FAIR WORK COMMISSION

FULL BENCH **C2013/5139**

UNITED VOICE
and another named in the Schedule
Applicants

COMMONWEALTH OF AUSTRALIA
and others named in the Schedule
Respondents

SHORT SUBMISSION ON PRELIMINARY QUESTION REGARDING DETERMINATION OF THE COMPARATOR

COMMONWEALTH OF AUSTRALIA

PART I INTRODUCTION

1. The Commission has posed the following preliminary question for determination:[1]

> Can the Commission be satisfied conclusively that the work performed by employees under the C5 and C10 classifications in the Manufacturing and Associated Industries and Occupations Award 2010 is of equal or comparable value to the work of employees under the Diploma Level and Certificate III classifications in the Children's Services Award 2010 respectively solely on the basis of the decision of the Australian Industrial Relations Commission Full Bench decision of 13 January 2005 (Print PR954938) (the 2005 decision) and the subsequent alignment in award rates for the respective classifications?

2. The Commonwealth does not take a position either way in relation to the preliminary question.

PART II COMMONWEALTH'S ROLE WITH RESPECT TO THE PRELIMINARY QUESTION

3. The Commonwealth does not operate long day care centres and is not an employer in the long day childcare and/or preschool sector. The third further amended Application of 28 September 2016 ('**Application**') seeks no orders with respect to the Commonwealth.

4. Accordingly, the Commonwealth's role is confined to assisting the Commission on questions of law and the approach to be taken in these applications and applications of this kind under the FW Act. For the purpose of the preliminary question, the Commonwealth's submissions respond to the Applicant's Submissions dated 11 October 2017 with respect to identifying relevant considerations the Commission should take into account in considering the preliminary question.

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[1] See *re Application by United Voice, Australian Education Union and Independent Education Union of Australia for an Equal Remuneration Order* [2017] FWCFB 2690 at [25].

5. The relevant considerations are informed by the legislative and factual context in which the *Equal Remuneration Decision 2015* [2015] FWCFB 8200 (**2015 Decision**) arose.

6. At the present time, the Commonwealth has not had the opportunity to view the submissions of any party other than those filed on behalf of United Voice and the Australian Education Union. The Commonwealth reserves its rights to respond to any further submissions to the extent such submissions touch on the relevant considerations.

PART III RELEVANT CONSIDERATIONS

7. The determination of an appropriate comparator cannot occur in isolation and requires consideration of the particular facts and circumstances.

8. In the 2015 Decision at [239], the Commission considered that it must be satisfied that the employee or group of employees of a particular gender to whom the order would apply do not enjoy equal remuneration to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value.

9. The Commission said at [291]:

> …It will ultimately be up to an applicant for an equal remuneration order to bring a case based on an appropriate comparator which permits the Commission to be satisfied that the jurisdictional prerequisite in s.302(5) is met. It is likely that the task of determining whether s.302(5) is satisfied will be easier with comparators that are small in terms of the number of employees in each, are capable of precise definition, and in which employees perform the same or similar work under the same or similar conditions, than with comparators that are large, diverse, and involve significantly different work under a range of different conditions. But in principle there is nothing preventing the comparator groups consisting of large numbers of persons and/or persons whose remuneration is dependent on particular modern awards.

10. Applying this approach:

    10.1. the Applicants must identify “an appropriate comparator”;

    10.2. such a task will be easier if the Applicants identify comparators which are small in number;

    10.3. such a comparator must be the actual comparator, established on the evidence, differentiated by gender from which it is proven that there is not:

        10.3.1. equal remuneration; and

        10.3.2. where the work is of equal or comparable value.

11. In this context, the relevance of the 2005 decision is not apparent. The alleged "nexus" asserted by the Applicants must be viewed in its proper and distinguishable context. Namely it arose:

    11.1. in a different legislative context, namely the variation of award minimum rates in two federal children's services awards where at that time the role of awards under the former *Workplace Relations Act 1996* was to provide a safety net of fair minimum wages and conditions of employment. The Commission has found that the provisions of Part 2-7 are not concerned with rates of pay in modern awards at all or the now current "minimum wages objective" (2015 Decision at [172] and [173]);

    11.2. where the Commission noted (and accepted) an historical agreement between the parties that it was appropriate, in a minimum rates context, to align the Child Care Worker Level 3 after one year's service with the Engineering Tradesperson Level 1 in the Metal, Engineering and Associated Industries Award 1988 – Part I [Print Q2527] (the **old Metals Award**);[2]

    11.3. where the Commission adopted the then established approach to properly fixing minimum rates (a context very different from the determination of equal remuneration). By way of example, reference was made to the *August 1989 National Wage Case Decision*, Print H9100,[3] where a system developed thereafter by which minimum rates for classifications across awards were set as against the rates for the metal industry tradesperson and building industry tradesperson; and

    11.4. where the Commission undertook a rigorous assessment of the contemporaneous evidence to determine the appropriate work value according to the wage fixation principles relevant in the minimum wage context.

12. As contemplated by the 2015 Decision, it is necessary for an evidence-based comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees (at [290]).

13. The approach taken by the Applicants does not identify the actual comparative groups of women and men for the purpose of identifying unequal remuneration. This means the alleged comparators comprise an hypothetical group of men employed under C5 and C10 classifications under the Manufacturing and Associated Industries and Occupations Award 2010 (the **Metals Award**), remunerated according to the modern award rate apparently a rate which is, in the main, largely comparable to that currently received by the hypothetical group of women employed at Diploma and Certificate III level under the Children's Services Award 2010 (the **Children's Services Award**).

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2 The Full Bench noted that the *1990 Full Bench Decision,* Print J4316 gave effect to an agreement between the unions and the Canberra Association of Community Based Children's Services that it was appropriate to make a comparison of the Child Care Worker Level 3 after one year's service with the Engineering Tradesperson Level 1 in the old Metals Award.

3 https://www.fwc.gov.au/documents/decisionssigned/html/h9100.htm.

14. If the comparators are modern award rate recipients under the Metals Award, the application would fail as there is no unequal remuneration.

15. In the 2015 Decision, the Full Bench observed that if the comparison is between groups of modern award-dependent employees, then established award relativities originating in the restructuring of awards as part of the Structural Efficiency process may be sufficient, at least on a prima facie basis, to establish equal or comparable value (at [288] - see also [291]).[4] However this application is not a comparison between groups of modern award-dependent employees. This application appears to compare childcare workers who are award-dependent with unidentified Metals workers whose wages have resulted from bargained outcomes and thus the purported comparators (being award-dependent) do not in fact appear to be the true comparators.

16. The Applicants have not advanced, in any detail, how it is that they say the work performed by employees under the C5 and C10 classifications under the Metals Award is "of equal or comparable value" (for the purposes of s 302(1) of the *Fair Work Act 2009*) to the work of the unidentified employees employed under Diploma Level and Certificate III classifications in the Children's Services Award.

17. The Applicants contend that by reason of the historical relativity structuring of the classifications in the respective awards, it is a given that the "nexus" between the two is achieved such that the Commission can be satisfied that the respective imprecise large groups of employees are comparative. This assertion is advanced where it must be presumed that these large groups are involved in significantly different work under a range of different conditions.

18. Determining work value entirely based on award relativities (where the true comparator is not award-dependent) would appear to exclude from the analysis factors which the 2015 Decision considered relevant: At [311]:

> It must be emphasised that some of the examples of non gender-related causes of pay differentials raised by the parties at the hearing are likely to be matters which would cause the Commission to conclude at the outset that the work being compared is not of equal or comparable value. For example where a female and a male employee perform the same role, but one receives higher pay because the work is performed at a remote location; it might be concluded that the value of the work is not equal or comparable because the conditions under which the work is performed are significantly different. This serves to confirm that the selection of an appropriate male comparator with which equality or comparability in work value can clearly be demonstrated will be critical to the success of an equal remuneration claim.

19. However, it does not appear that the Applicants are claiming that the two groups proposed for comparison are award-dependent and no such assumption can be made. The Full Bench's decision of 6 July 2017 (at [16]) refers to the statement by counsel for UV and the AEU on 16 May 2017 that establishing whether the two groups of workers are unequally remunerated would involve a survey of bargaining outcomes.

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4 *Equal Remuneration Decision 2015* [2015] FWCFB 8200.

20. Practically, applying the Applicants' comparators in this case would mean that the Commission would be unable to properly consider the true circumstances and consider all facets of the application.

21. The Commission contemplated in its 2015 Decision a very different comparative analysis than what is proposed here: see paragraphs [243], [289], [311] of the 2015 Decision.

22. Finally, in the intervening 12 years since the 2005 decision there have been a number of developments which would have bearing on the Commission's determination of this question, which have not been referred to by the Applicants. For example, the introduction of the National Quality Framework and changes in the staff-child ratios as well as the ratio of qualified staff to children.

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Schedule

FAIR WORK COMMISSION **C2013/5139**

Applicants

Second Applicant	Australian Education Union

Respondents

Second Respondent	Australian Chamber of Commerce and Industry
Third Respondent	Australian Childcare Centres Association
Fourth Respondent	Australian Community Children's Services
Fifth Respondent	Australian Community Services Employers Association - Union of Employers
Sixth Respondent	Australian Federation of Employers and Industries
Seventh Respondent	Australian Childcare Alliance New South Wales
Eighth Respondent	Australian Childcare Alliance Victoria Inc
Ninth Respondent	Australian Childcare Alliance QLD Inc
Tenth Respondent	Australian Childcare Alliance South Australia
Eleventh Respondent	Australian Childcare Alliance Western Australia
Twelfth Respondent	Community Connections Solutions Australia
Thirteenth Respondent	New South Wales Business Chamber Ltd