

**FAIR WORK COMMISSION**

***Fair Work Act 2009 (Cth) s 302 – Application for an Equal Remuneration Order  
Matter C2013/5139***

**Application by United Voice and the Australian Education Union**

**SUBMISSIONS OF UNITED VOICE AND THE AUSTRALIAN EDUCATION  
UNION REGARDING THE NEXUS BETWEEN THE CHILDREN’S SERVICES  
AWARD AND THE MANUFACTURING AND ASSOCIATED INDUSTRIES AND  
OCCUPATIONS AWARD SINCE 2005**

**Introduction**

1. These submissions are filed in accordance with the directions made by the Full Bench of the Fair Work Commission on 13 September 2017, and address the question proposed by the Full Bench in its decision on 6 July 2017:

*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 AIRCFB decision of 13 January 2005<sup>1</sup> (Print PR954938) and the subsequent alignment in award rates for the respective classifications?<sup>2</sup>*

2. On 27 July 2017, and in response to the invitation by the Full Bench to comment on the preliminary question,<sup>3</sup> United Voice and the Australian Education Union wrote to the Full Bench, stating that they wished to proceed with the preliminary hearing on the question proposed by the Full Bench, on the basis that the phrase ‘satisfied conclusively’ did not “apply or require a higher standard of proof or persuasion than that which normally applies in the Commission”.

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<sup>1</sup> The reference to this decision in [2017] FWCFB 2690 and the parties’ submissions wrongly states the date of the decision. It is 2005, not 2004.

<sup>2</sup> [2017] FWCFB 2690, [25].

<sup>3</sup> [2017] FWCFB 2690, [26]–[27].

3. The decision of the Australian Industrial Relations Commission (**AIRC**) in 2005 was that certain classifications in the pre-modern form of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Metals Award**) were appropriate comparators to certain classifications in the predecessors to the modern *Children's Services Award 2010* (**Children's Services Award**). United Voice and the Australian Education Union contend that the history of these awards since the 2005 decision demonstrates that the findings of the AIRC are still relevant, and will meet the test in s 302(1) and (2) of the *Fair Work Act 2009* (Cth) (**FW Act**) as to a proper comparator.
4. Annexure A to these submissions sets out the comparable hourly wage rates of the above classifications from immediately prior to the Work Value decision in 2005 to the current rates as last adjusted in the *Annual Wage Review 2016–2017* [2017] FWCFB 3500.
5. The submissions below detail the establishment of the above comparator and the history of the changes to the relevant industrial instruments that has maintained that comparison.

### **The Work Value decision – overview and background**

6. On 13 January 2005 a Full Bench of the AIRC (constituted by Vice President Ross, Senior Deputy President Marsh and Commissioner Deegan) determined applications to vary the *Childcare Industry (Australian Capital Territory) Award 1998* (**the ACT Award**) and the *Children's Services (Victoria) Award 1998* (**the Victorian Award**) in relation to wages, classification structure, new allowances and the award title.<sup>4</sup>
7. The decision was constituted by:
  - (a) The decision of the AIRCFB published on 13 January 2005 as PR954938, in which the AIRC determined that child care work was undervalued, and the awards should be recalibrated with new classification structures and wage rates comparable to certain levels in the old *Metals Award*; and

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<sup>4</sup> Print PR954938.

(b) The decision of the AIRCFB published on 13 April 2005 as PR957259, in which the AIRCFB determined the outstanding areas of disagreement between the parties, including as to the application of the C5 rate in the old Metals award to the appropriate Levels in the *Victorian Award* and the *ACT Award*.

(together referred to as the **Work Value decision**).

8. In the Work Value decision, the AIRC determined to establish a nexus between the Diploma Level and Certificate III classifications under the *Victorian Award*, the *ACT Award*, and the C5 and C10 classifications (respectively) of the *Metal, Engineering and Associated Industries Award 1998 – Part I (the old Metals Award)*. The nexus established by the Work Value decision was determined as a result of the Full Bench having regard to “the skill responsibility and the conditions under which [childcare] work is performed”,<sup>5</sup> and considering “comparable classification levels”<sup>6</sup> and the “conditions under which the work of child care workers is performed”.<sup>7</sup>
9. While the nexus between the awards was set in 2005, the rates did not become identical immediately, because the rate changes in the Work Value decision were subject to transitional arrangements. The transitional arrangements of the Work Value decision provided for four incremental – but not identical<sup>8</sup> – increases to the rates in the *Victorian Award* and the *ACT Award* commencing on 1 July 2005 and reaching parity both with each other, and with the old *Metals Award* rates, by 1 January 2007.
10. With the commencement of the *Workplace Relations Amendment (Work Choices) Act 2005 (Work Choices)* on 27 March 2006 (**the commencement date**), awards which existed immediately prior the commencement date were split into two categories. Employers and employees covered by federal awards prior to the commencement date became covered by *pre-reform awards*, and employers and employees who were not covered by federal awards became covered by *transitional awards*.<sup>9</sup> With some

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<sup>5</sup> PR954938, 13 January 2005 at [370].

<sup>6</sup> PR954938, 13 January 2005 at [371].

<sup>7</sup> PR954938, 13 January 2005 at [372].

<sup>8</sup> The increments were not identical as between the ACT and the Victorian awards because the Victorian award was a common rule award. However, the transitional arrangements were designed to achieve a uniform position between Victoria and the ACT, and parity with the old Metals award, by 1 January 2007.

<sup>9</sup> *The Victorian Award* and the *ACT Award* became pre-reform awards, and the old *Metals Award* became a transitional award.

exceptions, pre-reform awards did not contain pay and classification scales. These matters became the responsibility of the Australian Fair Pay Commission (AFPC). Pay and classification scales in transitional awards remained the responsibility of the AIRC. While these matters had a direct impact on the transitional arrangements prescribed for the Work Value decision, as set out below, the nexus between the *Victorian Award* and the *ACT Award*, and old *Metals Awards* that was established in 2005 has remained unbroken throughout the evolution of the instruments from their status as awards in 2005, through the Work Choices reforms, and to the modern awards in their present form. The nexus is both numerical (ie rates of pay) and conceptual (ie the reasons that justified the Work Value decision).

11. Accordingly, these submissions address (a) the reasons for the decision of the AIRC that the old *Metals Award* was an appropriate comparator to the *Victorian Award* and the *ACT Award*; (b) the transitional arrangements; (c) the interaction of the transitional arrangements with the commencement of the Work Choices pay-setting regime; and (d) award modernisation, the transitional review, and the four yearly review of modern awards.
12. The history of the Children’s Services Award and the Metals Award demonstrates that the conceptual nexus established by the Work Value decision has remained unbroken since that decision.

### **The findings of the AIRC in the Work Value decision**

#### The applications

13. The Work Value decision involved the consideration of two applications by the Australian Liquor, Hospitality and Miscellaneous Workers Union (LHMU) to vary the wage rates, classification structures, allowances, and titles of the *Victorian Award* and the *ACT Award*. The LHMU argued that its applications with respect to classification structures was consistent with work value principles, and claimed that the relativities proposed in the wage rates were consistent with those in the old *Metals Award*.<sup>10</sup> The relativity between the classification of ‘Child Care Worker Level 3’ to

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<sup>10</sup> See PR954938, 13 January 2005 at [8], [58].

the base trade level in the old *Metals Award* was “at the heart of the contentions” before the AIRC.<sup>11</sup>

14. The Application to vary the *Victorian Award* was made on grounds including those enumerated as grounds 3, 6 and 7 in the amended application dated 30 July 2003. Those grounds relevantly stated:

*3. The application is consistent with Principle 6 of the Commission’s wage fixing principles set out in the Safety Net Review decision of May 2003 (PR002003) on the basis that the work in question covered by the award has not been the subject of a work value examination since 1992...*

*6. In addition, certain work value changes have occurred which are exercised by some employees covered by the Award...*

*7. This examination also supports the Union’s application for relativities in the award, which is subject to this application to be measured against the Metal Industry Award this is established on the basis that both these Awards covering ancillary functions have been varied under the Structural Efficiency/Minimum Rates principles using the Metal Industry Award as the comparator.*

15. The Application to vary the *ACT Award* was made on grounds including those grounds enumerated as ground 1 and 5 in the amended application dated 28 October 2002. Those grounds stated:

*1. That the application if granted, will provide properly fixed minimum rates of pay for childcare workers employed in the Australian Capital Territory, which reflects the full work value of the skills, and competencies utilised by such workers.*

*5. That the application gives effect to the Wage Fixing Principles established by a Full Bench of the Australian Industrial Relations Commission, specifically Principle 6 Work Value Changes.*

That application identified the *Metal Industry Award* as the relevant comparator.

## Evidence

16. During the hearing, the AIRC heard evidence from 34 witnesses, of whom 24 were called on behalf of the LHMU and 12 on behalf of the employer party. The witnesses included childcare workers, childcare operators, academics, union organisers,

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<sup>11</sup> PR954938, 13 January 2005 at [117].

consultants, and persons involved in the training and accreditation of childcare workers.<sup>12</sup> On the basis of the material before it the AIRC found that “the nature of the work of childcare workers and the conditions under which that work is performed [had] changed over time,”<sup>13</sup> and that the increase in parents taking up childcare places on a part-time basis had in turn increased the workload and the value of the work undertaken by childcare workers.<sup>14</sup>

17. Other factors that had increased the work load of childcare workers included (a) changes in programming and documentation requirements; (b) an increase in the number of children from non-English speaking backgrounds; (c) an increase in the number of children with special needs or ‘at risk’ children in childcare centres; (d) perhaps most significantly, a change over time in the conceptualisation of children services from the notion of ‘child minding’ or ‘child care’ to one of ‘early childhood development, learning, care and education’.<sup>15</sup> In reaching this conclusion, the AIRC had regard to neuroscience and brain development research which found that quality of care and outcomes for children was positively related to the level of qualifications of childcare workers, and that money directed to the early years of children’s development had a positive result for children’s long term outcomes.<sup>16</sup>

#### Findings in the January 2005 decision

18. Having regard to the work value of the respective positions, the AIRC concluded that:

*The second broad conclusion concerns the proper fixation of rates for the key classification levels in the child care awards. In our view the rate at the AQF Diploma level should be linked to the C5 level in the Metal Industry Award. Further, it is appropriate that there be a nexus between the CCW level 3 on commencement classification in the ACT Award (and the Certificate III in the Victorian Award), and the C10 level in the Metal Industry Award.*

*We accept that aligning these key classifications in the manner proposed will, of itself, result in significant wage increases.<sup>17</sup>*

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<sup>12</sup> See PR954938, 13 January 2005 at [193].

<sup>13</sup> PR954938, 13 January 2005 at [206].

<sup>14</sup> PR954938, 13 January 2005 at [223].

<sup>15</sup> PR954938, 13 January 2005 at [227]–[240].

<sup>16</sup> PR954938, 13 January 2005 at [264].

<sup>17</sup> PR954938, 13 January 2005 at [367]–[368].

19. The AIRC found that “changes in the nature of work” of childcare workers “constituted a significant net addition to work requirements within the meaning of the work value principles.”<sup>18</sup> The applications before the Commission required a determination of whether the wage rates had been properly fixed,<sup>19</sup> which involved a three step process including, as a first step, fixing the key classification in the relevant award with particular reference to the current rates for the relevant classifications in the old *Metals Award*.<sup>20</sup>
20. The Australian Qualification Framework (AQF) system was highly relevant to the comparison by the AIRC of the rates between the *Victorian Award*, the *ACT Award* and the old *Metals Award*. The AIRC found that the introduction of the AQF in 1995 was accompanied by an increase in the amount of on the job training and assessment, which in turn increased the work of team leaders and others who supervised childcare employees undertaking further study.<sup>21</sup> The alignment of AQF qualifications between different industries was determined by educational outcome and the number and level of competencies attained by the student.<sup>22</sup>
21. On the basis of this evidence, and the fact that under the competency-based AQF system, childcare workers had the same qualifications as metal workers, the AIRC found that the Diploma level was a key classification in the *Victorian Award* and the *ACT Award*, and there should be a nexus between the applicable rates in those awards and the old *Metals Award*. The AIRC rejected the employer parties’ submissions that the conditions under which the work was performed was a factor against the establishment of a nexus, finding that “if anything, the nature of the work performed by childcare workers and the conditions under which that work is performed suggest that they should be paid more, not less, than their *Metal Industry Award* counterparts.”<sup>23</sup>
22. Accordingly, the AIRC determined to fix the Diploma level (Level 4) in the *Victorian Award* and the *ACT Award* to the C5 level in the old *Metals Award*, and that there

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<sup>18</sup> PR954938, 13 January 2005 at [366].

<sup>19</sup> PR954938, 13 January 2005 at [144].

<sup>20</sup> PR954938, 13 January 2005 at [155].

<sup>21</sup> PR954938, 13 January 2005 at [225]–[226].

<sup>22</sup> PR954938, 13 January 2005 at [185].

<sup>23</sup> PR954938, 13 January 2005 at [183].

should be a nexus between the Certificate III level in the children's services awards and the C10 level in the old *Metals Award*. However, the Full Bench declined to fix the rates in the January 2005 decision, instead directing the parties to attend conciliation in an attempt to resolve the outstanding issues, which included the alignment of the classifications between the *Victorian Award* and the *ACT Award*, and the internal relativities to be applied once the key classification levels (ie, Certificate III and Diploma) had been properly set.

#### The April 2005 decision

23. The parties attended five conciliation conferences between January and March 2005. By April 2005, agreement had been reached on a number of matters including the alignment of classification titles and descriptions between the *Victorian Award* and the *ACT Award*, and the internal relativities and rates for classification levels other than the Certificate III and Diploma levels.<sup>24</sup> The AIRC endorsed the agreement on the basis that it was consistent with the work value findings in the 13 January 2005 decision, and the method of determination of internal relativities established by the *Clerks (Breweries) Consolidated Award 1995 Case*.<sup>25</sup>
24. However, relevantly, the parties did not reach agreement on the proper classification and rate for an early childhood educator who had completed part or all of the AQF Diploma, but was not in charge of a group of children in a formal 'team leader' role. The LHMU sought the creation of an additional number of classifications in the Level 3 band to apply to such employees.
25. In rejecting the LHMU's application, the AIRC reinforced its findings in the January decision that the Diploma level was a 'key classification' for the purposes of comparison with the old Metals award. The AIRC took into account the evidence of Ms Diane Lawson, CEO of Community Services and Health Training Australia Ltd, the National Community Services and Health Training Advisory Body, about the characteristics and competencies of a children's services employee at the Diploma

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<sup>24</sup> Following guidance provided in the 13 January 2005 decision at Table 14 et seq, the LHMU accepted that the appropriate formula for determining properly fixed minimum rates was *Clerks (Breweries) Consolidated Award 1995 Case* (Print R9120, 14 September 1999, per Ross VP), and see the 13 April 2005 decision at [12] and generally, the 13 January 2005 decision at Section 4.

<sup>25</sup> PR957259, 13 April 2005 at [22].



level;<sup>26</sup> examined the requirements of a Diploma (Level 4) children's services employee; and compared them to the description of the C5 classification level.<sup>27</sup> On this basis, the AIRC confirmed that it was appropriate to link the wages of Level 4 Diploma-qualified children's services employees to the C5 rate in the old *Metals Award*.

#### Transitional arrangements and the 2005 Safety Net decision

26. The transitional arrangements concerning the new classifications and rates was determined in a decision by the AIRC on 10 May 2005.<sup>28</sup> The AIRC determined to phase in the increases associated with the new classification structures in the *Victorian Award* and the *ACT Award* in four six-monthly instalments of \$20 per week, commencing on 1 July 2005 and concluding on 1 January 2007.<sup>29</sup>
27. The *Safety Net Review – Wages June 2005* decision (**2005 Safety Net decision**) was handed down on 7 June 2005.<sup>30</sup> The AIRC determined to increase the minimum wage by \$17 per week, or between 3 and 3.6 per cent depending on the classification level.<sup>31</sup> On 7 July 2005, the minimum rates in the old *Metals Award* were adjusted to incorporate the 2005 Safety Net decision. The C10 rate increased to \$578.20 per week, and the C5 rate increased to \$701.40 per week.<sup>32</sup>
28. On 24 June 2005, the AIRC published orders concerning the implementation of the Work Value decision for the *ACT Award*. These orders incorporated the changes to minimum rates in the ACT award made by the 2005 Safety Net decision.<sup>33</sup>
29. The situation was slightly more complicated in Victoria, in part because the *Victorian Award* was a common rule award, and the rates in that award were subject to the phasing-in arrangements for common rule awards. The AIRC ultimately settled orders

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<sup>26</sup> See PR957259, 13 April 2005 at [72]–[73].

<sup>27</sup> PR957259, 13 April 2005 at [71].

<sup>28</sup> See PR957914, 10 May 2005 at [105].

<sup>29</sup> But see paragraph 32 below re the impact of Work Choices.

<sup>30</sup> PR002005, 7 June 2005.

<sup>31</sup> PR002005, 7 June 2005 at [424].

<sup>32</sup> PR959867, 7 July 2005.

<sup>33</sup> PR959278, 24 June 2005.

on 28 October 2005<sup>34</sup> to give effect to both the 2005 Safety Net decision and the implementation of the Work Value decision for the rates in the *Victorian Award*.

30. The AIRC determined that, by 1 January 2007:
- (a) The Certificate 3/Level 3.1 in both the *Victorian Award* and the *ACT Award* would increase by \$64.50 per week to \$578.20, which was relative to 100 per cent of the C10 rate in the old *Metals Award*.
  - (b) The Diploma level (4.1) in both the *Victorian Award* and the *ACT Award* would increase by \$82.20 per week to \$701.40, which was relative to 100 per cent of the C5 rate in the old *Metals Award*.
  - (c) The rates other than the Certificate 3 and Diploma rates would increase relative to the C5 and C10 levels, in accordance with the relativities set by the AIRC in the April 2005 decision.
31. The incremental rate increases determined by the AIRC pursuant to the Work Value decision occurred on 1 July 2005, 1 January 2006, and 1 July 2006. The commencement of Work Choices and the two-part increase in minimum rates of pay from 1 December 2006 as a result of the first wage setting decision by the AFPC, resulted in a minor numerical disparity between the Diploma/C5 levels, which continued past the final instalment of the Work Value decision on 1 January 2007. However, the conceptual nexus was not disturbed by this process.

## **2006 to 2009 – the Australian Pay and Classification Scales**

### The first AFPC decision and the final Work Value incremental increase

32. Work Choices commenced operation on 27 March 2006. On that date, the *Victorian Award* and the *ACT Award* became pre-reform awards, and the old *Metals Award* became a transitional award within the meaning of the legislation. The increases in the rates of pay determined by the Work Value decision in the *Victorian Award* and the

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<sup>34</sup> The AIRC issued implementation orders on 24 June 2005 (PR959278), part of which were corrected on 15 July 2005 (PR960275), but these orders did not incorporate the 2005 Safety Net Adjustment increases. The AIRC then issued order PR959339 made on 1 July 2005 which sought to vary the *Children's Services (Victoria) Award 2005* to give effect to the 2005 Safety Net decision. This order was "cancelled and replaced" by PR964145, issued on 28 October 2005.

*ACT Award* were preserved by operation of s 208(4) of the amended *Workplace Relations Act*.

33. On 26 October 2006, the AFPC handed down its first wage-setting decision.<sup>35</sup> The AFPC determined that for ‘preserved pay scales’ (which included those in the *Victorian Award* and the *ACT Award*), the following increases would apply:
  - (a) For basic periodic rates of pay up to and including \$18.42 per hour, the AFPC awarded an increase of \$0.72 per hour.
  - (b) For basic periodic rates of pay above \$18.42 per hour, the AFPC awarded an increase of \$0.58 per hour.
34. On 8 December 2006, the AIRC determined to apply the same minimum hourly wage increase to the transitional awards from 1 December 2006.<sup>36</sup>
35. The two-part increases determined by the AFPC and the AIRC affected the relevant awards in different ways. This was because as at 1 December 2006, the Level 3.1 and Diploma minimum rates in the *Victorian Award* and the *ACT Award*, and the C10 level in the old *Metals Award*, were under \$18.42 per hour and so received the bigger increase of \$0.72 cents per hour.
36. However, the C5 rate payable under the old *Metals Award* was \$18.46 per hour, and so attracted the smaller increase of \$0.58 cents per hour, to \$19.04, compared with:
  - (a) The Diploma level in the *Victorian Award*, which increased from \$17.29 (rate last adjusted on 1 July 2006 for Work Value reasons) by \$0.72 cents to \$18.02 cents, with a difference of \$1.02 per hour from the C5 rate; and
  - (b) The Diploma level in the *ACT Award*, which increased from \$17.87 (rate last adjusted on 1 July 2006 for Work Value reasons) by \$0.72 cents to \$18.59 cents, with a difference of \$0.45 cents per hour from the C5 rate.
37. The final Work Value increase was due to be applied to the Certificate III and Diploma levels in the *Victorian Award* and the *ACT Award* on 1 January 2007.

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<sup>35</sup> Australian Fair Pay Commission, *Wage Setting Decision 1/2006*, October 2006.

<sup>36</sup> PR002006, 8 December 2006 at [19].

38. The previous Certificate III increase, on 1 July 2006, raised the hourly rate to \$15.10, compared with the C10 Metals rate of \$15.21 – a disparity of \$0.11 cents. That differential was applied on 1 January 2007 to the rates as adjusted by the AFPC, bringing the Certificate III rate up to \$15.94 and achieving parity with the C10 rate in the old *Metals Award* as adjusted by the transitional award increase set by the AIRC effective 1 December 2006.
39. The previous Work Value increase to the Diploma rates, 1 July 2006, raised the hourly rate under the *Victorian Award* to \$17.29, and to \$17.87 under the *ACT Award*. As at 1 July 2006, the C5 rate in the old *Metals Award* was \$18.46, constituting a disparity of \$1.17 and \$0.59 cents respectively. Had the Diploma and C5 rates remained untouched by the AFPC and transitional award rate increases on 1 December 2006, the Diploma rates in the *Victorian Award* and the *ACT Award* would have increased by their respective disparity levels to achieve parity with the C5 rate in the old *Metals Award* on 1 January 2007.
40. However, the two-part increases applied by the AFPC, and mirrored by the AIRC in the transitional award wage review, threw out the mathematical alignment between the Diploma and the C5 rate that was relied on in setting the incremental increases contained in the Work Value transitional arrangements. The difference between the two-part increases of \$0.72 and \$0.58 respectively was \$0.14 cents. On 1 January 2007, the final Work Value increment was applied to the Diploma levels in the *Victorian Award* and the *ACT Award*. The *Victorian Award* had increased to \$18.02 per hour as a result of the AFPC increase, and so the Work Value increase of \$1.17 per hour brought the total hourly rate, taking rounding matters into account, to \$19.18.<sup>37</sup> By the same measure, the *ACT Award* had increased to \$18.59, and so the total Work Value increase of \$0.59 cents per hour applicable to that award raised the hourly rate to \$19.18. The C5 rate in the old *Metals Award*, as adjusted by the transitional award rate increase on 1 December 2006, was \$19.04, resulting in a difference in favour of the Diploma levels in the *Victorian Award* and the *ACT Award* of \$0.14 cents. The disparity has continued, and since 2011 has increased to its

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<sup>37</sup> The differences between the C5 rates in the old Metals Award and the Diploma level in the Victorian Award are properly expressed to four decimal places; for convenience, we have limited the references in these submissions to two decimal places.

present level of \$0.17 per hour, due to the application of rounding and uniform percentage increases to weekly wage rates, as explained below.

#### 2007 to 2009 AFPC decisions

41. The 1 January 2007 Work Value increment concluded a period of regular adjustments to hourly rates as a result of the 2005 Safety Net decision, the first AFPC wage-setting decision in 2006, and the four-part incremental transitional arrangements in July 2005, January 2006, July 2006, and January 2007 of the Work Value decision.
42. The period from 2 January 2007 to 1 July 2010 was relatively subdued by contrast, at least with respect to wage rate changes. The AFPC handed down two further wage rate increases, in October 2007 and October 2008, before its abolition by the FW Act in 2009, and the reinstatement of wage setting powers in the renamed FWA by the Annual Wage Reviews.
43. The increases in 2007 and 2008 maintained the nexus between the Certificate III and C10 levels, and the Diploma and C5 levels.<sup>38</sup> The AFPC declined to increase rates in 2009.

#### **2009 – Award Modernisation**

##### Creation of the Metals Award

44. On 28 March 2008, the Minister for Employment and Workplace Relations requested that the President of the AIRC modernise all federal awards. Shortly thereafter, the Minister requested that the President identify a list of priority industries for award modernisation.<sup>39</sup>
45. There was strong support among employers, unions, and the AIRC for the inclusion of the metal and associated industries on the priority list. In its decision concerning the list of the priority industries, the Award Modernisation Full Bench emphasised the role of the old Metals award as a benchmark award in Australia's industrial relations system. The AIRC said:

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<sup>38</sup> See table at Annexure A.

<sup>39</sup> Pursuant to the amended and consolidated request dated 16 June 2008.

*Given the widespread support for its inclusion, the historical central role of the Federal metal industry award in Australia's industrial relations system, and the criteria specified in the Minister's request, we have decided to include the metal and associated industries on the priority list...*<sup>40</sup>

46. On 12 September 2008, the AIRC published an exposure draft of the *Manufacturing and Associated Industries and Occupations Award 2010*, which applied to employers and employees covered by around 90 federal awards, common rule declarations, and NAPSAs. After a period of consultation in which the AIRC received submissions from approximately 75 parties, and held public hearings in October and November 2008, the *Manufacturing and Associated Industries and Occupations Award 2010* was published on 19 December 2008, and the final version of the modern award was published on 31 December 2009. There was no change to the classification levels or descriptions for the C5 or C10 levels from the old Metals Award to the modern award, and there was no attempt by any party or the AIRC to revisit the work value nexus between the C10 and C5 rates and their equivalents in the Children's Services Award as a result of the modernisation of the old Metals Award.

#### Creation of the Children's Services Award

47. The modern Children's Services Award was created in the final stage of the award modernisation process. The findings of the Work Value decision were expressly referred to by the AIRC on publication of the exposure draft on 25 September 2009. The AIRC stated:

*The classification structures for childcare employees have, in recent times, been the subject of work value assessments by the Commission, and this is reflected in the exposure draft.*<sup>41</sup>

48. The reference to the "work value assessments" performed by the Commission "in recent times" included the Work Value decision and the application of that decision to the *Child Care (Long Day Care) WA Award 2005*,<sup>42</sup> the *Child Care (South Australia) Award (8181 of 2003)*,<sup>43</sup> and the *Children's Services (Northern Territory) Award*

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<sup>40</sup> *Request from the Minister for Employment and Workplace Relations – 28 March 2008 Award Modernisation* [2008] AIRCFB 550, [40] (Decision 20 June 2008).

<sup>41</sup> [2009] AIRCFB 865, [93].

<sup>42</sup> See PR968525, 9 February 2006; although this is described as an 'interim decision', the award was amended by order dated 6 March 2006: PR969192.

<sup>43</sup> *Child Care (SA) Award Work Value Case* [2005] SAIRComm 49.

2005.<sup>44</sup> In its submission to the award modernisation Full Bench, the Australian Childcare Alliance (then known as the Australian Childcare Centres Association) argued that it was appropriate that the modern award include the classifications, position descriptions, definitions, and wage rates from the *Victorian Award* and the *ACT Award*, on the basis of the findings in the Work Value decision as to the proper comparator, and the value of work performed by childcare workers.<sup>45</sup>

49. The classification levels and descriptions in the *Victorian Award* and the *ACT Award* were transported to the exposure draft of the Children's Services Award without any alteration of substance. In addition, the parties proposed and the AIRC agreed, the addition of four further classification levels identified as Level 3A, Level 4A, Level 5A, and Level 6A. Level 3A was intended to accommodate regulations in Western Australia concerning the qualifications and numbers of workers required for particular age groups of children.<sup>46</sup> Levels 4A, 5A and 6A apply to persons doing the work of a Level 4, 5 and 6 employee but without the appropriate qualifications. Employees at Levels 3A, 4A, 5A and 6A are accordingly paid less than employees holding qualifications and working at Levels 3, 4, 5 and 6. The new classifications did not alter the operation of Levels 3, 4, 5 and 6 or their nexus to the old *Metals Award*.

#### Conclusions on award modernisation

50. It is significant that despite the opportunity for doing so, there was no amendment to the classification structure or descriptions for the *Victorian Award*, the *ACT Award*, or the old *Metals Award* during the award modernisation process. The acceptance by the award modernisation Full Bench and the parties of the appropriateness of the classification structures in the pre-modern awards was significant because first, the making of the modern awards involved the amalgamation of dozens pre-modern awards into two single federal awards, and second, by the time of award

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<sup>44</sup> PR966522, 16 December 2005. This order was appealed on 1 March 2006 by the Australian Childcare Centres Association, which sought to quash the 16 December 2005 order insofar as it bound certain employers who did not fully participate in the hearing which preceded the making of the 16 December 2005 order: see PR969147, 1 March 2006 (reasons) and PR969153, 1 March 2006 (orders). The March 2006 order was then rescinded and replaced with orders varying the award to include a different commencement date and final instalment dates for certain employees of the employers initially excluded by operation of the 1 March 2006 order: See PR970085.

<sup>45</sup> Submissions of the Australian Childcare Centres Association and Australian Community Services Employers Association dated 24 June 2009, at [7.1]–[7.2.3], available at [http://www.airc.gov.au/awardmod/databases/child/Submissions/ACCAandACSEA\\_pre\\_amend.pdf](http://www.airc.gov.au/awardmod/databases/child/Submissions/ACCAandACSEA_pre_amend.pdf)

<sup>46</sup> See the notes to Level 3A in the modern award.

modernisation, the Work Value decision had been in force for five years, and fully implemented for three years. If there had been any indication that the *Victorian Award* or the *ACT Award* were not functioning properly according to the relevant unions or employer interests, then it is reasonable to assume that this matter would have been raised by the parties, either by seeking that the modern award include provisions addressing any problem, or simply by the reservation of rights to re-agitate any issue after award modernisation. No party raised any such concerns.

## **2012 – the Transitional Review**

51. Fair Work Australia was required by Item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) to conduct a review of all modern awards two years after their commencement on 1 January 2010 (**the transitional review**). During the transitional review, relevantly, parties to this Equal Remuneration Order proceeding being United Voice, the Independent Education Union, Australian Business Industrial, and the Australian Childcare Centres Association each made various applications to vary the Children’s Services Award. None of the parties (or any other party) who participated in the transitional review proposed amendments that would have any impact, directly or indirectly, on the nexus established by the Work Value decision.<sup>47</sup>
52. No amendments were made or proposed (including by the FWC) to the Metals Award during the transitional review that would have or did have any impact on classification levels or hourly rates of pay in that award.

## **2014 to 2017 – the Four Yearly Review**

53. No amendments have been made or proposed (including by the FWC) during the four yearly review that would have any impact on classification levels or hourly rates of pay in the Children’s Services Award or the Metals Award. Similarly, while a number of common issue matters have been determined which will affect the content of the Children’s Services Award and the Metals Award, classification levels and rates of pay are unaffected and the parity has remained. The common issues concern annual leave; award flexibility, make-up time, and time off in lieu; plain language redrafting;

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<sup>47</sup> [2012] FWA 9296, [50]–[56].



and (potentially) unpaid family and domestic violence leave and family friendly work arrangements.

### **2010 to 2017 – the Annual Wage Reviews**

54. Immediately prior to award modernisation, the hourly rates of pay for employees at Certificate III/C10 levels were identical, while the hourly rates of pay for Diploma/C5 employees maintained the disparity of \$0.14 as a result of the AFPC's two-part wage increase in 2006, as described in paragraph 36 above.
55. The first Annual Wage Review in 2010 expressed the increase in dollar terms, of \$26.00 per week or \$0.69 per hour.<sup>48</sup> Subsequent increases have been expressed in uniform percentage terms as well as dollar terms. Hourly rates are calculated as 1/38th of the weekly wages, rounded to the nearest 10 cents.<sup>49</sup> This has had the effect of increases, in one cent increments every two years, the gap in the hourly rates between the Diploma/C5 levels that arose as a consequence of the two-part AFPC increases.
56. On the commencement of the modern awards on 1 January 2010, and from the first Annual Wage Review from 1 July 2010, a minor disparity arose in the *weekly wage* for the Certificate III/C10 rates of \$0.04 in favour of the Children's Services Award.<sup>50</sup> However, the *hourly wage rates* remained the same, and when the Annual Wage Review orders were published for the 1 July 2011 adjustment, the weekly rates were again equalised and have remained so ever since.
57. Aside from these matters, the Annual Wage Review increases have continued to apply in a uniform fashion to the Children's Services Award and the Metals Award as set out in Annexure A.

### **Conclusion on the history of the Children's Services and Metals Award**

58. The nexus established by the Work Value decision to align the AQF Diploma and Certificate III rates in the *Victorian Award* and the *ACT Award* with the C10 rate in the old *Metals Award* was made following a full assessment of the work value of children's services workers in 2005, and benchmarking of classifications and rates of

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<sup>48</sup> *Annual Wage Review 2009–2010* [2010] FWAFB 4000, [424].

<sup>49</sup> *Annual Wage Review 2010–2011* [2011] FWAFB 3400, [335].

<sup>50</sup> This appears to have been an anomaly (later corrected) that arose at award modernisation.

pay in the Children’s Services awards to the old Metals Award. Since the Work Value decision, the award landscape has traversed a period of considerable regulatory change, covering Work Choices, award modernisation, and the transitional and four-yearly review of modern awards. There have been numerous opportunities for the AIRC, FWA, the FWC, and the interested parties, to revisit and reconsider the appropriateness of the Metals Award as comparator to the work performed by childcare workers under the Children’s Services Award. At each stage, the conceptual nexus has held, and the numerical nexus has remained deliberately comparable.

### **Male and female composition of the sectors**

59. Further, and consistent with paragraph 290 of the *Equal Remuneration Order – Jurisdictional Decision* [2015] FWCFB 8200, United Voice and the Australian Education Union contend that employees who perform work in a long day care centre or preschool covered by the Awards the subject of the Application are overwhelmingly female and employees employed under the *Manufacturing and Associated and Occupations Award 2010* are overwhelmingly male. **Annexure B** to these submissions set out the data and sources for that submission.

### **Conclusion**

60. For the above reasons United Voice and the Australian Education Union assert that the C5 and C10 classifications under the *Manufacturing and Associated and Occupations Award 2010* are a suitable comparator in the Application for the purposes of s 302 of the Act. They contend that those comparators satisfy paragraph 290 of the *Equal Remuneration Order – Jurisdictional Decision*.

11 October 2017

H Borenstein

C W Dowling

K Burke

Counsel for United Voice and the Australian Education Union

**Annexure A:**

**Comparison of Hourly Rates of Pay between the Children's Services Award and the Metals Award, 2005 to 2017**

*Pre Award Modernisation*

Date	Decisions	Children's Award 3.1 (Cert III)		Metals Award C10	Children's Award 4.1 (Diploma)		Metals Award C5	Comment
		Victoria	ACT		Victoria	ACT		
Pre Work Value Decision		\$13.07	\$13.07	\$14.77	\$15.27	\$15.85	\$18.01	
<b>7 June 2005 – 2005 Safety Net decision</b>								
1 July 2005	PR957914 (decision) PR960275 (Vic)** PR959278 (ACT) PR959867 (Metals)	\$13.59	\$14.04	\$15.21	\$15.79	\$16.82	\$18.46	**Note the Victorian decision (PR960275) in force as at 1 July did not take into account the 2005 Safety Net decision. By 28 October 2005, this had been corrected – see PN964145.
1 Jan 2006	PR964145 (Vic) PR959278 (ACT)	\$14.57	\$14.57	\$15.21 (no change)	\$16.77	\$17.35	\$18.46 (no change)	

Date	Decisions	Children's Award 3.1 (Cert III) <i>Victoria ACT</i>		Metals Award C10	Children's Award 4.1 (Diploma) <i>Victoria ACT</i>		Metals Award C5	Comment
<b>27 March 2006 – Commencement of Work Choices</b>								
1 July 2006	PR964145 (Vic) PR959278 (ACT)	\$15.10	\$15.10	\$15.21	\$17.29	\$17.87	\$18.46	Increase to the old Children's Services awards preserved by s 208(4) of the amended <i>Workplace Relations Act</i> .
<b>26 October 2006 – Wage Setting Decision 1/2006 (AFPC)</b>								
<b>8 December 2006 – Wages and Allowances Review 2006 (AIRC)</b>								
1 Dec 2006	<i>Wage Setting Decision 1/2006</i> (Vic and ACT) PR975659 (Metals)	\$15.82	\$15.82	\$15.94	\$18.02	\$18.59	\$19.04	Note that the Metals award order was made on 27 April 2007, but came into force on 1 December 2006.
1 Jan 2007	PR964145 (Vic) PR959278 (ACT)	\$15.94	\$15.94	\$15.94 (no change from 1 Dec 06)	\$19.18	\$19.18	\$19.04 (no change from 1 Dec 06)	This was the last Work Value increase. CIII increased by \$0.12 cents to achieve parity with C10. The Diploma rates achieved internal consistency, but not parity with C5 for the reasons explained above.

Date	Decisions	Children's Award 3.1 (Cert III)		Metals Award C10	Children's Award 4.1 (Diploma)		Metals Award C5	Comment
		Victoria	ACT		Victoria	ACT		
1 Oct 2007	<i>Wage Setting Decision 3/2007</i> <sup>51</sup>	\$16.21	\$16.21	\$16.21	\$19.32	\$19.32	\$19.18	Increase of \$0.27 per hour for wages at and under \$18.42 per hour, and \$0.14 per hour for wages over \$18.42 per hour.
1 Oct 2008	<i>Wage Setting Decision 2/2008</i> <sup>52</sup>	\$16.78	\$16.78	\$16.78	\$19.89	\$19.89	\$19.75	Increase of \$0.57 cents per hour.
1 Oct 2009	<i>Wage Setting Decision 2/2009</i> <sup>53</sup>	\$16.78	\$16.78	\$16.78	\$19.89	\$19.89	\$19.75	No increase in 2009.

<sup>51</sup> Available at <https://www.fwc.gov.au/documents/sites/afpc2007wagereview/documents/afpc2007wsd234andrfd.pdf>

<sup>52</sup> Available at <https://www.fwc.gov.au/documents/sites/afpc2008wagereview/documents/afpc2008wsd2.pdf>

<sup>53</sup> Available at <https://www.fwc.gov.au/documents/sites/afpc2009wagereview/documents/afpc2009wsd2.pdf>

*Post Award Modernisation*

Date	Decisions	Children's Award 3.1 (Cert III)	Metals Award C10	Children's Award 4.1 (Diploma)	Metals Award C5	Comment
<b><i>1 January 2010 – commencement of the Fair Work Act 2009 (Cth) and modern awards</i></b>						
1 Jan 2010	Commencement of modern award.	\$16.78 (weekly \$637.64)	\$16.78 (weekly \$637.60)	\$19.89	\$19.75	
1 July 2010	<i>Annual Wage Review 2009–10</i> [2010] FWAFB 4000 PR998020 (CSA) PR997890 (Metals)	\$17.46 (weekly \$633.64)	\$17.46 (weekly \$663.60)	\$20.57	\$20.43	Difference of \$0.14 in the 4.1/C5 classifications.
1 July 2011	<i>Annual Wage Review 2010–11</i> [2011] FWAFB 3400 PR509151 (CSA) PR509041 (Metals)	\$18.06 (weekly \$686.20)	\$18.06 (weekly \$686.20)	\$21.27	\$21.13	Difference of \$0.14 in the 4.1/C5 classifications.
1 July 2012	<i>Annual Wage Review 2011–12</i> [2012] FWAFB 5000 PR522982 (CSA) PR522872 (Metals)	\$18.58	\$18.58	\$21.889 (weekly \$831.80)	\$21.739 (weekly \$826.10)	Difference of \$0.15 in the 4.1/C5 classifications.

<b>Date</b>	<b>Decisions</b>	<b>Children's Award 3.1 (Cert III)</b>	<b>Metals Award C10</b>	<b>Children's Award 4.1 (Diploma)</b>	<b>Metals Award C5</b>	<b>Comment</b>
1 July 2013	<i>Annual Wage Review 2012–13</i> [2013] FWCFB 4000 PR536785 (CSA) PR536675 (Metals)	\$19.07	\$19.07	\$22.46	\$22.31	Difference of \$0.15 in the 4.1/C5 classifications.
1 July 2014	<i>Annual Wage Review 2013–14</i> [2014] FWCFB 3500 PR551708 (CSA) PR551598 (Metals)	\$19.64	\$19.64	\$23.13	\$22.97	Difference of \$0.16 in the 4.1/C5 classifications.
1 July 2015	<i>Annual Wage Review 2014–15</i> [2015] FWCFB 3500 PR566800 (CSA) PR566677 (Metals)	\$20.13	\$20.13	\$23.71	\$23.55	Difference of \$0.16 in the 4.1/C5 classifications.
1 July 2016	<i>Annual Wage Review 2015–16</i> [2016] FWCFB 3500 PR579915 (CSA) PR579761 (Metals)	\$20.61	\$20.61	\$24.28	\$24.11	Difference of \$0.17 in the 4.1/C5 classifications.
1 July 2017	<i>Annual Wage Review 2016–17</i> [2017] FWCFB 3500 PR592223 (Children's Award) PR592105 (Metals Award)	\$21.29	\$21.29	\$25.08	\$24.91	Difference of \$0.17 in the 4.1/C5 classifications.

## Annexure B:

### Male and female composition of the sectors

#### *Early childhood sector employees*

<b>Data</b>	<b>Source</b>
Both Preschool and Long Day Care are 97.3% female	The Social Research Centre, <i>2013 National Early Childhood Education and Care Workforce Census</i> (Department of Education, North Melbourne, May 2014) 10  < <a href="https://docs.education.gov.au/system/files/doc/other/nwc_national_report_final_0.pdf">https://docs.education.gov.au/system/files/doc/other/nwc_national_report_final_0.pdf</a> >
Of 99,835 employees, 96.8% were female and 3.2% were male  (Excluding owner managers, employers and contributing family workers)	Australian Bureau of Statistics (ABS) (2011) Census of Population and Housing.  The Census of Population and Housing dataset provides a count of persons who are in Australia on Census Night. The data is found with reference to the Australia and New Zealand Standard Classification of Occupations (ANZCO) using the mostly the four-digit ANZCO classification from the 2011 Census (1341 Child Care Centre Managers, 2411 Early Childhood (Pre-Primary School) Teachers and 421 Child Carers).
Of 39,148 employees in preschool education, 94.3% were female, 5.7% were male	Australian Bureau of Statistics, 'Labour Force, Australia, Detailed, Quarterly, Nov 2013, Cat. No. 6291.0.55.003' in Pay Equity Unit, <i>Data report—preschool and long day care sector</i> , A report by the Pay Equity Unit of the Fair Work Commission pursuant to directions by the Full Bench for the Equal Remuneration Case (Fair Work Commission, 28 March 2014) 30.
Preschool Education, 89.3% are female, 10.7% are male (for 5 organisations)	Workplace Gender Equality Agency, Data Explorer, <a href="http://data.wgea.gov.au/industries/359">http://data.wgea.gov.au/industries/359</a>



Data	Source
<p>Of 140, 000 child care employed at November 2016, 95% are female (excluding child care centre managers).</p>	<p>Australian Bureau of Statistics (ABS) ‘Labour Force (trend and annual averages of original data)’ in Department of Employment, <i>Australian Jobs 2017</i> (Australian Government, Canberra, May 2016) 42  <a href="https://docs.employment.gov.au/system/files/doc/other/australianjobs2017.pdf">https://docs.employment.gov.au/system/files/doc/other/australianjobs2017.pdf</a></p>
<p><b>Workforce numbers:</b></p> <ul style="list-style-type: none"> <li>• 194,944 staff in ECEC overall, more than half are in long day care</li> <li>• 108,521 in long day care</li> <li>• long day care workforce grew by 43.5% since 2013 but family day care workforce grew by 131.8%.</li> </ul> <p><b>Feminisation:</b></p> <ul style="list-style-type: none"> <li>• 91.1% of the ECEC workforce is female. In 2010 it was higher at 94% female and 2013 93% female.</li> <li>• 96.1% of the long day care work force workforce is female (a very slight drop from 97% in 2013).</li> </ul>	<p>Social Research Centre, ANU ‘<i>2016 Early Childhood Education and Care National Workforce Census</i>,’ Department of Education and Training, September 2017,  <a href="https://docs.education.gov.au/documents/2016-national-early-childhood-education-and-care-workforce-census-report">https://docs.education.gov.au/documents/2016-national-early-childhood-education-and-care-workforce-census-report</a>.</p>

### *Manufacturing sector employees*

Data	Source
Of the 912, 400 employees in the manufacturing industry in November 2016, 72% were male, 28% female.	Australian Bureau of Statistics (ABS) ‘Labour Force (trend and annual averages of original data)’ in Department of Employment, <i>Australian Jobs 2017</i> (Australian Government, Canberra, May 2016) 19 < <a href="https://docs.employment.gov.au/system/files/doc/other/australianjobs2017.pdf">https://docs.employment.gov.au/system/files/doc/other/australianjobs2017.pdf</a> >
Of the 972,200 employees in manufacturing, 73.8% were male employees, 26.2% were female.  (Note that this includes manufacturing covered by other awards, ie, beverage and tobacco manufacturing is covered by the Food, Beverage and Tobacco Manufacturing Award 2010)	Data was found with reference to the Australian and New Zealand Standard Industrial Classification (ANZSIC) using the one digit and two-digit subdivision class level.  Australian Bureau of Statistics (ABS) ‘Labour Force, Australia, Details, Quarterly 2012, November 2012, Cat. No. 6291.0.55’ in RSRT & Minimum Wages Research Team, <i>Manufacturing industry profile</i> (Report 3/2013, Fair Work Commission, February 2013), 13.
Female employees account for 27.9% of manufacturing industry	Australian Bureau of Statistics (ABS) ‘Labour Force, Australia, Detailed, Quarterly, May 2016 Cat. No 6291.0.55.003 in Workplace Gender Equality Agency, ‘ <i>Gender segregation in Australia’s workforce</i> ’ (Australian Government, August 2016)