TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1055534

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER SAUNDERS

C2013/5139

s.302 - Application for an equal remuneration order

United Voice; Australian Education Union
and
The Association of Independent Schools of Tasmania Incorporated; Association of Independent Schools of Western Australia (Inc); Association of Quality Child Care Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare Queensland Inc; Australian Federation of Employers and Industries; Childcare South Australia; Child Care Association of Western Australia; Community Connections Solutions Australia; The State School Teachers' Union of W.A. (Incorporated); Association of Independent Schools of South Australia; Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations; Australian Chamber of Commerce and Industry; Australian Childcare Centres Association; Australian Community Children's Services; Australian Community Services Employers Association, Union of Employers; The Australian Industry Group; The Australian Industry Group; Chamber of Commerce and Industry; Tasmanian Chambers of Commerce & Industry; Australian Municipal, Administrative, Clerical and Services Union-New South Wales and ACT (Services) Branch
(C2013/5139)

Sydney

9.05 AM, THURSDAY, 30 NOVEMBER 2017

PN1

VICE PRESIDENT HATCHER: Yes, I'll take the appearances. Mr Borenstein, you appear with Ms Burke.

PN2

MR H BORENSTEIN: We seek permission to permission to appear.

PN3

VICE PRESIDENT HATCHER: Yes, United Voice and AEU. Ms Andelman, you appear for the IEU?

PN4

MS L ANDELMAN: Yes.

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VICE PRESIDENT HATCHER: Mr Ward, you appear with Mr Roucek for various entities. Mr Warren, you appear for the AFEI?

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MR R WARREN: We seek permission.

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VICE PRESIDENT HATCHER: Ms Eastman, you appear with Ms Raper for the Commonwealth?

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MS K EASTMAN: Yes, if the Commission pleases.

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VICE PRESIDENT HATCHER: Mr Gunn, you appear for Community Connection Solutions Australia.

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MR J GUNN: That's right.

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VICE PRESIDENT HATCHER: I don't think there's any appearances in Melbourne.

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MR BORENSTEIN: No, I think that's Mr Dirks.

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VICE PRESIDENT HATCHER: We'll continue the grant of permission for parties to be represented by lawyers and we can indicate that we've read the written submissions. Mr Borenstein.

PN14

MR BORENSTEIN: Yes, your Honour, thank you. We have filed written submissions, as your Honour notes. We filed our original submissions on 11 October 2017 and our reply submissions on 24 November 2017. We seek to rely

on those. I don't know whether it's this Commission's practice to mark them or not. I'm content with that.

PN15

I just want to draw attention to some highlights of the submissions that we made, rather than just go through them boringly. Before I do that, may I hand up to the Commission two folders each of reference documents that are referred to in our outline. There is only one document in those folders that isn't explicitly mentioned in our outlines and that is the document at tab 18 which is a report of the Full Bench decision in 1990 for a work value case in this area. It is referred to in the 2005 decision of the Full Bench with which we are dealing here and so we thought that for completeness, the Full Bench should have that decision to see how the movement occurred.

PN16

At tab 2 of the folders which we've just handed up, is a copy of this Full Bench's decision of 6 July 2017 which approved the applicant's application to have a preliminary question decided. I'm sure that the Bench is well familiar with this decision, but I just want to draw attention to three parts of it because they do bear on some of the submissions that have been made and in particular, by some of the respondents. It's at tab 2, and the first passage that I want to draw attention to is at page 9 in paragraph 18.

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Here, your Honour and members of the Bench have said:

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> *The comparative exercise in quotes which is required as a jurisdictional prerequisite to the making of an equal remuneration order under section 3025 to be carried out between the group of employees to be covered by the proposed order and an identified comparator group has three elements.*

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1. *The two groups must perform work of equal of comparable value;*

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2. *They must be of the opposite gender; and*

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3. *They must be unequally remunerated.*

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We obviously are addressing the first question and potentially the second question in passing, but we are not addressing item 3. The reason I draw attention to that is that some of the submissions by the respondents have tendered to shift from items one and two into item three to make part of their argument. I'd just simply wish to make clear that our understanding of the question is, that the proposed question is that we are dealing with the items one and two, rather that item three. I think at the time of the application I made it clear that item three would have to be dealt with after we identified the suitability of the comparator, which we were proposing.

PN23

Then the second thing that I wanted to just clarify, goes to the question of the use of the word 'conclusively' in the question which the Bench posed and the question is set out at paragraph 25 on page 11. There was some concern or lack of clarity about the understanding, certainly on our side and some of the respondents as to what the Bench actually intending by the use of the words 'be satisfied conclusively'.

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We believe that the answer lies in paragraph 23 where the Bench has indicated that the suitability of a preliminary hearing was affected by the avoidance of any evidence being called to make out the question. So, in 23 you've said:

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We consider the preliminary hearing could only be of value if it were confined to the question of whether the 2004

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And I interpose, it should be 2005.

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AIRC decision and the subsequent alignment in rates are capable alone of conclusively demonstrating equality or comparability of work value (and as a corollary that no evidence that might conceivably be adduced by any party could demonstrate otherwise).

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We assume that what the Bench meant by the use of the word 'conclusively' emanates from that. That what you're looking for is a question which if answered, provides the answer without the possibility of there being evidence that might have affected the answer.

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VICE PRESIDENT HATCHER: It provides the answer to what you identified as element one in paragraph 18, without the need for any further evidence?

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MR BORENSTEIN: Yes, and we assume that's what you meant when you said 'can the Commission be satisfied conclusively' by the answer to that particular question and we proceed on that basis.

PN31

We have provided a copy of the 2005 - I wanted to firstly, before I go to that, to go to the 2015 jurisdictional decision which is at tab 1 of the folder and just draw attention to a small number of matters that are referred to in there and which will arise in the course of submissions which the Commission will hear this morning.

PN32

The aspect of this that we want to draw particular attention to, is the change of terminology of the legislation over the years in the way in which it dealt with equal remuneration. The Full Bench, starting at page 13 at paragraph 50, has set

out at some length the progression of the concept through various decisions of the Commission over the years, starting with principles which called for equal pay for work of equal value with emphasis on equal value. That was the concept that informed the early cases going back to the 1969 case referred to at paragraph 51 and the principles which it established, which are set out at paragraph 55.

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Then there's a broadening of the concepts in 1972 and the history goes on. It's not necessary to go to each particular part of the history, but if we cut to the chase, at page 40, the Full Bench there starts a review of part 2.7 which is the current legislation. At page 46 at paragraph 186, the Full Bench comments in relation to the current legislation, that the provisions of part 2.7 incorporate a broader conception of equal remuneration than under equivalent provisions in both the Workplace Relations Act and the Industrial Relations Act.

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As we have mentioned, the previous legislative provisions effectively find equal remuneration to mean equal rates of remuneration for work of equal value, established without discrimination on the basis of sex. The provisions of part 2.7 are different in two key areas.

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First, the expression 'equal remuneration for men and women workers for work of equal value' is no longer defined by reference to the equal remuneration convention to mean rates of remuneration established without discrimination based on sex. They conclude at paragraph 187. It's no longer necessary to establish that the rates have been established on a discriminatory basis.

PN36

The second key aspect in respect of part 2.7 differs from its legislative antecedents, is that the expression of part of the provision equal remuneration for work of equal or comparable value now extends to the concept of comparable value. In our submission, that is a very important change for the purposes of the present case.

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In 189 the Bench comments:

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> *In the Sax case number one, the Full Bench observed that the inclusion of the concept of comparable value was a significant departure from the previous legislative regime and accordingly noted that the decisions under the Workplace Relations Act are not directly applicable being made under provisions limited to equal remuneration for work of equal value.*

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At 190, the intention that part 2.7 should have a broader operation than its legislative antecedents is confirmed by the explanatory memorandum for the Fair Work Bill and they set that out and we draw attention to that.

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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 part one. For instance, between the work of an executive administrative assistant and a research officer, relies on job and skill evaluation techniques.

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Then of course, they refer in the second paragraph of the ex-mem to the removal of the need to demonstrate that the rates were established by some kind of discrimination.

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We rely on this change to the inclusion of work at comparable value as a foundation to meet some of the arguments that are made by the respondents against the utility of the 2005 decision because of its references to the qualifications, the AQF qualifications of the two groups that it was investigating at that time. That is, the Metal Trades Group and the Child Care Group.

PN43

Clearly, it's a difficult thing to compare the value of changing a nappy in a child care centre and tightening a bolt in a factory. What this does, is to say that you don't need to descend to that. It may be that you had to do that under the old legislation where you have to have equal pay for equal work. But now, the concepts are broadened and it permits a broader approach to assessing the worth, the value of two types of work, even though those two types of work aren't the same, in the sense that I've exemplified. That's very important for our case and it's an error that some of the respondents' submissions demonstrate.

PN44

Then the next part of the decision that we want to draw attention to at this preliminary stage is on page 67 at paragraph 280 where the Full Bench states that there was no issue and we accept that the expression 'work of equal or comparable value' refers to quality or comparability in work value. So, it doesn't have to be actual equality as long as it's comparability of the work value, not of the work, of the work value.

PN45

The established industrial conception of that term is developed in the decisions of the Commission's predecessor tribunals, as well as by various state industrial tribunals, is the primary source of guidance in this regard. Such decisions point to the nature of the work, skill and responsibility required and the conditions under which the work is performed as being the principal criteria of work value. We consider that those criteria are relevant in determining whether the work being compared is of equal or comparable value.

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However, it's noted in the principles set down in the 1972 equal remuneration pay case, 'work value enquiries have been characterised by the exercise of broad judgment'. Further, as Munro J observed in the second HBM case:

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Experience of work value cases suggest that work value equivalents is a relative measure, sometimes dependent on an exercise of judgment. The history of such cases disclosed that a number of evaluation techniques have been applied for various purposes and with various outcomes from time to time.

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In other words, there is no rigid prescriptive process that has been developed in determining work value. Then can I go to paragraph 288 then, which is on page 69 where they comment again:

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The means by which equal or comparable value may be established will depend on the groups of male and female workers being compared. In some cases, it might be quite straightforward. If, as submitted by United Voice and AEU, the comparisons between groups of modern award dependent employees, then established award relativities originating in the restructuring of awards, as part of the structure or efficiency process may be sufficient, at least as a prima facie basis to establish equal or comparable value. Each case will have to turn on its own facts.

PN50

Now, the 2005 case falls into that basket where that sort of relativity has been established and so we say it takes the whole way, but at the very least, it takes us a prima facie case which requires some answering and we say there has been no sufficient answering to meet it.

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Then the conclusion of course at paragraph 290, that:

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In summary, in order for the jurisdictional prerequisite for the making of an equal remuneration order in 3025 to be met, the Commission must be satisfied that a group of employees of a particular gender to whom an equal remuneration order would apply, do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value.

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This is essentially a comparative exercise in which remuneration of the value of 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.

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That's what we intend to advance. We have put in our outline of submissions that there has been an extensive exercise in which a Full Bench of this Commission as

recently as 2005 formed the view that people at a particular level in the child care area had a linkage in terms of equivalence in work value or comparability of work value to particular classifications under the Metal Trades Award. We have also indicated, and this is not contested by any of the respondents, that the two groups in fact demonstrate two groups of relevantly different gender in the sense that the child care group is overwhelmingly comprised of female workers and the metal trades group is overwhelmingly comprised of male workers.

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We've provided data in our submissions which establishes that. Nobody seems to have contradicted that or sought to contradict that, and so we have in our submission, addressed the first and the second of the three points which the Full Bench noted in its judgment in paragraph 18.

PN56

VICE PRESIDENT HATCHER: With reference to something being established on a prima facie basis in paragraph 2(a)(viii), how does one get from a prima facie case to conclusively demonstrate something which was the gist of the question?

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MR BORENSTEIN: Well, a prima facie case, in my understanding your Honour, is a case that calls for an answer and if it's not answered or not adequately answered then it stands. In other words, it raises a case to be answered. We say in this case it does more than that, but even if it only did that, we will endeavour to demonstrate that the critical aspects of it are not adequately answered by the material that the respondents have referred to. We have addressed a number of those, in our written submissions which the Commission has seen.

PN58

But we say that when you look at the 2005 decision, you will see that it raises more than a prima facie case. Because it, together with the subsequent history which we've outlined in our written submission, demonstrates that the relationship, the nexus which is referred to in the materials that was established in 2005 has been perpetuated through a series of hearings in the Commission. This is both in modern award hearings and in the modern award reviews it has been maintained and that the industry has proceeded without demur from the employers since 2005 on the basis of those established relativities that date back to 2005.

PN59

Indeed, in our written submissions, we have made reference to submissions made by the ACA. I think it's - we've included in the bundle at tab 13, a copy of the submissions that were made that actually made, where submissions were made to the modern award Bench on behalf of Australian Child Care Centres Association, Australian Community Services Association, who are here in this case opposing.

PN60

At page 8, part 7, you will see they state that the submissions by the Associations is that it's appropriate to look to existing pre-reform Federal awards for guidance in relation to classification structures and wage rates. In 7.2 - this is for children's services employees, classifications, position description, definitions and wage

rates have been adopted from the Children's Services Victoria Award 2005 and the ACT Award 2005 which is exactly the awards which the 2005 decision set up.

PN61

Both of these awards were subject to an extensive work value pay equity hearing and decision of a Full Bench of the AIRC. That's the decision that we're talking about here. That decision determined that firstly there had been a significant net addition to work requirements within the meaning of the word 'value principle'. Secondly, the proper fixation of rates required aligning of the AQF diploma level to a C5 level in the Metal Industry Award.

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Additionally, the Bench determined it was appropriate for there to be a nexus between the CCW level 3 on commencement classification in the ACT Award and the C10 level in the Metal Industry Award.

PN63

This comprehensive decision established that these classifications and rates were properly fixed, arbitrated minimum rates. Accordingly, it's appropriate in the Association's submission to draw on these rates for inclusion in the modern award. The modern award proceeded on the basis of adopting the 2005 - I use the word 'nexus' into the modern award and has perpetuated, as I said, that connection such that over the years this linkage has been accepted in the industry up to the present time.

PN64

On that basis, we say it raises the proposition beyond simply a prima facie case, but we say a conclusive case that it is accepted within this industry that the people who are working at the particular classification levels in the child care industry are doing work of comparable worth or value to those working at the designated levels in the Metal Trades Award.

PN65

Had we been confined simply to the 2005 decision and we had nothing to add to it to bring it up to date, it may be that it would have only constituted a prima facie case. But we say when you look at what's happened since 2005, when you look at, as we've indicated in our written submissions that none of the employers at any stage have taken any opportunity which they had, to challenge the connection, to question the connection, none of them have done that. We say we demonstrate a conclusive case.

PN66

The Bench will be aware that in the modern award reviews and under section 157 it is open to any party to make application if they say that the modern award is not meeting the modern award objectives. If the rates of pay and the classifications and the linkages are wrong by reason of change of circumstances, then you might have expected that there would have been such an application. But there has not been.

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There've been applications for other changes in the modern award, we've referred to them in the submissions, but not in relation to this topic.

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VICE PRESIDENT HATCHER: Your application is found upon the premise that there are classifications in the Children's Services Award which involve work of equal comparable value to classifications in the Manufacturing Award and have been paid at the same rate for some years.

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MR BORENSTEIN: That's right.

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VICE PRESIDENT HATCHER: But the outcome of the application is to break the nexus so that the increases you seek, would put the Children's Services Award classifications above the comparable classifications in the Manufacturing Award?

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MR BORENSTEIN: No, no. We don't seek to change anything in the modern awards on either end of the equation. It needs to be borne in mind, as was made clear in Sax case, and I think repeated in the 2015 case that an equal remuneration order stands outside the stream of award fixation. It's quite separate and so for that reason, it is no part of our application to change the rates in the minimum rates awards.

PN72

The way in which it would operation, in the same way as it operated in the Sax case, is that there would be a separate order called an equal remuneration order. This would be made in consequence of a finding that after it has been established who the comparators are, and it has been established that they are appropriately gender different, there would be an investigation of the actual remuneration that each group is receiving. Because the Act talks about the remuneration received by each group for work of equal or comparable value and the cases have all said that remuneration isn't confined to minimum rates or anything of that sort; it's actual remuneration.

PN73

What would be undertaken, as I said when we made our application for this hearing, if we get over this hurdle, the balance of the case would involve an investigation of the third point in the three points in paragraph 18 which is, what are the two respective groups being paid for the work that has been found to be of equal or comparable value. If they are being paid differentially, then that raises the question of making - that then enlivens the Commission's discretion to make the equal remuneration order to create equal remuneration for work of equal or comparable value.

PN74

I think I indicated the sort of exercise which we would propose to undertake and no doubt there will be debate about the adequacy of it or not. But that will be a discrete exercise but it won't be an exercise of varying the minimum rates in the modern award. It's very important and I think some of the respondents have fallen

into this trap. It's very important to bear in mind as was said in the Sax case and again, I think in 2015, that an equal remuneration order stands outside that stream. I'm reminded by my learned junior at paragraph 215 of the 2015 case on page 51 at tab 1, this point is made and paragraph 216 again makes that point.

PN75

Can I just, by way of footnote to the submission I made about the continuation of the linkage that was established in 2005, in annexure A to our first set of submissions, we have set out a chart showing the progression of the minimum rates for the classification groups. You will see that save for the few cents here and there as a result of different types of national wage decisions they are almost identical all the way through to the present day. The slight discrepancies are explained in some detail in the applications in our submissions and I don't take the Commission's time up to deal with those.

PN76

VICE PRESIDENT HATCHER: When did the transition end from the 2005 decision?

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MR BORENSTEIN: Yes, it was intended originally to be four years and then the introduction of the Australian Fair Pay Commission process interrupted that, but they were all completed by the time the modern award was made. It was a very active period in wage fixation history and many changes.

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The 2005 decision is at tab 3 of the folder and the submissions which we have filed provide an analysis of the reasoning in that decision. The Commission heard from a large number of witnesses, some called by the unions, a number called by the respondents and you will see that set out at page 54 at paragraph 193. There's extensive evidence which is recounted in the following pages; we don't to take you to in detail.

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Then at page 47 commencing at 173, there's a discussion about the Australian qualification framework and the function that it serves. Then at paragraph 178 at page 50, there's a reference to the qualifications requires, the classification at C10 trade level in the Metal Industry Award. Then at paragraph 181, we draw attention to this. The Full Bench said:

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A central feature of this case is the alignment of the Child Care Certificate III and Diploma levels in the Act and Victorian Awards with the appropriate comparators in the Metal Industry Award. We've considered all of the evidence and submissions in respect of this issue. In our view, the rate at the AQF Diploma level in the ACT and Victorian Awards should be linked to the C5 level in the Metal Industry Award. It's also appropriate there be a nexus between the CCW Level III on commencement classification in the ACT Award and Certificate III level in the Victorian Award and the C10 Level in the Metal Industry Award.

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In reaching this conclusion, we have considered, as contended by the employers, the conditions under which the work is performed.'

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There is some muted criticism in some of the respondents' submissions, but that wasn't done and this is a direct statement to the contrary by the Full Bench. Then the Full Bench goes on:

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But contrary to the employer's submission, this consideration does not lead us to conclude that the child care workers with qualifications at the same AQF level as workers under the Metal Industry Award should be paid less. If anything, the nature of the work performed by child care workers and the conditions under which that work is performed, suggests they should be paid more, not less, than the Metal Industry Award counterparts.

PN84

We say that's a neat encapsulation of the finding which the Full Bench made in 2005, pointing as it does to the significance of the AQF comparison and also the consideration of the work and the conditions under which the work was performed.

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VICE PRESIDENT HATCHER: What was their evidence about that matter insofar as the Metals Award was concerned?

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MR BORENSTEIN: I beg your pardon?

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VICE PRESIDENT HATCHER: Was that finding based on any evidence insofar as the Metal Award was concerned?

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MR BORENSTEIN: The only evidence that we are aware of that was had regard to was the descriptors in the classifications in the Metal Industry Award. We have prepared, in view of some of the things that have been said by the respondents, we have prepared a document which shows the descriptors in the Metal Industry Award back in 2010 and the descriptors after the modern award was made, where the scope of the Metal Awards was expended. That's the subject of some comment by some of the respondents and the Bench will see when you hand it up, the Bench will see that although there has been an expansion under the particular classification levels to include other work, the original descriptors which were there in 2005 still remain.

PN89

So, in other words, they haven't been replaced, they've been supplemented with additional descriptors to accommodate the expansion of the scope of the modern award in the Metals area.

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VICE PRESIDENT HATCHER: Isn't buried in there an assumption that the work actually done by the comparative work for which they are paid is the work described in the classification descriptor for the purpose of a minimum?

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MR BORENSTEIN: Yes, the assumption is, that the description of the work that's to be remunerated at that level as a minimum rate, is work of the kind which that group does. Now, it may then be that if work is done over and above that, that that may be reflected in payments over and above the minimum rate. But work of that kind is required to be remunerated at the minimum rate; that's the way we would put it.

PN92

VICE PRESIDENT HATCHER: Well, I mean dealing with this step one about the comparator, don't we need to know what work both comparator groups are actually performing to justify their actual rates of pay, as distinct from the work the award requires to be performed for the purpose of the minimum rate of pay?

PN93

MR BORENSTEIN: We would submit that that goes to the issue of remuneration and equality or inequality of remuneration and the factors that might enter into that, when you're examining that. But we say that that doesn't affect the exercise of identifying a comparator in the first place.

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VICE PRESIDENT HATCHER: It's not about their remuneration necessarily, it's about what work they do. I mean I'd like to think our awards reflect the real work, but sometimes I suspect they don't.

PN95

MR BORENSTEIN: I can't image that would be so, your Honour. Just a second. We say, your Honour, that the starting point is to look at what they are required to do at a minimum and that if there is a finding of comparable worth between the two groups at that level, then we say that's sufficient to establish a comparator for the purposes of the section. If in the subsequent - in the stage 3 as the Bench has it, there is a need to look at whether remuneration is different for work of equal or comparable value, then at that point one may look to see whether there is a disparity or a significant disparity between the work described in the award and work actually performed and if there is, how that is reflected in the remuneration.

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VICE PRESIDENT HATCHER: I'm not sure that's consistent with the analysis in the 2015 decision.

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MR BORENSTEIN: I beg your pardon?

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VICE PRESIDENT HATCHER: I'm not sure that proposition is consistent with the analysis in the 2015 decision.

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MR BORENSTEIN: I'm not sure to which particular part your Honour is referring, if there is a particular part.

PN100

VICE PRESIDENT HATCHER: The general perception was once you've got the comparator in place, then it becomes a question of are they or are they not, being paid equal remuneration and then it becomes a case of do we exercise the discretion to equalise the remuneration or not. That is, I thought we departed from this notion there's then this further exercise where we start breaking down elements of the additional remuneration that one side has and the other side hasn't. Because you've already established by that point that it's a starting point of equality of work value.

PN101

But this issue of what work people actually perform is part of the starting point, that is, are you truly comparing groups with work of equal or comparable value. Now, while the awards and their descriptors might give you, as it were, a prima facie guide to that, don't we need to know something more about what work is actually done pursuant to people under these awards?

PN102

MR BORENSTEIN: Your Honour, I think that poses - that's a very broad proposition insofar as it applies to a broad area of kind which the Metal Trades Award applies to.

PN103

VICE PRESIDENT HATCHER: That's the very problem when choosing a comparator of that nature leads to. I mean, one can assume if you're in an industry where the award is the primary determinative of remuneration, the classification structure is likewise likely to closely reflect what employees actually do. But where you have a broad industry award where there's - I think it's broadly accepted that there's a whole range of over-award payments of varying levels at various places, then it begs the question, is there something about work value which is behind those over-award payments that is not reflected in the award classifications and the award paybacks?

PN104

MR BORENSTEIN: We would put it this way, your Honour, we would say that the starting point is the comparison of the kind which the 2005 Full Bench made. Looking at the skills and the responsibilities and the tasks which can be demanded of people in order to receive the minimum rates. We would say that in terms of the child care group, essentially that's the determinant of their remuneration. There may be some exceptions, but overwhelmingly that they are being remunerated on that basis.

PN105

And so, their remuneration is locked into the minimum that can be paid to people in the corresponding classifications in the Metal Trades Award. From the point of view of an applicant under part 2.7, the applicant being the group of child care workers comes to the Commission and it says, if you are looking at something

that compares to the value of work that we do, or the comparability of the value of the work we do, here is a group of people who by reference to their award, do work of the people of comparable value as established in 2005. So, they are a group that can be used as a comparator for the purpose of determining whether we are being underpaid in terms of the real value of what we do.

PN106

We submit that that's the first part of the exercise under the section in establishing the comparator. The next stage of the section is to investigate the differential in the remuneration received by the two groups. The reason for it, and as some of the cases say, there can be all sorts of reasons. There can be geographic reasons; there can be all sorts of reasons. But the starting point has to be, to find a group of works who are predominantly of the opposite gender who are subject to the award which prescribes a particular standard at the different levels or classifications and identify them for the purposes of getting a comparator.

PN107

We say that if you start feeding that the questions of how much they are getting paid and what are they getting paid for and so on, you then inexorably moving to the next part of the enquiry which may then muddy the waters in the first part of the enquiry. We think that the sort of questions that your Honour asked, are questions which are appropriately addressed in the next part, which is looking at the remuneration and having the debate about well, they get paid more because they do more than the award says or they do different things than the award says or what have you.

PN108

But if for example - just to finish the point, if for example, as is not uncommon, there's enterprise bargaining and again, as is not uncommon, the enterprise agreement that results, reflects the classification levels and the prescriptions et cetera in the award, but people are paid a higher rate, then you're in a situation where prima facie you would say, well we don't have to go down to each factory or workplace and investigate what each individual employee in the Metal Trades Industry is doing because there's an overarching prescription by the award, or if it's replaced by an enterprise agreement, by the enterprise agreement.

PN109

If the enterprise agreement reflects the same classifications et cetera that are in the award, then it generally answers the question which your Honour asks. One always has to allow for individuals who get paid more for various reasons. But we're looking at a macro picture here; we're looking at a picture in any factory or part of the metal industry where you have an agreement which is above the award, but which is likely to reflect the award classifications which is one figure that covers every worker in the factor.

PN110

It may be that some workers in the factor do something different and get paid extra above the enterprise agreement. But that shouldn't distract from the exercise, in our respectful submission, which the Commission undertakes under this part of the Act.

PN111

VICE PRESIDENT HATCHER: That approach suggests that once you get to what is step three in paragraph 18 of our last July decision, you start looking at the over-awards. If, for the sake of argument you find something of a work value nature which is driving the over-awards partially or wholly in your comparator group, that means you end up already having passed step one in concluding that there was a difference in work value after all, thus justifying the difference.

PN112

MR BORENSTEIN: But what we say, your Honour, is that it's something that needs to be looked at then, when you actually have the material in front of you about that. So, for example, we I think foreshadowed that part of the exercise would be to review what your Honour describes as the over-award payments in terms of reviewing outcomes for enterprise bargaining in the metals area. At that point, there would be scope to analyse how those bargaining outcomes reflect work value or simply an increment of remuneration over a period of time.

PN113

That's why we say, your Honour, that's a task that's appropriate for that third stage when the information is before the Full Bench.

PN114

VICE PRESIDENT HATCHER: All right. Perhaps to give my question more greater particularity, Mr Borenstein, it's really paragraph 307 of the 2015 decision.

PN115

MR BORENSTEIN: Your Honour, we did note that, we thought that was in our favour I must say.

PN116

VICE PRESIDENT HATCHER: It's really indicating that all the questions about work value are loaded up into the first step. There's no further step where we start slicing and dicing the difference to work out what caused it. It really depends upon us getting the comparator absolutely right as part of the first step, because once you're beyond the first step, equal comparable work value is done and then there's no further analysis of it.

PN117

MR BORENSTEIN: I must say, respectfully, we did read that in a different way. We did read that to suggest that once you establish the comparator, the appropriate comparator, there wasn't scope - and you were then moving to establish the differential in the wages, there wasn't scope to unpack that differential. But we still did see the investigation of the differential as being a later step than the initial identification of the comparator. Otherwise, really, you're then conflating the whole exercise because - we did read 307 as really being a response to a submission that once you were dealing with the question of differential, whether you could unpack it and attribute different causes to it rather than dealing directly with the question of the identification of the comparator as an exercise.

PN118

We can see how your Honour would read it the way you indicated but we would say that that's not the correct reading of it, with respect, and we would say that you do need to first of all establish a comparator based on the sort of considerations which the 2005 decision made and then after that you can look at this question of remuneration and it may be that you don't have to unpack it in terms of saying "Well, this is gender related and this is something else related and so on" and that's really what this is dealing with. But you can look at it and you could certainly look at it in terms of saying "Well, we're not going to investigate whether the differential is gender related or whatever", but it may be that it exposes some issue about work value that has emerged over a period of time.

PN119

You might then also have to look at work value changes at the other end of the scale, which is at the childcare side of the equation, and you might end up in a situation where you say "Well, that really exposes the whole problem of the wage differential, the gender based wage differential. Because you've got a group which is gender based which are the childcare workers, who have been found on the AQF and the other standards in 2005 to be doing work of comparable value, and then in 2017 one finds for a host of reasons that the other group, the other comparator group, is being paid more."

PN120

Now what this is saying is you shouldn't be looking to unpack whether parts of it are due to the gender or parts of it are due to something else or something else, or something else. You see, what your Honour is putting is that the remuneration, the actual remuneration which the metals people get might be a reflection of work value or some other thing. But our point would be that however they have managed to achieve the higher remuneration, the people in the childcare area have not and that that's the point of the ERO. The point of the ERO process is to identify comparable groups and then look at the outcomes for each of the groups and seek to equalise the outcomes and 307 - - -

PN121

VICE PRESIDENT HATCHER: That's correct insofar as it goes but it still begs the question are they truly comparable groups in terms of work value in the first place? That is at step 1 and that may involve, in an industry which has over-award payments, more than analysis of what the award says. It may require analysis of what work they actually do in reality.

PN122

MR BORENSTEIN: Your Honour, we would respectfully submit that that's not the process that should be followed. We would say that to the extent that there arises a situation where one group achieves some form of over-award payment for whatever reason, the sort of considerations which are referred to in 307 as not being things you should be looking at come into play for the - can I give your Honour an example of something that emerged in the SACS case. There were arguments put in the SACS case that the female work cohort was less able to achieve increased remuneration through enterprise bargaining on whatever terms because of their position and in part because of their gender.

PN123

Now it may be that looking at the sort of the exercise your Honour's looking at you run up against the very caution which the 2015 judgment makes about trying to separate out gender factors; that the evaluation of work value might be inherently tied up with the fact that one group - or the lack of evaluation of work value might be inherently tied up with the fact that one group is in the childcare sector and the other group is in the metal trades sector and things that flow from that, and this is what we saw as being the caution that was being expressed in paragraph 307.

PN124

And that's why in our respectful submission you go back to the objective situation which applied at the comparison in 2005 and if it emerges that the group in the metal trades has been able to enhance its remuneration over a period of time however that has been done, it's not appropriate to start, as your Honour says to dissect it, for cause. I mean otherwise you render this part of the Act into a very, very, very narrow field of operation which we would say, and I think we said in our submissions, is inappropriate in a provision of this kind which is meant to be remedial and which is inconsistent in approach with the expansion which was created in 1997 of the Fair Work Act to expand it.

PN125

It really comes back to the old formulation of equal pay for equal work or work of equal value, whereas here there was an intention to broaden it and there has been a recognition that you don't have to make a comparison with the exact work functions from one to the other. And so all of those things point against looking at the sort of subsequent work value situations that your Honour is adverting to, in our respectful submission. We think that the objects of the ERO are best advanced if you look at the comparison at a basic level and say "Well, at the basis these two groups are comparable".

PN126

Now the fact that one group has been able to achieve advancements and the other has not might be for a whole range of reasons. They might be to do with gender. They might be to do with geography. They might be to do with technological change, a whole host of things. But we read 307 as indicating that you don't go into that.

PN127

VICE PRESIDENT HATCHER: At the later stage.

PN128

MR BORENSTEIN: At that early stage.

PN129

VICE PRESIDENT HATCHER: No, at the later stage. So if you go back to the analysis in the July decision there are steps 1, 2 and 3.

PN130

MR BORENSTEIN: Yes.

PN131

VICE PRESIDENT HATCHER: One is work value. Two is the gender difference. Three is the unequal remuneration. Once you satisfy those three steps you don't start trying to look or search for the explanation of the pay difference. That's what that paragraph is saying. But we're still at step 1. That is, are we truly comparing two groups performing work of equal comparable value? And what I'm simply putting to you is that may involve an analysis of more than just the award classifications in an industry which is characterised by pay and work arrangements which depart greatly from what the award prescribes as a minimum.

PN132

MR BORENSTEIN: Yes well, your Honour, we've made the submission. We submit that the exercise at the level which the 2005 Commission did is apt to expose an appropriate comparator as it did here, and the basis on which they did it was we say an appropriate basis and an efficacious basis to do it. We've set out in our written submissions the transitional arrangements which applied and it starts at paragraph 26 and onward. We don't need to take the Commission to that in any detail. At paragraph 44 and following we've dealt with the modern award that was made for the metal industry and we have made our submissions in relation to the outcome of that, and we don't need to say any more than that.

PN133

In terms of the Child Services Award and the modern award that was made in that area, we've addressed that at paragraph 47 and following of the written submissions, and can I just take a moment to indicate there that there are submissions from the respondents to suggest that the modern award for the child services area is not or does not bear a resemblance to the previous two awards that were the subject of the 2005 work value decision. We reject that and we have referred the Commission to the submissions which were made by the Australian Childcare Alliance and we also at paragraph 49 of the outline indicate that those States who had particular arrangements locally were accommodated by additional and separate classification levels which we've identified in paragraph 49.

PN134

But the base levels, the core levels that take back to 2005 were maintained in the modern award. And so the submission that we make on that point is that the linkages that were created in 2005 have been perpetuated through the modern award system, through the transitional review, through the four yearly review up to the present time, and have been recognised as an appropriate basis for the remuneration of the childcare sector in the modern awards. And we say that the linkage, because of the continuation of the linkage, that at the present time the connection which the 2005 decision established still persists and that the answer to the question which was posed by the Bench as the preliminary question should be in the affirmative.

PN135

VICE PRESIDENT HATCHER: Just looking ahead, if the answer to the question was yes, just dealing with the third step, you would then need to bring some evidence of what persons in the C5 and C10 classifications in the Manufacturing Award were actually paid.

PN136

MR BORENSTEIN: That would be our intention, yes.

PN137

VICE PRESIDENT HATCHER: Right, and where would that evidence come from?

PN138

MR BORENSTEIN: In the broad my anticipation is that we would survey the material that is maintained by the Commission and other authorities but monitor award - I'm sorry, enterprise agreement outcomes across different industries.

PN139

VICE PRESIDENT HATCHER: Right. Thank you.

PN140

MR BORENSTEIN: Can I just say very quickly I don't want to foreclose the possibility of other sources of information coming to light.

PN141

VICE PRESIDENT HATCHER: Sure.

PN142

MR BORENSTEIN: But that's probably the first port of call that one would make to establish the levels across the board in the metals industry to get a sense of the remuneration levels, and of course the same would be applied to the childcare industry because there may be some bargaining outcomes in that area too, although very minimal, to give a sense of how the remuneration levels fall in the two areas. Unless there's anything else I can help the Bench with, they're our submissions.

PN143

VICE PRESIDENT HATCHER: Thank you.

PN144

MR BORENSTEIN: And we reserve the right to reply to anything that falls from our friends.

PN145

VICE PRESIDENT HATCHER: Yes.

PN146

Ms Andelman?

PN147

MS ANDELMAN: Yes, the Independent Education Union has made an application for an equal remuneration order for early childhood teachers and the applications by the unions have travelled together up to the 2015 jurisdictional decision. We have filed some short submissions setting out some matters but if I could comment on the question posed by your Honour about whether there is a requirement for actual work to be demonstrated for the purpose of whether or not there's equal or comparable work, and I seek to do that by going back to the 2015

jurisdictional decision starting at paragraph 274 where the Commission set out in this section about the work value comparison process as identifying that:

PN148

...the modern awards regime...involves the establishment of minimum wages which take into account work value.

PN149

And no party made any submission contrary to that. The Full Bench described the work value process as an established industrial concept and on page 86 in the summary in paragraph 9 described it as "a traditional work value assessment". From that perspective there can be a - - -

PN150

VICE PRESIDENT HATCHER: Paragraph 274 is talking about a different type of application and it's framed by reference to the work performed which is described in the classification. The question I was raising was whether Mr Borenstein was trying to do a comparison in an industry where people are commonly paid above the award. It begs the question of whether the work they're doing is as described in the classifications in the award or something different, and therefore whether the classifications are a sufficient guide to the value of the work which is actually performed in your putative comparator sector.

PN151

MS ANDELMAN: Yes, and the point made there is that it's actually the comparison of the classification descriptors between modern awards, that the analysis of those descriptors have led to the same or similar rates in the award being made.

PN152

VICE PRESIDENT HATCHER: Yes.

PN153

MS ANDELMAN: So that was the work value analysis conducted in that traditional manner that led to the conclusion in the modern awards of the minimum rates in the modern awards.

PN154

VICE PRESIDENT HATCHER: Yes.

PN155

MS ANDELMAN: And then further in paragraph 280 there's a reference to a comparison of the wages and the corresponding classification descriptors, and it's clear that that can occur across and within industries, and in paragraph 278 it's made clear that groups of employees can be compared. So it's not individual employees being compared. It can be groups of employees being compared on that work value analysis.

PN156

And the second point I seek to make in my submission that there isn't a requirement for actual work necessarily in every case to be compared is because

there's no longer a requirement for there to be a finding that the rates are based on discriminatory conduct. It's not a case of one woman being paid less because of some discrimination. There's no requirement for a discrimination. It's about groups of workers in female dominated industries being compared to groups of employees in male dominated industries.

PN157

VICE PRESIDENT HATCHER: That's a different point from comparing the work which they actually do isn't it? That's nothing to do with the reason for it. It's simply saying what work does X group actually do and what work does Y group actually do, to work out whether they're equal or comparable.

PN158

MS ANDELMAN: And that analysis can be undertaken on the established industrial concept of work value, and the established industrial concept of work value evaluation does not in every instance have to rely on actually analysing and assessing the work of an individual employee. It can be that analysis can be undertaken on the papers, so to speak, by looking at descriptors of classifications, duty statements and analysing the value of the work performed.

PN159

VICE PRESIDENT HATCHER: Right.

PN160

MS ANDELMAN: The other point very briefly just to expand on in our submissions is that we agree with learned counsel for the unions in this application that there has been some conflation between as a first step assessing the work value of the work performed with the remuneration payable. They are two separate and distinct exercises and just going back to the discussion in regard to paragraph 307, paragraph 307 has to be read together with paragraph 306. Paragraph 307 is an answer to paragraph 306, and on the same account the Commonwealth in paragraph 21 of their submissions says that this application is very different to that contemplated by the 2015 jurisdictional decision, that the comparative analysis proposed is very different to one that was contemplated.

PN161

That proposition really does need to be unpacked, and there's reference to three paragraphs in the decision to support that assertion and if one goes to those paragraphs, that's paragraphs 243, 289 and 311, it will be immediately noted that those paragraphs deal with the issue of remuneration; so questions such as whether someone is a casual, whether there is a bonus scheme payable or an incentive payable, whether someone is in a remote location and therefore has a pay differential. They're all matters to be taken into account when the Commission is considering about whether or not there's equal remuneration and the reason for that difference. They're not matters to be taken into account for the analysis of the work value assessment.

PN162

VICE PRESIDENT HATCHER: I thought that paragraph 307 made it clear that once you got through the first three steps you're not looking any more at the reason for the difference.

PN163

MS ANDELMAN: Yes.

PN164

VICE PRESIDENT HATCHER: Because once you've satisfied yourself that there's work of equal comparable value, that there's a gender differentiation between the two groups in terms of composition and there's a difference in payment, that's all done and you're looking at how to rectify it. You're not looking at the reasons for it.

PN165

MS ANDELMAN: No, and that's where the discretion is engaged. So if there is evidence that the remuneration is not equal because the remuneration of a person is being compared because they're in a remote location, the Commission would exercise its discretion based on that evidence. But these jurisdictional facts operate in a chronological manner. So the first step is to assess the work value. The second is to identify that the groups that are being compared have different gender, and then the third is that it was the question of remuneration.

PN166

VICE PRESIDENT HATCHER: If you go back to step 1 and an applicant is seeking to compare group X to group Y and it turns out that group Y all work in a remote location under harsh conditions, that would be a reason why step 1 would not be satisfied would it not? That is, they're not doing work of equal comparable value by reasons of the conditions under which the work is performed. You don't get past step 1.

PN167

MS ANDELMAN: There's two points there - - -

PN168

VICE PRESIDENT HATCHER: Isn't that right?

PN169

MS ANDELMAN: There's two points there.

PN170

VICE PRESIDENT HATCHER: Yes.

PN171

MS ANDELMAN: The first one is they're in a remote location, so it's a condition of employment that is a work value assessment.

PN172

VICE PRESIDENT HATCHER: Yes.

PN173

MS ANDELMAN: And that's a matter that is relevant. As is contemplated in paragraph 288 - - -

PN174

VICE PRESIDENT HATCHER: That's step 1.

PN175

MS ANDELMAN: Yes. On a prima facie basis where there is awards with the same remuneration based on the descriptors in the classification, that prima facie suggests that there is the same work value. Now the onus is on the applicant to bring the evidence to satisfy the Commission in regard to that point. Now once prima facie that case has been established perhaps the onus shifts onto the respondent to demonstrate why there isn't the same work value because there is the conditions under which the persons are employed are different.

PN176

VICE PRESIDENT HATCHER: Right.

PN177

Mr Ward?

PN178

MR WARD: Thank you, your Honour.

PN179

VICE PRESIDENT HATCHER: Sorry, just to be clear. So Ms Andelman, your position is the question should be answered yes?

PN180

MS ANDELMAN: Yes.

PN181

VICE PRESIDENT HATCHER: Yes.

PN182

MR WARD: Our submissions will be in four parts. I think it's necessary at the outset to explain what we thought would happen following on from the 2015 decision in an equal remuneration case. I think we should come out of the wardrobe and just explain as simply as we can what we think should happen. I want to make a brief observation about what's being compared in the question. Then I want to focus on two things. I want to focus on the assumptions we say you must accept to answer the question in the positive, that is to say yes, and then I want to pose the proposition even if you do answer the question yes, where does it actually take us and that will bring me back to this actual work performed issue, which I'll talk about briefly at the end.

PN183

Now look, to explain how we thought things were meant to work can I try and use an example that's as simple as possible. That is a single female and a single male. Let's assume that the female is called Jane and the male is called Bob. Jane could very well work with the same employer as Bob. Jane could very well work with a different employer but in the same industry, or Jane could work in an entirely different industry and move from the equal to the comparable in terms of those propositions. We'd assume that Jane would have observed Bob, would have said "Hey, I'm actually performing work that I think is of equal or comparable value to the work, Bob, you're actually performing".

PN184

That there would have been an examination of whether or not they're actually performing work of equal or comparable value and if the parties consented that they were or the Bench in an arbitration determined they were performing work of equal or comparable value that is actually performing that work, you tick box 1. The next question is, is Bob paid more than Jane and if Bob's paid more than Jane you tick box 2. And having ticked those boxes, actually performing work of equal or comparable value, female, male, Bob is paid more, we'd get into a discretionary case.

PN185

Without trying to appear overly simplistic we thought that's exactly what was going to happen, and the Bench have said that obviously it can be done in a much broader way than just one employee, one employee. The Bench have also said that the broader you get the harder the case becomes and it seems to us, moving to my second point, that United Voice have possibly picked the hardest case that could ever be run because they're seeking to consider persons employed in a reasonably discrete industry, that's the childcare industry, it's reasonably discrete.

PN186

But they want to compare that industry at this stage to they say a particular award and, as we'll say later on, that award covers in an omnibus sense possibly the largest number of industries of any award that this Commission has, and the only commonality of those industries is that they have some form of manufacturing process. That's the only commonality we can find. But it's not only that expansive. That award is even more expansive than that. That award is also an occupation based award as well.

PN187

It covers mechanical, electrical trades, plus a series of other occupations, testers in environmental laboratories and all sorts of things. So what is being compared are extraordinarily complex propositions. The childcare industry is slightly simpler but the comparison is possibly the most complex comparison you could find. Now let me talk about the assumptions we say you have to accept to answer the question conclusively yes. There's four assumptions about the childcare industry and we say there are three assumptions you have to accept about the persons covered by the Manufacturing Award.

PN188

The first assumption is that the outcome of the 2005 decision which when it was made only applied to the ACT and Victoria, is applicable to the whole of Australia because the current Childcare Industry Award applies at large in Australia. So you have to assume that whatever was said for the ACT and Victoria has some application to the whole of Australia. In making that assumption you have to make a further assumption that you can say that even though other jurisdictions in the childcare industry took a very different approach to the valuing of work and the fixing of wages, and the most relevant case for that of course is New South Wales, and I might just hand up our folders. I apologise, I should have done this at the beginning.

PN189

I'll just be taking the Commission to some of these today. I won't take you in any detail to the New South Wales decision. Can I just say this about the New South Wales case. One, I have to accept that the New South Wales case was both a work value case and an undervaluation case although this Bench in its 2015 decision basically sees undervaluation cases as a form of work value case. It formulated different sets of rates for childcare workers to the ones that applied in Victoria and the ACT and it did so without getting caught up in this idea of a nexus to the Metal Industry Award. In fact it part rejected that concept.

PN190

So one of the assumptions you have to make of course is that that all means nothing. We turn a blind eye to whether or not that actually was perhaps better reasoned than the Victorian concept. We just turn a blind eye to it. The next assumption is about award modernisation. Now anybody who was involved in award modernisation will say a couple of things about it. They'll probably say it was the most extraordinary administrative process ever undertaken by an industrial tribunal. But being honest they'd say it was a bit of Rafferty's Rules, it was a bit of rough and tumble, and at best it was a Tribunal-supervised negotiation between industrial parties.

PN191

In the childcare industry that negotiation condensed a series of State and Federal awards into one instrument and you'd have to make a further assumption, and that is that the condensing of those awards, the bringing together of those awards, had no impact on what happened in 2005 in the ACT and Victoria. You also have to make a further assumption and that is since 2005 nothing has happened in the childcare industry in terms of the performance of work or things that impact the performance of work that impact the value of work.

PN192

Some 12 years has passed since 2005 so you've got to be comfortable if you're going to say "Well, whatever happened in 2005 is still alive and well and applicable", you've got to say that the last 12 years haven't introduced any changes to the childcare industry that could have impacted on the value of the work. Now with respect, the likelihood of accepting all those assumptions after rational reflection in our submission should lead you to a very arid outcome, and we struggle to understand how you could make those assumptions.

PN193

The applicant for its part has had a go at us with two lines of argument really. The first one is "Well, no one's challenged work values since that time. The employers could have run a work value case but they haven't". And the second one is that in 2008 an organisation which actually isn't my client, but I'll talk about that, suggested that the Victorian rates should be used for award modernisation. I just need to deal with both those points. I've never seen an employer run a work value case successfully reducing wages. In my experience whenever a work value case is run what seems to happen is wages go up.

PN194

So the Bench shouldn't be shocked that the employers haven't run a work value case in the childcare industry, and it's almost a silly question to ask. So the idea

that for some reason we've implicitly accepted what happened in 2005 and continue to support it, I just think that doesn't take you anywhere, and the employers haven't run a work value case because they obviously want to try and keep the rates where they are. The second proposition is a little more complicated but let's be honest about it. Can I just say at the beginning that the party in 2008 is not my client but I have to concede that a number of members of my current client would have been members of what was then a registered industrial association that has now been deregistered.

PN195

VICE PRESIDENT HATCHER: So which organisation was that?

PN196

MR WARD: The Australian Childcare Centres Association was a registered industrial organisation. I understand it was deregistered I think two years ago. I might be mildly corrected but I think it was two years ago. The Australian Childcare Alliance is not a registered body in the Federal system. Some of its State constituent bodies are registered in State systems but it's not really - it's not the same entity. But it would be wrong for me to say that members of the Alliance weren't possibly members of that association. I have to accept that many would have been.

PN197

But let's not get too caught up with what happened in 2008. The drive of the employers in 2008 was an obvious one. It didn't want the higher New South Wales rates applying across Australia so it simply selected a set of rates that were below the New South Wales rates that everybody in the industry was happy to live with. So again I would hate to think that there's some kind of deep science taken from the opportunism that the modern award process actually applied, and of course as the Bench would be aware, having been involved in the award modernisation process, in some industries employers wanted low rates and in some industries certain employers wanted high rates.

PN198

In this case it was just "Let's not have the New South Wales rates" because if we did there would be quite a lot of wage inflation in the industry and that's why that association at that time didn't support New South Wales rates. It supported Victorian rates. Let's just assume for a minute that you get through all those assumptions and you go "Mr Ward, we actually think those assumptions are made out. We support them, we accept them". We find that hard, but let's say you do. You have to make three further assumptions about the Manufacturing Award.

PN199

The first assumption is that the original C10 and C5 in the Metals Award - and I'm going to focus primarily on C10 because that's really where it all came from - that they were properly set on work value grounds originally. Mr Warren's client starts to go to this in their written submissions. It's something that is taken up from the historical perspective in the 2005 decision in part but I think it's important that I in dealing with that question develop a little bit of the history of that. I had not done it in my original written submissions but I think it would assist the Bench and it does arise very clearly from what Mr Warren's client said.

PN200

That's proposition number 1. You know, did Moses come down from the mountain? Was there an 11th tablet? Did it have C10 written on it or is there a little bit of myth about the whole origins of C10 which I need to go to? The second assumption you're going to have to accept is that when the award modernisation process happened in 2008 and the Metals Award disappeared and in its place an Omnibus Manufacturing Award appeared inclusive of coverage of a large number of occupations, that nothing in that process could have changed the value of work under that award. Now in Annexure C to our written submissions we set out the list of awards that were consumed by the Manufacturing Award.

PN201

That was obtained from the Australian Relations Commission draft awards audit website used for award modernisation. I won't take you to that other than to say this. I invite the Bench to review it. The Bench will see that there is a very large number of industries identified, the rubbers manufacturing, the plasterboard industry gets scooped in, brick manufacturing gets scooped in, the manufacturing of paint gets scooped in. There's a whole series of others that get scooped in. All of those industries had their own history, jurisprudence, setting of wages, valuing of work, and all of those get tipped into the melting pot.

PN202

In addition to that the award becomes the home for in particular mechanical and electrical trades people. The Bench would be well aware that historically many electrical and mechanical trades people were covered by industry awards. We use in our submission an example that I'm very familiar with and that was the quarrying industry in New South Wales where those mechanical trades people were actually covered by the Quarrying Industry Award and not by an occupations award. So all of the people historically covered by industry awards in those trades, they get sucked out of those awards with their own history and they get dropped into this Omnibus Manufacturing and Occupational Award.

PN203

And the challenge you have to come to grips with is can you assume that the fundamental shift in character from a very specific Metal Manufacturing Award, respondency based, to an omnibus broad sweep manufacturing award plus occupations from different industries coming in, has that possibly done anything to change the value of work under that award. You've got to assume, if you're going to say yes to your question, the answer is no there's no likelihood that that has made any change. And again it's really arid to say "Well, hey, the employers haven't run a work value case to test that". Of course the employers haven't run a work value case to test that. Why would they?

PN204

I can't understand why the unions haven't, but a personal view is I don't think many 30 year old legal officers in unions know how to run work value cases these days. That's probably why it hasn't happened. The next assumption you've got to make, the third one, you've got to assume also that in all of those industries and all of those occupations covered by the Manufacturing Award, that nothing has changed since work was last properly valued to impact the value of work.

Whether or not that's 2010, 2008, 2005 or in some cases some of those industries haven't had work properly valued predating back before 1989.

PN205

Now you might be prepared to form a view that the manufacturing sector has remained static over all those years. I think the Bench can take general notice of the dynamism in the manufacturing industry in Australia. The manufacturing process has not stood still. During this period we've gone through mechanical to hydraulics and pneumatics to computer processing. The manufacturing industry is now very commonly involved in robotics and artificial intelligence and we would think it would be very difficult to assume that all of those changes might not have impacted the performance of work and possibly its value.

PN206

But again to accept what the unions want to say in the affirmative you've got to assume that none of that has changed anything. You've got to make that assumption. With respect, it seems impossible to us that any exercise of rational reflection upon what has occurred transitioning from the Metals Award to the Manufacturing and Occupations Award, that any of those assumptions could be accepted as true. You would have to have very material doubt that that assumptions are correct. Can I therefore say this: in relation to those second and third assumptions we think it's obvious those assumptions would fail.

PN207

We think it's obvious (indistinct) the answer to the question has to be no, but I might just develop the first statement a little further, and I apologise but I'm going to have a short little history lesson if the Bench could just bear with me. So Mr Warren's clients started to move into this area questioning whether or not in 2005 there was actually any work value assessment in relation to the value of work in the metal industry and also in particular the work value assessment of the C10 classification, and your Honour the presiding member asked if there was any evidence about that.

PN208

The Commission should be cautious seeing C10 as some kind of holy writ. It was a construct for a purpose. Now this is discussed at some length but not the whole story in the 2005 decision between paragraph 142 to 154. The Full Bench talk at some length about the evolution of wage fixation arising from the 1989 National Wage Case decision, the minimum rates adjustment process and the like. I'm not for a minute suggesting that characterisation is any way wrong. It's actually correct but it only tells about 80 per cent of the story and I'd like to just provide the Bench with the additional 20 per cent if I can just to fill it out, and I'll try and do this as quickly as I can.

PN209

If the Bench goes to the folder and if I can start in reverse order with number 7. The Bench will recall that the 1987 National Wage Case decision introduced the two tier - I do apologise, I might be aging members of the Bench entirely inappropriately. I apologise. The 1987 National Wage Case decision introduced the two tier wage fixation system. It introduced the notion of the restructure and

efficiency principle and it also reintroduced the notion of supplementary payments through the supplementary payments principle.

PN210

VICE PRESIDENT HATCHER: So did you say tab 7?

PN211

MR WARD: Tab 7 is the National Wage Case March 1987. It should be 17 IR.

PN212

VICE PRESIDENT HATCHER: My folder doesn't have anything behind tab 4, 5, 6 and 7.

PN213

MR WARD: Mr Roche I think is about to lose his job, your Honour, but that will be a matter for later.

PN214

SPEAKER: I'll represent him.

PN215

MR WARD: You'll represent him? I think that's only fair.

PN216

Your Honour, I apologise - - -

PN217

VICE PRESIDENT HATCHER: I'm the only one, so keep going.

PN218

MR WARD: Are you? Your Honour will remember this. I think your Honour was in the case.

PN219

MS ANDELMAN: Your Honour, I'm happy to give your Honour my copy and I'll listen along.

PN220

MR WARD: This decision introduced the restructure and efficiency principle but it also reintroduced the principle providing for supplementary payments, and in large measure supplementary payments were effectively a payment separate to the minimum rate reflecting the existence of over-award payments in an industry. If I can take you to page 82. Under the heading "Supplementary Payments" the Commission says this:

PN221

> *In the decision of 23 December 1986 the Commission said it was prepared to consider a principle providing for the inclusion of supplementary payments in the minimum rates awards as part of a carefully controlled process to address the position of lower paid workers in the current economic circumstances and to assist in moving towards consistency between minimum rates and paid rates awards.*

PN222

The Commission turned to page 84 when they articulated that principle which is set out at the second half of page 84, A to F. A says this:

PN223

The prime consideration will be the level of actual payments to the employees covered by the award under review. Where relevant the level of supplementary payments made to similar classifications of employees in other minimum rates awards may also be taken into account.

PN224

And in C:

PN225

There must be a clear understanding and acceptance by the unions concerned in the award that the introduction or adjustment of supplementary payments may alter relativities of actual rates within the award and other awards.

PN226

I'll leave it there. That is the beginning of a conversation in the Federal Commission about relativities and some concern and anxiety about what it's doing disturbing relativities. The Commission then in 1988 in 25 IR which, if Mr Roche saves himself, should be at tab 6. I hope he does so. This National Wage Case decision replaced the restructuring and efficiency principle with the structural efficiency process and your Honour the presiding member will recall that in the 2015 Equal Remuneration decision there's a reference to the structural efficiency process, and if I could ask the Bench to go to the very last word on page 174 the decision says this:

PN227

We have decided therefore to provide a structural efficiency principle which will be the key element in a new system of wage fixation. That new principle will provide an incentive and scope within the wage fixation system for parties to examine their awards with a view to establishing skill related career paths which provide an incentive for work to continue (indistinct) skill formation eliminating impediments to multiskilling and broad banding the range of tasks that the worker may be required to perform -

PN228

And it goes on. The Bench then at about halfway down the page say this:

PN229

We expect that any resulting restructure will be done primarily by consultation and at minimum cost, however we are not prepared to allow the restructuring of some awards without regard to the relationship of restructured awards one to another and the overall cost impact -

PN230

And I leave it there. That's a reiteration of the growing anxiety about the relativity question and the concern that always seemed to plague the Federal Tribunal, which was this notion of leapfrogging claims, but then the issue hots up quite

considerably in the February 1989 review. That is at 27 IR which should be at tab 5. Will the Bench go to page 200.

PN231

VICE PRESIDENT HATCHER: What page?

PN232

MR WARD: I withdraw that. If the Bench goes to page 197. At about point 6 we hear this:

PN233

In addition to making reports on progress in various areas -

PN234

I just pause there. That's progress on how structural efficiency is going:

PN235

- the Australian Council of Trade Unions also produced a blueprint for award restructuring which it considered would facilitate major and substantial award reform on a general basis with a clear understanding of award relationships one to another and with the necessary level of control by this Commission.

PN236

And if the Bench then turned to page 200 at the last sentence, in considering all of this the Bench say:

PN237

The result is there exist in Federal awards widespread examples of the prescription of different rates of pay for employees performing the same work. But this is only part of the problem. For too long there existed inequitable relationships amongst various classifications. The situation as it exists can be traced to features in the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards -

PN238

Which back then were a major feature of the Federal system:

PN239

- different attitudes taken to the inclusion of over-award elements in awards, be they minimum rates or paid rates, the inclusion of supplementary payments of some but not others, and the different attitudes taken to consent arrangements in arbitrated awards -

PN240

And I leave it there. The next paragraph the employers come off pretty badly. There's a general criticism of employers looking at localised working surveys causing havoc and then the Bench go on to say:

PN241

In turn this has inevitably caused feelings of injustice leading to industrial disruption, unwarranted flow on settlements and leapfrogging in particular cases.

PN242

At about point 6 the Commission go on to say:

PN243

Consequently we endorse in principle the approach proposed by the ACTU though not necessarily the particular award relationships submitted in the case.

PN244

And at the next National Wage Case all of this crystallises and that is at tab 4 and if the Bench can go to tab 4 30 IR, and I'll do this fairly quickly. It's page 92 where the last sentence is this:

PN245

In these proceedings the ACTU sought specific endorsement for the following classification rates of supplementary payments -

PN246

And you see a table. Metal industries trades person. Minimum rate 356.30. Supplementary rate $50.70, and that is the same as a building industry trades person, and then you see some others further on. The Commission goes on to say after the table:

PN247

The Commission was informed that these rates and the relationships they bear to each other had been endorsed collectively by the trade union movement.

PN248

After that - sorry, I withdraw that:

PN249

After long deliberation they were also supported by the agreement made by the ACTU and the Commonwealth. It was argued that they would provide a firm base for sustainable relationships across Federal awards and thus provide a stable base for wage fixation -

PN250

And I leave it there. Now ultimately in that decision they only endorsed the top two. The metal industry trades person, that is the genesis of what becomes C10. In the next wage case which I don't have in your folder - I won't take you to it but just it's in 36 IRs commencing at page 120. In the next National Wage Case the Metal Trades Industry Association as it then was and the Metal Trades Federation of Union turn up with a consent deal for how to make all that work and that's how C10 starts.

PN251

Now I just raise that proposition because I always get anxious if the Bench think that somehow C10 was this three week work value case and it was all properly (indistinct) and whatever. C10 was a construct advanced with the agreement of the union movement accepted by the Commission for a purpose, and its purpose that it was accepted for wasn't that it reflected work value, its purpose was accepted because it would then create a framework that would create stability. And so in terms of the first assumption, we say you have to be comfortable with in relation to the Manufacturing Award, that is you have to assume that the original C10 was properly set on work value grounds. I ask the Bench to be cautious about that because it wasn't.

PN252

So those are the three assumptions you have to accept about the Manufacturing Award, as we've advanced, these four assumptions you have to accept about the Childcare Award and in our respectful submission it would be verging on the absurd to accept those submissions on any basis of rational reflection. Now let's just assume for a minute that you were against me on that and you said "Well, Mr Ward, we accept all of those assumptions", I'm not really sure where that takes us in any practical sense because I think we end up in one of two places.

PN253

Either what the unions are doing is comparing a person employed on a minimum rates classification in one award with a minimum rates classification on another, in which case they're paid exactly the same amount of money so the case ends there, or they're trying to do something else. Now eventually - even though they're trying to avoid it - eventually they're going to actually have to show you a comparator. It will have to be a man or a group of men. It will have to have blood coursing through their veins. They'll have to really exist.

PN254

They'll actually have to have a job. They'll have to perform work, and perhaps I can demonstrate the difficulty that's going to arise even if you answer the question yes. Let's assume for a minute that the person with blood pouring through their veins is a fitter at Coca-Cola Amatil. Good luck finding a C10 anywhere in industry, by the way. There aren't many left, but good luck. But let's say you find a fitter at Coca-Cola Amatil. I'm assuming that being Coca-Cola they've probably got an enterprise agreement. I'm assuming that the first two things you'd do when you find that is you'd say "Well, how's the work of the fitter at Coca-Cola Amatil actually classified?"

PN255

That's question number 1. "What do they actually do and "How does that work that they're actually performing compare to that woman in the childcare industry?" So it seems to us that even if you answer the question yes, you can't tick the comparator box. You've still got to go on later on and find the living real comparator, understand what work they're still actually doing and then come back and answer your first question which is, is the work they're actually doing of equal or comparable value to the woman in the childcare industry.

PN256

So with respect to the applicant, even if you do answer yes, which we find hard to believe, it doesn't in our respectful submission do what is required from the 2015 decision which is a necessary step, and that is one, is the actual work performed by the woman and the man or the group of women and the group of men of equal or comparable value. We still have to do that and I just don't understand why that's not - it seems to me to be a simple exercise. Go and find them, let's examine what work they're doing. But it seems to be something that the United Voice are trying to avoid at all costs. In our respectful - - -

PN257

VICE PRESIDENT HATCHER: To be clear, the way these proceedings have been structured, if the answer to the question is yes, the work value part of the equation is just over and we move on to the further aspects of the enquiry.

PN258

MR WARD: This is the real problem. You can't answer yes. You just can't because you haven't examined the actual work that the comparators perform, and if you're simply comparing somebody paid on the minimum rates awards with somebody paid on the minimum rates award, well there's no difference in pay. That's the work that the award says they're being paid for. You're actually trying to examine people who are performing real work. So in our view if what your Honour is saying is right then you can't answer yes. You just can't.

PN259

It would be against the 2015 decision of the Full Bench to do that because you're preventing a proper examination of whether or not the work actually performed between A and B is of equal or comparable value, and this Full Bench has said that that's what we have to do first. In our respectful submission we say the question should be answered in the negative and the matter should be dismissed. If the Commission pleases.

PN260

VICE PRESIDENT HATCHER: Mr Warren, we might just take a morning tea adjournment of about 10 minutes before we resume.

SHORT ADJOURNMENT **[11.03 AM]**

RESUMED **[11.22 AM]**

PN261

VICE PRESIDENT HATCHER: Yes, Mr Warren.

PN262

MR WARREN: Yes, thank you, your Honour. Your Honours, Commissioner, I'll be brief. AFEI relies upon its submissions filed in these proceedings. It's important to note that these proceedings are about a preliminary question, and the preliminary question was clearly stated by the Commission on 6 July 2017. The question being, in essence, can the Commission be satisfied based solely on the 2005 decision, that the work performed by employees classified in C5 and C10 under the Manufacturing Industry Award is of equal or comparable value to that

of the employees who are either diplomat level or Cert III level under the Child Services Award.

PN263

It is essential as has fallen between the Bench and the Bar table today, there needs to be identified with some precision a comparator group, and we say clearly the Manufacturing Award and the classifications C5 and C10 which have been drawn cover clearly a broad range of types of work and types of employees across Australia. The very essence of saying C5 and C10, here's the classification structure, that's our comparative group, is insufficient. There needs to be identified with great precision, we say, what is that comparator group, what work do they do, what is the work value of that comparator group. What are the circumstances under which the work is performed et cetera. Then that is the step one.

PN264

There was in the 2005 case - no comparison of work value between the C5, C10 and the diplomat and Cert IIIs in the childcare industry. There was certainly extensive work value conducted and evidence given with respect to the Children's Services Award. So much is apparent from the decision. But there was - the link between the Metals Award and the Children's Services Awards as they were then was the question of qualifications. It was Cert III in metals equals in Cert III in childcare. Cert III equals Cert III across Australia.

PN265

Once you've got your Certificate III it's a standard form of qualification. A diplomat is a standard form of qualification, and that was the essence of the 2005 decision in linking those two classifications in metals to the Children's Services Awards. I speak to them in general terms. There was no attempt, nor was there a need to have an attempt, to do a work value comparison between the metals and the Children's Services Award. I think it was my learned friend Mr Ward has said that the union couldn't have picked a tougher one.

PN266

The Manufacturing Industry Award is so broad and the types of people that may be employed as C5 or C10 can vary broadly across Australia in many ways. Yet what has to be identified, what has to be identified is the comparative group. What work does that comparative group do? What is the work value of that comparative group? What are the circumstances and situation of the work in that - with that group, and where does it compare and how does it compare with the persons they are attempting to bring in with equal remuneration order in the Children's Services Award. That's the exercise. That exercise was simply not done in 2005, nor was it necessary, of establishing minimum rates. Nor was it necessary.

PN267

So we say quite clearly the answer to the preliminary question is no. You cannot be satisfied solely on the 2005 decision that a proper comparative group is established by looking generally at C5 and C10 under the Metals Award, with persons who have Cert III and diplomats in the Children's Services Award. That really is the end of the matter so far as these proceedings today are concerned.

PN268

The areas that other or the union have covered or attempted to cover in their submissions today go beyond what the preliminary question is. Identify the 2005 decision, what does it say. What does it say so far as assisting the Commission as is currently established with the task at hand, and that is establishing number one, a comparative group. The 2005 decision is of no assistance for this Commission to establish and comparative group and in that circumstance, and for all the reasons we both put in our written submissions and we note of course the helpful submissions on the law with respect to the - from the Commonwealth. It is not possible to establish a comparative group for the purposes of the equal remuneration order in section 302(5) of the Act in these proceedings. Unless there are any questions, those are the submissions.

PN269

VICE PRESIDENT HATCHER: Thank you. Ms Eastman.

PN270

MS EASTMAN: If the Full Bench pleases, we rely on the submissions filed on 8 November and the Full Bench will I think appreciate that the Commonwealth doesn't advocate for any particular answer to the question. We don't advocate an answer of yes or no and I don't think there's any room for an answer being maybe, perhaps or could be. The question's framed in a way we understand it that your Honours need to be satisfied that the answer to the question is in fact yes, and if it's not yes then in a sense that's the end of the case.

PN271

The approach that the Commonwealth takes in its submissions is to assist the Full Bench on the approach that may be taken in answer to the question, and that is an approach that has to be informed by the operation of part 2-7 of the Fair Work Act, together with the 2015 decision. If one looks at the question as posed, we would say the first step is to go back one step, and the initial question that was sought on the preliminary comparative question was put this way; are the C5 and C10 classifications under the Metals Award a suitable comparator. So that's how the matter started.

PN272

Now for various reasons that question was not going to be appropriate and so the modification of that question to the question posed by the Full Bench following the decision in July, we thought directed the parties' attention very squarely to four issues. The first issue was to identify work performed by employees under C5 and C10 classifications. So that was a necessary step that had to be addressed in the question. The second question to be able to approach this issue was to ask what is the work of employees under the diploma level or Certificate III level classifications in the Children's Services Award?

PN273

So they're the starting point. Then what the question required is assistance in asking whether or not the work performed with respect to employees in the two groups or one might subdivide those groups into four total groups, was that work of equal value or was that work of comparable value? In that context the approach that the Commonwealth takes is to say as a matter of law that cannot be

done in an abstract fashion and it cannot be answered by way of a hypothetical question.

PN274

So for the matters that we've identified in our written submissions, the concerns the Commonwealth raises at paragraph 13 is to express our reservations as the Commonwealth that the applicants had not identified actual comparative groups of men or women for the purpose of identifying unequal remuneration. The concern that we addressed in paragraph 13 was that the approach taken by the applicants was based on a hypothetical group of men employed under C5 or C10 classifications, and a largely hypothetical group of women employed at a diploma or certificate III level.

PN275

The difficulty in not identifying the work performed, and in that concept one is not only looking at a particular task that must be performed, the authorities make it clear that the question is directed to work, skill, responsibility and also to look at the conditions in which the work is performed. That necessarily has to be identified. Once that's done we get to the question of whether or not the work is of equal value or comparable value. Those expressions equal and comparable are different for the purpose of part 2-7. If I could take the members of the Bench back to the jurisdictional decision, the 2015 decision.

PN276

I'll use the pamphlet version as Mr Borenstein did. It's page 67, paragraph 280. The Full Bench said there at paragraph 280 that:

PN277

There was no issue and we accept that the expression "work of equal or comparable value" refers to equality or comparability in work value.

PN278

They go on to say by reference to the earlier decisions is that:

PN279

Such decisions point to the nature of the work, skill and responsibility required and the conditions under which the work is performed as being the principal criteria of work value.

PN280

Just pausing there. In our respectful submission, simply identifying comparative classifications may be a helpful starting point but the classifications themselves don't answer the question as to what is the nature of the work, skill and responsibility required and the conditions under which the work is being performed.

PN281

You'll see at paragraph 281 that the Full Bench also notes that:

PN282

One might take into account the specific characteristics of the work under consideration and it may be appropriate to apply a different and additional criteria in order to assess equality or comparability in the value.

PN283

That's the point that we've sought to make in paragraph 15 of our submissions, that it may be one thing to compare award dependent employees in two different industries or areas, but it's another thing to compare an award dependent employee, for example, in the childcare industry against those employees whose remuneration depends on bargaining outcomes who would otherwise be covered for minimum rates purposes by the Metal Award. So that question of whether ones comparing the work value necessarily has to take into account specific characteristics if they exist.

PN284

The final question then is what does equal mean and what does comparable mean, and again the Full Bench dealt with this, in our respectful submission, clearly and helpfully in the decision. With respect to the meaning of equal at paragraph 282 the Full Bench says:

PN285

Equal in respect of work value should as with remuneration be given its ordinary meaning and that is the same as or alike.

PN286

As we understand our learned friend's submissions for the unions, this case is not about equal in the sense of work that is the same or alike. The focus of the submissions this morning is very much on the work being comparable, and in that respect the Full Bench deals with the ordinary meaning of comparable at paragraph 287. The question there is it's comparable work if it is capable of being compared or worthy of comparison. The Full Bench says:

PN287

We consider that having regard to the extrinsic matters referred to above the inclusion of comparable serves the purpose of applying the provisions of part 2-7, not just to the same or similar work that is equal in value but also to dissimilar work which is nonetheless capable of comparison.

PN288

They go on to say at paragraph 288:

PN289

This means by which equal and comparable value may be established will depend on the groups of male and female workers being compared.

PN290

Now the criticism made with respect to our paragraph 21 was that what we sought to highlight in that paragraph is that what the Commission had in mind in this jurisdictional question was not abstract comparisons based merely on classification or workers who are not identified. The paragraphs that we referred to in turn in paragraph 21 all refer to the Commission having in mind the

identification of groups of particular workers. This, in our submission, is reinforced by paragraph 288 where the Full Bench says that:

PN291

The means by which equal or comparable value may be established will depend on groups of male and female workers.

PN292

That's a different question to simply saying that a particular industry or area is female dominated or male dominated.

PN293

In summary, our submissions address the importance of the preliminary question being answered by reference to identified work performed by employees in the respective areas, be it C5 and C10 classifications on one hand and by the diploma level and Certificate III employees on the other hand. This is an exercise that should not be done where one looks at these questions in the abstract or the hypothetical. We understood that the Full Bench was inviting the parties to identify with some specificity the work performed so that the exercise of asking whether there was equal of comparable value could be a question answered in the concrete, and not in the abstract. So unless there's any particular matters arising out of the Commonwealth's submissions, those are the only matters that I wish to raise this morning.

PN294

VICE PRESIDENT HATCHER: Thank you, Ms Eastman. Mr Gunn.

PN295

MR GUNN: Thank you, your Honour. CCSA remains an interested party in the remuneration case, however we're not taking a position on the specific issue of United Voice's proposed comparator as the work performed by employees covered by the Manufacturing and Associated Industries and Occupations Award lies well outside our area of expertise. We're mostly interested in fully understanding the outcomes of today's hearing for subsequent proceedings in this case, and believe the current issues are being more wholly ventilated by the other parties than an organisation such as CCSA could do. However, we do stand ready to assist the Commission understanding any of the specific characteristics of early childhood education and care if that is of any utility. Commission pleases.

PN296

VICE PRESIDENT HATCHER: Thank you. Mr Borenstein, reply?

PN297

MR BORENSTEIN: Yes, thank you. Can we start by going to the headline issue which your Honour identified in my earlier submissions and which other parties have addressed. Our position we submit is supported by what was said in the 2015 decision, particularly at paragraph 280. This is on page 67 and you'll see that the Full Bench there said:

PN298

There was no issue and we accept that the expression of work of equal or comparable value refers to equality or comparability in work value.

PN299

Not in work but in work value.

PN300

The established industrial conception of that term as developed in the decision of this Commission's predecessor tribunals, as well as by other state tribunals, is the primary source of guidance in this regard. Such decisions point to the nature of the work.

PN301

We say the nature of the work is identified by the classification descriptors in the awards that were used in the 2005 decision and the descriptors that were adopted when the modern awards were made, which in the Childcare Award applied those descriptors. It talks about - - -

PN302

VICE PRESIDENT HATCHER: Mr Borenstein, that be the question that arises from what Ms Eastman said about what is meant in the question and maybe the fault is in the question by the phrase "employees under the C5 and C10 classifications". That is who actually are they? Are they persons doing precisely the work described in those classifications, are they persons paid in accordance with those classifications or are they some broader group?

PN303

MR BORENSTEIN: They are persons doing the work in those classifications.

PN304

VICE PRESIDENT HATCHER: Right. How do we work out who they are in a real life sense?

PN305

MR BORENSTEIN: Your Honour - - -

PN306

VICE PRESIDENT HATCHER: As distinct from doing that and something else or doing some of it but not all of it. How in a real sense do we grapple with identifying what that group is for the purpose of the remainder of the exercise?

PN307

MR BORENSTEIN: Your Honour, we would say respectfully that that's not the question that needs to be answered. You don't need to be able to identify a list of names. You don't need to be able to identify members of a particular group in terms of names, identify individuals. It is sufficient, we say, that you can identify a group or a cohort of workers by reference to the classification under which they work in a particular industrial instrument. That is sufficient. Otherwise we have the same problem on the other side of the equation as well, and we don't understand that the 2015 decision required that level of specificity.

PN308

What you need is to be able to identify a group sufficiently for the purposes of deciding whether the work that's performed is of comparable value. What we say here is that the group of people who work under the classifications in the Metals Award that we're referring to, the two classifications, and in the appropriate classification in the Childcare Award are both identified by reference to the fact that they are employed, persons who are employed under those awards in those classifications. That is a sufficient descriptor to enable you to determine the comparability of the work value.

PN309

The point I was going to come to, and I'll come back to your particular question, but the point I was going to make here was that in paragraph 280 the Commission points to the factors that you look to, to work out the work value. They point to things such as the nature of the work, which we say is the descriptor in the classification. The skills and responsibilities required, again identified in the descriptors in the classifications and the conditions under which the work is performed. The Full Bench in 2005 made reference to those conditions and the submissions that were made by the employees, although it didn't identify particularly the submissions that were made but they pointed to the fact that they took into account the conditions and said that the conditions didn't dissuade them from applying the criteria that were derived from the AQF classifications.

PN310

But then going on they say:

PN311

We consider that those criteria are relevant in determining whether the work being compared is of equal and comparable value, however it's noted in the principles set down in the 1972 equal remuneration pay case work value inquiries have been characterised by the exercise of broad judgments.

PN312

As Munro J said:

PN313

Experience of work value cases suggest that work value equivalence is a relative measure sometimes dependent on an exercise of judgment. A history of such cases would disclose a number of evaluative techniques that have been applied for various purposes and with various outcomes from time to time.

PN314

Now the submission we want to make is this. In 2005 nobody identified the particular group of childcare workers who were the subject of the application. They didn't say the childcare workers down the road or the childcare workers in Victoria or the childcare workers in Tasmania. It was put in terms of a group of employees who are employed under a particular classification level in that award. That was regarded as being appropriate and nobody has demurred from that proposition and again when you're looking at the modern award, when they're fixing classifications and the money to be attached to each classification, nobody said you have to go and identify a whole bunch of people in order to do that. It

was an accepted practice, an accepted part and an historical practice in the Commission, in cases of this kind, that you deal with people as the groups who work under a classification. Classification describes the work that they are supposed to do and for which they get paid and are entitled to get paid, and that values that work.

PN315

VICE PRESIDENT HATCHER: I'm just trying to tease out again what the question is asking us to do. So in the - for example, in the steel industry at Port Kembla they're covered by an enterprise agreement. The employer doesn't use the classification structure in the award, it has its own long established internal pay structure. Is anybody down there employed under C5 and C10? I mean there's no doubt the award would cover the work but what does it mean to say someone's employed under those classifications?

PN316

MR BORENSTEIN: Well, your Honour - - -

PN317

VICE PRESIDENT HATCHER: I mean I'm sure there's somebody in the steelworks who does work, which if they're under the award would be under those classifications but employed under their discreet classifications, they do whatever they do.

PN318

MR BORENSTEIN: But your Honour it may come down to this, just as for example in the situation that your Honour gave there has been a negotiation where the classifications in the award have been departed from and there's been a site specific or industry specific classification structure, different from this.

PN319

VICE PRESIDENT HATCHER: It's a structure that pre-dates them coming into this award.

PN320

MR BORENSTEIN: Well, however that arises, it couldn't be said that those people are employed under this classification structure.

PN321

VICE PRESIDENT HATCHER: Could not be.

PN322

MR BORENSTEIN: Could not be.

PN323

VICE PRESIDENT HATCHER: So for example if you got to step three where we're comparing remuneration, they could not be counted in the analysis.

PN324

MR BORENSTEIN: No. No, and - - -

PN325

VICE PRESIDENT HATCHER: So you'd have to just find people who were explicitly employed under these classifications.

PN326

MR BORENSTEIN: Because it's the consequence of the premise. If the premise is that the comparator is the group that works under these classifications then when you come to the point of determining the equal remuneration or the differential, you obviously must confine your inquiry to those people who are employed under these classifications. Otherwise it's illogical. We readily accept that. We also accept that, as your Honour points out, there are a number of work places, perhaps even industries, where differential classification structures are in place. That's just a fact of the industry.

PN327

It will be that those people who are not caught within this classification structure can't be argued to be the subject of the comparison, because the comparison that was made in 2005 and the comparison that we seek to make now is based on that group. We accept that. That's clear limitation. We accept that. But we say that within that group you have a situation where the value of the work that was being performed by the childcare workers was fixed by reference to the value that was put on on the minimum rate for the work of the other people. So the work was a comparable value.

PN328

The fact that one group has been able to leverage a higher remuneration is something that's dealt with at the third stage. But the work has been recognised in 2005 as having a comparable value and that position has been perpetuated for 12 years, and the position that's being advanced against us now is that it was okay in 2005 to value the childcare workers work value then by reference to these people, but for the purpose of the award - the wage fixation in 2005, but that despite the fact that that process and that outcome has been accepted in 2005, in 2010 in the modern awards and in the reviews, but now when we come to ERO, which is intended to be a remedial provision to allow people who have fallen behind of the agenda to catch up, that we now have to have a more stringent test, a more demanding analysis, a more far reaching analysis.

PN329

We would say a more impractical in a realistic sense analysis, in order for these people to achieve a remedy which the Act is struggling to give them. We say that the Commission should proceed on the basis that where the work has been recognised as of equal value, even though for the purposes of the minimum rates nonetheless it was the value which was put on the childcare workers' efforts in 2005, and which has continued to be the determinate of their wages in overwhelming part, that that should be set to one side where they seek to take advantage of this remedial provision under the part 2-7 to say well our wages are undervalued by reason of gender, and we want to catch up. All of a sudden we're confronted by a barrage of submissions which say well, that was good enough in 2005 and it was good enough in 2010, and when one of the employer organisations came to the Full Bench on the modern award making and said this is the valuation you should put into the 2010 award because it's the proper work

value valuation, and they now come along and say well it wasn't us, it was our predecessor or our uncles or our aunts or what have you.

PN330

Nonetheless the Commission proceeded on that basis and dealt with the awards, and all of these - and overwhelmingly the people in the childcare sector had their wages fixed by that valuation, by that connection. It is still regarded as being the appropriate connection. However C10 came about historically, that is the connection that has been recognised in this Commission for all purposes except this. We say that that is an irrational outcome in terms of statutory construction if that's where you end up. We say it's a constructional point that you shouldn't come to.

PN331

VICE PRESIDENT HATCHER: So do you accept that your comparator group by reason of the expansion of the award would include persons who weren't in the Metals Industry Award at the time of the 2005 decision?

PN332

MR BORENSTEIN: Well, I was going to come to that, your Honour.

PN333

VICE PRESIDENT HATCHER: Right.

PN334

MR BORENSTEIN: The - I'm sorry - Mr Warren gave us notice yesterday that he was going to produce the classifications that were in the Metals Award in 2008 and I understand he has them in the Commission, and I wonder - - -

PN335

MR WARREN: I haven't produced them but I'm quite happy to - - -

PN336

MR BORENSTEIN: I wonder if he might provide them.

PN337

MR WARREN: Yes, sure.

PN338

MR BORENSTEIN: 1998, yes, sorry. So these as we perceive them are the classifications that were there in the period when the 2005 award was made and we also hand up copies of the classification which appear in the current modern award, and a comparison of the two documents. So if you go in the first document to work group C10 which is on page 82 of 101.

PN339

DEPUTY PRESIDENT DEAN: Sorry, Mr Borenstein, the first document was what?

PN340

MR BORENSTEIN: This is the classifications in the Metals Award - - -

PN341

DEPUTY PRESIDENT DEAN: As at.

PN342

MR BORENSTEIN: - - - as at 1998 - as at 28 April 1988 - 1998, I apologise.

PN343

DEPUTY PRESIDENT DEAN: Thank you.

PN344

MR BORENSTEIN: The second one you will see at the top is the award with all amendments up to 29 July 2017. So to do a quick comparison of the content of the classifications as I said in 1998 one on page 82 of 101, and in the 2017 one it's on page 105, and you will see that the difference is the addition of the word "manufacturing" in paragraph (a) after the word "engineering", and then in (i) the same, and in (ii) the same, but that if you look at - if you look at the function you'll see it says that:

PN345

Those persons is able to exercise the skills and knowledge of the engineering trade so as to enable the employee to perform work within the scope of his level.

PN346

Then in (ii) again the same in both:

PN347

Understands and applies quality control techniques, exercises good interpersonal communication skills -

PN348

so and so on. In the - so it appears that apart from the change in the description of a tradesperson by adding the manufacturing components, the actual functions haven't changed. Then the same comparison can be made with C5, which is on page 87 of 101 in the earlier award and at page 111 in the current one. The difference that you see there in the first part of C5 is after the dot points, "who has completed", and in the earlier one there are three items of qualification and in the later one that's described differently as:

PN349

Complete the minimum training requirement specified in B21, schedule B or equivalent.

PN350

Then the balance, as I understand it, is again the same except down to paragraph - yes, for the engineering technician that is now described as engineering/laboratory technician and there is a reference in the 2017 document to some additional skills required of a laboratory technician, which is to use judgment and problem solving skills to perform a range of routine and non-routine tests.

PN351

So overwhelmingly we say the classification requirements are the same or to the extent that they are different we would submit that the differences are not significant for present purposes.

PN352

VICE PRESIDENT HATCHER: Well, that's a technical comparison but I was really asking a different question. That is that the award modernisation process brought in industries and occupations however classified that weren't in the Metals Award in 2005. Do you accept that?

PN353

MR BORENSTEIN: I'm sorry, would your Honour repeat that?

PN354

VICE PRESIDENT HATCHER: Yes. When the - as a result of the award modernisation process the current Manufacturing Award covers workers in industries and occupations that were not covered by the Metals Award in 2005. Do you accept that proposition?

PN355

MR BORENSTEIN: Yes.

PN356

VICE PRESIDENT HATCHER: Now does that have any implications for continued comparability as for example the condition under which work is performed or other issues concerning skills or responsibility? So for example Mr Ward said that the Quarries Award or some aspect of the Quarries Award ended up in the Manufacturing Award.

PN357

MR BORENSTEIN: Yes.

PN358

VICE PRESIDENT HATCHER: Does that raise the possibility that whatever was said about the conditions under which the work was performed in 2005 can no longer be automatically translated to the award now?

PN359

MR BORENSTEIN: Well, in terms only of the question of the conditions under which the work is performed, one would have to accept that if there are activities, industrial activities that weren't covered previously it leaves open the possibility that conditions in those areas might be different. The problem that derives from the 2005 decision's treatment of conditions is that there's no explanation of particulars or particulars of the conditions that were actually explained to the Full Bench, or that the Full Bench took into account and weighed in the decision. So we're at something of a disadvantage there in terms of answering what your Honour says, but we should remember - - -

PN360

VICE PRESIDENT HATCHER: Well, the Full Bench seemed to just draw on its inherent knowledge of the metals industry.

PN361

MR BORENSTEIN: Yes, that's right and I understand where your Honour's going with that. I can't avoid that but the Full Bench - excuse me. The Full Bench did make the point, as you would remember, that they were not persuaded that the conditions under which the work was performed took away from or detracted from the impact or the importance of the AQF comparisons, and on that basis we would - and allowing also for the fact that this linkage has continued unquestioned even after the modern award was made, right up to the present time, so that the childcare workers are still linked at those levels, in our respectful submission, should lead you to the conclusion that although we can't now say with certainty that the conditions consideration which the Full Bench had then might have been different and led them to a different conclusion.

PN362

We say that you should give the same priority to the AQF requirements that they did and you should treat the nexus or the linkage which they created as still being a valid one because of the significance of it then, because of the continuation of it then, because of the fact that the industry has continued unquestionably to apply that linkage, that it would be an inappropriate exercise to now say well, it doesn't apply any longer and we don't think that we should use it as a legitimate connection or linkage between the two people.

PN363

In a sense it's almost a matter of equity to be applied that where a state of affairs has been in place for such a long time unquestioned by any of the parties, encouraged by some of the parties at critical stages, that at this point those parties should be able to walk away from that situation and that the childcare workers should be told well that's all very well but you have to do the whole work value thing again. We say that that would be a very unfortunate situation to produce in a case such as this. Can I just see if there's anything else that I need to deal with. No, I think that's all I need to say, thank you.

PN364

VICE PRESIDENT HATCHER: In relation to the disposition of the matter, if the answer is yes do we then, what, list the matter for a further directions hearing?

PN365

MR BORENSTEIN: I think so.

PN366

VICE PRESIDENT HATCHER: Would then that be a single hearing to complete the matter or would there be further discreet stages do you envisage?

PN367

MR BORENSTEIN: Well, we wouldn't anticipate any further discreet stages but we'd be assuming that we would then move into the sort of phase 3 process, and that the Commission would give programming directions for the filing of material and then there'd be one more hearing.

PN368

VICE PRESIDENT HATCHER: And if the answer is no?

PN369

MR BORENSTEIN: Well, I think I said to your Honour on the last occasion in answer to a very direct question that that would seem to be the end of it.

PN370

VICE PRESIDENT HATCHER: Right.

PN371

MR BORENSTEIN: Would your Honour just excuse me a moment?

PN372

VICE PRESIDENT HATCHER: Yes.

PN373

MR BORENSTEIN: My attention's just been drawn to paragraph 24 of your decision in 2017. The Bench raises the question about how the jurisdictional prerequisite is then discharged for other classifications in the award, and I think the way we would envisage it is that that would form - that would be informed by the decision which the Commission makes on the preliminary question, and the reasoning of that decision. But that would form part of calculation of the equal remuneration order as it applied through the award, based on the existing award relativities that are in place and that's the way we would see it. I'm not sure what position the other parties would take on that, so that might be a matter that will have to be at least discussed at the directions hearing after the decision is made if it's in the affirmative.

PN374

VICE PRESIDENT HATCHER: If there's nothing further, we thank the parties for their submissions. We reserve our decision and we will now adjourn.

ADJOURNED INDEFINITELY [12.08 PM]