

SHORT SUBMISSION REGARDING WHETHER THERE SHOULD BE A PRELIMINARY DETERMINATION OF THE COMPARATOR QUESTION

COMMONWEALTH OF AUSTRALIA

FAIR WORK COMMISSION

C2013/5139

UNITED VOICE

and another named in the Schedule
Applicants

COMMONWEALTH OF AUSTRALIA

and others named in the Schedule
Respondents

PART I INTRODUCTION

1. The Applicants seek the following order:

The matter be listed for hearing on a date to be fixed (with an estimate of 1 day) to determine the following question:

Are the C5 and C10 classifications under the Manufacturing and Associated Industries and Occupations Award 2010 a suitable comparator in this application for the purposes of section 302 of the Fair Work Act 2009 (Cth)?
2. These submissions are filed in response to the directions made by the President on 19 October 2016 and are directed to the question of whether there should be a hearing to determine whether the Full Bench can make a finding on a preliminary basis that certain classifications in the *Manufacturing and Associated Industries and Occupations Award 2010* (**'Metals Award'**) are suitable comparators in the third further amended Application of 28 September 2016 (**'Application'**) for the purposes of s 302 of the Fair Work Act (**'comparator question'**).
3. The Commonwealth submits that it is a matter for the Full Bench to determine whether it needs to list the matter for a hearing of the comparator question. The Full Bench may decline the Applicants' request for a hearing to determine the comparator question, if the Full Bench considers that the Applicants' proposed approach is not an appropriate way to proceed.
4. For the purpose of dealing with the comparator question, the Commonwealth considers its role as one of assisting the Commission on the approach to be taken in these applications and applications of this kind. This is because the Commonwealth, while providing funding to the sector, does not operate long day care centres and is not an employer in the long day childcare and/or preschool sector. Further, there are no orders sought with respect to the Commonwealth.

5. In order for the parties to respond and for the Full Bench to determine whether the matter needs to be listed for a hearing on the comparator question, it is submitted that the Applicants should explain why the Applicants propose the comparator question be addressed as a discrete preliminary issue.

PART II RELEVANT CONSIDERATIONS TO WHETHER THE COMPARATOR QUESTION SHOULD BE DETERMINED ON A PRELIMINARY BASIS

6. Part 2-7 of the Fair Work Act confers on the Commission a discretionary power to fix rates of remuneration for those to whom the order will apply to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value.
7. Section 302 of the Fair Work Act sets out three key elements to the Commission's determination of whether it may make an equal remuneration order:
 - 7.1. the identification of the current "remuneration" of that group of workers to whom the applicant's proposed order will apply;
 - 7.2. the assessment of whether in fact there is "equal remuneration" between that group of workers to whom the proposed orders apply and workers of the opposite gender who undertake work of equal or comparable value; and
 - 7.3. the identification of what "equal value" and "comparable value" mean.
8. The Commonwealth submits that each element must be satisfied by reference to reliable evidence. The elements call for a rigorous approach to be adopted and that each matter should be dealt with on its merits.
9. As was found by the Full Bench,¹ the Commission must be satisfied that there is an absence of equal remuneration because of gender. As was stated by the Full Bench of the Commission at [291]:

It is not necessary for the purpose of this decision to attempt to prescribe or establish guidelines in respect of how an appropriate comparator might be identified. 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. Accordingly, in order for the Commission to achieve the object of Part 2-7 of the Fair Work Act, namely ensuring that there will be equal remuneration *for men and women*

¹ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [290].

workers, it must necessarily undertake a comparative exercise between male and female workers in order to determine whether there is in fact equal or unequal remuneration.

PART III AVAILABLE MATERIAL TO DETERMINE WHETHER A PRELIMINARY HEARING ON THE COMPARATOR QUESTION SHOULD PROCEED?

11. On the present state of the Application and the Applicants' Submissions dated 26 October 2016, the reasons for seeking a hearing on the comparator question and the merits of proceeding on the comparator question remain unclear.
12. As noted in the letter from the Australian Government Solicitor, dated 18 October 2016 to the Commission, the Commonwealth is concerned that this preliminary determination may be of limited utility given the imprecision of the Applicants' Application. Such a preliminary determination would only be of assistance if it was discrete and confined and did not require substantial evidence.
13. As is noted in the extract of the Full Bench's decision above, the determination of comparators can be a complex exercise where the claim is broad.
14. It is not possible to elucidate from the Application:
 - 14.1. the precise scope of the Application, noting that paragraph 2.d makes reference to enterprise agreements but without identifying them;
 - 14.2. which classifications in which Awards and (currently unspecified) enterprise agreements would be the subject of the preliminary determinations;
 - 14.3. how the purported comparative C5 and C10 classifications in the Metals Award would be applied to each of the respective classifications in the relevant Awards and enterprise agreements.
15. Accordingly, the extent of and complexity required of the proposed determination is not clear.
16. The Commonwealth had anticipated that the Applicants, being aware of the Commonwealth's concerns, would have set out in their submissions, what the relevant Childcare classifications in awards and enterprise agreements were and identifying the purposed comparative C5 and C10 classifications with respect to each classification proposed to be covered by the Application.
17. Furthermore, the Commonwealth notes that at paragraph 8 of the Applicants' submission, the Applicants appear to assert that the rates of pay in certain classifications in the Childcare Services Award and Metals Award have been comparable since the 2005 decision: *Australian Liquor, Hospitality and Miscellaneous Workers Union re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 – re Wage rates – PR954938 [2005] AIRC*

28.² It is therefore unclear as to whether the Applicants propose for those classifications in the Childcare Services Award to be revalued (presumably above the Metals Award classification rates) and the basis upon which the Applicants would be asserting that there is not equal remuneration for work of equal or comparable value.

18. In the Commonwealth's submission, a proper understanding of the nature and scope of the Applicants' claim and the extent of the comparative exercise is necessary in order for the Commission to be able to determine whether a preliminary determination is appropriate.
19. Given that there was no such clarification of the breadth of this determination in the Applicants' submissions, in order to assist the Commission, the Australian Government Solicitor, wrote to the Applicants' solicitors on 28 October 2016 seeking clarification of these issues so that the Commonwealth would be then able to determine its position. A copy of this correspondence is attached.
20. Unfortunately, the Applicants have declined to provide this information.
21. As a matter of principle, the Commonwealth supports the determination of any preliminary issue if it would assist in the efficient running of the proceedings.
22. However, on the state of the available information, the Commonwealth is not in a position to assist the Commission in determining whether the proposed approach will be a worthwhile exercise.

Date: 2 November 2016



Virginia Masters
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the First Respondent

² It is noted that the Applicants refer to the decision as being in 2004 but it seems that it was in 2005 (see paragraph 5 of the Applicants' submissions).

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

Date: 2 November 2016



Your ref. JK:4130712 Our ref. 13141544

28 October 2016

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Dear Mr Kennedy

C2013/5139 Application by United Voice and Australian Education Union for Equal Remuneration Order

1. We refer to the submissions dated 26 October 2016 filed by the Applicants in this matter. We understand from those submissions that you now act for both Applicants in this matter and that the request for a preliminary determination of the comparator issue is now one of both United Voice and the Australian Education Union.
2. As was adverted to in our correspondence to the Commission dated 18 October 2016, the Commonwealth has difficulty understanding the nature and scope of your client's Third Further Amended Application. In particular, the Application does not set out clearly and in tabulated form, the relevant classifications under the numerous awards set out in paragraph 2 of the Application and the unspecified enterprise agreements (asserted to be covered by sub-paragraph 2.d of the Application) to which the proposed *Manufacturing and Associated Industries and Occupations Award 2010* (the Metals Award) C10 and C5 classifications should apply as comparators.
3. Unfortunately, your clients' submissions of 26 October 2016 do not provide any clarity on this issue. In our view, for the Commission to determine whether a preliminary determination of the kind your clients proposes for the comparator issue is discrete and appropriate, will necessarily depend on an understanding of how the Metals Award C10 and C5 classifications would be applied to which classifications in each of the awards and enterprise agreements specified in paragraph 2 of your clients' Application.
4. We would be grateful if you could provide us with a table properly identifying each of the classifications in each of the relevant awards and enterprise agreements your clients assert the C10 and C5 classifications in the Metals Award should be used as an appropriate comparator for.
5. Further, given as your clients appear to be asserting, in paragraph 8 of your clients' submission, that rates of pay in certain classifications in the Childcare Services

Award and the Metals Award have been comparable since the 2005 decision, our client seeks clarification of the basis upon which your clients assert in this Application that there is not equal remuneration for work of equal or comparable value.

6. We would be grateful if you could provide this information to us by 12 noon on Monday 31 October 2016 so that we are able to then properly respond to your clients' submission. If you think you will need more time to prepare the information then we suggest that an approach be made to the Commission to vary the current timetable, by consent.

Yours sincerely



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