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Annual Wage Review 2023-24: Draft Timetable & Research Program

We refer to Statements [2023] FWC 3383 and [2023] FWC 3384, concerning the draft timetable and draft research program for the Annual Wage Review 2023-24.

The draft timetable is in line with the usual programming of the annual wage review, which we would ordinarily support. However, we are concerned to ensure that the gender equity issues are adequately explored. The draft research program indicates that the “Stage 2” report of the Gender Pay Equity Research will not be available until after initial submissions are due. There is presently some uncertainty as to the precise scope of that research and, accordingly, the issues to which submissions may be directed in the annual wage review. More fundamentally, we are concerned that the issues of gender based undervaluation cannot be comprehensively addressed to finality within the context of the tight timeframe imposed by the annual wage review. In addition, there are further matters which we wish to suggest for inclusion in the draft research program.

Gender pay equity research and how it may be addressed

The annual wage review has, prior to the amendments introduced by the *Secure Jobs, Better Pay Act*, permitted variations to modern award minimum wages without the requirement that these be justified by work value reasons. In our view, this continues to be the position. However, we accept that paragraph (aa) of subsection 284(1) and paragraph (ab) of subsection 134(1) provide a pathway, albeit a non-exclusive one, for “achieving gender equality” by reference to assessments of work value.

The apparent purpose of the Stage 2 report is to “...determine whether the Commission (or its predecessors, or, where relevant, State Tribunals) has ever undertaken a comprehensive work value assessment of classifications in the awards”¹ (emphasis added), being the awards identified the Stage 1 report.

¹ President’s Statement, “[Gender pay equity research – Stage 2 to be conducted](#)”, 5/12/23 at [5].

The word “comprehensive” needs to be understood in light of relevant findings and conclusions in the decision of the Full Bench in the *Aged Care* matter. In particular, the Full Bench observed in summarising the applicable principles that:

“Section 157(2A) does not contain any requirement that the ‘work value reasons’ consist of identified changes in work value measured from a fixed datum point. But, in order to ensure there is no ‘double counting’, it is likely the Commission would adopt an appropriate datum point from which to measure work value change, where the work has previously been properly valued. The datum point would generally be the last occasion on which work value considerations have been taken into account in a proper way, that is, in a way which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.”

Where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective or that they were properly fixed.”² (emphasis added).

The Full Bench accepted that “The approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations”³. Ultimately, the work value reasons which justified such interim increases as have been granted in that case and those which are yet to be finally determined extended beyond the re-alignment of qualifications to classifications and largely turn on changes to the work performed and the identification of skills which had hitherto been “invisible”, with the reasons for such invisibility found to be related to gender:

“Gender-based undervaluation in the employment context occurs when the work value is assessed with gender-biased assumptions which means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.”⁴ (emphasis added).

In our view, it follows that the Stage 2 report, whilst an essential and valuable resource to progress work to address gender-based undervaluation, can only take the matter so far. Primarily, its value will be assisting to identify how existing understandings of work value in the particular awards might be lacking. The questions of subsequent job change and assessments of missing skills (and any internal or external relativity alignment) in respect of those awards would require further inputs and analysis. In addition, the Stage 2 report does not appear to be intended to be an exhaustive examination of all indicia of gender based undervaluation in the awards identified in Stage 1. More fundamentally, the Stage 1 report itself does not exclude the possibility that there is gender-based segregation and undervaluation in industries/occupations outside of those identified therein, and that further research to identify and understand these is necessary.

It is with these matters in mind that we seek clarity regarding the process intended to be adopted in the annual wage review, or beyond it, to properly examine the issues. It may

² [2022] FWCFB 200 at [293]

³ [2022] FWCFB 200 at [758](6)

⁴ [2022] FWCFB 200 at [758](3)

well be that the Stage 2 report does little more than inform a decision that work value has not been comprehensively assessed for some classifications in particular awards. But it would be in our view inappropriate, if not impossible, within the confined timetable of an annual wage review, to seek to conduct the comprehensive assessment required for those particular classifications (not to mention others that may also be affected by gender-based undervaluation). Such an assessment would require a substantive evidentiary case. The *Aged Care* matter, if indicative, suggests this would include more than 100 lay witnesses as well as expert evidence dealing with each classification. Such a case would involve months of preparation and multiple weeks of hearings. It would be both unrealistic and unfair to expect this to occur in a manner that enabled all interested parties to be heard (and have a reasonable opportunity to prepare) in respect of all of the identified classifications in the relatively short timeframe of the annual wage review. Whilst there is a clear need to address undervaluation, it is equally important that the process is undertaken in a way where sufficient time and resources are dedicated to enable the issues to be dealt with comprehensively. It is the strong view of the ACTU and its affiliates that as a matter of procedural fairness, no final findings in this regard or final variation to modern award wages responsive to such findings should be made without providing interested parties an opportunity to provide evidence (including expert evidence) and submissions directed to all indicia of gender-based undervaluation. We believe this necessitates these matters not being finalised in the annual wage review, but that there be a further process or proceedings to comprehensively address questions of undervaluation.

In our view, it would be desirable if interested parties were given additional information about the following matters before finalising the timetable for the annual wage review:

- How is the Commission intending to deal with the Stage 1 and Stage 2 reports in the annual wage review?
- Whether it is proposed that the annual wage review constitute a final, comprehensive assessment of all gender-based undervaluation issues in the awards identified in the Stage 1 report?
- If not:
 - o What issues would the Commission wish parties to address in their submissions on gender-based undervaluation in the annual wage review?;
 - o Does the Commission intend to undertake further research to identify segregation and undervaluation in other industries and occupations?;
 - o Does the Commission have an alternative process in mind to further progress the work of addressing gender-based undervaluation in modern awards (including in relation to the awards identified in the Stage 1 report, additional awards and additional indicia of gender-based undervaluation);
 - o Will parties be given the opportunity to be heard on what the indicia of gender-based undervaluation are, and in what process might that be determined?; and
 - o If any party intends to make an application to vary modern award minimum wages (including because of gender based undervaluation), how will that relate to 2023-2024 Annual Wage Review?

We would be pleased to participate in any consultations necessary to clarify these matters.

Other research in the draft research program

We welcome the research proposals contained in the draft research program for this annual wage review, as well as the medium-term proposals.

One issue that could be further explored relates to the issue of budget standards. In our view, the budget standards are a valuable resource, however their utility diminishes over time if they are not kept current. There are two aspects to this:

- Firstly, the expenditure items in the standards require a form of indexation. As they may not correspond sufficiently with the CPI basket, it may be appropriate to separately index and then re-sum the expenditure components;
- Secondly, the budget standards involve, among other things, a point in time assessment of normative standards of the items necessary for a decent standard of living.

In relation to the first point, we suggest that this could be completed within the statistical report for this year's review. In relation to second point, we request that the Commission liaise with the authors of the budget standards report to determine a reasonable review cycle, and commit to this within the "Future research" section of the research program.

Additionally, one aspect of the budget standards may require more detailed consideration. Both in the budget standards report, and in the minimum wages research group meetings, there was some acknowledgement that the allocation for housing expenses was illustrative of particular housing types in Sydney, but not necessarily elsewhere. There is in our view some merit in further investigating how to best price housing costs in the budget standards. It may be convenient to include some alternative measures in the statistical report in order to meet this need.

Over the medium term, it would in our view assist the annual wage review if there were some improvements to the availability of external data sources. In particular it would be beneficial if:

- the ABS *Household Expenditure Survey*, *Survey of Income and Housing* and *Employee Earnings and Hours* were conducted more frequently (ideally annually) and microdata available; and
- the RBA could make available data it may hold on mortgage and rental stress at as disaggregated level as is possible, particularly as it relates to income levels relevant to award reliant work, which would be of assistance in tracking living standards and the extent to which needs are being met.

We would be grateful if the Commission could raise these matters with ABS and the RBA.

With respect to the medium term proposal to update the *Profile of employee characteristics across modern awards* report, it would be of assistance to gain some further insights into measures that are marked as "not published" (assuming that some entries will again be marked in this way in the revised report). We understood from discussions with the Minimum Wage Research Group that entries may be marked as "not published" by the ABS

either due to data quality concerns (such as sample size) or because of confidentiality concerns, or due to a combination both. If the Commission was in a position to know the reason for the “not published” designation in respect of each observation where it is made, this may provide opportunities for some further exploration, even if it be limited. For example, if particular measures were regarded as confidential because they may identify an employer, perhaps that employer could be approached to ascertain whether it objected to the data being published. Alternately, if particular measures were regarded as being of poor quality, the ABS may nonetheless allow the Commission (or the authors of the updated report) to utilise them for a more limited purpose, for example to allow qualitative observations to be made.

The only other suggestion we wish to make concerns the presentation of the statistical report. In our view, it would be of assistance if the report included hyperlinks to the data tables used in the presentation of that report, whether they be generated by the Commission itself or from external sources.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Trevor Clarke', written in a cursive style.

Trevor Clarke
Manager, Industrial & Legal