap - - -

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MR TAYLOR: As we read the application of the Australian Education Union, the application extends to professional teachers and directors, both of whom are covered by our application, the latter if they are a teacher, and only if they're a

teacher but most directors are teachers. So I think there is some overlap but not in respect of the comparators.

PN106

VICE PRESIDENT HATCHER: Right. So Mr Borenstein, it's clear that if we had the preliminary hearing, whatever the outcome would be would not dispose of the IEU's application.

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MR BORENSTEIN: No, either way, but it does have that potential in relation to our application.

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VICE PRESIDENT HATCHER: All right. All right, if there is nothing further, I thank the parties for their submissions. We propose to reserve our decision and we'll now adjourn.

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MR BORENSTEIN: Just before you adjourn, your Honour - - -]

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VICE PRESIDENT HATCHER: Yes, Mr Borenstein?

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MR BORENSTEIN: Depending on the outcome, and without anticipating the outcome can we expect that when the decision is handed down there will be some sort of communication about timelines if they're necessary for submissions and evidence, and so on?

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VICE PRESIDENT HATCHER: Yes. What I anticipate is, whatever the outcome there will need to be a fairly major directions hearing, too, to program the case.

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MR BORENSTEIN: Very well, thank you, Commissioner.

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VICE PRESIDENT HATCHER: Thank you.

**ADJOURNED INDEFINITELY
AM]**

[10.40