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Dear President

**Australian Government submission in the matter of C2010/3131 – Equal Remuneration case for social and community service workers**

The Australian Government welcomes the opportunity to provide a submission in relation to the application made by the Australian Services Union and other unions for an equal remuneration order for the social and community services (SACS) sector.

The Government recognises the vital services the SACS sector delivers to some of the most vulnerable members in our society across a broad spectrum of community services, and values the contribution the sector makes.

Please find attached the Government's submission in this case.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Collins'.

**Senator Jacinta Collins**  
**18 November 2010**



Australian Government

# Equal Remuneration Case

Fair Work Australia

Australian Government Submission





**Australian Government**

## **Outline of Contentions to**

### **Fair Work Australia**

**IN THE MATTER OF: APPLICATION BY THE AUSTRALIAN  
MUNICIPAL, ADMINISTRATIVE, CLERICAL AND  
SERVICES UNION AND OTHERS FOR AN EQUAL  
REMUNERATION ORDER  
No.C2010/3131**



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## Abbreviations

AAWI	Average Annualised Wage Increase
ABS	Australian Bureau of Statistics
AHOTE	Average Hourly Ordinary Time Earnings
AIHW	Australian Institute of Health and Welfare
AIRC	Australian Industrial Relations Commission
ANZSIC	Australian and New Zealand Standard Industrial Classification
ASU	Australian Services Union
AWOTE	Average Weekly Ordinary Time Earnings
AWU	Australian Workers Union
DEEWR	Department of Education, Employment and Workplace Relations
EAPA	Energy Accounts Payment Assistance
EEH	Employee Earnings and Hours
EOWA	Equal Opportunity for Women in the Workplace Agency
EOWW Act	<i>Equal Opportunity for Women in the Workplace Act 1999</i> (Cth)
ER	Emergency Relief
FBT	Fringe Benefits Tax
FMP	Financial Management Program
FWA	Fair Work Australia
FW Act	<i>Fair Work Act 2009</i> (Cth)
HACC	Home and Community Care
ILO	International Labour Organisation
IR Act	<i>Industrial Relations Act 1988</i> (Cth)
JSA	Job Services Australia
NAHA	National Affordable Housing Agreement
NDS	National Disability Agreement
NES	National Employment Standards
NP	National Partnerships
NSW Act	<i>Industrial Relations Act 1996</i> (NSW)
NSW IRC	New South Wales Industrial Relations Commission
OMIE	Owners Managers of Incorporated Enterprises
PBI	Public Benevolent Institution
QIRC	Queensland Industrial Relations Commission
QSU	Queensland Services Union
Qld Act	<i>Industrial Relations Act 1999</i> (Qld)
SACS	Social and Community Services
SACS Modern Award	Social, Community, Home Care and Disability Services Industry Award 2010
SDA	<i>Sex Discrimination Act 1984</i> (Cth)
SPP	Specific Purpose Payments
T&C Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
WAD	Workplace Agreements Database
WR Act	<i>Workplace Relations Act 1996</i> (Cth)

## Executive Summary

1. The Australian Government recognises the vital service the social and community services (SACS) sector delivers to some of the most vulnerable members in our society across a broad spectrum of community services, and values the contribution the sector makes.
2. The Government is committed to pay equity in Australia. The Equal Remuneration provisions of the *Fair Work Act 2009* (FW Act) reflect the Government's intention of removing the historical barriers to pay equity claims in the federal jurisdiction by removing the requirement for applicants to prove discrimination as a prerequisite to an equal remuneration claim.
3. The FW Act intentionally broadens previous federal equal remuneration provisions and allows comparisons to be carried out between different, but comparable, work for the purpose of assessing an equal remuneration claim.
4. As this is the first application to be heard by Fair Work Australia (FWA) for an equal remuneration order under the FW Act, FWA will be required to consider the statutory requirements to be addressed and satisfied in order to successfully make out an application for an equal remuneration order. The Government encourages FWA to develop appropriate equal remuneration principles within the scope of the FW Act and drawing on the experience of state jurisdictions such as the Queensland Equal Remuneration Principle of 2002 and the New South Wales Equal Remuneration Principle, in so far as they are relevant, to guide the formulation and hearing of future applications for equal remuneration orders.
5. The Government submits that in determining an application under Part 2-7 of the FW Act it is open to FWA to adopt an approach that involves identifying whether the work in question has been undervalued, taking into account the provisions in the FW Act. FWA may consider a range of factors in its evaluation, including: the features of the industry or occupation; the degree of occupational segregation; the representation of women in the occupation; the relative levels of full-time, part-time and casual employment; whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed.

6. Where it is found that the work in question has been undervalued, it is open to FWA to redress any undervaluation by determining a fair rate of pay, assisted through the use of appropriate comparator groups. The Government submits that a fair rate of pay is a rate which ensures equal remuneration for work of equal or comparable value (as outlined in the FW Act and the Explanatory Memorandum to the Fair Work Bill 2008).
7. The Government further submits that if FWA decides to issue an equal remuneration order, consideration should be given to a range of factors in determining the appropriate remedy or fair rate of pay, having regard to the objects of the FW Act and considering the implications that a considerable wage increase may have on SACS services, SACS funders and the broader economy. This includes discounting comparator rates of pay which may have been relied upon in establishing undervaluation for factors which are not gender based and considering whether compensation is required for loss of relativity even where previous work value adjustments have been made.
8. The funding arrangements in the SACS sector are highly complex, with funding provided by a range of sources and through various mechanisms. The Government provides considerable support to the sector through direct funding, indexation of a significant proportion of this funding and the provision of indirect support through tax concessions such as the Fringe Benefit Tax (FBT) and income tax exemptions.
9. The Government notes that any significant increase to wages in the SACS sector, holding all else constant, will impose greater cost pressures on organisations delivering SACS services. Such increased pressures may have adverse impacts on service delivery standards within the SACS sector. However, it needs to be noted that these cost pressures can be at least partially mitigated through the Government and SACS service providers continuing to identify and implement more efficient ways of operating. For instance, the Government's recently announced commitment to develop a common contract for dealing with the not-for-profit sector and to review the efficiency and effectiveness of current tendering, contracting and acquittal arrangements in the sector should reduce the compliance overheads incurred by the not-for-profit sector. Beyond this, the Government would encourage SACS service providers, their employees and relevant unions to bargain collectively at the enterprise level on improvements in pay and conditions and employment and productivity. This will assist providers in offering

competitive pay and conditions which, in turn, will assist in attracting and retaining skilled employees.

10. In the Government's view it is important that FWA, in its deliberations, note the implications that a considerable wage increase may have on SACS services and the broader economy in a way that is consistent with the object of the FW Act to 'promote productivity and economic growth for Australia's future economic prosperity'.
11. Depending on the decision of FWA, the potential fiscal cost to the Commonwealth of significant wage increases in the SACS sector could be considerable, even taking into account a phased implementation. The Government's fiscal strategy – which is aimed at ensuring fiscal sustainability and returning the budget to surplus – will influence the Government's ability to support the sector in meeting additional wage costs. If any additional Government funding is provided, it would likely come at the expense of other Government funded services.
12. In examining the SACS sector, the Government contends, based on Australian Bureau of Statistics (ABS) data, that many businesses in the SACS industry are small employing businesses which operate on a not-for-profit basis and are largely reliant on government funding. The sector consists of around 153,000 workers, is female dominated, has a high proportion of employees engaged on a part-time or casual basis, has an ageing workforce and has relatively low levels of unionisation.
13. Research put forward by the Government in this submission indicates that a larger than average proportion of SACS employees are award reliant when compared to all industries. The research also indicates that while around half of all SACS employees are covered by collective bargaining arrangements, pay rates for employees covered by these arrangements are relatively low in comparison to the all industries average.
14. An examination of the history of the development of the modern SACS award also indicates that previously established relativities may have been compressed over time due to dollar rather than percentage wage increases.
15. The Government contends that the combination of high levels of award reliance and below average bargaining pay outcomes contributes to the low wages of SACS sector

employees and, based on the bargaining data referred to in Chapter 5 of this submission, reflects the wages outcomes for women in female dominated industries generally.

16. However, Government data also shows that almost one third of the SACS workforce utilises salary sacrifice arrangements. The high take up of these arrangements in the SACS sector is due to the FBT exemption available to Public Benevolent Institutions (PBIs), which covers many SACS sector organisations. These arrangements, when passed on to employees, can have a considerable impact on the net earnings of employees' take home pay and are therefore relevant to FWA's assessment of employees' real rates of remuneration.
17. The Government encourages FWA to find the right balance between equal remuneration for SACS employees and the broader implications of any wage increase in reaching its decision. In this regard the Government notes that while signs of economic recovery are clearly evident, some level of volatility is anticipated to remain in the Australian economy in the short-term.

## **Introduction**

18. In 1969 Australia's first federal equal pay case was decided, granting women the right to equal pay for equal work. Despite this, women on average continue to earn less than men. While there have been significant advances with respect to women's employment outcomes since 1969, including increased workforce participation, greater numbers of female tertiary graduates, growing access to family friendly working arrangements and higher numbers of women in executive roles, the aggregate gender pay gap stands at 17.6 per cent as at May 2010.
19. The Government considers the issues of pay equity and improving the economic outcomes of women to be important. It is within this context that the Government initiated a range of measures, such as the introduction of a paid parental leave scheme, the House of Representatives inquiry into pay equity and increasing female workforce participation, the review of the *Equal Opportunity for Women in the Workplace Act 1999* (EOWW Act), increasing female participation on boards and proposed amendments to the *Sex Discrimination Act 1984* (Cth) (SDA).

20. The Government's focus on equality for women is further reflected in a range of enhanced provisions in the FW Act aimed at supporting better pay equity outcomes.
21. The FW Act enables pay equity to be advanced in the context of a strengthened safety net of legislated National Employment Standards (NES) and modern awards, including minimum wage increases and provision for modern awards to be varied on work value grounds; and the FW Act's focus on collective bargaining, including access to facilitated multi-employer bargaining in low-paid sectors.
22. For the first time in federal workplace relations legislation, the FW Act extends the concept of equal remuneration to include the right to equal pay for work of equal or comparable value. The expansion of the equal remuneration principle to include the term comparable value provides for the consideration of pay equity from a broader perspective.
23. The Australian Services Union (ASU) in conjunction with the Health Services Union, the Australian Workers Union – Queensland Branch, the Liquor Hospitality and Miscellaneous Union and the Australian Education Union have applied for an equal remuneration order under these provisions for employers throughout Australia in the social, community and disability services industry and their employees.
24. The case presents the first opportunity to consider pay equity in the context of the new and enhanced equal remuneration provisions of the FW Act. The Government welcomes the opportunity to make this submission.
25. This submission also delivers on the commitment made by the Government under a Heads of Agreement negotiated with the ASU in 2009 to participate in case proceedings by presenting evidence and research on matters relevant to the application, including labour market and workplace relations features of the sector.

## **Outline of submission**

26. Chapter one provides background to the case and outlines the terms of the Heads of Agreement entered into by the Government and the ASU. It also provides an overview

of the Government position in relation to the not-for-profit sector, which many SACS sector organisations operate in.

27. Chapter two explores the changes made over time to the equal remuneration provisions and examines the new provisions contained in the FW Act. In addition, the chapter looks at equal remuneration principles and relevant case law in other jurisdictions, particularly in New South Wales and Queensland.
28. Chapter three presents current gender pay equity data for the Australian economy to enable FWA to consider the concept of equal remuneration in a broader context. This chapter also provides an overview of the Government initiatives currently in place to support pay equity and increased female participation in the workforce.
29. Chapter four examines the labour market features of the SACS sector by presenting a snapshot of businesses operating in the sector and data on the make-up of the workforce. It demonstrates that the sector, which employs around 153,000 employees, many of whom are women and work on a part-time or casual basis, makes a significant contribution to the Australian economy. It also identifies, among other things, that the SACS workforce is ageing with fewer younger people entering the industry and that skills shortages remain an ongoing concern for employers in the sector.
30. Chapter five provides an overview of industrial regulation and methods of pay setting in the SACS sector. It shows that a higher than average proportion of SACS employees are award reliant and presents evidence to suggest that the female dominance of the sector contributes to employees' level of award reliance. The chapter also outlines the extent of bargaining in the sector, trends in federal agreements and examines salary sacrifice provisions and the value such arrangements can have on employee earnings. Finally, the chapter presents a history of the development of the SACS modern award, including current relativities with comparable awards.
31. Chapter six presents information on the current Government funding arrangements for the sector. It provides a snapshot of the Government's current contribution to the sector through funding, indexation and tax exemption arrangements. It shows that the funding arrangements in the SACS sector are highly complex, with funding provided by a range of sources and through various mechanisms. Given the potential financial implications of the case for the Commonwealth, this part of the submission also considers any

potential funding implications arising from a decision by FWA in the context of the Government's fiscal strategy.



# Chapter 1: Background

## Introduction

- 1.1. In broad terms, the SACS sector involves the direct provision of social and community services to clients including social work, recreation work, welfare work, youth work or community development work. It also consists of organisations such as those primarily engaged in policy, advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services.<sup>1</sup>
- 1.2. In May 2009, in response to an application made by the Queensland Services Union (QSU) to create a new Queensland state award combining the federal *Social and Community Services (Queensland) Award 2001* and the federal *Crisis Assistance Supported Housing (Queensland) Award 2001*, and increase pay rates in the new award on work value and equal remuneration grounds, the Queensland Industrial Relations Commission (QIRC) awarded pay increases of between 18 and 37 per cent. The increases in the new award, entitled the *Queensland Community Services and Crisis Assistance Award – State 2008*, were to be phased in over 3 years from July 2009. Following this decision, the Queensland Government committed to additional funding for the sector of \$414 million over four years in its 2009/10 Budget to fund the wage increases.
- 1.3. On 14 September 2009, in response to an application made by the Australian Workers Union (AWU), the QIRC handed down a decision granting pay increases in the order of 22 to 27 per cent for disability support workers on the basis of pay equity considerations. The pay increases are to be phased in accordance with the same timetable laid down for the Queensland SACS sector.
- 1.4. The QIRC decision increased the rates of pay in the *Queensland Community Services and Crisis Assistance Award – State 2008*. All employers covered by that award (those in the Queensland industrial relations system) were obliged to pay their employees the

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<sup>1</sup> Taken from the definition of the SACS sector in the SACS Modern Award.

new higher rates of pay from 13 July 2009 (with rates of pay increasing every six months until January 2012).

- 1.5. Preserving these state pay equity orders (including future programmed wage increases), for Queensland SACS and disability workers was considered by the Government in the context of states and territories referring their powers in respect of workplace relations matters to create a national workplace relations system for the private sector. In that context, Item 30A of Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (T&C Act) will ensure that once a modern award begins to apply, these employers will continue to be required to pay employees the QIRC decision rates until the relevant modern award rates catch up.
- 1.6. On 1 January 2010 these employers moved into the national workplace relations system as a result of Queensland's referral of power. At that time the original State award became a federal instrument (known as a Division 2B State award) and these employers remain obliged to pay employees in accordance with the terms of the QIRC decision.
- 1.7. Regulations can be made under the T&C Act to extend the obligation under the original State award to other Queensland SACS employers who are not currently within its scope but who are in receipt of supplementation from the Queensland Government for the purpose of paying the higher rates awarded in the QIRC decision. No such regulations have yet been made.

## **Heads of Agreement**

- 1.8. The Government signed a Heads of Agreement with the ASU on 30 October 2009 (see **Attachment A**). The Heads of Agreement was negotiated in the context of the Queensland Government's intention to refer its powers in respect of workplace relations matters to the Commonwealth from 1 January 2010.
- 1.9. The Heads of Agreement sought to preserve the pay increases awarded in 2009 to Queensland SACS workers on pay equity grounds by ensuring these pay rates were maintained in full when employers and their employees transferred into the federal system as a result of referral of powers in respect of workplace relations matters.

- 1.10. The Heads of Agreement also flagged the ASU's intention to lodge with FWA in 2010 an application for an equal remuneration order or work value wages review covering SACS workers in the federal jurisdiction.
- 1.11. Under the Heads of Agreement the Government agreed to support FWA and the parties by seeking leave to make submissions and to participate in the proceedings. The Government agreed to present evidence and research on matters relevant to the case such as the labour market features of the sector. The Government also committed to supporting the development of an appropriate equal remuneration principle for the federal jurisdiction. The content of this submission delivers on the Government's commitments in this respect.
- 1.12. The ASU acknowledged through the Heads of Agreement that there could be significant budgetary impacts to state and territory governments and the Government if its application is successful and a wage increase is awarded. In order to ensure the financial sustainability of the sector, the ASU agreed to support a gradual phasing in of any wage increases taking into account the capacity of the Government, and state and territory governments, to meet a significant cost increase in the current economic and budgetary environment.
- 1.13. In this context, the ASU has agreed with the Government that it will support an argument that any pay increase which may be awarded in this case not take effect for at least six months after the decision and will be phased in over not less than four and a half years. The ASU and the Government both support annual minimum wage adjustments being applied over the agreed phase-in period to maintain the integrity of any equal remuneration order.
- 1.14. The Government is also working with the ASU to develop an agreed statement of facts, acknowledging that such a document would be useful in limiting arguments before FWA.

### **The not-for-profit sector**

- 1.15. Current ABS data suggests that the majority of organisations operating in the SACS sector are not-for-profit organisations. The Productivity Commission in its 2010

research report on the contribution of this sector describes the sector in the following way, ‘The not-for-profit sector is made up of a diverse range of entities. Called by many different names – third sector, voluntary sector and the social economy – the sector comprises organisations established for a community purpose, whether altruistic or mutual in nature’. <sup>2</sup> Chapter 4 of the submission provides more detail on the composition of the SACS sector.

- 1.16. The Government recognises that a strong, productive and innovative not-for-profit sector is essential to building an inclusive Australia. In this context the National Compact has been developed, and a number of innovative reforms have been announced regarding the way the Government works with the not-for-profit sector.

## **National Compact**

- 1.17. The National Compact: *working together* was launched by the former Prime Minister, the Hon Kevin Rudd MP on 17 March 2010. The National Compact outlines how the Government and not-for-profit sector organisations will work together in new ways based on partnership and respect. It is the culmination of two years of consultation between the Government and the not-for-profit sector.
- 1.18. To date over 500 Compact Partners have committed to support the Compact’s shared Vision, Purpose and Principles. The National Compact recognises the vital contribution of the not-for-profit sector to Australian communities, especially in supporting the most vulnerable in the Australian society.
- 1.19. The Government is committed to supporting service delivery through the SACS and not-for-profit sectors, and contends that this is the most efficient way to deliver services and ensures application of local knowledge and skills for effective service delivery.
- 1.20. The Government’s National Compact with the not-for-profit sector demonstrates the Government’s commitment to supporting a stronger relationship between the Government and organisations in the sector to improve social, cultural, civic, economic and environmental outcomes. The continued delivery of essential services through the

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<sup>2</sup> Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra, p.xxv

not-for-profit sector will be supported by a strengthened relationship between the Government and the sector.

### **Reforms to the not-for-profit sector**

- 1.21. On 10 August 2010, the Prime Minister, the Hon Julia Gillard MP, announced historic reforms to the not-for-profit sector, with the aim of improving the transparency and accountability of the sector while simplifying and centralising its regulation.
- 1.22. The Government committed to establishing an Office for the Non-Profit Sector, to drive and coordinate policy reform in this area within government. The Office will be supported by a Non-Profit Sector Reform Council made up of representatives from across the sector, which will ensure constructive dialogue is maintained between government and sector representatives.
- 1.23. The Government also committed to undertaking a study to scope the responsibilities of a national not-for-profit regulator and to simplify and harmonise not-for-profit issues, including between the Commonwealth and states and territories. These reforms would remove the complex regulatory arrangements currently in place, streamline reporting arrangements and boost transparency and accountability in the sector.
- 1.24. Additionally, the Government has committed to improving efficiency when dealing with not-for-profit organisations. This will be achieved through measures such as developing a common Commonwealth contract for dealing with the sector, and reviewing the efficiency and effectiveness of current tendering, contracting and acquittal arrangements in the sector. These measures will also assist to mitigate the cost impact of any wage increase awarded by FWA.
- 1.25. Work is also underway through the Council of Australian Governments to introduce an optional Standard Chart of Accounts to improve consistency in financial reporting by organisations to funding agencies and departments, and harmonising fundraising legislation across States and Territories.
- 1.26. These reforms recognise the crucial role of the not-for-profit sector, including its SACS component. They boost the sector's innovative capacity by simplifying dealings with

the Government, and ensure that sector representatives are able to shape policy implementation.

## **Chapter 2: Legislative Framework**

### **Introduction**

- 2.1. This chapter outlines the Government's contentions in relation to the proper construction of the equal remuneration provisions set out in Part 2-7 of the FW Act.
- 2.2. As this is the first application to be heard by Fair Work Australia for an equal remuneration order under the FW Act, FWA will be required to consider the statutory requirements to be addressed and satisfied for an application to be successful. The Government encourages FWA to develop clear appropriate principles within the scope of the FW Act in its decision to guide the formulation and hearing of future applications for equal remuneration orders. The Government encourages FWA, in doing so, to draw on the experience of state jurisdictions such as the Queensland Equal Remuneration Principle of 2002 and explanatory notes and the New South Wales Equal Remuneration Principle, in so far as they are relevant.
- 2.3. The Government submits that in determining an application under Part 2-7 of the Act it is open to FWA to adopt an approach that involves identifying whether the work in question has been undervalued, taking into account the provisions in the FW Act. FWA may consider a range of factors in its evaluation, including: the features of the industry or occupation; the degree of occupational segregation; the representation of women in the occupation; the relative levels of full-time, part-time and casual employment; whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed.
- 2.4. Where it is found that the work in question has been undervalued, it is open to FWA to redress any undervaluation by determining a fair rate of pay, assisted through the use of appropriate comparator groups. The Government submits that a fair rate of pay is a rate which ensures equal remuneration for work of equal or comparable value (as outlined in the FW Act and the Explanatory Memorandum to the Fair Work Bill 2008).
- 2.5. The Government further submits that if FWA decides to issue an equal remuneration order, consideration should be given to a range of factors in determining the appropriate

remedy or fair rate of pay, having regard to the objects of the FW Act and considering the implications that a considerable wage increase may have on the sector concerned and the broader economy. This includes discounting comparator rates of pay which may have been relied upon for factors which are not gender based and considering whether compensation is required for loss of relativity even where previous work value adjustments have been made.

- 2.6. This chapter provides an overview of Part 2-7 of the FW Act and then considers the history of equal remuneration legislation in Australia and the way in which the equal remuneration provisions of the FW Act interact with the other provisions of the FW Act. It outlines what factors the Government submits FWA should take into consideration in the context of an application under Part 2-7 of the FW Act.

## **Fair Work Act 2009**

- 2.7. Section 302 of the FW Act provides as follows:

### **302 FWA may make an order requiring equal remuneration**

#### *Power to make an equal remuneration order*

- (1) FWA may make any order (an equal remuneration order) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

#### *Meaning of equal remuneration for work of equal or comparable value*

- (2) ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.

#### *Who may apply for an equal remuneration order*

- (3) FWA may make the equal remuneration order only on application by any of the following:
- (a) an employee to whom the order will apply;
  - (b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
  - (c) the Sex Discrimination Commissioner.

#### *FWA must take into account orders and determinations of the Minimum Wage Panel*

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



- (a) orders and determinations made by the Minimum Wage Panel in annual wage reviews; and
- (b) the reasons for those orders and determinations.

*Restriction on power to make an equal remuneration order*

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

- 2.8. The power conferred on FWA by subsection 302(1) is broad and discretionary. Thus the tribunal ‘may’ make an order, and may make any order it considers appropriate to ‘ensure that.....there will be’ equal remuneration for men and women workers for work of equal or comparable value. By reason of subsection 302(5) though FWA must not exercise power unless first satisfied there is *not* equal remuneration in the defined sense.
- 2.9. The key concept of Part 2-7, namely ‘equal remuneration for work of equal or comparable value’, is defined in subsection 302(2). The expression means ‘equal remuneration for men and women workers for work of equal or comparable value’.

## **History of Federal Equal Remuneration Legislation in Australia**

- 2.10. While there is State case law prior to this date, it is helpful to trace the genesis of federal equal remuneration legislation in Australia to 1951 and the International Labour Organisation (ILO) Equal Remuneration Convention 100 (the Convention).
- 2.11. Articles 2 and 3 of the Convention provide:

### **Article 2**

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
2. This principle may be applied by means of—
  - (a) national laws or regulations;
  - (b) legally established or recognised machinery for wage determination;
  - (c) collective agreements between employers and workers; or
  - (d) a combination of these various means.

### Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.
2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.
3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

- 2.12. Australia ratified the Convention on 10 December 1974. However, in the *1969 Equal Pay Case*,<sup>3</sup> the Commonwealth Conciliation and Arbitration Commission considered the Convention in the context of a claim it described as one ‘to insert into the award and determinations an amount of money which would eliminate the difference in current rates represented by the difference between the former male and female basic wages’.<sup>4</sup> The Full Bench said:

While we accept the concept of 'equal pay for equal work' implying as it does the elimination of discrimination based on sex alone, we realise that the concept is difficult of precise definition and even more difficult to apply with precision. We do not propose to deal in detail with all the possible different meanings of the phrase, nor do we propose to consider how it could be applied, in communities other than ours. Though we realise that the various United Nations and I.L.O. declarations and conventions must carry significant weight in a general way, we must consider how, if they are to be applied they can be fitted into our community. We have certain values which have in part been created by our own institutions including a complex wage system. This Commission cannot escape its own history, including the history of the Court, even if it wanted to. If the arbitration system had in the past not concerned itself with a needs or family wage but had fixed a rate for a job, irrespective of the sex, marital or parental status of the worker, the probabilities are that the rate for the job would lie somewhere between the current male rate and the current female rate. This is speculation on our part but it does highlight the difficulties of finding a

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<sup>3</sup> (1969) 127 CAR 1142.

<sup>4</sup> *Ibid* at 1147.

satisfactory solution to the issues now before us. We consider it preferable to start from a decision on principle in this case and let that principle be worked through the system.<sup>5</sup>

- 2.13. The *1969 Equal Pay Case* was the first articulation of equal pay principles in the federal jurisdiction, but confined it to the wages of male and female employees working under the terms of the same award. Principle 3 stated that the work performed by both males and females should be of the same or a like nature and of equal value. Also of interest is Principle 8, which stated:

[t]he expression of “equal value” should not be construed as meaning “of equal value to the employer” but as of equal value or at least of equal value from the point of view of wage or salary assessment.

- 2.14. In 1972, the Commonwealth Conciliation and Arbitration Commission reconsidered the 1969 Principles in the *National Wage and Equal Pay Cases 1972*.<sup>6</sup> The Commission said that:

the concept of “equal pay for equal work” is too narrow in today’s world and we think the time has come to enlarge the concept to “equal pay for work of equal value”. This means that award rates for all work should be considered without regard to the sex of the employee.<sup>7</sup>

- 2.15. The Full Bench went on to set out a new set of equal pay principles.<sup>8</sup> The passage quoted above was reflected in Principle 1, which defined equal pay for work of equal value as “fixation of award rates by a consideration of the work performed irrespective of the sex of the worker”.<sup>9</sup> To that end, in Principle 2 the Full Bench expressly embraced work value comparisons as the machinery for fixing rates. They said:

adoption of the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned<sup>10</sup>

- 2.16. The Full Bench elaborated further on that approach in Principle 4. They said:

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<sup>5</sup> *Ibid* at 1156; quoted in *Re Equal Remuneration Principle* [2000] NSW IR Comm 113 per Wright J President, Hungerford J, Schmidt J, Sams DP and McKenna C at [36].

<sup>6</sup> (1972) 147 CAR 172.

<sup>7</sup> *Ibid* at 178.

<sup>8</sup> *Ibid* at 179-180.

<sup>9</sup> *Ibid* at 179.

<sup>10</sup> *Ibid* at 179.

Implementation of the new principle by arbitration will call for the exercise of the broad judgment which has characterised work value inquiries. Different criteria will continue to apply from case to case and may vary from one class of work to another. However, work value inquiries which are concerned with comparisons of work and fixation of award rates irrespective of the sex of the employees may encounter unfamiliar issues. Insofar as those issues have been raised we will comment on them.

- 2.17. By Principle 5, the Full Bench firstly noted that the automatic application of any formula which sought to bypass a consideration of the work performed was inappropriate. Secondly they stated that work value comparisons should, where possible, be made between female and male classifications within the award under consideration, but where such comparisons were unavailable or inconclusive, such as where the work was performed exclusively by females, it might be necessary to take into account comparisons of work value between female classifications within the subject award and female classifications in other awards. It was also countenanced that in some cases comparison with male classifications in other awards might be necessary. Thirdly, the Full Bench reiterated that references to the value of work referred to the worth in terms of wages or salary, and not worth to the employer.

### **Industrial Relations Reform Act 1993**

- 2.18. The next significant development in the history of federal equal remuneration legislation in Australia was the enactment of the *Industrial Relations Reform Act 1993* (Cth) which amended the *Industrial Relations Act 1988* (Cth) (the IR Act) by introducing Division 2 of Part VIA, titled ‘Equal Remuneration for Work of Equal Value’. This was the first piece of federal legislation expressly dealing with equal remuneration in Australia. The Commonwealth relied on the external affairs power to enact the legislation.

- 2.19. Section 170BA stated the objects of the Division as follows:

The object of this Division is to give effect, or further effect, to:

- (a) the Anti-Discrimination Conventions<sup>11</sup>; and

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<sup>11</sup> Included the Equal Remuneration Convention.

- (b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation 90, and a copy of the English text of which is set out in Schedule 7; and
- (c) the Discrimination (Employment and Occupation) Recommendation 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation 111, and a copy of the English text of which is set out in Schedule 9.

2.20. Section 170BB, headed ‘Equal Remuneration for Work of Equal Value’ was an important definition section. It provided:

- (1) A reference in this Division to equal remuneration for work of equal value is a reference to equal remuneration for men and women workers for work of equal value.
- (2) An expression has in subsection (1) the same meaning as in the Equal Remuneration Convention.

Note: Article 1 of the Convention provides that the term ‘equal remuneration for men and women workers for work of equal value’ refers to rates of remuneration established without discrimination based on sex.

2.21. The other provision of Division 2 of the IR Act that is of relevance is s170BC(1) which states:

Subject to this Division, the Commission may make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value.

2.22. Division 2 was the first statutory recognition of equal remuneration entitlements for women. The Explanatory Memorandum to the *Industrial Relations Reform Bill 1993* contains the following:

The Convention is aimed at the elimination of differences in remuneration which are based on sex, whether directly or indirectly ...

The concept of equal remuneration goes beyond a reference to equal pay for the same work. The Convention meaning of equal remuneration for work of equal value turns on an objective comparison of the content of the jobs being done by men and women, and the Convention contemplates that job appraisals will be conducted where necessary to make such a comparison. It is not limited to comparisons between women and men employed in

the same enterprise or occupation or performing the same duties or using the same skills or techniques.<sup>12</sup>

## **Workplace Relations Act 1996**

2.23. Division 2 of Part VIA of the IR Act was largely replicated, with substantially the same effect, in the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). These provisions were amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). At that time, the amended provisions were moved to Division 3 of Part 12 of the *Workplace Relations Act 1996* (Cth) (the WR Act). Relevantly, a new provision was inserted in the following terms:

### **622 Relationship of this Division to AFPC decisions and the Australian Fair Pay and Conditions Standard**

...

- (2) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:
- (a) the group of employees who would be covered by the order applied for; and
  - (b) the comparator group of employees;
- are both entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7.

...

- (4) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:
- (a) the group of employees who would be covered by the order applied for is entitled to a rate of pay that is higher than the rate of pay the group would be entitled to under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7; and
  - (b) the comparator group of employees is entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7.

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<sup>12</sup> p22.

(5) To avoid doubt, subsection (4) does not apply if the comparator group of employees is entitled to a rate of pay higher than the applicable guaranteed rate.

...

(7) In this section:

...

**comparator group of employees** means employees whom the applicant contends are performing work of equal value to the work performed by the employees to whom the application relates (emphasis added).

2.24. This section was not re-enacted in Part 2-7 of the FW Act.

2.25. Despite the presence of equal remuneration machinery in federal workplace relations law since 1993, no equal remuneration claim has been successful to date. This has been so, the Government submits, for two reasons.

2.26. First, it was held that an applicant had to establish that any lack of equality in remuneration was caused by sex discrimination. Until the FW Act, the phrase ‘equal remuneration for work of equal value’ was deemed by subsection 170BB(1) of the WR Act to have the same meaning as the Equal Remuneration Convention. A note to section 170BB referred to the Convention requirement that rates of pay be established without discrimination based on sex. In *AMWU v HPM Industries*<sup>13</sup> Simmonds C held the issue of discrimination to be ‘central to the matter’.<sup>14</sup> He went on to say:

It follows from the definition of equal remuneration for work of equal value that as a first step to making an order the Commission must be satisfied that rates of remuneration have been established without discrimination based on sex. Both the applicant and the respondent to these proceedings, and some of the interveners addressed this question and accepted that a necessary precursor to establishing this was to establish that the work is of equal value. This must be so, as direct discrimination only arises where there is the same treatment in different circumstances. To establish the same circumstances exist there needs to be an assessment as to the equivalence of the work.<sup>15</sup>

2.27. Second, the requirement to identify work of ‘equal value’ was restrictive.

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<sup>13</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries Pty Ltd* (1998) 94 IR 129.

<sup>14</sup> *Ibid* at 158.

<sup>15</sup> *Ibid* at 159.

2.28. The appropriate method of evaluating ‘equal value’ was to apply the criteria of work value as described in the wage fixing principles.<sup>16</sup> This was a difficult task. As Munro J said in the second HPM case:

Views may differ about what considerations would constitute the elements upon which a particular member of the Commission may be satisfied that, for a particular employee or set of employees, there is not equal remuneration for work of equal value. A subjective judgment is a necessary component of the paragraph 170BC(3)(a) condition precedent to an order. However there must at least be a clear and relatively complete depiction and hopefully finding about both the “work” of the employee(s) to be subject to the order, and the “comparator” work of equal value. Upon the relevant two sets of work content being established, the valuation and relative equivalence of them will need to be established. That forensic task involves a requirement to persuade the Commission of both the validity of an evaluation principle to be used and of the equivalence of the work resulting from the application of it.<sup>17</sup>

2.29. In summary, prior to the introduction of the FW Act, the content of federal equal remuneration legislation required the applicant to:

- establish discrimination as the cause of any pay discrepancy;
- identify a comparator group; and
- establish that the comparator group performed work of equal value.

2.30. Other key features were that:

- the central concept of equal remuneration was framed in terms of a comparison between the value of work of men and of women; and
- the valuation of that work is its monetary value.

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<sup>16</sup> *Ibid* at 160.

<sup>17</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries Pty Ltd* (Unreported, C No 21025 of 1998) per Munro J at [17].



## **Fair Work Act 2009**

- 2.31. Equal remuneration is an important principle in the FW Act. Not only are there stand alone provisions dealing with equal remuneration in Part 2-7 of the FW Act but equal remuneration is also included as a relevant consideration in the minimum wages objective set out at section 284 of the FW Act and as a modern awards objective at section 134 of the FW Act.
- 2.32. A number of changes were made to the equal remuneration provisions when the FW Act was introduced and include:
- adding the word ‘comparable’ to the statutory expression ‘equal value’; and
  - removing the reference to the ILO Convention and its definition of ‘equal remuneration for work of equal value’ as ‘rates of remuneration established without discrimination based on sex’. The Government contends that this removes the requirement to establish discrimination as the cause of the claimed pay inequity; and
  - removal of specific reference to comparator groups in the text of the legislation.
- 2.33. The Government’s intention is disclosed in the Explanatory Memorandum to the Fair Work Bill, which relevantly states (emphasis added):
1191. The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.
1192. The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.

## **Other legislation**

- 2.34. Before moving to consider the Government's position on the proper statutory construction of the equal remuneration provisions under the FW Act, it is useful to consider other jurisdictions' equal remuneration legislation.
- 2.35. The Government has reviewed equal remuneration legislation in the UK, New Zealand, Canada, the USA and South Africa. The international provisions are of little assistance in that they are all framed in more narrow terms than the FW Act. Their general theme is to provide for equal pay between men and women who work for the same employer, though within that context, they do provide for a form of 'work value' assessment to establish any wage differential.
- 2.36. The Australian jurisdictions of Queensland and NSW, on the other hand, operate by reference to the same definition of equal remuneration as appears in section 302(2) of the FW Act.

## **Queensland**

- 2.37. The *Industrial Relations Act 1999* (Qld) (the Qld Act) provides in section 3 that the principal object of the Act is to provide a framework for industrial relations that supports economic prosperity and social justice by, inter alia, 'ensuring equal remuneration for men and women employees for work of equal or comparable value'. In relation to the Queensland Industrial Relations Commission's (QIRC) award making powers, section 126 of the Queensland Act provides that the QIRC must ensure an award 'provides for equal remuneration for men and women employees for work of equal or comparable value'.
- 2.38. Part 5 of the Queensland Act provides for the making of an equal remuneration order by the QIRC. It operates by reference to a definition of equal remuneration in section 59, which is the same as that in subsection 302(2) of the FW Act. Section 62 of the Queensland Act requires the QIRC to make an equal remuneration order if the employees to be covered by the order do not receive equal remuneration as defined. This requirement is to be contrasted with the discretionary provision in subsection 302(5) of the FW Act.

2.39. Section 288 of the Queensland Act authorises the QIRC to make a binding decision as to the principle to be applied in all industrial matters. Using this power, the QIRC adopted an Equal Remuneration Principle in 2002. It provides that in assessing the value of work, the QIRC will examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features. The reference to conditions under which work is performed has the same meaning as in the work value principles (Principle 2). The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender (Principle 3).

2.40. Principle 6 deals with assessment of work value and requires the QIRC to have regard to the history of the award including whether there have been any assessments of the work in the past. Principle 6 then deems as relevant to an assessment of the value of work, and hence to the question of whether work is undervalued by reason of gender, the following indicia:

- Whether there has been some characterisation or labelling of the work as ‘female’;
- Whether there has been some underrating or undervaluation of the skills of female employees;
- Whether remuneration in an industry or occupation has been undervalued as a result of occupation segregation or segmentation;
- Whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part-time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or
- Whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.

- 2.41. Principle 7 provides that gender discrimination is not required to be shown to establish the undervaluation of work, and Principle 8 states that comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.

## **New South Wales**

- 2.42. In NSW, the *Industrial Relations Act 1996* (NSW) (the NSW Act) provides in s19, that the New South Wales Industrial Relations Commission (NSW IRC) is to review awards every three years and that such reviews would have regard to addressing, among other things, any issues of discrimination, including pay equity, in those awards. Section 21 of the Act contains a series of conditions which the NSW IRC must, on application, include in awards. Those conditions include, at s21(1)(b) 'Equal remuneration and other conditions for men and women doing work of equal or comparable value'. Finally, section 23 provides that 'Whenever the Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value'. Like the QIRC, the NSW IRC does not have discretion to remedy.
- 2.43. Section 51 of the NSW Act allows the NSW IRC to make Principles and in 2000, the NSW IRC promulgated a new Equal Remuneration Principle to be included in the state wage fixing principles.
- 2.44. The principle provided, among other things, that the assessment of the work, skill and responsibility required under the principle was to be approached on a gender neutral basis and in the absence of assumptions based on gender.
- 2.45. Paragraph (a) of the principle provides that claims can be made under the principle 'on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis'. This gender basis does not require that the relationship between gender and undervaluation must be one of cause and effect.<sup>18</sup> In the *Equal Remuneration Principle Case*<sup>19</sup> the Full Bench

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<sup>18</sup> A more detailed discussion of this issue is contained in the next section of this chapter.

<sup>19</sup> (2000) 97 IR at 196.

conceived of the relationship as one in which the failure to properly value the work must be ‘related to factors *associated with* the sex of those performing the work’<sup>20</sup> (emphasis added).

- 2.46. It is to be noted that the NSW principle differs in several respects from that which was subsequently promulgated in Queensland. Perhaps most significant is the absence of an equivalent to Queensland Principle 7 that ‘gender discrimination is not required to be shown to establish undervaluation of work’. There is also no equivalent for Queensland Principle 8, that comparisons are not required.
- 2.47. Nor does the NSW principle include a list of factors that may be relevant in establishing undervaluation, as the Queensland principle does.
- 2.48. The NSW principle also states that where ‘under-valuation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of the work, such as labour market attraction or retention rates or productivity factors’.
- 2.49. In the NSW Pay Equity Inquiry conducted by Glynn J in 1998, her Honour considered that comparisons were usually required, but should not be the first step or operate as a threshold test for the purpose of a pay equity claim under NSW legislation.<sup>21</sup> This position is to be contrasted with previous Commonwealth case law that did require this as a first step. In arbitrations concerning Kindergarten and Childcare workers and Librarians conducted by the NSW IRC since the Pay Equity Inquiry of 1998 comparators were relied upon to find there was unequal undervaluation<sup>22</sup> and to assess value of the work performed.<sup>23</sup>

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<sup>20</sup> *Ibid* at [71].

<sup>21</sup> At p157.

<sup>22</sup> *Re Miscellaneous Workers – Kindergarten and Child Care Centres (State) Award* [2006] NSWIRC 64 at [210]; *Crown Librarians & Ors* [2002] NSWIRComm 55 at [23]-[28].

<sup>23</sup> *Ibid* at [243], and in the *Librarians’ Case* at [147] – [148].

## Construction of Part 2-7

2.50. This case is the first application to be heard by FWA for an equal remuneration order under the FW Act. Accordingly, in deciding whether to make an order or not, FWA will establish the statutory requirements that must be addressed and satisfied for an application to be successful. This gives FWA the opportunity to establish guiding principles in relation to how future equal remuneration applications should be handled. The Government submits that FWA should take this opportunity to set out in its decision clear appropriate principles drawing on the experience of other jurisdictions, where relevant, to guide the formulation and hearing of future applications for equal remuneration orders.

2.51. The principles applicable to statutory construction are not controversial. They were stated by the High Court in *Project Blue Sky v Australian Broadcasting Authority*.<sup>24</sup> In summary, the Court held that:

- the process of construction of a statutory provision must always begin by examining the context of the provision within the statute as a whole, so that:
  - the provision should be construed to be consistent with the language and purpose of other provisions of the statute;
  - the meaning of the provision is determined by reference to the language of the statute viewed as a whole;
  - the context, general purpose and policy of the provision and its consistency with fairness is considered<sup>25</sup>;
- a statute must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals;
- in construing a statutory provision one must strive to give meaning to every word of the provision, and avoid a result which deprives any part of the provision or the statute of meaning, operation or utility.

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<sup>24</sup> (1998) 194 CLR 355 at [69]-[71].

<sup>25</sup> See also s.15AA of the *Acts Interpretation Act 1901* (Cth).

- 2.52. The context of a statutory provision may also include its history, as that may throw light on the purpose and meaning of the provision.
- 2.53. In a Part 2-7 application, the Government submits that it is open to FWA to adopt an approach that will best achieve the statutory purpose of Part 2-7, which is to expose and redress unequal remuneration between men and women for work of equal or comparable value.
- 2.54. The Government submits that in determining an application under Part 2-7 of the FW Act it is open to FWA to adopt an approach that involves identifying whether the work in question has been undervalued, taking into account the new provisions in the FW Act and a broad range of factors relevant to the circumstances of the case. Factors which FWA may consider relevant include: the features of the industry or occupation; the degree of occupational segregation; the representation of women in the occupation; the relative levels of full-time, part-time and casual employment; whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed.
- 2.55. With respect to work value, the context and history of federal industrial legislation suggests that the well recognised and understood work value process could be applied and adapted. That provides consistency with subsection 156(4) and also the jurisprudence in NSW and Queensland.
- 2.56. That said, the Government notes that the application of work value assessments in a Part 2-7 context are necessarily different from a traditional work value assessment because the purpose of such an assessment in an equal remuneration context is to expose gender based inequality of pay between work of equal or comparable value. However, the list of factors in subsection 156(4) may provide a useful starting point for an assessment of comparable work value.<sup>26</sup>
- 2.57. In paragraphs 2.31-2.32 the Government drew attention to the changes to the federal equal remuneration provisions brought about through the enactment of Part 2-7. The requirement to demonstrate discrimination was removed, leaving FWA

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<sup>26</sup> The same elements apply to the work value assessments required under the Queensland and NSW Equal Remuneration Principles.

with a greater discretion to determine any connection between the subject matter of unequal remuneration and gender. FWA's power is discretionary and conferred for the purpose of achieving a specified end, namely to "ensure that there will be" equal remuneration between men and women for work of equal or comparable value. While the Government submits that a connection is required it also submits the Part should be given a generous construction. In this context, it is open to FWA to identify how the connection is to be established that will best give effect to the purpose of the Part.

- 2.58. The Government has drawn attention in paragraph 2.44 to the formulation posited by the NSW IRC; namely that undervaluation must be related to factors associated with sex. Another approach is that proposed by Weinberg J in *Macedonian Teachers' Association of Victoria Inc. v Human Rights and Equal Opportunity Commission*.<sup>27</sup> In that case his Honour was primarily concerned with construing the expression 'based on' in an anti-discrimination context. His Honour held that the expression meant the same as 'by reference to', about which his Honour said:

That expression does not, of itself, suggest a relationship of cause and effect. It suggests rather a relationship of a different and broader kind. The links between the elements connected by this expression must, no doubt, be real and tangible, but not necessarily causative in nature. To ask whether the manner in which the complainant was treated is in any way referable to his race, colour, descent or national or ethnic origin is not necessarily to ask whether these characteristics 'caused' the impugn conduct.<sup>28</sup>

- 2.59. The purpose and context of Part 2-7, and the history of the provisions it enacts, justifies a similar approach. Accordingly, the Government contends that to justify the exercise of power (subject to discretionary factors) FWA needs to be satisfied on the evidence before it that there is unequal remuneration between men and women because it is satisfied that there is undervaluation, on work value grounds, of the work performed by the subject group by reference to gender.
- 2.60. The above notwithstanding, the requisite connection will be easily satisfied if the evidence justifies a finding that the cause of undervaluation is sex discrimination or gendered assumptions. Similarly, evidence of female domination of an industry or

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<sup>27</sup> (1998) 160 ALR 489. His Honour was upheld on appeal: *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) FCR 47; and his approach approved by a Full Court in *Bropho v State of Western Australia* (2008) 169 FCR 59 at [68]-[69].

<sup>28</sup> *Ibid* at 506-507.



workplace, while not of itself determinative, may be evidence which, in combination with other evidence, supports the requisite connection.

## Comparators and Comparison

- 2.61. Part 2-7 is titled ‘Equal Remuneration Orders’. By reason of subsection 302(5), FWA must be satisfied there is not *equal* remuneration in the defined sense as a condition of power. Similarly, any order made in the exercise of discretion must ensure that there will be equal remuneration in the defined sense.
- 2.62. As a matter of statutory interpretation, it is contemplated under Part 2-7 that a comparison would be sufficient to establish for the purposes of subsection 302(5), whether the employees to whom any order would apply, are not receiving equal remuneration for work of equal or comparable value. That comparison is similarly sufficient for the purposes of subsection 302(1) to determine what is the ‘equal remuneration for work of equal or comparable value’ that is to be addressed by the equal remuneration order.
- 2.63. The Commonwealth submits, however, that this does not mean that a direct application of comparator rates of pay to the applicants in a particular case is necessarily an appropriate remedy. A range of factors may influence the appropriateness of the remedy, including discounting and/or compensating any comparator rate where appropriate. This issue is explored further in the section on Remedy.
- 2.64. The hallmark of equal pay<sup>29</sup> and remuneration cases in the federal jurisdiction since the 1972 *Equal Pay Case* is adherence to work value as the machinery of assessment, a position summarised by Munro J in *AMWU v HPM Industries*<sup>30</sup> in the following terms:

the Commission’s principles and practice related to work value comparisons and changes are a primary source of guidance about what factors and considerations are of accepted relevance to such an evaluation.<sup>31</sup>

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<sup>29</sup> In this respect, the continuing relevance of the 1972 equal pay principle was confirmed by a Full Bench in *AMWU v Alcoa Australia Ltd* (1996) 63 IR 138 at 159 and directly in relation to the pre-Work Choices WR Act equal remuneration provisions by Simmonds C in *AMWU v HPM Industries* (1998) 94 IR 129 at 160.

<sup>30</sup> (19 May 1998) Print Q1002.

2.65. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries Pty Ltd*,<sup>32</sup> Commissioner Simmonds sets out some extracts of the ILO general survey of the reports on the Equal Remuneration Convention and Recommendation in 1986. Those extracts include the following:

Article 3 provides differential rates based on an objective appraisal not related to sex or not contrary to the principle... it is implicit that adoption of the idea of work of equal value necessarily implies some comparison between jobs. When the value of different jobs has to be compared there should exist appropriate machinery and procedures to ensure an evaluation free from discrimination based on sex.<sup>33</sup>

2.66. These passages from the ILO report reaffirm the emphasis that previous legislation placed on the use of comparisons in respect of the Convention, which the current legislative provisions no longer specifically cite.

2.67. The position in respect of the current legislation is further confirmed in paragraph 1191 of the Explanatory Memorandum to the Fair Work Bill which outlines that the broadening of the equal remuneration principle in the FW Act ‘allows comparisons to be carried out between different but comparable work’ for the purpose of assessing an equal remuneration claim.

2.68. Where a comparator is used by an applicant the function of such a comparator is to expose whether employees of one gender are not receiving equal remuneration with employees of the opposite gender for performing work of equal or comparable value. In this context, the best comparator to be used for this purpose is the one which best serves the function in the circumstances of the particular application before FWA. For example, it may be appropriate to compare the work value of the subject group with that of another group of workers, including female workers, whose remuneration has been determined on a gender-neutral basis. Indeed, that was the approach of Cartwright SDP when fixing minimum rates under the respective social and community service pre-reform awards in the course of the award simplification process; a matter explained in more detail in Chapter 5.

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<sup>31</sup> At [18].

<sup>32</sup> (1998) 94 IR 129.

<sup>33</sup> At 136.

- 2.69. Where a comparator is used by an applicant for an equal remuneration order, the question may also arise as to the appropriateness of using a comparator group whose remuneration has been determined through enterprise bargaining.
- 2.70. Prior to the Work Choices amendments to the WR Act in 2006, the Australian Industrial Relations Commission (AIRC) was empowered under section 170BC to make such orders as it considered appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value. Subsection (2) provided that ‘an order under this Division may provide for such increases in rates (including minimum rates) of remuneration (within the meaning of the Equal Remuneration Convention) as the Commission considered appropriate’.
- 2.71. The ILO Equal Remuneration Convention defined ‘remuneration’ in Article 1, as follows:
- The term ‘remuneration’ includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment.
- 2.72. The Work Choices amendments changed the terms of the former subsection 170BC(2) by deleting the phrase ‘including minimum wages’ and replacing it with ‘other than those set by the AFPC’.<sup>34</sup>
- 2.73. This change is consistent with the exclusions in section 622 of the WR Act in relation to rates of pay set by the Australian Fair Pay and Conditions (AFPC) Standard. Subsection 622(2) deprived the AIRC of jurisdiction to deal with an application if the subject group of employees and the comparator group were both entitled to a rate of pay equal to the AFPC standard.
- 2.74. In the FW Act, the equivalent section, section 303, does not have any of the restrictions in the WR Act. The term ‘remuneration’ is not defined and there is no reference in the FW Act to any link with the ILO Equal Remuneration Convention. ‘Remuneration’ is not limited to safety net rates fixed by awards, whether pre-reform or modern.

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<sup>34</sup> Section 624(2) of the WR Act.

- 2.75. The Explanatory Memorandum at paragraph 1190 states, '[t]he term remuneration encompasses entitlements in addition to wages (ie, it encompasses wages and other monetary entitlements)'.
- 2.76. Having regard to the remedial nature of this legislation and its history, the Government contends that section 302 should be given a generous construction and on that basis should not be interpreted as being confined to minimum rates of pay. That being so, FWA could have regard to enterprise agreement pay rates if it were considered that such a comparison would best expose gender-based undervaluation. However, as the task for FWA is to fix a gender neutral rate of remuneration that reflects the value of the work performed, the Government submits that factors such as labour market attraction or retention rates, or productivity factors should be excluded from consideration, a matter addressed in greater detail in the section on Remedy.

## **Remedy**

- 2.77. The Government contends that in determining an application under Part 2-7 of the FW Act, where FWA identifies that the work in question has been undervalued, it is open to FWA to redress any such undervaluation by determining a fair rate of pay, assisted through the use of appropriate comparator groups. In doing so, FWA should have regard to the objects of the FW Act and consider the implications that a considerable wage increase may have on the sector concerned (in this case SACS services and SACS funders) and the broader economy.
- 2.78. The Government submits that a fair rate of pay is a rate which ensures equal remuneration for work of equal or comparable value (as outlined in the FW Act and the Explanatory Memorandum to the Fair Work Bill 2008).
- 2.79. The Government further submits that if FWA decides to issue an equal remuneration order, a range of factors can be considered when determining a fair rate of pay, and some of these may lead to discounting and compensation. They include but are not limited to:
- where there is an identified comparator group, identifying whether the group has achieved remuneration outcomes through bargaining or over-award payments;

- where this has occurred the Government contends that FWA needs to examine whether the rate of pay has been achieved through factors unrelated to gender undervaluation including for example, productivity tradeoffs, specific attraction and retention strategies including to address skills shortages, the geographical location of employees, and discount accordingly; and
- identifying where previous work value claims have been assessed and remedies provided through comparison with relevant awards for jobs of equal or comparable value but where relativities have not been maintained. The Government envisages this could occur for example where increases were awarded to one group of employees on a dollar basis but increases awarded to a comparator group were awarded on a percentage basis. In such cases, the Government contends that FWA should take into consideration the percentage loss of relativity when determining an appropriate rate of remuneration.

### **Interaction with other provisions of the FW Act**

- 2.80. Given this is the first application for an equal remuneration order heard by FWA, the Government contends that it is appropriate for some context to be given as to how the equal remuneration provisions interact with the other provisions of the FW Act.
- 2.81. Part 2-7 deals with some of the same issues as the low paid bargaining provisions contained in Division 9 of Part 2-4 of the FW Act and the power conferred on FWA by section 156 to vary the wages in modern awards on work value grounds.

### **Work Value in a Modern Award Context**

- 2.82. FWA is required by section 156 to review the wages in modern awards every 4 years. In the course of a review, any variation to modern award rates of pay must be justified on work value grounds: 156(3). That limitation on power generally corresponds with the safety net principles that were adopted by the AIRC in relation to pre-reform awards.

The definition of work value reasons is set out in subsection 156(4), which provides that:

(4) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
- (c) the conditions under which the work is done.

2.83. The focus in an equal remuneration application is broader than a work value assessment. Its purpose is to assess whether there is gender based undervaluation. The work value elements identified in subsection 156(4) are apposite, but in the context of reviewing modern award rates are directed to a different issue.

### **Low Paid Bargaining**

2.84. The FW Act makes provision for low paid bargaining in Division 9 of Part 2-4 of the Act.

2.85. The objects of the Division are set out in section 241. In summary, they are, to assist low paid employees and their employers to overcome historical constraints on bargaining collectively at the enterprise level to make an agreement that meets their needs, to assist in identifying productivity improvements through collective bargaining, and to enable FWA to assist low paid employees and their employers to facilitate bargaining for an enterprise agreement.

2.86. Section 246 prescribes the assistance which FWA may provide under the Division. FWA can facilitate bargaining, direct a person to attend a conference, or provide assistance as if it were dealing with a dispute, for example through conciliation or arbitration (with the agreement of the bargaining representatives).

2.87. The Division enables those authorised by FWA to bargain on a multi-employer basis. The authorisation must be given if it is in the public interest. The matters that FWA is required to take into account include the history of bargaining and the relative

bargaining strengths of employers and employees, as well as the prospects of bargaining success. FWA must also take into account the current terms and conditions of employment as compared to relevant industry and community standards. However, that comparison does not require a gender comparison.

- 2.88. Division 2 of Part 2-5 authorises FWA to make consent low-paid workplace determinations and special low-paid workplace determinations, if parties are unable to reach an agreement and the conditions of Division 2 are met.
- 2.89. The low paid bargaining provisions provide a means by which employers and employees in the sector can be assisted to bargain collectively and in doing so, may indirectly address undervaluation. However, the Government does not contend that it precludes relief being sought or granted under Part 2-7.

## **Conclusion**

- 2.90. The FW Act marked a shift in the shape of federal equal remuneration legislation. The inclusion of equal remuneration for work of ‘comparable value’ in the FW Act enhances the scope and effectiveness of the equal remuneration provisions by removing historic obstacles, such as the requirement to prove sex discrimination to successful claims for equal remuneration in the national system.
- 2.91. Equal remuneration is a guiding principle of the FW Act, which has several other features designed to address pay inequity, including new criteria to guide minimum wage increases, the new low paid bargaining stream and new opportunities for collective bargaining.
- 2.92. The Government submits that in determining an application under Part 2-7 of the FW Act it is open to FWA to adopt an approach that involves identifying whether the work in question has been undervalued, taking into account the provisions in the FW Act. FWA may consider a range of factors in its evaluation, including: the features of the industry or occupation; the degree of occupational segregation; the representation of women in the occupation; the relative levels of full-time, part-time and casual employment; whether sufficient and adequate weight has been placed on the typical

work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed.

2.93. Where it is found that the work in question has been undervalued, it is open to FWA to redress any undervaluation by determining a fair rate of pay, assisted through the use of appropriate comparator groups. In determining a fair rate of pay, FWA should have regard to the objects of the FW Act and consider the implications that a considerable wage increase may have on the sector concerned and the broader economy. This includes discounting comparator rates of pay which may have been relied upon in establishing undervaluation for factors which are not gender based and considering whether compensation is required for loss of relativity even where previous work value adjustments have been made.

2.94. The Government encourages FWA to develop clear appropriate principles to guide approaches taken to any future applications under the FW Act for equal remuneration orders. The jurisprudence of other jurisdictions, including the Queensland Equal Remuneration Principle of 2002 and the NSW Equal Remuneration Principle, provide useful guidance for this purpose.



## **Chapter 3: Pay Equity and the Gender Pay Gap**

### **Introduction**

- 3.1. This chapter provides a brief overview of Government initiatives in place to support pay equity and female participation in the workforce, in addition to the introduction of the expanded equal remuneration provisions in the FW Act.
- 3.2. This chapter also provides a snapshot of current gender pay equity and labour market data across the Australian workforce.

### **Advancing pay equity and female workforce participation**

- 3.3. The Government considers the issues of pay equity and improving the economic outcomes of women to be important. The Government is currently implementing a range of initiatives focused on progressing equality between women and men to support better pay equity outcomes, and improved female workforce participation.
- 3.4. The Government recognises the vital service the SACS sector delivers to some of the most vulnerable members in our society across a broad spectrum of community services, and values the contribution the sector makes.

### **Fair Work Act 2009**

- 3.5. In addition to expanding the equal remuneration provisions, the FW Act puts in place practical measures to assist women and men to make choices about how to balance paid work and family life such as individual flexibility arrangements that can be negotiated under the relevant modern award or enterprise agreement and which must result in the employee being better off overall.
- 3.6. Collective bargaining, underpinned by good faith bargaining obligations, is at the centre of the FW Act. The Government considers there are incentives and protections in place in negotiating and approving enterprise agreements which facilitate positive pay equity outcomes.

- 3.7. This good faith collective bargaining framework is underpinned by the NES and Modern Awards which establish a strong safety net of minimum entitlements that cannot be undermined through the bargaining process.
- 3.8. Collective bargaining allows for the development of balanced, cooperative arrangements that foster improved productivity across a business and improved flexibility for employers and employees. Collective bargaining helps to ensure working arrangements are tailored to suit the needs of an individual business and its employees.
- 3.9. The FW Act also provides a new stream of bargaining for low paid employees and those who have not historically had access to the benefits of collective bargaining. These provisions have been designed with particular sectors in mind, such as the cleaning and child care industries, many of which comprise a high proportion of female employees.

### **Paid Parental Leave**

- 3.10. From 1 January 2011, the Government will deliver Australia's first national Paid Parental Leave scheme. The *Paid Parental Leave Act 2010* was passed by Parliament on 17 June 2010 and received Royal Assent on 14 July 2010.
- 3.11. The Paid Parental Leave scheme is designed to promote maternal and child health and wellbeing, encourage greater workforce participation by parents and also promote gender equity and work/family balance.
- 3.12. The Paid Parental Leave scheme will give parents more time to stay at home and care for their baby during the vital early months of their baby's life. The Government's scheme will support women to maintain their connection to the workforce and boost workforce participation. The scheme will give parents more options to balance work and family life and help employers retain skilled and experienced staff.
- 3.13. Currently almost half of all Australian women have access to paid parental leave, however, those on low incomes are more likely to miss out. ABS data from August 2009 shows less than 20 per cent of women on very low wages (under \$400 per week) have access to employer-provided paid parental leave, compared to almost 70 per cent

of women on high wages.<sup>35</sup> Under the Government's scheme, casual and part-time workers, contractors and the self-employed will be eligible for the Paid Parental Leave scheme, many for the first time.

- 3.14. Generally, the Government expects that mothers will access Parental Leave Pay in the first instance. However it is becoming increasingly common for fathers to spend some time being the primary carer of the child during the first year. The Government's Paid Parental Leave scheme is flexible and will allow parents to make their own work and family decisions. Should the father or other carer become the primary carer, all or part of the parental leave pay can be transferred to them, provided both they and the mother meet the eligibility requirements. The Government has committed more than \$1 billion over the next four years for this historic reform.
- 3.15. The Government anticipates that by supporting working parents to stay connected to their workplace, workforce participation by parents (particularly women) will be supported. It will also be likely to promote employment prior to childbirth so that claimants could qualify for the Paid Parental Leave scheme, meaning women may be more likely to return to work, particularly in between pregnancies. In its Final Inquiry Report 'Paid Parental Leave: Support for parents with newborn children', the Productivity Commission noted that long-run European studies into the impacts of parental leave entitlements on aggregate employment and wages imply moderate paid leave periods can stimulate female employment and workplace participation. The Commission estimated that a Commonwealth scheme would maintain women's link to the labour market and increase their lifetime employment, and therefore earnings, by around six months.

### **Sex Discrimination Act 1984**

- 3.16. The Government has responded to the report of the Senate Legal and Constitutional Affairs Committee Inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* (Cth) (SDA) in eliminating discrimination and promoting gender equality.

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<sup>35</sup> ABS, *Employee Earnings, Benefits and Trade Union Membership* (cat. 6300.0), August 2009.

- 3.17. Legislation was introduced to Parliament on 24 June 2010 to ensure the protections from discrimination provided by the SDA apply equally to women and men, through reference to additional international instruments which create obligations in relation to gender equality; establishing breastfeeding as a separate ground of discrimination; providing greater protection from sexual harassment for students and workers; and, extending protection from discrimination on the ground of family responsibility to both women and men in all areas of employment.
- 3.18. While these initiatives do not directly influence workplace remuneration levels, they do support an equal playing field for women and men at work.

### **Equal Opportunity for Women in the Workplace Act 1999**

- 3.19. The Government commenced a review in June 2009 of the Equal Opportunity for Women in the Workplace Agency (EOWA) and its underpinning legislation, the *Equal Opportunity for Women in the Workplace Act 1999* (the EOWW Act). The purpose of this review is to examine the effectiveness and efficiency of EOWA and the EOWW Act in promoting equal opportunity for women in the workplace.
- 3.20. In the context of this review, the Government has committed to retaining and improving EOWA and the EOWW Act to support gender equality and workplace flexibility. As part of strengthening the EOWW Act, the Government intends to streamline the existing reporting requirements, reducing cost to business, by using measurable indicators of outcomes for men and women in the workplace.

### **Female Representation on Boards**

- 3.21. The Government is committed to increasing women's equal place in society and the number of leadership positions held by women. One of the Government's initiatives in this area is its strategic partnership with the Australian Institute of Company Directors to offer a new scholarship program aimed at increasing the number of women on boards.

- 3.22. The Government has also committed to a new target of 40 per cent representation for both women and men on Federal Government boards.

### **House of Representatives inquiry into pay equity and increasing female workforce participation**

- 3.23. On 23 November 2009, the House of Representatives Standing Committee on Employment and Workplace Relations, following 18 months of public consultations and receiving 155 submissions, released its report 'Making it fair: pay equity and associated issues related to increasing female participation in the workforce'.
- 3.24. The Government welcomes the release of this report which makes 63 recommendations on a wide range of issues spanning several areas, including workplace relations, superannuation and financial matters, portability of long service leave, reporting requirements, data collection and cultural change.
- 3.25. The Government is considering the recommendations of the pay equity inquiry in association with the outcome of the review of EOWA and the EOWW Act.

### **Gender pay gap overview**

- 3.26. The following sections provide a snapshot of the latest gender pay gap data.

### **Pay gap data and trends**

- 3.27. There are a number of ways of estimating the size of the gender pay gap. While each demonstrates the existence of a pay gap, the size of the gap varies depending on the data source relied on. One way of assessing the size of the gender pay gap is through an examination of Average Weekly Ordinary Time Earnings (AWOTE). Another is through review of research into the gender pay gap.
- 3.28. The gender pay gap based on AWOTE for full-time adults stood at 17.6 per cent in May 2010, unchanged from February 2010 (trend terms). This represents the equal highest

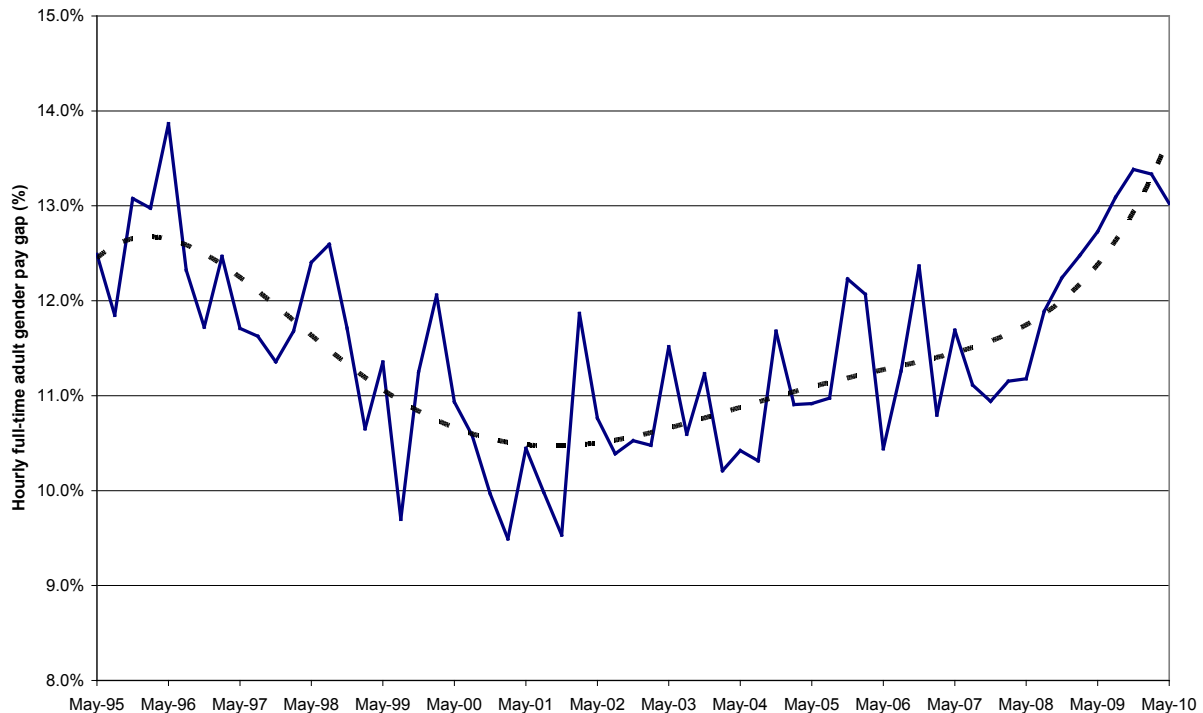
weekly gap on record.<sup>36</sup> This figure reflects the fact that weekly female earnings as a percentage of male earnings remained constant at 82.4 per cent in May 2010.

- 3.29. Analysis of the gender pay gap based on AWOTE data, however, ignores differences in the hours worked by males and females, differences in work experience, industry choice and occupation choice and differences in their employment status. If these factors are taken into account, the gender pay gap could be significantly smaller. The AWOTE data also excludes salary sacrificed amounts which may have an impact on the gender pay gap, noting that almost a third of workers in the female dominated SACS sector utilise salary sacrifice arrangements.
- 3.30. Taking into account the differences in the hours worked by males and females the average hourly gender pay gap fell marginally to 13.0 per cent in May 2010, down from 13.3 per cent in February 2010 (original terms).
- 3.31. Chart 3.1, however, shows that the hourly gender pay gap has been on a steady upward trend since the early 2000s. This may be due, in part, to the strength in conditions and wages in traditionally male dominated industries such as mining in recent years. However there is now evidence of a slight reduction in the hourly gap.

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<sup>36</sup> ABS, *Average Weekly Earnings* (Cat. No. 6302.0), May 2010.

**Chart 3.1: Hourly full-time adult gender pay gap**



Source: ABS *Average Weekly Earnings* (Cat. No. 6302.0), May 2010, original data and ABS, *Labour Force, Australia, Detailed, Quarterly* (Cat. No. 6291.0.55.003), May 2010.

Note:

Average hourly earnings are calculated by DEEWR by dividing full-time adult average weekly earnings (in original terms) (from ABS *Average Weekly Earnings* Cat. No. 6302.0) by the number of hours worked by full-time employees, aged 20 years and over in all industries except Agriculture, forestry and fishing for the relevant quarter (from ABS *Labour Force, Australia, Detailed, Quarterly*, May 2010 Cat. No. 6291.0.55.003).

3.32. Research commissioned by the Office for Women into the economic impact of a sustained gender wage gap<sup>37</sup> estimated that the cost to the economy of the gender wage gap is around \$93 billion or 8.5 per cent of GDP. This research relied upon data from the ABS *Average Weekly Earnings* series, with the applied sample limited to full-time working adults working ordinary time.

3.33. The research also identified key determinants of the gender wage gap in Australia. Simply being female accounted for 60 per cent of the difference between men and women's earnings followed by industrial segregation (25 per cent), labour force history (7 per cent), under representation of women with vocational qualifications (5 per cent) and under representation of women in large firms (3 per cent). The presence of children

<sup>37</sup> National Centre for Social and Economic Modelling, *The impact of a sustained gender wage gap on the economy*, November 2009.

was also found to be a contributor to the gender wage gap as women with dependent children earn 7.5 per cent less than women without dependent children.

## Participation rates

3.34. The trend participation rate for the general workforce stood at 65.4 per cent in August 2010. The male participation rate stood at 72.3 per cent in August 2010, while the female participation rate stood at 58.7 per cent in August 2010.<sup>38</sup>

## Age profile

3.35. The gender pay gap also varies by age. The average gap based on mean weekly earnings in main job over the last two decades for full-time employees is smallest amongst younger workers. The gap increases until around age 55, where it narrows towards retirement.

**Table 3.2: Average gender pay gap by age for full-time employees, 1990-2009**

Age	Average pay gap for full-time employees (1990-2009) (%)
15–19	4.8
20–24	7.4
25–29	9.9
30–34	11.8
35–39	18.2
40–44	23.4
45–49	24.3
50–54	25.0
55–59	21.9
60–64	17.6
65 and over	19.0
<b>All age groups</b>	<b>18.9</b>

Source: ABS *Employee Earnings, Benefits and Trade Union Membership* (Cat. No. 6310.0), August 2009, Datacube 63100TS0002.

Note: Pay gap data in the above table are calculated using mean weekly earnings in main job.

<sup>38</sup> ABS, *Labour Force, Australia* (Cat. No. 6202.0), August 2010.



## Method of setting pay

- 3.36. Unpublished data from the ABS Employee Earnings and Hours (EEH) survey show that female non-managerial employees were more likely to be award-reliant than males (20.9 per cent of females had their pay set by awards or pay scale only compared with 15.1 per cent of males) in August 2008. By comparison, males were more likely than females to have their pay set by unregistered individual agreements (41.7 per cent compared with 32.4 per cent respectively).
- 3.37. This data also indicates that the gender pay gap varies according to the method of setting pay. For example, the average hourly gender wage gap was greater in every type of individual agreement than it was in every type of collective agreement.
- 3.38. Table 3.3 shows that gender wage gaps ranged from -5.2 per cent for award or pay-scale reliant employees (illustrating that females on awards or pay scales earn more than males on awards or pay scales) to 33.8 per cent for state registered individual agreements.

**Table 3.3: Hourly gender wage gap for non-managerial adults by method of setting pay**

Method of setting pay	Adult hourly ordinary time earnings (\$)		Gender pay gap (%)
	Male	Female	
Award or pay scale only	19.20	20.20	-5.2
Collective agreement (Federally registered)	30.60	27.10	11.4
Collective agreement (State registered)	34.10	31.30	8.2
Collective agreement (unregistered)	35.50	31.20	12.1
Individual arrangement (Federally registered)	30.10	26.00	13.6
Individual arrangement (State registered)	30.50	20.20	33.8
Individual arrangement (unregistered)	31.80	26.90	15.4
<b>All methods of setting pay</b>	<b>30.30</b>	<b>26.70</b>	<b>11.9</b>

Source: ABS *Employee Earnings and Hours* (Cat. No. 6306.0), August 2008, unpublished data.

- 3.39. The gender pay gap is explained in part by the higher proportion of non-managerial adult females who are award-reliant, that is 19.1 per cent compared with males at 12.9 per cent, in August 2008. As shown in Table 3.3, award or pay-scale reliant employees, regardless of gender, earn significantly less than employees on other types of industrial instruments.

## Occupation

- 3.40. Using ABS EEH data, the gender pay gap for the occupational group of Community and personal service workers stood at 16.9 per cent in August 2008. As shown in Table 3.4, females earned on average \$22.60 per hour compared to males who earned on average \$27.20 per hour.
- 3.41. The occupational group with the lowest gender pay gap was Machinery operators and drivers at 11.3 per cent, with the highest being Technicians and trade workers at 20.3 per cent.
- 3.42. In addition, the gender pay gap for Managers was one of the highest at 19.1 per cent (see Table 3.4).

**Table 3.4: Gender pay gap (AHOTE) for non-managerial adults by occupation, August 2008**

Occupation	Adult hourly ordinary time earnings (AHOTE)		Gender pay gap (%)
	Male	Female	
Managers	41.40	33.50	19.1
Professionals	42.80	35.50	17.1
Technicians and trades workers	28.60	22.80	20.3
Community and personal service workers	27.20	22.60	16.9
Clerical and administrative workers	28.10	24.40	13.2
Sales workers	25.50	20.60	19.2
Machinery operators and drivers	26.60	23.60	11.3
Labourers	21.90	19.40	11.4
<b>All occupations</b>	<b>30.30</b>	<b>26.70</b>	<b>11.9</b>

Source: ABS *Employee Earning and Hours* (Cat. No. 6306.0), August 2008, unpublished data.

## Industry

- 3.43. ABS EEH 2008 data shows gender pay gaps by industry ranged from 1.9 per cent for Accommodation and food services to 28.6 per cent in the Financial and insurance services industry. The Health care and social assistance industry recorded a gender pay gap of 24.1 per cent (see Table 3.5).

**Table 3.5: Gender pay gap (AHOTE) for non-managerial adults by industry, August 2008**

Industry	Award-reliance (%) <sup>*</sup>	Average Hourly Ordinary Time Earnings (AHOTE) (\$)		Gender Pay Gap (%)	Females as proportion of total employees (%) <sup>*</sup>
		Male	Female		
Mining	1.2	46.60	36.60	21.5	15.4
Manufacturing	12.2	27.20	24.30	10.7	24.1
Electricity, gas, water and waste services	5.4	33.10	30.50	7.9	23.6
Construction	9.1	30.50	25.50	16.4	11.8
Wholesale trade	9	27.50	24.30	11.6	34.6
Retail trade	28.9	22.40	20.70	7.6	57.7
Accommodation and food services	50.3	20.90	20.50	1.9	56.1
Transport, postal and warehousing	8.3	27.60	26.50	4	22.5
Information media and telecommunications	5.6	35.90	30.30	15.6	41.6
Financial and insurance services	2.2	41.30	29.50	28.6	54.3
Rental, hiring and real estate services	20.2	28.50	24.10	15.4	46.2
Professional, scientific and technical services	5.4	40.10	28.70	28.4	45.3
Administrative and support services	33.9	26.40	24.00	9.1	57.9
Public administration and safety	3.6	33.00	30.50	7.6	48.4
Education and training	8.4	34.00	31.40	7.6	70.5
Health care and social assistance	17.2	36.50	27.70	24.1	80.8
Arts and recreation services	14.2	27.70	23.00	17	41.6
Other service	25.4	23.80	22.30	6.3	41.7
<b>All industries</b>	<b>16.5</b>	<b>30.30</b>	<b>26.70</b>	<b>11.9</b>	<b>46.8</b>

Source: ABS, *Employee Earning and Hours* (Cat. No. 6306.0), August 2008, unpublished data and ABS, *Labour Force, Australia, Detailed, Quarterly* (Cat. No. 6291.0.55.003), August 2008.

\*Note: For all employees, as at August 2008.

3.44. Gender pay gaps were below the ‘all industries’ gap in ten industries, indicating that there exists a degree of labour market segmentation by industry, similar to that seen in the analysis by occupation above.

3.45. There is no clear relationship between the size of the gender pay gap within an industry however, and the proportion of employees who are women. Gender pay gaps are high in male dominated industries such as mining and construction but are also high in the female dominated industry of health care and social assistance.

## Conclusion

3.46. The Government contends that there are many factors which may contribute to pay inequity including occupational and industry segregation<sup>39</sup>, undervaluation of what has traditionally been women's work and difficulties both men and women encounter in balancing work and caring responsibilities. Despite advances in gender equality over previous decades, overall women continue to earn less than men.

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<sup>39</sup> Commentary arguing that occupational segregation advantages women in terms of pay rates, except those in high-paid private-sector jobs (see Baron and Cobb-Clark 2008) have not accounted for the not-for-profit sector, which is a crucial component of the SACS sector.

## **Chapter 4: Labour Market Features of the SACS Sector**

### **Introduction**

- 4.1. This chapter provides current information on the SACS labour market.
- 4.2. The labour market features of the sector, including a snapshot of businesses operating in the sector and the economic contribution made by the sector overall are outlined below in detail. Included is data on the size of the SACS workforce, the proportion of female staff, the number of part-time, casual and full-time equivalents, the contribution made by volunteers, the average age of the workforce, staff qualification levels, and information on skills shortages within the sector.
- 4.3. In addition, the chapter addresses levels of unionisation, labour retention and turnover including duration of employment and levels of paid and unpaid overtime worked in the sector.
- 4.4. The data has largely been derived from published and unpublished ABS data. In this data, the level of accuracy in representing the SACS sector depends on whether the ANZSIC class, group or subdivision level data is available. The subdivision (2 digit), group (3 digit) and class (4 digit) levels provide increasingly detailed information with the class level providing the most specific and detailed information. The Government's view on the appropriate ANZSIC categories that cover the SACS sector are discussed in this chapter and these categories of data will be referenced throughout the remainder of this submission.
- 4.5. The data draws a picture of a sector that makes a significant contribution to the Australian economy and that employs around 153,000 employees who are predominantly female. Many employees are part-time or casual, and volunteers make a significant contribution to the workforce of the sector. Union membership levels are low. In addition, the data indicates that employees in the sector are ageing with few young people entering the industry, and that skill shortages are an ongoing concern to the sector.

## Interpreting the data

- 4.6. The majority of the information provided in this chapter is obtained from published and unpublished ABS data.
- 4.7. The most accurate snapshot of the SACS sector comes from labour force and industry data at the industry *class* level – that is the 4 digit ANZSIC level. Only some of the ABS data available provides this level of detail for the SACS sector. The two industry classes subject to the case are:
- Other residential care services (8609); and
  - Other social assistance services (8790).
- 4.8. The Government contends that all employees in the Other residential care services class (8609) are likely to be covered by the SACS modern award. This class consists of units mainly engaged in providing residential care (except aged care) combined with either nursing, supervisory or other types of care as required (including medical). The primary activities delivered by organisations in this industry class include children's home operation, community mental health hostel, crisis care accommodation operation, home for the disadvantaged operation, hospice operation, residential refugee operation and respite residential care operation.
- 4.9. The Government also contends that all employees in the Other social assistance services class (8790) are likely to be covered by the SACS modern award. The primary activities delivered by organisations in this industry class include adoption services, adult day care centre operation, aged care assistance service, alcoholics anonymous operation, disabilities assistance services, marriage guidance services, operation of soup kitchens (including mobile), welfare counselling services and youth welfare services.
- 4.10. Where data is available at the industry *group* level – that is at the 3 digit ANZSIC level, the Government contends that the two industry groups subject to the case are:
- Other social assistance services (879); and
  - Residential care services (860).

- 4.11. The Other social assistance services group (879) consists of a variety of social support services within this sector and includes the Other social assistance services class (8790).
- 4.12. The residential care services industry group (860) consists of industry classes:
- Other residential care services (8609); and
  - Aged care residential services (8601).
- 4.13. The Aged care residential services class (8601) is likely to cover some SACS sector employees as well as some in the aged care sector.
- 4.14. In some cases, data is only available at the subdivision level – that is at the 2 digit ANZSIC level. The Government contends that the relevant subdivisions for the case are Residential care services (private) (86) and Social assistance services (private) (87).
- 4.15. The Social assistance services subdivision (87) covers Other social assistance services (8790) and Child care services (8710). As the Child Care Services Industry class consists of businesses primarily engaged in providing day care to infants and children, such as those offering before and/or after school care services and childminding services, this industry class does not fall within the scope of the case.
- 4.16. The Residential care services subdivision (86) covers Other residential care services (8609) and Aged care residential services (8601).
- 4.17. The level of accuracy in the data presented depends on whether class, group or subdivision level data is available. The categories of data being used will be referenced throughout this and following chapters.

## **Overview and history of the sector**

- 4.18. The equal remuneration case relates to employers and employees covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SACS Modern Award).
- 4.19. The SACS sector, as defined in clause 3.1 of the modern award, means:

the provision of social and community services including social work, recreation work, welfare work, youth work or community development work, including organisations which primarily engage in policy, advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services.

4.20. The equal remuneration case before FWA, consistent with clause 4.2 of the SACS Modern Award, excludes from its coverage employers and employees bound by the following awards:

- *Aged Care Award 2010;*
- *Amusement, Events and Recreation Award 2010;*
- *Fitness Industry Award 2010;*
- *Health Professionals and Support Services Award 2010; and*
- *Nurses Award 2010.*

### **History of the SACS Sector**

4.21. There is a strong tradition in Australia of charities, not-for-profit entities and religious institutions providing social services, particularly before the Second World War. The 2008 Senate Economic Committee Inquiry into the Disclosure regimes for charities and not-for-profit organisations noted that Australia's first not-for-profit entity, the NSW Society for Promoting Christian Knowledge and Benevolence in these Territories and the Neighbouring Islands (since renamed the Benevolent Society), was established in 1813. Soon after started district nursing services (1820), asylums for the poor, blind, aged and infirm (1821), maternity hospitals (1866) and the first Women's Hospital in Australia (1901), followed by the introduction of the Age Pension (1909), Invalid Pension (1910), Maternity Allowance (1912), Child Endowment (1941), Widow's Pension (1942) and Unemployment and Sickness Benefits (1945). After the Second World War, governments increasingly undertook responsibility for the provision of social services.



- 4.22. The origins of the modern non-government community services sector can be traced to the 1950s and the late 1960s, when the Commonwealth began to fund community services in response to demands of advocacy groups.
- 4.23. Since the mid-1960s the variety of community services organisations operating as public, for-profit and not-for profit has grown, ranging in size from single worker organisations to those employing more than 10,000 people.
- 4.24. In the 1980s and 1990s governments began to introduce new mechanisms to provide welfare services. In essence governments moved away from being direct service deliverers to policy makers and introduced contracts for the non-government sector to deliver services. Part of the rationale for this movement was the view that not-for-profit organisations could deliver services more efficiently and cost effectively.
- 4.25. The not-for-profit sector has become more ‘professionalised’ than it used to be, and the line between the not-for-profit sector and the business sector, increasingly blurred. For-profit organisations work in areas that may traditionally have been considered the domain of not-for-profit organisations and not-for-profit organisations are involved in competitive tendering and running social enterprises. In many cases, the not-for-profit sector also now operates much more closely in partnership with government, bidding for contracts to carry out tasks that in earlier times the government would have administered itself.
- 4.26. The way the not-for-profit sector now operates commercially as an arms-length of government is most starkly highlighted by the Job Network. This was set up in 1997 when the federal government shut down its Commonwealth Employment Service and invited businesses and not-for-profit organisations to bid to supply job placement and training services to the unemployed. More than 10 years on, not-for-profits accounted for half of Job Network turnover, and some of Australia’s leading not-for-profit welfare organisations, including the Salvation Army, the Wesley Mission, Mission Australia, and Catholic Welfare, now rely heavily on government employment service contracts for a proportion of their income.
- 4.27. The variety of service types in the community services sector today is reflected in its complex industrial landscape and history. The SACS sector today provides services as diverse as drug and alcohol counselling to support for migrants. Commonwealth

Government agencies work in partnership with other government and non-government organisations to manage a diverse range of programs and services designed to support and improve the lives of Australians.

4.28. More details regarding the funding arrangements of the sector are included at chapter 6.

## **Organisations in the SACS sector**

4.29. The SACS sector is made up of predominantly small, not-for-profit organisations.

4.30. It is estimated that in June 2007 there would have been up to 6,093 organisations operating in the SACS sector that could be subject to the equal remuneration application. This figure is based on 5,250 organisations being in the Other social assistance services class (8790), and 843 organisations in the Other residential care services class (8609).<sup>40</sup>

4.31. Of the estimated 6,093 organisations operating in the SACS sector, around 43 per cent (or 2,607 businesses) were employing businesses.<sup>41</sup>

4.32. Of the 2,607 employing businesses:

- 71.8 per cent had 1-19 employees ('small employing businesses')
- 24.9 per cent had 20-199 employees ('medium employing businesses') and
- 3.3 per cent had 200 or more employees ('large employing businesses').

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<sup>40</sup> ABS, *Counts of Australian Businesses, Including Entries and Exits* (Cat. No. 8165.0), June 2003 to June 2007, Datacube 8165001, released 21 December 2007. This publication provides the number of businesses operating in Australia down to the 4 digit industry level.

<sup>41</sup> Whilst this data can be used to provide an accurate picture of the number of businesses operating in the SACS sector, a complicating factor is that the industry data provided in this publication are based on the previous ANZSIC 1993 industry classification. This is not a problem for ANZSIC 2006 industry class 8609 (Other residential care services), as it has direct concordance with ANZSIC 1993 industry class 8722 (Residential care services not elsewhere classified). For ANZSIC 2006 industry class 8790 (Other social assistance services), however, there is no direct single concordance, but rather partial concordances with ANZSIC 1993 industry class 8634 (Community health centres) and ANZSIC 1993 industry class 8729 (Non-residential care services not elsewhere classified). For the purposes of this exercise, the total number of businesses in ANZSIC 1993 industry classes 8634 and 8729 have been added together and attributes this figure, albeit an overestimate, to the number of businesses in ANZSIC 2006 industry class 8790.

4.33. The more recent ABS Community Services survey suggests that at the end of June 2009, there were around 4,033 businesses in the SACS sector subject to the pay equity case.<sup>42</sup> While this data does not provide a breakdown by business size, it does show that of the 3,287 businesses operating in the Other social assistance services class (8790), around 76 per cent were not-for-profit organisations. Of the 746 businesses operating in the Other residential care services class (8609), around 87 per cent were not-for-profit organisations.<sup>43</sup>

### **Economic contribution of the sector**

4.34. The Productivity Commission found in its 2010 report into trends in the not-for-profit sector, that the sector makes a significant contribution to the Australian economy, noting that in 2006-07, the not-for-profit sector accounted for 4.1 per cent of GDP.<sup>44</sup>

4.35. The available ABS industry performance data indicates that the SACS sector makes a similarly large contribution to the Australian economy. In 2008-09 the combined industry value added for the SACS sector (covering ANZSIC codes 86 and 87) was 1.8 per cent of the total value add for all industries (see Table 4.1).<sup>45</sup> This amounted to around \$14.9 billion.

4.36. While the share of total employment for the SACS sector<sup>46</sup> was around 4.4 per cent for this period, the share of total wages and salaries for the sector was only around 3.2 per cent, reflecting the lower average wages and salaries within the SACS sector.

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<sup>42</sup> The Community Services survey is not designed to provide high quality estimates of numbers of businesses for any of the output classifications (for example, employment size or industry) and instead are included in the survey to provide contextual information for the user. A more robust source of counts of Australian businesses is available from *Counts of Australian Businesses, Including Entries and Exits, Jun 2003 to Jun 2007* (Cat. No. 8165.0).

<sup>43</sup> ABS, *Community Services 2008-09* (Cat. No. 8696.0), released 24 June 2010.

<sup>44</sup> Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra.

<sup>45</sup> ABS, *Australian Industry* (Cat. No. 8155.0), 2007-08, Datacube 81550D001\_200708, released 28 May 2009.

<sup>46</sup> This data covers ANZSIC classifications 86 - Residential care services subdivision, and 87 - Social assistance services subdivision.

**Table 4.1: Key data by industry subdivision, 2008-09**

	Employment at end of June	Wages and salaries	Sales and service income	Total income	Total expenses	Operating profit before tax	Earnings before interest, tax, depreciation and amortisation	Industry value added
Industry	'000	\$m	\$m	\$m	\$m	\$m	\$m	\$m
86 Residential care services (private)	222	6,955	4,550	13,745	13,529	256	-131	8,083
87 Social assistance services (private)	213	5,452	4,672	11,339	10,882	467	-193	6,802
Total selected industries	9,997	393,621	2,424,323	2,555,339	2,289,962	272,010	339,745	842,582
Percentage of total	%	%	%	%	%	%	%	%
86 Residential care services (private)	2.2	1.8	0.2	0.5	0.6	0.1	0.0	1.0
87 Social assistance services (private)	2.1	1.4	0.2	0.4	0.5	0.2	-0.1	0.8
Total selected industries	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: ABS *Australian Industry* (Cat. No. 8155.0), 2008-09, Datacube 81550DO002\_200809, released 28 May 2010.

Notes:

(a) Due to the methodology employed in the ABS *Australian Industry* publication, data for industry subdivisions 86 and 87 are for the private sector only.

(b) In the ABS *Australian Industry* publication, 'total selected industries' comprises data for all ANZSIC divisions, excluding ANZSIC division K (Financial and insurance services).

4.37. The profit margin for the Residential care services subdivision (86) was 5.6 per cent and 10.0 per cent for the Social assistance services subdivision (87). Both are below the all industries average of 11.2 per cent. The data also shows that organisations in these two subdivisions were more likely to make a loss than other industries (see Table 4.2).<sup>47</sup>

<sup>47</sup> ABS, *Australian Industry* (Cat. No. 8155.0), released 28 May 2009.

**Table 4.2: Industry performance by subdivision, 2008-09**

		Percentage of business that		
	Profit margin	Made a profit	Broke even	Made a loss
Industry	%	%	%	%
86 Residential care services (private)	5.6	62.9	0.3	36.9
87 Social assistance services (private)	10.0	70.4	0.1	29.5
Total selected industries	11.2	73.4	1.6	25.0

Source: ABS *Australian Industry* (Cat. No. 8155.0), 2008-09, Datacube 81550DO002\_200809, released 28 May 2010.

Notes:

(a) Due to the methodology employed in the ABS *Australian Industry* publication, data for industry subdivisions 86 and 87 are for the private sector only.

(b) In the ABS *Australian Industry* publication, 'total selected industries' comprises data for all ANZSIC divisions, excluding ANZSIC division K (Financial and insurance services).

## Labour market features of the sector

- 4.38. According to the ABS Community Services survey, there were around 153,322 employees in the SACS sector in June 2009, of which around 90 per cent worked for not-for-profit organisations. The sector employed around 90,271 full-time equivalent staff.
- 4.39. Of this total, there were around 121,780 people employed within the Other social assistance services class (8790), with 88.3 per cent of these employed by not-for-profit organisations. This amounts to 74,363 full-time equivalents.<sup>48</sup>
- 4.40. There were also 31,548 workers employed in the Other residential care services class (8609). Of these, 92.8 per cent were employed by not-for-profit organisations. This amounts to 15,908 full-time equivalents.
- 4.41. The August 2008 Employee Earnings and Hours data shows that approximately 16.1 per cent of non-managerial employees in Social assistance services (subdivision 87) were employed in small businesses (those with fewer than 20 employees). This data should be taken as an indication only, given the small sample sizes.

<sup>48</sup> ABS, *Community Services 2008-09* (Cat. No. 8696.0), released 24 June 2010.

**Table 4.3: Proportion of non-managerial employees by business size, August 2008**

Proportion of employees							
	Industry	1-14 employees	15-19 employees	20-99 employees	100-499 employees	500+ employees	Total
86	Residential Care Services	np	np	18.3	35.4	43.9	100
8609	Other Residential Care Services	np	np	**17.5	* 34.6	* 38.1	100
87	Social Assistance Services	* 8.5	* 7.6	* 24.1	33.4	* 26.4	100
879	Other Social Assistance Services	np	np	* 21.4	* 32.6	* 42.2	100
	<b>All industries</b>	<b>18.8</b>	<b>4.1</b>	<b>21.1</b>	<b>18.1</b>	<b>37.9</b>	<b>100</b>

Source: ABS *Employee Earnings and Hours* (Cat. No. 6306.0), August 2008, unpublished data.

\* estimate has a relative standard error of 25% to 50% and should be used with caution.

\*\* estimate has a relative standard error greater than 50% and is considered too unreliable for general use.

np = not available for publication but included in totals where applicable, unless otherwise indicated.

### Female concentration in the sector

- 4.42. Women form the majority of people working in the SACS industry and in the health sector overall. According to the Australian Institute of Health and Welfare (AIHW), those health occupations with the highest proportion of females in 2006 included social workers at 81 per cent and other allied health workers at 80 per cent.<sup>49</sup>
- 4.43. The May 2010 ABS Labour Force survey showed that 76.2 per cent of employees in the Other social assistance services group (879) and 83.9 per cent of employees in the Residential care services (860) were female.<sup>50</sup> This compares with 46.9 per cent across all industries for the same period.
- 4.44. According to the ABS Community Services survey which provides more specific SACS industry data, there were 87,939 persons providing direct community services in the Other social assistance services class (8790) and females accounted for 67,069 or 76 per

<sup>49</sup> AIHW, *Australia's health 2008* (Cat. No. AUS 99), released 7 May 2008.

<sup>50</sup> ABS, *Labour Force, Australia Detailed, Quarterly* (Cat. No. 6291.0.55.003), May 2010.

cent of these persons.<sup>51</sup> Meanwhile, there were 23,137 females employed in the Other residential care services class (8609), accounting for 73 per cent of total employment.<sup>52</sup>

### **Part-time and casual employment**

4.45. The Government contends that there is a very high proportion of employees working part-time within the SACS industry. The rate of casual employment is lower than the average rate across all industries, however when considered together, the overall proportion of employees not in full-time employment is high.

#### *Part-time employment*

4.46. The May 2010 Labour Force data suggests that around half of all workers in the sector are employed on a part-time basis. By comparison the rate of part-time employment across all industries is 29.2 per cent.<sup>53</sup>

4.47. According to the Community Services survey, permanent part-time employees comprised the majority of employment in Other social assistance services class (8790) with 48,484 persons or 39.8 per cent of the 121,774 employees in the total workforce. This is followed by 37,078 permanent full time employees and 36,212 casual employees.

4.48. Similarly, there was a high proportion of permanent part-time employees working in Other residential care services class (8609) accounting for 11,581 employees or 36.7 per cent of the 31,548 employees in the total workforce.<sup>54</sup> This is followed by 10,437 casual employees and 9,530 permanent full-time employees.

#### *Casual employment*

4.49. The ABS Employee Earnings, Benefits and Trade Union Membership survey suggests that employees working in the SACS sector are slightly less likely to be casuals than the

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<sup>51</sup> Provision of community services by businesses and organisations can be either direct or non-direct. Direct community service provision occurs when community services are provided to individuals or families on an interactive or face-to-face basis or on their behalf. Non-direct community service provision includes activities such as working on social policy, group advocacy, community development, service delivery support to other organisations, managerial activities, administrative support and fundraising.

<sup>52</sup> ABS, *Community Services 2008-09* (Cat. No. 8696.0), released 24 June 2010.

<sup>53</sup> ABS, *Labour Force, Australia, Detailed, Quarterly* (Cat. No. 6291.0.55.003), May 2010.

<sup>54</sup> ABS, *Community Services 2008-09* (Cat. No. 8696.0), released 24 June 2010.

all industries total. Casual employees are classified as those employees without paid leave entitlements.

- 4.50. In August 2009 22.4 per cent of employees in the Other social assistance services group (879) were casual employees, while 18.6 per cent of employees in the Residential care services group (860) were casual employees. This compares to a rate of 24.4 per cent casual employment in all other industries (see Table 4.4).<sup>55</sup>
- 4.51. Industry class level information obtained from the Community Services survey suggests that employees are slightly less likely to be engaged as casuals than they are to be employed on a permanent part-time basis.
- 4.52. The survey shows that 29.7 per cent of employees in the Other social assistance services class (8790) and 33.1 per cent of employees in the Other residential care services class (8609) were working on a casual or temporary basis.<sup>56</sup>
- 4.53. The high level of part-time and casual employment in the SACS sector may be due to a predominantly female workforce seeking flexible working arrangements. However the data may also reflect organisational decisions on resourcing in the sector leading to a higher than usual reliance on part-time and casual staffing arrangements to deliver services.

**Table 4.4: Number of casual employees (excluding OMIEs) by industry, August 2009**

	<b>Permanen t</b>	<b>Casual</b>	<b>Total</b>	<b>Permanent</b>	<b>Casual</b>	<b>Total</b>
<b>Industries</b>	<b>('000)</b>	<b>('000)</b>	<b>('000 )</b>	<b>(%)</b>	<b>(%)</b>	<b>(%)</b>
860 Residential Care Services	144.4	33.1	177.4	81.4	18.6	100.0
879 Other Social Assistance Services	139.3	40.2	179.5	77.6	22.4	100.0
All industries total	6544.5	2117.4	8661.9	75.6	24.4	100.0

Source: ABS *Employee Earnings, Benefits and Trade Union Membership* (Cat. No. 6310.0), August 2009, unpublished data.

Notes:

OMIE = owner managers of incorporated enterprises

<sup>55</sup> ABS, *Employee Earnings, Benefits and Trade Union Membership* (Cat. No. 6310.0), August 2009, unpublished data.

<sup>56</sup> ABS, *Community Services 2008-09* (Cat. No. 8696.0), released 24 June 2010.



## **Volunteers**

- 4.54. Available data shows that volunteers make a significant contribution to the SACS sector workforce, particularly in not-for-profit organisations.
- 4.55. The Community Services survey indicates that during 2008-2009, around 172,482 volunteers assisted Other social assistance services organisations (8790), with 61 per cent of these people providing direct community services. In addition, around 26,205 volunteers provided assistance to organisations in the Other residential care services class (8609), with 99 per cent of these people assisting not-for-profit organisations.
- 4.56. The data on the number of people volunteering in the SACS sector indicates that volunteer numbers are greater than the 153,322 employees in the paid workforce. While the ABS suggests caution when using this data, the data does indicate the significant contribution by volunteers to the SACS sector.<sup>57</sup>

## **Levels of unionisation in the sector**

- 4.57. The ABS Employee Earnings, Benefits and Trade Union Membership data indicates that union membership levels within some parts of the SACS sector are below average.
- 4.58. In August 2009, 16.1 per cent of employees in the Other social assistance services group (879) and 24.3 per cent in the Residential care services group (860) were members of a trade union. By comparison, trade union membership across all industries averaged 21.0 per cent.<sup>58</sup>
- 4.59. The average of these two groups is only slightly below the all industries average level of unionisation. However, given that the Other social assistance services group (879) in the Government's view most closely covers SACS sector employees, the Government assumes that the actual level of union membership in the sector is closer to 16.1 per cent.

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<sup>57</sup> The estimates regarding volunteer numbers provided here have a relative standard error of 10% to 50% and should be used with caution.

<sup>58</sup> ABS, *Employee Earnings, Benefits and Trade Union Membership* (Cat. No. 6310.0), August 2009, unpublished data.

**Table 4.5: Number of employees (excluding OMIEs) by trade-union membership by industry**

	FT employees	PT employees	All employees
Industry	(%)	(%)	(%)
860 Residential Care Services			
Trade union member	31.3	19.5	24.3
Not a trade union member	66.0	78.6	73.4
Did not know	..C	..C	2.2
Total	100.0	100.0	100.0
879 Other Social Assistance Services			
Trade union member	20.2	11.9	16.1
Not a trade union member	77.4	84.7	81.0
Did not know	2.3	3.3	2.8
Total	100.0	100.0	100.0
All industries			
Trade union member	23.5	15.4	21.0
Not a trade union member	73.4	82.8	76.3
Did not know	3.1	1.8	2.7
Total	100.0	100.0	100.0

Source: ABS *Employee Earnings, Benefits and Trade Union Membership* (Cat. No. 6310.0), August 2009, unpublished data.

Notes:

..C = Confidentialised data

OMIE = owner managers of incorporated enterprises

## Duration and cessation of employment

- 4.60. The annual ABS Forms of Employment survey indicates that the duration of employment for SACS sector workers is similar to that of employees across all industries.
- 4.61. In November 2009, the proportion of employees in the Residential care services group (860) and the Other social assistance services group (879), who had worked a continuous period of less than one year with their current employer (21.3 per cent and 19.2 per cent respectively), was similar to that across all industries (21.3 per cent).<sup>59</sup>
- 4.62. Similarly, the annual ABS Labour Mobility survey (unpublished) suggests that the proportion of employees leaving SACS sector employment was roughly the same as for all other industries.
- 4.63. The same survey also shows that 70.9 per cent of job leavers from the Other social assistance services group (879), and 86.9 per cent of employees from the Residential

<sup>59</sup> ABS, *Forms of Employment* (Cat. No. 6359.0), November 2009, unpublished data.

care services group (860) left voluntarily. The same figures for employees in all industries who ceased a job during the year ending February 2008, showed that 70.2 per cent did so voluntarily.<sup>60</sup>

- 4.64. Duration and cessation of employment are relevant factors to consider in a pay equity case. In the SACS sector, however, the results indicate that there is not an especially proportionately high level of turnover of employees in the sector. The results therefore do not support that these factors represent gender inequity in the SACS sector. However, it is not clear from the available data whether those employees who do cease employment do so due to programs ceasing or whether they go on to other jobs in the sector, move on to similar jobs in the public sector, or move outside of the industry completely.

### **Prevalence of paid and unpaid overtime**

- 4.65. The November 2009 Working Time Arrangements publication<sup>61</sup> indicates that SACS sector employees are less likely to work overtime than employees in other industries. The data further indicates that for employees in the Other social assistance group (879), any overtime worked is much less likely to be paid and more likely to be provided as time off in lieu. This does not appear to be the case in the Residential care services group.
- 4.66. As at November 2009, 32.4 per cent of employees in the Other social assistance services group (879) usually worked extra hours or overtime. Of those who usually worked extra hours or overtime, 35.0 per cent were paid for overtime, 21.7 per cent were not compensated and 37.5 per cent were entitled to receive time off in lieu.
- 4.67. As at November 2009, 28.7 per cent of employees in the Residential care services group (860) usually worked extra hours or overtime. Of those employees who did usually work extra hours or overtime, 44.7 per cent were paid overtime, 36.9 per cent were not compensated and 13.7 per cent were entitled to receive time off in lieu.

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<sup>60</sup> ABS, *Labour Mobility* (Cat. No. 6209.0), February 2008, unpublished data.

<sup>61</sup> ABS, *Working Time Arrangements* (Cat. No. 6342.0), November 2009.

- 4.68. By contrast, 37.6 per cent of employees in the all industries category usually work extra hours or overtime. Of these, 42.2 per cent were paid for overtime, 26.6 per cent were not compensated and 16.3 per cent were entitled to receive time off in lieu.
- 4.69. Compared with the all industries average, employees in the Other social assistance services group (879) have a slightly greater degree of control over the hours they choose to work. For example, 48.3 per cent of employees in this industry reported they had some say in start and finish times (compared with 41.5 per cent across all industries) and 79.1 per cent were able to choose when holidays are taken (compared with 73.6 per cent across all industries) (see Table 4.6).<sup>62</sup>

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<sup>62</sup> ABS, *Working Time Arrangements* (Cat. No. 6342.0), November 2009, unpublished data.

**Table 4.6: Employees (excluding OMIES) in main job by selected working arrangements**

	860 Residential Care Services		879 Other Social Assistance Services		All industries	
	'000	%	'000	%	'000	%
Whether had any say in start and finish times						
Had some say in start and finish times	67.7	32.4	82.3	48.3	3554.2	41.5
Able to choose times on a day-to-day basis	32.0	15.3	52.5	30.8	2305.8	26.9
Times negotiated with employer in advance	24.1	11.5	20.5	12.0	893.0	10.4
Other	11.6	5.6	9.4	5.5	355.4	4.2
Did not have say in start and finish times	141.1	67.6	88.0	51.7	5008.8	58.5
Whether able to choose to work extra hours in order to take time off						
Able to choose to work extra hours	68.3	32.7	68.0	39.9	3369.3	39.3
Not able to choose to work extra hours	127.2	60.9	96.2	56.5	4729.3	55.2
Did not know	13.4	6.4	6.1	3.6	464.4	5.4
Whether able to choose when holidays were taken						
Could choose	173.7	83.2	134.7	79.1	6299.4	73.6
Could sometimes choose	22.2	10.6	18.1	10.6	1049.5	12.3
Could not choose	12.9	6.2	17.6	10.3	1214.1	14.2
Whether usually worked extra hours or overtime and how compensated for overtime worked (a)						
Usually worked extra hours or overtime	59.9	28.7	55.2	32.4	3220.0	37.6
Paid for overtime	26.8	12.8	19.3	11.3	1357.7	15.9
Included in salary package	3.0	1.4	2.7	1.6	494.1	5.8
Entitled to receive time off in lieu	8.2	3.9	20.7	12.2	524.3	6.1
Compensated in some other way	2.7	1.3	1.4	0.8	99.0	1.2
Not compensated	22.1	10.6	12.0	7.0	855.4	10.0
Did not usually work any extra hours or overtime	148.9	71.3	115.1	67.6	5343.0	62.4
<b>Total employees (excluding OMIES)</b>	<b>208.8</b>	<b>100.0</b>	<b>170.3</b>	<b>100.0</b>	<b>8563.0</b>	<b>100.0</b>

Source: ABS *Working Time Arrangements* (Cat. No. 6342.0), November 2009, unpublished data.

Notes:

(a) Refers to all types of compensation received, therefore people may appear in more than one category.

OMIE = owner managers of incorporated enterprises

**Table 4.7: Employees who usually worked extra hours or overtime, by compensation**

Of those who usually worked extra hours or overtime						
	860 Residential Care Services		879 Other Social Assistance Services		All industries	
	'000	%	'000	%	'000	%
Usually worked extra hours or overtime	59.9	100.0	55.2	100.0	3220.0	100.0
Paid for overtime	26.8	44.7	19.3	35.0	1357.7	42.2
Included in salary package	3.0	5.0	2.7	4.9	494.1	15.3
Entitled to receive time off in lieu	8.2	13.7	20.7	37.5	524.3	16.3
Compensated in some other way	2.7	4.5	1.4	2.5	99.0	3.1
Not compensated	22.1	36.9	12.0	21.7	855.4	26.6

Source: ABS *Working Time Arrangements* (Cat. No. 6342.0), November 2009, unpublished data.

Notes:

(a) Refers to all types of compensation received, therefore people may appear in more than one category.

### Employees by age group

4.70. The SACS sector is ageing and is relatively older when compared to the overall Australian workforce.

4.71. ABS Labour Force data shows that there is a clear difference in the age profile of employees in Residential care services (86) and Social assistance services (87) compared with that across all industries. In these two industries there are higher proportions of employees in all the older age groups (45 years and above) and lower proportions of employees in the younger age groups (age groups below 45 years) (see Table 4.8).<sup>63</sup>

<sup>63</sup> ABS, *Labour Force, Australia Detailed, Quarterly* (Cat. No. 6291.0.55.003), May 2010.

**Table 4.8: Number and proportion of employees by age group, by industry**

Number of employees by age group ('000)									
Industry	15 - 19	20 - 24	25 - 34	35 - 44	45 - 54	55 - 59	60 - 64	65 and over	Total
Residential care services (86)	4.5	12.3	31.0	38.7	54.3	24.4	20.0	4.6	189.8
Social assistance services (87)	10.4	31.2	51.1	61.3	67.8	29.6	20.9	5.2	277.5
All industries	675.0	1122.8	2222.4	2185.0	2117.1	766.0	482.3	199.9	9770.5
Proportion of employees age group (%)									
	15 - 19	20 - 24	25 - 34	35 - 44	45 - 54	55 - 59	60 - 64	65 and over	Total
Residential care services (86)	2.4	6.5	16.4	20.4	28.6	12.8	10.5	2.4	100.0
Social assistance services (87)	3.7	11.2	18.4	22.1	24.4	10.7	7.5	1.9	100.0
All industries	6.9	11.5	22.7	22.4	21.7	7.8	4.9	2.0	100.0

Source: ABS, *Labour Force, Australia, Detailed, Quarterly* (Cat. No. 6291.0.55.003), May 2010.

- 4.72. This data suggests an ageing workforce as well as low participation rates among the youngest age cohort within the SACS sector.
- 4.73. According to the AIHW *Health and Community Services Labour Force* report, the average age of employees in the community services workforce is 41 years, compared to the average age of 39 years in the general labour market.
- 4.74. The health and community services workforce aged between 2001 and 2006. In the community services workforce, the highest proportion of community services workers were aged 45 to 54 years in 2006. This is compared to 2001 when the highest proportion of community services workers fell into the 35 to 44 age group.
- 4.75. In addition, between 2001 and 2006, the proportion of community services workers in the 55 to 64 age group increased, whereas the proportion aged 35 to 44 years decreased.

- 4.76. During this same period, the proportion of female workers in the 55 to 64 age group increased from 8.9 per cent to 13.6 per cent. Whereas, the proportion of female workers aged 35 to 44 years decreased from 27.0 per cent to 23.9 per cent.<sup>64</sup>
- 4.77. According to the Productivity Commission, the community services sector faces particular workforce challenges in attracting suitably qualified staff, due to issues such as high turnover and vacancy rates, high share of part-time and casual workers, and a high proportion of employees approaching retirement age.<sup>65</sup>

### **Qualifications attained**

- 4.78. The level of qualifications attained by those in the SACS sector varies due to the broad nature, skills and requirements of the work performed.
- 4.79. National Centre for Vocational Education Research (NCVER) data shows that the proportion of welfare and community workers with no post-school qualification fell from 32 per cent in 1996 to 18 per cent in 2006, while the proportion with a bachelor degree increased by 13 percentage points during this time.<sup>66</sup>
- 4.80. A report by the AIHW into the health and community services labour force found that a relatively high proportion, that is 64 per cent of community services employees, held a post-school qualification.<sup>67</sup> This is compared to 52 per cent of the general workforce.<sup>68</sup>
- 4.81. The most common highest qualification among community services workers was a certificate, with 36 per cent of the community services workforce reporting as holding such a qualification.
- 4.82. Further, the distribution of qualification level differs across various occupations in the sector. For example, family services, disability and other community services managers were more likely to hold a bachelor degree (47.3 per cent, 35.4 per cent and 39.4 per

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<sup>64</sup> AIHW, *Health and community services labour force* (Cat. No. HWL 43), released March 2009.

<sup>65</sup> Productivity Commission 2010, *Contribution to the Not-for-Profit sector*, Research Report, Canberra p261.

<sup>66</sup> NCVER, *Workforce Planning for the Community Services and Health Industry*, June 2009.

<sup>67</sup> AIHW, *Health and community services labour force* (Cat. No. HWL 43), released March 2009, p18.

<sup>68</sup> ABS, *Education and Work*, Australia, Cat. no. 6227.0, Canberra.



cent respectively) than another qualification. In contrast, aged and disability care workers (67.7 per cent) typically held a certificate.<sup>69</sup>

4.83. The Productivity Commission Report notes the increasing reporting requirements attached to government funding, with professionals recruited by not-for-profit organisations to write tender applications for government services and philanthropic trust grants.<sup>70</sup>

4.84. In addition, the Productivity Commission report notes that ‘The past few decades have seen a clear trend to the professionalisation of the community services direct care workforce’.<sup>71</sup> The expectation is that this trend will continue due to ‘more complex client requirements and increased community expectations of care’.<sup>72</sup>

4.85. These trends indicate that the complexity of the roles and the professionalism required of SACS sector employees is increasing. As mentioned above, this has been reflected in an increase in the number of employees gaining vocational and technical qualifications. It has also resulted in an increase in the number of enrolments in relevant courses. For example, the number of students undertaking Community Services Training Packages increased from 77,200 in 2004 to 108,200 in 2008.<sup>73</sup>

### **Workforce shortages**

4.86. In 2008, 64 per cent of community service organisations indicated that they had experienced difficulty over the past year attracting staff, particularly appropriately qualified staff. A significant proportion of respondents also reported that they had difficulties retaining such employees.<sup>74</sup>

4.87. Surveys undertaken by the Department of Education, Employment and Workplace Relations (DEEWR) support these findings, reporting skills shortages in all states and

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<sup>69</sup> AIHW, *Health and community services labour force* (Cat. No. HWL 43), released March 2009, p18.

<sup>70</sup> Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra, p262

<sup>71</sup> *Ibid* at 262.

<sup>72</sup> *Ibid* at 249.

<sup>73</sup> *Ibid* at 262.

<sup>74</sup> ACOSS, *Australian Community Sector Survey 2009*, Report 2009, Volume 1 – National, [http://www.acoss.org.au/upload/publications/papers/5961\\_\\_CSS%20combined%20report%20final.pdf](http://www.acoss.org.au/upload/publications/papers/5961__CSS%20combined%20report%20final.pdf)

territories for social workers in 2008 and skills shortages for welfare workers in New South Wales and Queensland and recruitment difficulties in other states.<sup>75</sup>

- 4.88. More recent DEEWR data indicates that in 2010 there was no longer a national shortage of social and welfare worker occupations, however, recruitment difficulties were experienced in NSW along with regional shortages in Queensland for social workers. Welfare workers shortages were experienced in NSW, SA and NT, with regional shortages occurring in WA.<sup>76</sup>
- 4.89. The 2007 AIHW report *Australia's welfare 2007* also found that the disability workforce is, on average, older than the general workforce in Australia. Disability services in particular may therefore experience shortages sooner than other industries due to the number of disability services workers expected to retire in the next ten years.<sup>77</sup>
- 4.90. DEEWR data indicates that in 2010, employers based in Brisbane and major regional centres in Queensland reported few difficulties in attracting suitably qualified social workers. By contrast, respondents in remote areas of Queensland reported significant recruitment difficulties, due in part to the isolation and cost of living associated with these locations.<sup>78</sup>
- 4.91. Some employers in the non-government sector have commented that the low levels of remuneration, compared with equivalent positions in the public sector, and the lack of job security due to funding arrangements, has contributed to the recruitment and retention difficulties experienced.<sup>79</sup>
- 4.92. Employers said they attempt to overcome recruitment and retention difficulties associated with low salaries by offering staff incentives such as salary packaging and flexible working arrangements.<sup>80</sup>

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<sup>75</sup> DEEWR Skills Shortage Research 2008, unpublished material .

<sup>76</sup> DEEWR Skill Shortage Research 2010, unpublished material.

<sup>77</sup> AIHW, *Australia's welfare 2007* (Cat. No. AUS 93), released 14 November 2007.

<sup>78</sup> DEEWR Skill Shortage Research 2010, unpublished material.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

4.93. Some employers have also commented that although positions were filled by qualified experienced candidates, at times their experience did not always match the experience being specifically sought by the organisation.<sup>81</sup>

## **Conclusion**

4.94. The Government estimates there are approximately 4,000 businesses in the SACS industry subject to the case, of which around three-quarters operate on a not-for-profit basis. A significant number of these organisations are small employing businesses, who are heavily reliant on the receipt of government funding.

4.95. The available data indicates that there are around 153,000 employees in the sector, the majority of which work in the not-for-profit sector. These employees are predominantly female, with around half of these employees working part-time.

4.96. The data available also indicates that the SACS workforce is ageing, and that skill shortages have been, and are likely to continue to be a concern in the future. This trend is unlikely to be helped by the low wage levels evident in the sector – more detail on wage rates are provided in chapter 5.

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<sup>81</sup> *Ibid.*

## **Chapter 5: Industrial Regulation of the Sector**

### **Introduction**

- 5.1. This chapter provides an overview of industrial regulation, methods of pay setting and pay outcomes in the SACS sector. It also examines salary sacrifice provisions in SACS modern awards and agreements, noting the contribution salary sacrifice makes to the earnings of SACS sector employees.
- 5.2. The relevant ABS data suggests that a larger than average proportion of SACS employees are award reliant when compared to the proportion across all industries.
- 5.3. About half of the SACS workforce are also covered by collective bargaining instruments, however pay rates for employees covered by these instruments are low in comparison to the all industries average. The average annualised wage increase (AAWI) data for federal collective agreements also suggests that wage increases are lower in SACS sector agreements than in all current agreements.
- 5.4. The Government contends that the combination of high levels of award reliance and below average pay outcomes in bargaining contributes to the low wage levels of SACS sector employees.
- 5.5. There is also widespread reliance on salary sacrifice arrangements in the SACS sector. These arrangements increase an employee's after tax remuneration by reducing the amount of income tax payable by employees.

### **National workplace relations system**

- 5.6. 1 January 2010 marked the commencement of the national workplace relations system for the private sector, in which all states, except Western Australia, are participating through referrals of powers to the Commonwealth in respect of workplace relations matters. Up to 96 per cent of the private sector workforce is now covered by the national workplace relations system.
- 5.7. As a result, all private sector employers and employees in referring states are subject to the same workplace laws, tribunals, minimum conditions, rights and entitlements.

Accordingly, SACS sector employers and employees are now predominantly covered by the FW Act.

## Modern award development

- 5.8. As part of the Government's Fair Work reforms, the Australian Industrial Relations Commission (AIRC) was given the task of modernising awards. Modern awards provide minimum terms and conditions of employment for particular industries and occupations and while they came into operation from 1 January 2010, the pay rates, loadings and penalty rates do not commence until 1 July 2011 and are subject to a phasing-in period.
- 5.9. The classifications and minimum wages contained in the SACS Modern Award were adopted from the exposure draft released by the Full Bench of the AIRC at the time of its stage 4 modern award statement.<sup>82</sup> The Full Bench relied on four pre-reform awards as the sources of the work classifications and rates of pay it proposed in the exposure draft and then adopted. These pre-reform awards were:
- *The Social and Community Services (Queensland) Award 2001*
  - *The Crisis Assistance Supported Housing (Queensland) Award 1999*
  - *The Family Day Care Services Award 1999*
  - *The Home and Community Care Award 2001*
- 5.10. The Full Bench also referred to the *Residential and Support Services (Victoria) Award* in relation to disability services employees. However, they later varied the modern award and integrated these employees into the definition of the social and community services stream.<sup>83</sup> These employees are now covered by the social and community services workers classifications and rates of pay of the Modern Award. In their 4 December 2009 decision,<sup>84</sup> the Full Bench dealt with an application by the ASU to defer parts of the modern award pending the outcome of its application in this case. The

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<sup>82</sup> [2009] AIRCFB 945 at [80]. The stage 4 modern award decision is [2009] AIRCFB 865.

<sup>83</sup> [2010] FWAFB 2024. The corresponding Order is PR995399. It amended the definition of social and community services sector. See also the coverage clause: cl. 4.1.

<sup>84</sup> [2009] AIRCFB 945.

pay rates, loadings and penalty rates for the SACS Modern Award do not come into operation until 1 July 2011 and are subject to a phasing in period.

## **SACS sector award history**

- 5.11. The rates of pay in the SACS Modern Award are derived from simplified pre-reform awards. In the case of the social and community service worker stream, the Full Bench of the AIRC drew on the rates and classifications contained in the federal *Social and Community Services (Queensland) Award 2001* (pre-reform), and in doing so observed that this, as well as the federal social and community services awards for the ACT and Western Australia, had been ‘reviewed as part of the award simplification process in 2002’.<sup>85</sup> That observation is important because it reflects an acceptance by the Full Bench that the rates of pay in the *Social and Community Services (Queensland) Award 2001* contained properly fixed minimum rates of pay.
- 5.12. The simplification process referred to by the Full Bench was a product of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). Item 51(4) of that Act conferred on the AIRC a power to vary a federal award upon review if the rates in the award were not operating or not intended to operate as minimum rates of pay.
- 5.13. In the *Paid Rates Review Decision*<sup>86</sup> a Full Bench decided that all awards would be subject to conversion under Item 51(4) if the rates they contained did not operate as minima or were not intended to so operate, criteria directly reflected in Item 51(4), and the rates did not bear a proper work value relationship to award rates that contained properly fixed minima.<sup>87</sup> The Full Bench considered that they were compelled to adopt these criteria by the WR Act, pointing to the references in Item 51(4) to sections 88A, 88B and 89A(3) of the WR Act all of which were relevant to the function of awards and the award making function of the AIRC under the WR Act. An insight into what the Full Bench meant by the criterion ‘did not bear a proper work value relationship to award rates that contained properly fixed minima’ can be gleaned from the Full

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<sup>85</sup> [2009] AIRCFB 865 at [101].

<sup>86</sup> (1998) 123 IR 240.

<sup>87</sup> *Ibid* at 253.

Bench's reliance on the following provisions, which they extracted in their decision from section 88A(3)<sup>88</sup> of the WR Act:

- (3) In performing its functions under this Part, the Commission must have regard to the following:
  - (a) the need for alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed;
  - .....
  - (d) the need to apply the principle of equal pay for work of equal value without discrimination based on sex.

5.14. The sub-sections supported the Full Bench's conception of what amounted to equitable award rates of pay that excluded market considerations, which the Full Bench held to be the province of agreement making, section 170MX awards or 'perhaps exceptional matters orders'.<sup>89</sup> Properly fixed rates of pay were accordingly rates that reflected an appropriate work value relationship on a gender neutral basis between the award under review and other awards with rates fixed on the same basis.

5.15. To that end, the Full Bench adopted the minimum rates adjustment principle from the August 1989 National Wage Case decision.<sup>90</sup> It enabled rates of pay to be fixed and adjusted on a common basis.<sup>91</sup> The common basis depended on:

identifying the key classification in the award under review, striking the appropriate work value relativity between that classification and the fitter in the Metal, Engineering and Associated Industries Award - Part I (2000) 110 IR 247, adjusting the rate for the key classification accordingly (if necessary) and then adjusting all of the rates in the award under review to maintain the pre-existing relativities with the key classification.<sup>92</sup>

5.16. The above was described by the Full Bench in the *Paid Rates Review Decision* as the method for establishing properly fixed minimum rates.<sup>93</sup> It relied on comparisons.<sup>94</sup> Another Full Bench in *The Railways Professional Officers Award 2002 and Municipal*

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 254.

<sup>90</sup> *Supra*: note 2. Principle 1 at 256

<sup>91</sup> *Ibid* at 254.

<sup>92</sup> *Ibid* at 255.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid*, see Principle 3 at 256.

*Officers' (Metropolitan Transit Authority) Award 1984*<sup>95</sup> explained that the required comparison could be done indirectly<sup>96</sup> or directly. The indirect method linked the key classification of the award under review with an equivalent key classification in another award or awards that already contained properly fixed minima. The direct method established the relativity directly with the C10 fitter. The Full Bench confirmed a preference for the direct method, where there was 'evidence and argument' that showed that the 2 methods produced different results, because that method:

was likely to promote uniformity and consistency in a system that is predicated upon all properly fixed rates having a relativity linkage to the C10 fitter.

- 5.17. The object of both the indirect and direct method was to produce a rate of pay for the key classification of an award under review (as the basis for fixing rates for the other classifications in an award under review) that reflected its comparative work value, expressed as a relativity to the C10 fitter, regardless of gender.

### **The application of the simplification process to the rates adopted for the SACS stream**

- 5.18. At the time of the Modern Award, there were five federal SACS awards that applied by State or Territory in Queensland, Victoria,<sup>97</sup> the ACT<sup>98</sup>, WA,<sup>99</sup> and the Northern Territory.<sup>100</sup> In Tasmania, NSW and South Australia SACS awards were made by the respective State tribunals.<sup>101</sup>
- 5.19. In 2001 and 2002 the federal SACS awards were subject to Item 51(4) reviews undertaken by Cartwright SDP. The evidence of Sally McManus, ASU Branch Secretary for NSW and ACT in these proceedings is that, before Cartwright SDP's reviews, the rates of pay in the predecessor awards to the federal SACS awards

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<sup>95</sup> (29 November 2005) PR965797 at [23]-[24].

<sup>96</sup> The indirect method also appears from Principles 2 and 3 of the *Paid Rates Review Decision*.

<sup>97</sup> Social and Community Services - Victoria – Award 2000.

<sup>98</sup> Social and Community Services (ACT) Award 2001.

<sup>99</sup> Social and Community Services – Western Australia – Award 2002.

<sup>100</sup> Social and Community Services Industry – Community Services Workers – Northern Territory – Award 2002.

<sup>101</sup> Community Services Award (TAS), Social and Community Services (State ) Award (NSW), and Social and Community Services Award (SA).



differed.<sup>102</sup> Cartwright SDP reviewed each award separately and applied a common approach to the identification of the key classification in each award and its relativity with the C10. The origins of his Honour's approach are found in his review of the Western Australian SACS award. His Honour held that the rates in that award were properly fixed because:

I have compared the rates in the current award with the properly fixed rates in other awards. The professional rates for 3 year and 4 year equate to the appropriate rates in the Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998. The rates for the other salary levels in the award are properly set relative to these benchmarks. Based on the material before me and the submissions of the parties, I am satisfied based on the material that the rates in the award equate to properly fixed rates in other awards.<sup>103</sup>

5.20. In his Honour's review of the *Social and Community Services (Queensland) Award* 2001,<sup>104</sup> Cartwright SDP found that the rates were not properly fixed and required adjustment. He identified the key classification as the graduate entry classification for a social worker with a 4 year degree on the basis:

- (a) of uncontested evidence given by an experienced ASU official that social workers comprised the largest group of employees covered by the award; and
- (b) of an observation that the classification was common in the various social and community services (SACS) awards around Australia.<sup>105</sup>

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<sup>102</sup> Statement of Sally McManus: at [71(j) and (k)]. Indeed, it is Ms McManus' evidence that the ACT award was operating as a paid rates award: at [85].

<sup>103</sup> [2001] AIRC 1317 PR912428 at [9].

<sup>104</sup> [2002] AIRC 235 (PR914950) at [14].

<sup>105</sup> *Ibid.*

5.21. The relativity Cartwright SDP accepted for the key classification in the Queensland SACS award was 130% of the C10 fitter. That was the relativity contended for by the ASU<sup>106</sup> relying on a comparison between graduate social workers with a 4 year degree and graduate engineers and scientists covered by the *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998* (pre-reform) with a 4 year degree qualification.<sup>107</sup> His Honour also had in mind his decision concerning the Western Australian SACS award, which had produced a relativity of 130% 'benchmarked against metal trades'.<sup>108</sup>

5.22. Further insight into his Honour's approach can be gained from his review of the Victorian SACS award. His Honour explained:<sup>109</sup>

[20] During the process of reviewing the rates in the Social And Community Service (Queensland) Award 1996 ("SACS(Qld) award"), I received extensive submissions from the ASU concerning properly fixed rates of pay in other awards for similar work to that covered by the award. This evidence was primarily focused on the rates of pay for the entry points of degree qualified social workers. On the basis of submissions from the parties, as well as the considerable evidence led during the course of the proceedings, I reached the conclusion that that the appropriate relationship between a social worker with a four year degree and the metal industry C10 fitter was 130%. This accords with the approach adopted in the Professional Scientist classifications in the Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998 [AW797948] which are set at 125% and 130% for three year and four year degrees. The reasoning behind this conclusion is set out in detail in my earlier decision [PR914950]. A similar submission was also made by the ASU before Hingley C.

[21] In order to determine the current external relativity of a graduate social worker with a four year degree under the Award, I have compared the rate for that classification (designated a Class 1, Level 3 social worker in the Award), at the time the Award was made, with the C10 metals fitter rate of the same year. This provides an external relativity figure that is not [sic] been potentially distorted by the inclusion of the various flat rate safety net adjustments and can then be compared to the four year graduate classification in the SACS(Qld) and Social and Community Services Industry - Community Services Workers - Western Australia Award 1996 ("SACS(WA)") awards.

[22] When the interim Award was made in 1995, the rate for a social worker with a four year degree was \$519.50. The rate for a C10 metal industry fitter was \$425.20. The external relativity between the social worker and the fitter is approximately 122%. This does not equate with the 130% relativity for the graduate social worker with a four year degree in the SACS(Qld) award. I therefore am satisfied on the evidence that the rates in the award do not equate to properly fixed rates. Principle 2 requires that rates which do not

<sup>106</sup> [2002] AIRC 235 (PR914950) at [10].

<sup>107</sup> That relativity was the result of a decision made by Commissioner Harrison in 1992 (Print K1997) in respect of scientists and engineers, upheld on appeal (Print M3882). The Full Bench in *The Railways Professional Officers Award 2002 and Municipal Officers' (Metropolitan Transit Authority) Award 1984* (29 November 2005) PR965797 mention this history and other professionals awards to which it flowed on at [9].

<sup>108</sup> *Ibid* at [17].

<sup>109</sup> [2002] AIRC 333.

equate to properly fixed minima be converted in accordance with the remaining Conversion Principles. Accordingly, I am satisfied that the rates require conversion.

- 5.23. The outcome of his Honour's reasoning for the *Social and Community Services (Queensland) Award 2001* was an 8 level classification structure with the key classification (being a graduate with a 4 year degree) identified at Community Services Worker Level 3, Paypoint 4. A graduate with a 3 year degree was placed at Community Services Worker Level 3, Paypoint 3.<sup>110</sup> This is reflected in his Honour's variation order.<sup>111</sup>

### **The work value relationship with engineers and scientists under the modern award**

- 5.24. Before rates in the Modern Award were adjusted for the 3 July 2010 decision of the Minimum Wage Panel, the Modern Award rates of pay for Level 3, paypoints 3 and 4 were virtually identical to those contained in the 2008 pay scale summary<sup>112</sup> extracted from the *Social and Community Services (Queensland) Award 2001*. By 2008 the 130% relativity with the C10<sup>113</sup> had been lost. It was 118%.<sup>114</sup> The reason for the compression in the relativity was progressive safety net adjustments awarded in flat dollar amounts rather than percentage terms. That was the explanation given by a Full Bench in 2005 to explain the compression over time in the C10 relativity with the 4 year graduate engineer in the *Technical Services Professional Engineers (General Industries) Award 1998*.<sup>115</sup>
- 5.25. On current rates, a comparison between the C10<sup>116</sup> rate in the *Manufacturing and Associated Industries and Occupations (Modern) Award 2010* with the rate prescribed

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<sup>110</sup> [2002] AIRC 235 (PR914950) at [19].

<sup>111</sup> *Social and Community Services (Queensland) Award 1996* (5 March 2002) PR914975 at [3].

<sup>112</sup> AP808848 (14 July 2008).

<sup>113</sup> When compared with the C10 rate in the Pay Scale Summary of the Metal, Engineering and Associated Industries Award 1998 Part 1 (AP789529).

<sup>114</sup> Rounded to nearest whole percentage (22 July 2008).

<sup>115</sup> *The Railways Professional Officers Award 2002, Municipal Officers' (Metropolitan Transit Authority) Award 1984* (29 November 2005) PR965797 at [25]. See also clause B.2.2 of Schedule B to the *Manufacturing and Associated Industries and Occupations Award 2010*, which says:

The percentage wage relativities to C10 in the table in clause B.2.1 reflect the percentages prescribed in 1990 in Re Metal Industry Award 1984 – Part 1 (MM039 Print JS043). The minimum wages in this award do not reflect these relativities because some wage increases have been expressed in dollar amounts rather than percentages and as a result have reduced relativities.

<sup>116</sup> The amount of \$663.60 is the amount specified for the C10 in the *Manufacturing and Associated Industries and Occupations Award 2010*.

by the Modern Award for Level 3, paypoint 4 of the social and community service work stream shows the relativity is 117%.<sup>117</sup> The relativity is 115% when compared with Level 3, paypoint 3. Professional engineers and scientists are now covered by the *Professional Employees (Modern) Award 2010*. The classification under that award for graduates with a 4 or 5 year degree is Level 1, pay point 1.1. The prescribed rate of pay is \$40,640 per annum. The rate of pay for a graduate with a 3 year degree is \$39,640. When converted to a weekly rate of pay and compared with the C10 in the *Manufacturing modern award*, the relativity is 118% and 115% respectively.

5.26. The *Manufacturing and Associated Industries and Occupations Award 2010* is the apparent successor to the *Metal, Engineering and Associated Industries Award, 1998 - Part 1*. It covers the metal industry, although it is not limited to that industry.<sup>118</sup> To that end, it utilises coverage definitions that are similar to the *Metal, Engineering and Associated Industries Award Part 1 2001*.<sup>119</sup> The classification clause of the *Metal, Engineering and Associated Industries Award Part 1 2001*<sup>120</sup> is identical to the corresponding clause in the *Manufacturing Modern Award*.<sup>121</sup> Both clauses contain a C10 classification. Further, in the classification definition schedules to both awards<sup>122</sup> is a table that identifies internal wage relativities by reference to the C10 classification.

5.27. In [2009] AIRCFB 450 the Full Bench of the AIRC explained that the *Professional Employees Award 2010* was an amalgamation of three awards in which ‘we saw a number of common conditions and similarity in the wage rates’.<sup>123</sup> There is no material difference in the way the Professional Employees’ Modern Award and its pre-reform predecessor define the work and required qualifications of engineers and scientists. In its application to graduates, the Professional Employees’ Modern Award amalgamated the two classifications prescribed by the *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998* for engineering and science

<sup>117</sup> The comparison has been done on the basis of current rates; the rates increased by the July 2010 decision of the minimum rates panel.

<sup>118</sup> [2008] AIRCFB 1000 at [177]-[192].

<sup>119</sup> Compare cl. 1.4 of the *Metal, Engineering and Associated Industries Award* with cl. 3.1 of the *Manufacturing and Associated Industries and Occupations Award 2010*. For example, the definitions of “Engineering Streams” in the pre-reform award is almost identical to the definition adopted in the modern award. The same is true of the definition of “vocational fields”. Both awards identify these fields as trades, technical, engineering/production, supervisor/trainer/coordinator and professional. Each of these fields is defined in the same terms in both awards.

<sup>120</sup> Cl. 5.1.1(c).

<sup>121</sup> Cl. 24.1.

<sup>122</sup> Schedule B to the *Manufacturing modern award* and Schedule D to the pre-reform award.

<sup>123</sup> At [196].

graduates with 4 and 5 year degrees. The two classifications in the pre-reform award prescribed the same rate of pay. Accordingly, their amalgamation had no practical effect.

5.28. The Pay Scale Summary<sup>124</sup> published on 1 July 2009 applicable to employees covered by the *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998* prescribed an hourly rate of pay equivalent to \$750.50 per week<sup>125</sup> for graduates with a 4 or 5 year degree.<sup>126</sup> When the *Professional Employees Award* came into force on 4 September 2009<sup>127</sup> the rate was \$39,288, or \$755.38 when converted to a weekly rate. The Modern Award when first published in December 2009 prescribed a weekly rate of \$750.39 for Level 3, paypoint 4 of the social and community worker stream. However, that was not the classification the Full Bench selected for graduates with 4 year degrees, despite it being adopted as the key classification by Cartwright SDP. The Modern Award prescribes Level 3, paypoint 3 as the classification for graduates with a 4 year degree. The Government has not been able to find a basis for this classification.<sup>128</sup> Whatever the reason, when first published the Modern Award entitled a graduate SACS employees with a 4 year degree to \$734.93 per week. In contrast, equivalent graduate engineers and scientists were entitled to \$20.45 a week more.

5.29. The critical aspect of Cartwright SDP's decision for this application is the linkage he found on gender neutral and work value grounds between the 4 year SACS graduate and the equivalent classification in the pre-reform award applicable to engineers and scientists. His Honour compared the work of these employees and found the work value to be equivalent. A comparison between current rates of pay prescribed by the respective modern awards for these employees shows that SACS employees are worse off, an outcome compounded by the lower classification adopted in the Modern Award for 4 year SACS graduates. The differences are set out in Table 5.1 below.

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<sup>124</sup> AP787948. The pay scale did not apply in Tasmania, South Australia or Queensland.

<sup>125</sup> When multiplied by 38.

<sup>126</sup> The equivalent transitional Order of the AIRC (PR989041) fixed a weekly rate of \$750.40.

<sup>127</sup> PR988777.

<sup>128</sup> This is so despite a review of the modern award statements of the AIRC and the submissions of parties.

**Table 5.1: Award comparison**

Degree	Modern award weekly rate of pay for Level 3 Social and community service workers	Modern award weekly rate of pay for Level 1 employees covered by the Professionals modern award <sup>129</sup>	The extent to which Professionals Award employees are better off
Graduate with 4 or 5 year degree	\$760.93	\$781.54	\$20.61 per week or 2.7% better off.
Graduate with a 3 year degree	\$745.07	\$762.02	\$16.95 per week or 2.3% better off.

### **The Queensland Community Services and Crisis Assistance Award – State 2008**

- 5.30. The Government notes that there are differences in the award histories of the Modern Award and the *Queensland Community Services and Crisis Assistance Award - State 2008* (Queensland State Award). The Queensland Industrial Relations Commission (QIRC) ordered increases to the Queensland State Award in 2009 on equal remuneration and work value grounds.
- 5.31. The Queensland State Award was made by consent in 2008 bringing together the wages and conditions provided by the *Social and Community Services (Queensland) Award 2001* and the *Crisis Assistance Supported Housing (Queensland) Award 1999*. While Cartwright SDP adjusted the rates of the *Social and Community Services (Queensland) Award 2001* during the award simplification process as outlined in paras 5.19 to 5.20, the Government has found no evidence indicating that the rates in the *Crisis Assistance Supported Housing (Queensland) Award 1999* were adjusted other than for annual minimum wage increases.

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<sup>129</sup> The rates in this award are expressed in annual terms. For comparative purposes they have been converted to weekly rates by dividing by 52.

## Award-reliance in the SACS sector

- 5.32. The ABS Employee Earnings and Hours data<sup>130</sup> shows that in all industries women were more likely to be award-reliant than men (19.9 per cent compared with 13.3 per cent for men). Award reliance has declined for both women and men over the period May 2006 to August 2008 (down from 23.4 per cent and 14.7 per cent respectively).
- 5.33. Compared to the general workforce, a large proportion of employees in the SACS sector have their pay and conditions determined by awards.
- 5.34. The Employee Earnings and Hours data (Table 5.2) shows that 30.9 per cent of non-managerial employees in the SACS sector had their pay set by awards or pay scales compared with 18.1 per cent of non-managerial employees across all industries.

**Table 5.2: Comparison of Pay Setting Methods in the SACS Sector**

Employees (%)				
Industry	Award or pay scale only	Collective agreement	Individual arrangement	All methods of setting pay
8609 Other residential care services	35.9	51.7	12.4	100.0
879 Other social assistance services	29.4	51.2	19.4	100.0
Total SACS industry (8609+879)	30.9	51.3	17.7	100.0
All industries	18.1	42.8	39.1	100.0

Source: ABS *Employee Earnings and Hours* (Cat. No. 6306.0), August 2008, unpublished data.

## Earnings of award reliant employees

- 5.35. The 2008 Employee Earnings and Hours survey indicates that non-managerial employees in the SACS sector had lower average earnings than non-managerial employees in other industries, in terms of ordinary time average hourly and weekly earnings.

<sup>130</sup> ABS, *Employee Earnings and Hours* (Cat. No. 6306.0), August 2008, unpublished data.

- 5.36. Overall, employees in the Other residential care services class (8609) earned an average of \$25.70 per hour and employees in the Other social assistance services group (879) earned \$23.30 per hour. By contrast, the all industries average is \$28.00 per hour.<sup>131</sup>
- 5.37. In contrast to the overall pay rates of SACS employees, those SACS employees whose wages are set by award earned higher weekly and hourly rates than the all industries average for award reliant employees.
- 5.38. Award reliant employees in the Other residential care services class (8609) earned an average of \$23.50 per hour and employees in the Other social assistance services group (879) earned \$25.00 per hour. By contrast, the all industries average is \$18.60 per hour (see Table 5.3).
- 5.39. The data indicates that the overall levels of pay for SACS sector employees are below average which may be due to workers in the SACS sector not achieving the same bargaining outcomes compared to workers in other sectors and the fact that a higher proportion of SACS workers are covered by award rates (30.9 per cent compared to the all industries average of 18.1 per cent).

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<sup>131</sup> These rates refer to average weekly ordinary time earnings.



**Table 5.3: AWOTE and AHOTE of non-managerial employees by method of setting pay by industry**

Industry	Average Weekly Ordinary Time Earnings (AWOTE) (\$)				Average Hourly Ordinary Time Earnings (AHOTE) (\$)			
	Award or pay scale only	Collective agreement	Individual arrangement	All methods of setting pay	Award or pay scale only	Collective agreement	Individual arrangement	All methods of setting pay
<b>8609 Other residential care services</b>	677.90	729.40	585.00	693.00	23.50	27.70	24.30	25.70
<b>879 Other social assistance services</b>	652.80	552.70	568.30	585.20	25.00	21.60	25.30	23.30
<b>All industries</b>	466.60	904.20	987.30	857.60	18.60	29.80	29.40	28.00

*Source: ABS, Employee Earnings and Hours (Cat. No. 6306.0), August 2008, unpublished data.*

## Agreements and bargaining in the SACS sector

### Overview

5.40. The 2008 ABS Employee Earnings and Hours survey shows that around 51.3 per cent of non-managerial employees in the SACS sector had their pay determined by a collective agreement. This is substantially higher than the all industries average of 42.8 per cent. However, this data also indicates that pay levels for employees in the SACS sector on collective agreements are low.

5.41. This data also indicates that there is a significant variance in the hourly and weekly wage rates<sup>132</sup> received by employees covered by a collective agreement in the Other residential care services class (8609) compared to the Other social assistance services group (879), highlighting a diversity of pay rates in the SACS sector.

5.42. The Department of Education, Employment and Workplace Relations (DEEWR) Workplace Agreements Database (the Database) contains information on collective bargaining in the federal sphere. Information from the Database suggests that average

<sup>132</sup> Average weekly ordinary time earnings (AWOTE) and Average hourly ordinary time earnings (AHOTE).

wage increases of 3.7 per cent in federal collective agreements in the SACS sector<sup>133</sup> are below the average 4.1 per cent wage increases for all current agreements. However, this data is limited due to the small number of SACS agreements in the Database which may include employees who are not employed in the SACS sector.

### Federal collective bargaining outcomes

- 5.43. The Database contains details of wage increases provided in agreements and an agreement's relationship with the relevant award or pay scale (including commitments to future increases related to minimum wage decisions). These wage increases are converted into an 'average annualised wage increase' (AAWI).
- 5.44. An analysis of all agreements in the Database demonstrates that women generally receive lower pay increases than men. It also shows that wage increases are lower in federal collective agreements that cover a workforce of predominantly female employees.

**Table 5.4: Comparison of male and female AAWIs, 2004-2009**

	2004	2005	2006	2007	2008	2009
Overall	4.3	4.5	4	4	4.2	4
Male	4.4	4.5	4.1	4.2	4.3	4.1
Female	4.3	4.5	3.9	3.9	4.1	3.8
<b>Female proportion covered by agreement</b>						
< 40%	4.3	4.4	4.3	4.4	4.4	4.2
>60%	4.0	4.5	3.7	3.9	4.1	3.7
40-60%	4.6	4.4	4.1	3.9	4.0	4.0

Source: DEEWR, Workplace Agreements Database.

- 5.45. The Database shows that there are currently 318 collective agreements operating federally in the SACS sector, covering approximately 32,468 employees. This is the number of employees covered by the relevant agreements at the time they were made, and may also cover some non-SACS employees.
- 5.46. Of the 318 SACS federal collective agreements, only 74 had not passed their nominal expiry date as at 30 April 2010, and only around half contained wage increases that

<sup>133</sup> Agreements considered to be SACS agreements in the Database include those that are underpinned by a federal or state award that relates to the SACS sector and that are operating in the social assistance services subdivision.

could be quantified in percentage terms. These SACS federal collective agreements provided for an AAWI of 3.7 per cent, compared to the 4.1 per cent AAWI provided under all current agreements.

- 5.47. The wage increase results demonstrated in the SACS federal collective agreements may provide some explanation for the low wage rates seen in the Employee Earnings and Hours data for collective arrangements in the broader SACS sector.<sup>134</sup> The overall AAWI data indicates that collective agreements covering predominantly female workforces will have lower than average AAWI increases, with the average wage increases in the sample of current SACS federal collective agreements on par with the low average wage increases seen in predominantly female agreements.

### **Market wage comparisons**

- 5.48. One of the difficulties in respect of market wage comparisons is obtaining meaningful data. The Government is continuing to seek to identify and obtain such data and notes that this work will be further informed when any comparator groups are confirmed by the applicants.

### **Salary sacrifice arrangements in the SACS sector**

- 5.49. Salary sacrifice arrangements enable employees of eligible employers to use salary which is otherwise taxed as income, to pay for personal benefits, thereby reducing their taxable income. The extent of the benefit gained from salary sacrificing will depend on an employee's marginal tax rate, with employees on higher marginal tax rates generally gaining the greatest benefit.
- 5.50. While Fringe Benefits Tax (FBT) is an employer tax, employers can pass on the cost to the employee. Since the advent of FBT, there remains an attraction in packaging certain items that are taxed less heavily than cash salary. Where a benefit is exempt from FBT, salary sacrificing will have the effect of saving income tax on the salary foregone, which will not be offset by FBT. An example of an exempt benefit is superannuation

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<sup>134</sup> ABS, *Employee Earnings and Hours* (Cat. No. 6306.0), August 2008, unpublished data.

contributions (up to a specified limit) made for the benefit of an employee. An example of a concessionally treated benefit (where the effective tax rate is less than 46.5 per cent) is motor vehicles, where the taxable value of a car falls as it travels more kilometres (this is because greater business use is assumed).

- 5.51. Salary sacrifice arrangements are a feature of SACS employee arrangements due to the capped exemption from FBT available to public benevolent institutions (PBIs) in recognition of the special nature of these organisations. Many SACS sector organisations are PBIs.
- 5.52. Since 2001, PBIs have been provided with an FBT capped exemption on up to \$30,000 of grossed-up taxable value of fringe benefits per employee. The capped exemptions have been used by employers and employees to enter into salary sacrifice arrangements which allow employers to pass on the benefits of the tax exemption to employees. Fringe benefits under the cap and covered by salary sacrifice arrangements are not subject to FBT, income tax or GST. For example, an employer can provide or pay for private expenditure of an employee such as mortgage payments and school fees and as a fringe benefit within the capped exemption, will not be liable for FBT on the benefits provided.
- 5.53. The capped concession reduces the overall costs of salaries for those employees of PBIs who salary sacrifice. The cap does not place a limit on the use of other FBT exempt benefits.
- 5.54. In addition, meal entertainment and entertainment facility leasing expenses are exempt from FBT and excluded from the capped exemption for employees of PBIs. The exclusion enables employees of these bodies to access through salary sacrifice arrangements, unlimited tax-free meal entertainment and entertainment facility leasing expenses that are outside the capped exemptions. The benefits are provided to employees as part of a remuneration package out of pre-tax salary and are not subject to FBT, Goods and Services Tax or income tax. The benefits are also not included as reportable fringe benefits which are shown on an employee's payment summary and included for the purposes of certain income tested benefits.
- 5.55. These arrangements are discussed further in chapter 6 of this submission.

## **Salary packaging in the SACS modern award**

5.56. On 25 September 2009, the AIRC decided not to include a salary packaging provision in the exposure draft of the SACS Award. The AIRC did however indicate its willingness to reconsider its approach provided it obtained more information about the incidence of salary packaging within the industry and a more detailed explanation of the relative benefits for employers and employees.

5.57. Some of the concerns regarding the inclusion of salary sacrifice arrangements in the modern award noted by the AIRC on 25 September 2009 in its draft decision was that:

We do not have a clear indication of the extent to which employees in the industry need or use the award provisions. Nor do we know the extent to which salary packaging provides a net benefit to employees.

5.58. On 4 December 2009, the AIRC decided to include salary packaging and salary sacrifice provisions in the final SACS Award, acknowledging the strong support among major parties for the inclusion of such provisions. The AIRC noted in its 4 December decision:

We maintain the concern we expressed when we published the exposure draft, however all parties, including the Australian Government, asked that we make provision for salary sacrifice.

5.59. Accordingly, clause 14 of the SACS Modern Award provides for salary packaging in the following terms:

Where agreed between the employer and a full-time or part-time employee, an employer may introduce remuneration packaging in respect of salary, as provided for in clauses 15 to 17. The terms and conditions of such a package must not, when viewed objectively, be less favourable than the entitlements otherwise available under this award.

## **Salary sacrificing in collective bargaining**

- 5.60. According to the Database, 98 per cent of federally operating SACS sector agreements, covering around 31,800 employees provided salary sacrifice opportunities for employees.
- 5.61. The guidelines around individual salary sacrificing arrangements in the federal collective agreements analysed take a variety of forms, including:
- limits on the dollar amount or percentage of salary; or
  - indicative items available for salary packaging, for example direct payment of:
    - house mortgage or rental accommodation expenses;
    - loan repayments;
    - school fees; or
    - utility and local government charges.
- 5.62. Though most salary packaging clauses emphasise that the arrangements are by agreement, some emphasise that arrangements are at the employer's discretion.

## **Salary sacrificing and SACS employee pay outcomes**

- 5.63. Salary sacrifice can substantially boost an employee's take-home pay.
- 5.64. Based on current individual income tax rates, an employee with a taxable income of \$35,000<sup>135</sup> can replace salary and wages up to \$18,725 with fringe benefits, thereby reducing their income tax liability from \$3,575 to \$41 whilst maintaining a cash salary of \$16,234. For example, a part-time SACS worker in a two-income family may find it attractive to salary sacrifice this money into mortgage payments and at the same time, receive almost a tax free salary.
- 5.65. Data from the Australian Taxation Office indicates that in the 2008/09 financial year, 48,149 employees in the SACS sector (approximately one-third of the sector's employees) accessed salary sacrificing arrangements with reportable fringe benefits valued at \$1.125 billion. The ABS *Survey of Income and Housing* indicates that the

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<sup>135</sup> Approximately SACS modern award paypoint 2.2.

average rate of take up of salary sacrifice arrangements for employees in all industries is 13.2 per cent.<sup>136</sup>

- 5.66. This information suggests that around a third of SACS sector employees utilise salary sacrifice arrangements, and that the impact on an employee's take home pay can be substantial. Take home pay rates when salary sacrifice arrangements are accessed are obviously higher than rates in the Modern Award or, the Government would contend, in bargaining arrangements. As such, they should be taken into consideration by FWA when considering the actual pay levels provided to some SACS sector employees.

## **Conclusion**

- 5.67. An examination of the history of the development of the modern SACS award indicates that previously established relativities may have been compressed over time due to dollar rather than percentage wage increases.
- 5.68. The lower wage outcomes evident in the SACS sector may be explained by the high levels of award reliance in the SACS sector, and the low pay outcomes for those on collective agreements.
- 5.69. As outlined in chapter 3 of this submission, award or pay-scale reliant employees, regardless of gender, earn significantly less than employees covered by other types of industrial instruments.
- 5.70. The low pay outcomes for those employees covered by collective arrangements may be explained by the female dominance of the sector, and the trend for collective agreements that cover predominantly female workforces to have lower than average pay increases. The diversity of employment arrangements and pay rates within the sector is also highlighted by the variance in this data for employees covered in the Other residential care services class (8609) compared to the Other social assistance services group (879).
- 5.71. In addition to high levels of award and bargaining reliance, salary sacrifice arrangements are likely to be a feature of the employment conditions of many SACS

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<sup>136</sup> Unit record data from ABS *Survey of Income and Housing*, 2007-08.

employees. The Government contends that FWA should also consider the potential positive impact that salary sacrifice arrangements may have on SACS employees' take home pay when considering this case.



## **Chapter 6: Funding arrangements and models**

### **Introduction**

- 6.1. The funding arrangements in the SACS sector are highly complex, with funding provided by a range of sources and through various mechanisms. This chapter presents information on the current funding arrangements which apply to this sector.
- 6.2. The Government places great importance on services provided in the SACS sector. This chapter includes a snapshot of the Government's current contribution to the sector through funding, indexation and tax exemption arrangements.
- 6.3. In reviewing and determining the SACS application, the Government asks FWA to note that there is limited data available on exact employment numbers and arrangements in Commonwealth program funding agreements. It is therefore difficult to provide an in-depth analysis of the likely impact on organisations funded to deliver Commonwealth programs, should there be any increase to the wage rates in the sector.
- 6.4. In the Government's view it is important that FWA, in its deliberations, note the implications that a considerable wage increase may have on SACS services and the broader economy, as well as the Government's current fiscal strategy which will influence the Government's ability to support the sector in meeting additional wage costs.

### **Funding arrangements in the SACS sector**

- 6.5. The SACS sector largely derives income from three broad sources in order to deliver services:
  - Governments, particularly the Commonwealth and State and Territory governments (State governments). Although local governments also provide funding to the sector.
  - Individuals who access community services may be charged fees for certain services.

- Donations, fund raising activities and sales of goods and services.

6.6. During the 2008-09 financial year, the total sector income was \$8.8 billion.

Government (Commonwealth, State and Local) funding was the largest source of income, with \$5.4 billion, followed by \$1.2 billion from direct community services provisions. Not-for-profit organisations received 97 per cent of total government funding for the sector and 71 per cent of total income from direct community services provision. This is outlined in Table 6.1.

**Table 6.1: Funding sources in 2008-09**

Income source	NSW (\$m)	VIC (\$m)	QLD (\$m)	SA (\$m)	WA (\$m)	TAS/NT/ACT (\$m)	Total (\$m)	For profit (\$m)	Not-for-profit (\$m)	Total (\$m)
Government*	1,617	1,613	900	377	488	432	5,427	174	5,254	5,427
Direct community services provisions	367	363	181	86	85	87	1,168	335	832	1,168
Other provision of services	218	152	119	27	80	29	625	234	391	625
Donations and fundraising	253	145	150	28	65	25	665	0	0	665
Sales of goods	89	58	38	31	70	34	320	16	304	319
Grants from non-government sources	67	61	18	5	15	4	169			170
Interest	110	41	17	5	13	6	191	2	166	197
Other**	61	4	25	7	137	6	239	9	254	263
<b>Total</b>	<b>2,781</b>	<b>2,437</b>	<b>1,447</b>	<b>566</b>	<b>952</b>	<b>622</b>	<b>8,804</b>	<b>770</b>	<b>7,201</b>	<b>8,834</b>

Source: ABS *Community Services* 2010 – other residential care services and other social assistance services  
Notes:

\* Government: includes funding from Commonwealth, state and local governments

\*\*Other: includes dividend income, net profit or loss on share trading or asset sales or resulting from the revaluation of assets.

6.7. Government funding refers to project or program payments made by Commonwealth, State and local governments in the form of operational funds for ongoing operations and capital funds to purchase equipment or property.

6.8. The notional funding by level of Government was derived by applying the proportionate funding by level of Government at Figure 6.1 (source: the Australian Council of Social Service (ACOSS) Australian Community Sector Survey 2010) to the total income for

Community services indicated in Table 6.1. The notional funding by level of Government is outlined in Table 6.2.

**Table 6.2: Notional split of Government funding**

Level of Government	\$m	%
Commonwealth	2,562	47.2
State and Territory	2,827	52.1
Local	27	0.5
<b>Total</b>	<b>5,427</b>	<b>100</b>

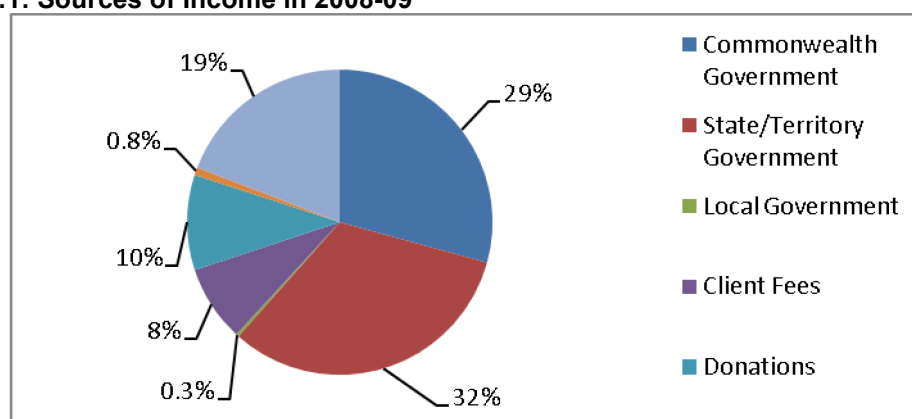
*Note: Total may not add due to rounding.*

#### **The ACOSS Australian Community Sector Survey 2010**

The survey was completed by 582 organisations involved in the provision of community services including: health services; residential aged care; disability services; home and community care; child care; employment and training services; and housing and homelessness services.

As shown in Figure 1, the Community sector received an average of 29 per cent of income from the Commonwealth government, 32 per cent from a State or Territory government, and the remaining from other sources.

**Figure 6.1: Sources of Income in 2008-09**



- 6.9. While the Commonwealth is a major funder for the sector, it is important to note that each level of government maintains a different share of responsibility for specific services. For example, under the National Affordable Housing Agreement (NAHA) between the Commonwealth and State governments, the responsibility of housing and homelessness services belongs to State and local governments, whereas the Commonwealth's focus is to provide income support and rental subsidies. At the same time, under the National Disability Agreement (NDA), disability services are primarily

a State government responsibility although the Commonwealth administers the employment component.

6.10. Table 6.3 provides a summary of key responsibilities of the Commonwealth, State, and local governments under the NAHA and NDA.

**Table 6.3: Key government responsibilities for NAHA and NDA**

	<b>Key Commonwealth Responsibilities</b>	<b>Key State/Territory/Local responsibilities</b>
<b>NAHA</b>	<ul style="list-style-type: none"> <li>- Income support and rental subsidies</li> <li>- Immigration and settlement</li> <li>- Financial sector regulation</li> <li>- Commonwealth taxation arrangements</li> <li>- Competition policy</li> <li>- Housing data collected by ABS/Centrelink</li> <li>- Coordination of homelessness data</li> </ul>	<ul style="list-style-type: none"> <li>- Housing and homelessness services</li> <li>- Housing for Indigenous people</li> <li>- Land use, supply, tenure and planning</li> <li>- Housing related financial support</li> <li>- State and local taxes and charges</li> <li>- Infrastructure policy and services</li> <li>- Tenancy and Not-For-Profit sector regulation</li> <li>- Collection and publication of data</li> </ul>
<b>NDA</b>	<ul style="list-style-type: none"> <li>- Administer disability employment services (open employment, supported employment, targeted employment support)</li> <li>- Income support</li> <li>- Advocacy (shared)</li> <li>- Information (shared)</li> <li>- Print services (shared)</li> <li>- Research and Development (shared)</li> </ul>	<ul style="list-style-type: none"> <li>- All other disability services (except employment)</li> <li>- Advocacy (shared)</li> <li>- Information (shared)</li> <li>- Print services (shared)</li> <li>- Research and Development (shared)</li> </ul>

*Source: Department of Families, Housing, Community Services and Indigenous Affairs.*

6.11. To further illustrate the different variables entailed in funding the SACS sector, the following examples are provided.

**Example 1 – funding arrangement for the Home and Community Care program (HACC)**

HACC is a joint Commonwealth and State Government initiative which provides services such as domestic assistance, personal care as well as professional allied health care and nursing services. These services are to support older Australians, younger people with a disability and their carers to be more independent at home and in the community, and to reduce the potential or inappropriate need for admission to residential care.

HACC services operate under a variety of business models, including models that incorporate a high level of volunteers. Many services also charge client fees. The fees charged vary between services and clients, depending on factors such as a given client's ability to pay and the fee arrangements in place in individual states and territories.

**Client scenario**

The statistically average HACC client in 2007-08 was a 72-year-old woman born in Australia. She spoke English at home, lived with her family and received on average four hours of HACC services a month. This service was most likely to be one type of support, such as domestic assistance. If she received a combination of services, it was likely to include centre-based day care, meal delivery and transport. The following scenario is based on this client.

Mrs HACC receives the following services weekly and lives in Western Australia. In Western Australia, Mrs HACC has been assessed as a Level 1 client meaning that she is receiving a pension of some type, so pays the lowest amount in fees. Her weekly services include:

- *Happy and Helpful Home Care* – 1 hrs domestic assistance @ \$8.00 per hour = \$8.00 per week

- *DoHA Meals on Wheels* – 4 delivered meals a week @ \$7.00 per meal x 4 days = \$28.00 per week

- *CPCB Centre Based day care* – once a week @ \$8.00 per occasion. She also has a meal at the day centre @ full cost (est.) \$5.00 and requires transport to and from the day care centre @ \$2.50 = \$ 15.50 per week.

Total for Mrs HACC is \$51.50 per week billed monthly as \$206 per month.

The Commonwealth does not collect fees in the HACC program. This is a State and territory responsibility through individual service providers. The fees used in the example above are taken from the Western Australian fees schedule. They do not reflect a national fee schedule.

*Source: Department of Health and Ageing*

**Example 2 – funding arrangement for Emergency Relief services (ER)**

ER is a service strategy of the Financial Management Program (FMP) which aims to build financial resilience and wellbeing among those most at risk of social and economic exclusion and disadvantage. ER assists organisations to provide emergency, financial or other assistance to individuals and families in immediate financial crisis.

The FMP is only one source of funding for ER organisations. In 2005, ACOSS estimated that the Commonwealth's contribution represented about 25% of overall ER funding, with the remainder coming from the organisations own fundraising activities or donations, or from State and local governments (in some states). State and local governments contribute to the provision of ER in a number of different ways:

- WA, Qld, ACT and Tasmanian Governments provide grants to community organisations for ER;
- Tasmanian Government has provided one-off funding in response to the global financial crisis;
- Victorian Government provides substantial funding to VicRelief and Foodbank, which in turn provides low-cost food to ER agencies across Victoria; and
- NSW Government contributes to ER largely through provision of vouchers, such as the Energy Accounts Payment Assistance Scheme (EAPA) vouchers to community organisations for distribution to people who are unable to pay their energy bills.

*Source: Department of Families, Housing, Community Services and Indigenous Affairs*

6.12. While the SACS sector receives direct funding from a number of sources, organisations providing SACS services may also be eligible to receive indirect support through tax concessions such as FBT and income tax exemptions. These exemptions are provided in recognition of the special nature of not-for-profit organisations (known as PBIs) established for the direct relief of poverty, sickness, suffering, distress, misfortune, disability or helplessness.

6.13. At the Commonwealth level, endorsed PBIs receive the most generous concession around FBT exemptions. Table 6.4 outlines the amount of exemption for PBIs from 2009-10.

**Table 6.4: Exemption for PBIs**

	<b>2009-10 (\$m)</b>	<b>2010-11 (\$m)</b>	<b>2012-13 (\$m)</b>	<b>2012-13 (\$m)</b>
Social security and welfare	760	800	860	910

*Source: Taxation Expenditure Statement 2009 p135.*

6.14. Although the benefit of this exemption accrues to the employer, organisations can utilise the exemption to increase the value of remuneration to employees through salary sacrifice arrangements.

- 6.15. As discussed in more detail in chapter 5, salary sacrifice arrangements enable employees to give up salary which would otherwise be taxed as income, in return for personal benefits. Australian Taxation Office data indicated that in the 2008/09 financial year around one-third of employees working for PBIs in the SACS sector utilised salary sacrifice arrangements. However, this may not fully translate given the significant level of casual and part-time award reliant employees who are subject to this case.

### **Commonwealth's contribution to the sector**

- 6.16. The Commonwealth provides funding to the sector through various mechanisms such as contracts, grants, and fee for service. Contracts are generally tendered on an outputs rather than inputs basis. Grants are an arrangement for the provision of financial assistance by the Commonwealth while fee for service is a direct charge for the provision of a service. These funding mechanisms will not necessarily include or require a breakdown on cost of inputs, including salaries.
- 6.17. Payments made by the Commonwealth for the delivery of services within this sector are generally indexed in recognition that organisations need to meet a range of cost pressures throughout the term of the agreement, including general increases in wages and salaries. Indexation is not intended to fully compensate for changes in prices or wages as to do so would run counter to the Commonwealth's aim, as part of the overall indexation framework, to provide incentives for agencies to manage programs efficiently and to implement productivity improvements. Annual administered payments are generally indexed using the Wage Cost Index series calculated as a weighted average of price movements for wage costs and non-wage costs (based on the Consumer Price Index).
- 6.18. In addition to the above funding mechanisms, the Commonwealth contributes to state and territory (state) functions in the form of National Specific Purpose Payments (SPPs) and National Partnerships (NPs).
- 6.19. Since the reform of the Commonwealth-State financial relations, SPPs can now be expended more flexibly by the states within the sector for which the funding is

provided. This means the Commonwealth does not fund a specific program run by State governments. This allows the states to allocate funding to areas of need according to their own budget priorities.

- 6.20. Base funding for each SPP is provided on an on-going basis indexed on 1 July 2010 and each year thereafter by a specific growth factor agreed between the Commonwealth and the States, with a review of these factors scheduled for 2014-15. Any changes in funding arrangements would require renegotiation with the states and territories and, if it involves base funding, a change to legislation (*Federal Financial Relations Act 2009*).
- 6.21. NPs are focused on the achievement of outcomes based objectives, with facilitation, project and reward payments intended to drive reforms or improve service delivery standards. These payments are based on the delivery of outcomes rather than inputs.
- 6.22. NPs are generally not indexed, though cost escalation is incorporated into the NP funding amounts. Variation to the quantum of payments will only be likely upon the renegotiation of expired NPs should the policy continue. NPs by their nature are intended to be time-limited and any changes to funding arrangements would require renegotiation with the state and territories.
- 6.23. The Commonwealth does not directly employ workers covered by the SACS award; however, the Commonwealth funds programs and contributes to state and territory obligations which in turn fund organisations who employ people covered by the SACS award to deliver services to the community. The following table (Table 6.5) summarises the estimated Commonwealth program funding and contribution to States and Territories in relation to services to the community which may flow through to organisations employing workers covered by the SACS award.



**Table 6.5: Total estimated Commonwealth program funding and contributions to States/Territories**

<b>2010-11 (\$m)</b>	<b>2011-12 (\$m)</b>	<b>2012-13 (\$m)</b>	<b>2013-14 (\$m)</b>
10,298	10,831	11,204	11,348

*Note: This funding is for Commonwealth program expenditure and contribution to States and Territories, including service provider costs.*

- 6.24. In addition to this funding, PBIs are entitled to a range of tax concessions at both the Commonwealth and state and territory level.
- 6.25. At the Commonwealth level, PBIs are eligible for a range of tax concessions including an income tax exemption, an FBT exemption, Goods and Services Tax concessions, access to refundable franking credits and deductible gift recipient status. At the state, territory and local level, charities can access various exemptions from payroll tax, stamp duties, land tax and municipal rates.
- 6.26. These tax concessions represent a revenue cost to the Commonwealth and the states and territory governments. Whilst not directly subsidising the employee costs of PBIs, they nonetheless represent an additional source of support and income that assists with the expenses of these institutions.

### **Data limitation**

- 6.27. The likely impact on SACS sector service delivery and Commonwealth program funding of any increase of wage rates under the SACS award cannot be determined with any precision. This is due to data limitation and the number of variables surrounding the cost structures and employment arrangements of organisations delivering SACS services. Current data limitations make it difficult to derive estimates of the proportion of workers:
- on the SACS modern award;
  - on each pay point of the SACS modern award; and
  - being paid over the award rate.

- 6.28. The Commonwealth's endeavours to reduce red tape for the not-for-profit sector means that most programs have shifted from being funded on an inputs basis to being funded on an outcomes basis. This means funding agreements do not usually include a breakdown of staffing numbers.
- 6.29. However, preliminary analysis indicates that any significant wage increase awarded by FWA will result in a substantial cost increase to service providers delivering Commonwealth programs. This is discussed further below.
- 6.30. The following examples illustrate the varying expectations of various Commonwealth agencies on service providers in relation to information to be provided on employment arrangements:

**Example 1: Department of Immigration and Citizenship**

The Commonwealth currently funds various humanitarian programs where services are provided by several contractors, with a mix of for profit and not-for-profit providers. The expectation is for tenderers to factor in wage costs in their tender pricing; therefore information on employment arrangements, including award specifics, is not canvassed.

**Example 2: Department of Health and Ageing**

Community care packages are funded under the *Aged Care Act 1997* (the Act). The Act sets out the requirements of aged care providers in relation to staffing. Section 54-1 (1) (b) of the Act identifies that approved providers are required to maintain an adequate number of appropriately skilled staff to ensure that the care needs of all care recipients are met.

**Example 3: Department of Education, Employment and Workplace Relations**

Service providers of employment programs such as Job Services Australia (JSA) are paid on the basis of fees set out in the Employment Services Deed. All fees in the funding deed are paid on the basis of services delivered to participants or outcomes achieved. The JSA funding deed does not include staff wage costs and providers are expected to manage their own staff budgets within the JSA funding. It is expected that a JSA organisation's budget also allows for staff costs.

## **Implications for service delivery within the SACS sector**

- 6.31. The Commonwealth does not directly employ workers covered by the SACS modern award; however, organisations who employ workers under a SACS award are recipients of Commonwealth funding in order to perform the services they provide to the community.
- 6.32. Any significant increase to the award rates, holding all else constant, will impose greater cost pressures on organisations delivering SACS services.

- 6.33. Increased funding to the sector would ease pressure on SACS employers to reduce employment (and therefore service delivery), however any supplementation by the Commonwealth would likely come at a cost to other Commonwealth funded services (see section on Commonwealth Fiscal Strategy).
- 6.34. Without supplementation, the full wage price pressure of the decision would fall on the SACS sector employers and their clients. Organisations would then be likely to reassess their capacity to meet the deliverables under their funding agreements which in turn could risk employment and the range and level of services provided to the community by these organisations. However, the Government contends that solutions to cost pressures for SACS sector employers arising from significant wage increases should not fall to supplementation alone. Organisations should, as a matter of course, look to implement measures that boost productivity to offset some of the cost pressures.

### **Commonwealth's fiscal strategy**

- 6.35. The Government will consider any funding implications arising from FWA's decision in the context of its fiscal strategy, which is designed to ensure fiscal sustainability and, through the deficit exit strategy, provides a framework for returning the budget to surplus.
- 6.36. The focus of the fiscal strategy in future years will remain on returning the budget to surplus as soon as possible, including offsetting all new spending measures by reprioritising existing expenditure. In addition, once the budget returns to surplus, and while the economy is growing at or above trend, the Government will maintain expenditure restraint by retaining a 2 per cent annual cap on real spending growth, on average, until surpluses are at least 1 per cent of GDP. This commitment to cap spending has already placed – and will continue to place – a significant restraint on Commonwealth expenditure.
- 6.37. Depending on the decision of FWA, the potential fiscal cost to the Commonwealth of significant wage increases in the SACS sector, if fully supplemented, could be considerable, even taking into account a phased implementation. However, due to the complexity and diversity of the SACS sector and the uncertainty of its employment

structure, the exact pressure from any wage increase cannot be reliably estimated at this point in time.

- 6.38. The Government's fiscal strategy – which is aimed at ensuring fiscal sustainability and returning the budget to surplus – will influence the Government's ability to support the sector in meeting additional wage costs. Any additional Commonwealth funding provided would likely come at the expense of other Commonwealth funded services.
- 6.39. The need to balance priorities will mean any decision to supplement SACS service providers should FWA award an increase, would need to be matched by reductions in other Commonwealth funded programs. This is due to the Government's current fiscal strategy which involves fully offsetting any additional spending.

### **Economic impact**

- 6.40. The ASU's application seeks significant increases to the rates of pay in the SACS Modern Award, reflecting those pay increases awarded in 2009 by the QIRC to SACS workers in Queensland.
- 6.41. Analysis conducted by the Government suggests that the ASU's application, if successful, could result in pay rises of between 14 to 50 per cent, when compared with the rates contained in the modern award.
- 6.42. The ASU's application for wage increases would likely have a negligible impact on aggregate wages growth across the economy as a whole (adding around 0.03 per cent to through-the-year wages growth<sup>137</sup> over the four and a half year phase-in period). There would likely be a similarly negligible impact on employment growth and on inflation. This is a result of the SACS sector's relatively small employment share, as outlined in chapter 4.
- 6.43. Although the impact of the proposed wage increase is likely to be negligible when taken in isolation, if similar increases were negotiated across other sectors, such as the aged

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<sup>137</sup> Through-the-year growth is the percentage change in a variable compared to its value in the same period (often the month or quarter) of the previous year.

care sector, the cumulative impact on aggregate wages and employment would become significant.

- 6.44. The Government anticipates that FWA will take into account the impacts on the SACS sector and broader economy in its consideration of this application.

## **Conclusion**

- 6.45. The Government acknowledges that there is likely to be an impact on service delivery in the SACS sector, should FWA grant a significant increase in the award. Any decision may also impose implications on other sectors and the broader economy.
- 6.46. While signs of economic recovery are clearly evident, it is important FWA takes into account the fact that some level of volatility is anticipated to remain in the Australian economy in the short-term.
- 6.47. It is evident that there are numerous variables surrounding funding arrangements within the SACS sector including indexation arrangements and taxation exemptions. All factors play an important role in contributing to the sustainability of organisations delivering SACS services.
- 6.48. The Government contends that it is important that FWA finds the right balance between equal remuneration for SACS employees and the broader implications of any wage increase in reaching its decision.
- 6.49. The Government has not considered the question of supplementation should any increase be awarded by FWA. The Government reserves its right to make final written submissions to FWA on this issue.

# Attachment A: Heads of Agreement

## Heads of Agreement

### Australian Government and the Australian Services Union

#### Background

- Currently there are many employees in the social and community services sector (SACS sector) who are employed by entities that are not constitutional corporations and so remain within state workplace relations systems.
- The Australian Government has developed the proposal below to respond to certain concerns held by the Australian Services Union and its state based associated bodies (together, the ASU) relating to the possible transfer of those employers and employees into the federal system as a result of referral of powers by the states.
- The most significant of the ASU's concerns is how the recent pay equity decision that awarded significant pay increases for the SACS sector in Queensland (*Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (A/2008/5)*) ('the Queensland Decision') will be dealt with in any transfer of the relevant employees into the federal system, both in terms of:
  - preserving the new rates for the Queensland employees; and
  - how the ASU may seek to achieve similar outcomes for employees in other states through pay equity and work value claims in state or federal tribunals.
- The Australian Government has been advised by the ASU that it intends to make an application for an equal remuneration order/work value wages review under the *Fair Work Act 2009* (Fair Work Act) for the SACS sector.
- The Australian Government and the ASU recognise the unique circumstances in which the ASU will make an application for equal remuneration. The claim will be the first under the *Fair Work Act 2009*, against the background of uncertainty as to jurisdictional coverage of SACS sector workers and the finalisation of negotiations between the Commonwealth and state governments in relation to the creation of a national workplace relations system for the private sector. Therefore the approach adopted in this Heads of Agreement does not constitute a precedent for future pay equity claims.

#### Heads of Agreement

1. The ASU and the Australian Government have agreed that the following package of measures will satisfy the ASU's concerns regarding a transfer of employees in the SACS sector into the federal system.
2. The ASU agrees that as a result of its concerns being substantially satisfied, it supports referrals of power covering workplace relations for the SACS sector from the states to the Commonwealth and the application of the Fair Work Act to those employees and will advocate to State Governments that they should make such referrals of powers.
3. In the event that the Commonwealth agrees with the States of Queensland, New South Wales, South Australia and Tasmania upon referral of workplace relations powers covering employees in the SACS sector, then the parties agree that they will undertake the actions set out at clauses 4 to 16 below.

#### Pay equity application

4. In the event that the ASU makes an application to set or vary rates of pay for the SACS sector based on the equal remuneration and /or work value provisions under the Fair Work Act, the Australian Government will seek leave from Fair Work Australia (FWA) to make a submission and to otherwise participate in those proceedings. This is consistent with:
  - a. the important public interest considerations in the hearing of the first major case under the new pay equity provisions of the Fair Work Act;
  - b. the Australian Government's desire to provide a view concerning the proper approach to the pay equity provisions of the new legislation;
  - c. recognition of the ongoing workforce issues in the SACS sector; and
  - d. recognition that any resulting pay rises will have significant financial implications for the Australian Government and the States.
5. The Australian Government acknowledges that, if an equal remuneration/work value application is made, the proceedings are likely to be complex, lengthy and resource intensive. Given these factors, and in order to assist FWA and the parties, the Australian Government:
  - a. will seek leave from FWA to make a submission and to participate in proceedings:
    - i. to support the development of an appropriate equal remuneration principle for the federal jurisdiction drawing on the Queensland Equal Remuneration Principle of 2002 and explanatory notes and relevant New South Wales jurisprudence;
    - ii. to assist Fair Work Australia and the parties by presenting evidence and research on matters including: the history of relevant awards; employee earnings and the economic and labour market features of the sector; changes in regulation and legal requirements of the sector; and data on bargaining in the sector; and
    - iii. propose the development of an Agreed Statement of Facts in advance in order to limit arguments before FWA.
  - b. reserves its position in respect of making a submission in relation to the appropriate quantum and funding arrangements of any pay increase until such time as the ASU's application has been made, evidence presented to FWA and further analysis on the impacts of any proposed increase is undertaken.
6. As a first step, the ASU will write to the President of the AIRC (copied to the Australian Government) indicating its intention to lodge a pay equity/work value claim for SACS sector workers and to request that the President convene a conference of interested parties, including the Australian Government as well as state and territory governments, to consider how the issue might be progressed given the current award modernisation proceedings and the scope for an agreed position. The Australian Government will support that proposal.
7. In that context, and assuming that an agreed position does not emerge from any conference convened by the President, the ASU and Australian Government will submit to the President of the AIRC that, given the following factors:
  - a. the pending application by the ASU for the determination of rates of pay for the SACS sector in accordance with the pay equity principles of the Fair Work Act and the proper setting of those rates based on work value considerations;

- b. the fact that the timeline for award modernisation does not permit sufficient time to allow a full examination of these issues before commencement of the modern award on 1 January 2010; and
- c. that there is currently uncertainty over whether employers in this sector who are not constitutional corporations will be referred from state systems to the federal system means that questions of wage rates and transitional arrangements will be difficult to determine at this time,

the modern award proceedings and the pending ASU application should be dealt with as follows:

- d. the AIRC should proceed to create a modern award for the SACS sector in accordance with the timetable set down for Stage 4 awards; and
  - e. the rates of pay for the modern award should be established initially on an interim basis and should reflect the rates that presently exist in relevant instruments, pending a full hearing of the ASU's application to properly fix the rates.
8. The ASU acknowledges that there would be very significant budgetary impacts to state, territory and Commonwealth governments in the event of any significant increase to the current rates of pay of SACS workers. The ASU acknowledges that in order to ensure the financial sustainability of the sector, it is therefore essential that there be a gradual phasing in of any such wage increase that takes into account the capacity of the Commonwealth, state and territory governments to meet a significant cost increase in the current economic and budgetary environment.
9. Accordingly, in the event that Fair Work Australia awards a significant increase to the current rates of pay of SACS workers, the ASU agrees to support the argument (which will be put in the Australian Government submission):
- a. that any increase awarded on pay equity or work value grounds should not take effect until at least 6 months after the date of any decision, in order to allow sufficient time for the necessary funding arrangements to be put in place; and
  - b. that any increase awarded on pay equity or work value grounds should be phased via instalments over not less than an additional four and a half year period (so that additional costs are imposed gradually over this period); and
  - c. assuming that any increase awarded by Fair Work Australia on pay equity grounds is based upon a pay equity comparison undertaken on or about the time of the decision, then annual minimum wage adjustments (as awarded each year by Fair Work Australia under section 166 of the *Fair Work Act 2009*) should also be applied throughout the phasing in period to ensure the comparative pay equity position of any increased rate so awarded is not eroded over the agreed phase in period.
10. Notwithstanding paragraph 9 above, the Australian Government and the ASU each reserve their positions in respect of advocating for appropriate phasing arrangements for those Queensland employers and employees who are subject to the Social and Community Services (Queensland) Award 2001 or the Crisis Assistance Supported Housing (Queensland) Award 1999<sup>1</sup> and, who but for the referral of power from the State of Queensland would, from 26 March 2011, have become subject to the Queensland Decision.

<sup>1</sup> These are Workplace Relations Act transitional awards that continue in operation until 26 March 2011 under Schedule 20 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* in reliance upon the conciliation and arbitration powers of the Constitution whereupon it lapses.



11. The Australian Government agrees to participate in discussions with the state governments, through an appropriate forum and both before and after any decision by FWA on the ASU's application, in order to work through the potential funding implications.
12. The Australian Government agrees, in consultation with the Queensland Government, to develop and seek to enact (or otherwise implement) referral arrangements that will preserve the obligations of employers currently bound by the Queensland decision to continue to pay, as a minimum, the rates determined by that decision to their employees (including the rates that are to apply at future dates in accordance with the decision).
13. The Australian Government agrees, in consultation with the ASU and the Queensland Government, to:
  - provide by an appropriate method, an enforceable legal obligation to pay the rates of pay provided in the Queensland decision; and
  - that this obligation will apply to such of those employers (or their successors) who are currently bound by the Social and Community Services (Queensland) Award 2001 or the Crisis Assistance Supported Housing (Queensland) Award 1999 who are also in receipt of budget supplementation from the Queensland Government provided for the purpose of paying all relevant staff the higher rates provided in the Queensland decision.

#### Unfair dismissal

14. The Australian Government recognises the particular difficulties faced by community sector employees who are vulnerable to having serious (and potentially unfounded) complaints made against them by dissatisfied clients, and the implications that this has for their job security and well being.
15. Accordingly, the Government will request the Fair Work Ombudsman to work with the ASU and other relevant stakeholders to develop a Best Practice Guide concerning possible unfair dismissals with a particular emphasis on the handling of allegations of misconduct and under-performance for the SACS sector.
16. The Guide will set out a model process and guidelines for dealing with unfair dismissals and allegations that takes into account the special needs of the sector, including the:
  - a. serious nature of allegations that are may be made and the need for such allegations to be fairly, competently and impartially investigated; and
  - b. fact that many organisations are small and may be administered by volunteer boards.

#### Resolution of Disputes

17. The ASU has conveyed to the Australian Government its view that disputes between employers and employees in the SACS sector should be able to be resolved through dispute resolution processes at the workplace level, and failing such resolution, by an independent industrial umpire.
18. Consistent with the Australian Government's policy position to support Australian employers who are complying with the Fair Work Act, the Australian Government agrees:
  - a. That as direct Australian Government funding arrangements in the SACS sector are scheduled for re-negotiation, the Government will, in order to foster best practice, require funding recipients to provide as a minimum genuine dispute resolution mechanisms, such as those set out in Schedule 6.1 of the Fair Work Regulations, which provides for the representation of employees and the settlement of the dispute

- by Fair Work Australia if discussions at the workplace and mediation or conciliation by Fair Work Australia have failed to resolve the dispute; and
- b. that it will participate in discussions with the states through an appropriate forum and will seek to secure agreements to implement similar arrangements in respect of funding administered through state governments.

On behalf of the Australian Government:

Signed:



Date:

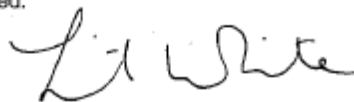
30/10/09

The Hon Julia Gillard MP  
Deputy Prime Minister

Minister for Education  
Minister for Employment and Workplace Relations  
Minister for Social Inclusion

On behalf of the Australian Services Union:

Signed:



Date:

30th October 2009

Linda White  
Assistant National Secretary

Australian Services Union

## Appendix:

### Regulation 6.1 Fair Work Regulations

- (1) If a dispute relates to:
    - (a) a matter arising under the agreement; or
    - (b) the National Employment Standards;this term sets out procedures to settle the dispute.
  - (2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.
  - (3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.
  - (4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Australia.
  - (5) Fair Work Australia may deal with the dispute in 2 stages:
    - (a) Fair Work Australia will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
    - (b) If Fair Work Australia is unable to resolve the dispute at the first stage, Fair Work Australia may then:
      - (i) arbitrate the dispute; and
      - (ii) make a determination that is binding on the parties.
- Note: If Fair Work Australia arbitrates the dispute, it may also use the powers that are available to it under the Act. A decision that Fair Work Australia makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.
- (6) While the parties are trying to resolve the dispute using the procedures in this term:
    - (a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and
    - (b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:
      - (i) the work is not safe; or
      - (ii) applicable occupational health and safety legislation would not permit the work to be performed; or
      - (iii) the work is not appropriate for the employee to perform; or
      - (iv) there are other reasonable grounds for the employee to refuse to comply with the direction.
  - (7) The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term.

#### Extract from fair Work Principles for Procurement

To foster best practice, Commonwealth agencies and government contractors in the event of a workplace dispute, must provide as a minimum genuine dispute resolution mechanisms, such as those set out in Schedule 6.1 of the Fair Work Regulations, which provides for the representation of employees and the settlement of the dispute by Fair Work Australia if discussions at the workplace and mediation or conciliation by Fair Work Australia have failed to resolve the dispute.