

## **Fair Work Commission Annual Wage Review 2023-24**

### **Reply Submission by Professor Meg Smith and Dr Michael Lyons**

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**April 2024**

1. Professor Smith and Dr Lyons work in the School of Business at Western Sydney University. The views in this reply submission are expressed in our private professional capacity, and do not purport to be the views of Western Sydney University.
2. In 2021 we were commissioned by the Australian Nursing and Midwifery Federation (through Gordon Legal), concerning the work value of classifications in aged care and nursing awards. This work was the basis of expert witness evidence to the Fair Work Commission matters AM2020/99, AM2021/63 and AM2021/65, concerning the work value of nominated classifications in the Aged Care Award and Nurses Award.
3. The FWC refers to this work as the “Smith/Lyons Report”, and was cited by the FWC Full Bench in the 2022 Aged Care Industry Stage 1 decision ([2022] FWCFB 200; Re Aged Care Award 2010, (2022) 319 IR 127) and the FWC Expert Panel in the 2024 Aged Care Industry Stage 3 decision ([2024] FWCFB 150). A subsequent statement by the President on addressing occupational segregation and gender undervaluation directly cited that part of the Commission’s decision in the aged care sector that relied upon the Smith/Lyons Report.<sup>1</sup>
4. We also made a submission (No 12) to the Senate Education and Employment Legislation Committee Inquiry, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.

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<sup>1</sup> Fair Work Commission (2023) President’s Statement – Occupational Segregation and Gender Undervaluation, paragraph 7, URL <https://www.fwc.gov.au/documents/consultation/presidents-statement-segregation-gender-2022-11-04.pdf>

5. This reply submission to the Annual Wage Review 2023-24 is motivated by the gender pay equity research reports initiated by the FWC, discussed in the President’s Statements of November 2023 and December 2023, and published on the FWC website.<sup>2</sup> We refer to the November 2023 publication (Cortis et al. 2023)<sup>3</sup> as the “Stage 1 research report”. We refer to the April 2024 publication produced by staff at the FWC as the “Stage 2 research report”.
  
6. Both President’s Statements included in the lists of 13 modern awards relevant to the pay rates of highly feminised occupations the Educational Services (Schools) General Staff Award 2020 [MA000076] for the occupational classification Education Aides. Our comments are mainly restricted to this modern award and this occupational classification.

*Stage 1 research report (15 November 2023):*

7. Chapter 10 of the Stage 1 research report (Cortis et al. 2023: 45-49) explores the Preschool and School Education sectors and identify occupational categories in the sectors has a very high proportion (80% or more) of women workers. While preschool and early childhood education occupations are the most highly feminised, the occupation categories of “Educational Aides” are a likewise highly gender skewed workforce:
  - Education Aides in primary education 92.9% female;
  - Education Aides in secondary education 82.1% female; and
  - Education Aides in combined primary and secondary education 88.0% female.
  
8. The role of Education Aides is described as performing “non-teaching duties to assist teachers”. About two-thirds (66%) of Education Aides are employed in the public sector (i.e. government schools). About two-thirds (67%) of Education Aides work part-time.

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<sup>2</sup> URL: <https://www.fwc.gov.au/agreements-awards/gender-pay-equity/gender-pay-equity-research>

<sup>3</sup> Cortis, N., Naidoo, Y., Wong, M. and Bradbury, B. (2023). *Gender-based Occupational Segregation: A National Data Profile*. Sydney: UNSW Social Policy Research Centre.

9. About half of Education Aides are aged over 45 years. About 70 per cent of Education Aides have obtained a post-school qualification at Certificate III level or higher (though the qualification might not be directly related to the work performed) (Cortis et al. 2023, Table 10.1).
10. Relying on data from the Survey of Employee Earnings and Hours (EEH), award dependence or award reliance for Education Aides seems to be rare as collective agreements are the main method of setting pay (over 95%). However, a note to Table 10.2 states this estimate should be used with caution (Cortis et al. 2023: 49). We note as well that minimum wage rates are established by the relevant modern award that sets a legally binding minimum wages and conditions of employment. These award rates are most relevant for award-reliant employees but also establish legally binding minima for those whose actual rates of pay are determined by enterprise agreements.<sup>4</sup>
11. The Stage 1 research report shows in 2021 Education Aides were paid a median hourly rate of \$31, which was less than the all employee rate of \$35.70 per hour (Table 10.2). The federal modern award most applicable to Education Aides working in non-government schools is the Educational Services (Schools) General Staff Award 2020.
12. There is some uncertainty about the size of the Education Aides workforce in non-government schools. For instance, Table 10.1 shows the workforce size for the ANZCO 4-digit code 4221 Education Aides as:
- Combined primary and secondary education 14,667 workers;
  - Primary education 49,323 workers; and
  - Secondary education 20,749 workers.
- Thus, the total occupational workforce in Australia in 2021 was 84,730.
13. However, Table 10.2 shows an occupational workforce size of 131,079.

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<sup>4</sup> Layton R, Smith M and Stewart A (2013). *Equal Remuneration under the Fair Work Act 2009*, Report for the Pay Equity Unit of the Fair Work Commission, University of Adelaide, p. 98, p. 126; Pointon M, Wheatley T, Ellis, G et al (2012) *Award Reliance and Differences in Earnings by Gender*, Research Report 3/2012, Fair Work Australia, Melbourne, p. 4.

14. With about one-third (34%) of Education Aides working in non-government schools, the “Schools Award” would be relevant for between 27,000 (34% of 84,730) and 44,000 (34% of 131,079) Education Aides, plus the school staff employed in the other award occupational classifications.

*Stage 2 research report (4 April 2024):*

15. Part 3.4 of the Stage 2 research report <sup>5</sup> discusses the Educational Services (Schools) General Staff Award 2020, or the “Schools Award”. This modern award covers the school education industry, and has classifications relevant for classroom support services, curriculum/resources services, preschool/childcare services, school administration services, and school operational services. While some “instructional” roles apply, the award does not cover teachers (Stage 2 research report [142]).
16. The Stage 2 research report restates the observation in the Stage 1 research report that relatively few Education Aides are award-reliant but does not highlight the cautionary note of the Cortis et al. (2023) Table 10.2 (Stage 2 research report [144]).
17. Aspects mentioned in the Stage 2 research report of the “pre-modernisation” situation are noteworthy: (1) unlike in other industries, there does not seem to have been a principal federal award from which to draw from in setting rates and classifications; (2) the relevant awards were generally made by consent agreements and not an arbitrated process; and (3) with the exception of NSW, the awards operated as a “safety net” underpinning above-award terms and conditions of employment (Stage 2 research report [145]). The pre-modern awards shared similar classifications and rate structures with either a three or four level classification structure and with pay increments within each level (Stage 2 research report [147] – [148]).

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<sup>5</sup> Fair Work Commission (2024) Stage 2 report: Gender Pay Equity Research, Annual Wage Review 2023–24, April 2024.

18. The Stage 2 research report indicates the award modernisation process was somewhat straightforward. The draft modern award contained 8 classification levels with pay points for most levels, and “commencement levels” for different occupation roles (e.g. classroom support services grades 1 to 3, school administration services grades 1 to 8 etc). This arrangement was unaltered in the final modern award of 4 September 2009, and the AIRC Full Bench provided no commentary on rates or classifications in the Schools Award (Stage 2 research report [149] – [154]).
19. Three items mentioned in the Stage 2 research report are notable. Level 3 of the Schools Award seems to be the “standard rate” alignment to C10 of the Metal Industry Award ([155]). The classifications and rates of the 2009 award closely resemble the classification and structure now appearing in the current modern award ([154]). And there is no indication that “the rates and classifications in this award having been through an assessment on work value grounds” (Stage 2 research report [157]).

***Evaluation:***

20. A review of the “History of variations” of the Schools Award ([MA000076]) listed on the FWC website <sup>6</sup> does not indicate the award has been subject to any substantial variation since 2009. The only major changes to Schools Award occurred as a result of the FWC’s plain language re-drafting process as part of the 4 yearly review of modern awards of 2019-2020 (see [\[2019\] FWCFB 6861](#)).
21. In this regard it is useful to note the comments of the FWC Full Bench in April 2020. An exposure draft was released in February 2020 and the Full Bench invited interested parties to make submissions in response to the revised award. No submissions were received (see [2020] FWCFB 1814, [64] – [68]).

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<sup>6</sup> URL: <https://www.fwc.gov.au/document-search/view/2/aHR0cHM6Ly9zYXNyY2RhdGFwcmRhdWVhYS5ibG9iLmNvcnUud2luZG93cy5uZXQvYXdhcmRzL01vZGVybkF3YXJkcy9NQTAwMDA3Ni5kb2N40>

22. In the light of the wide use of enterprise agreements for general staff in the non-government school sector, this stakeholder inactivity is understandable (the exposure draft of the Contract Call Centres Award also garnered no submissions). Yet this does not imply the Schools Award is of little relevance to the sector.

23. A survey of a range of non-government school enterprise agreements showed similarities with the Schools Awards. The agreements examined were:

- Anglican Schools Commission Inc. NSW Enterprise Agreement 2023 (AE521680)<sup>7</sup>
- Anglican Schools Commission Inc. Victorian Enterprise Agreement (AE521628)<sup>8</sup>
- NSW and ACT Catholic Systemic Schools Enterprise Agreement 2020 (AE510098)<sup>9</sup>
- NSW and ACT Catholic Systemic Schools Enterprise Agreement 2023 (AE522879)<sup>10</sup>
- South Australian Catholic Schools Enterprise Agreement 2020 (AE517602)<sup>11</sup>
- St Johns Grammar School Inc Enterprise Agreement 2023 (AE522966)<sup>12</sup>

24. For general staff the classification structures of the agreements were similar:

- Anglican Schools NSW Agreement 2023 (AE521680) – classroom support services (Schools Assistants) 4 levels, school administration services 4 levels with 11 pay points.
- Anglican Schools Victorian Agreement (AE521628) – 5 levels (“range”) with between 2 and 8 pay points per level.
- NSW and ACT Catholic Schools Agreement 2020 (AE510098) – 6 levels with steps for levels 1 to 4.
- NSW and ACT Catholic Schools Agreement 2023 (AE522879) – 6 levels with steps for all levels.
- South Australian Catholic Schools Agreement 2020 (AE517602) – 6 levels (“grades”) with 4 pay points per level.
- St Johns Grammar School (Adelaide) Agreement 2023 (AE522966) – 8 levels (classroom support services grade 1 to 3, school administration services grade 1 to 8).

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<sup>7</sup> PR766674 [2023] FWCA 3151.

<sup>8</sup> PR766563 [2023] FWCA 3098.

<sup>9</sup> PR726166 [2021] FWCA 173.

<sup>10</sup> PR769699 [2023] FWCA 4407.

<sup>11</sup> PR746387 [2022] FWCA 3384.

<sup>12</sup> PR769875 [2023] FWCA 4497.

25. As identified in the Stage 2 research report ([143]), the Schools Awards has 8 levels with 2 pay points for levels 1 to 6, and 3 pay points for level 7 (level 8 has a single pay point)
26. The classification structure of the Schools Award, as developed in 2009, did not “mirror” any of the awards applying to non-government schools (Stage 2 research report [155]). Consequently, the classification structure of recent enterprise agreements should not be expected to mirror those of the Schools Award. Moreover, in 2020 it was noted by the IEU (NSW/ACT Branch) that “the classification model and pay structures for administrative and support staff in the public sector are markedly different to those in non-government schools” (Crouch 2020).<sup>13</sup>
27. In the six agreements listed above Education Aides are classified as “school assistants” with 4 levels (AE521680), or “student/teacher support” with 3 levels (AE521628), or “classroom and learning support services” with 3 levels (AE510098 and AE522879), or “education support officer – curriculum” with 4 levels (AE517602), or “business support staff – classroom support services” with 3 levels (AE522966).
28. In the Schools Award, Education Aides are classified as “classroom support services” with 3 levels (Schedule A). Accordingly, there is some consistency in how Education Aides are assigned in the enterprise agreement classifications; 3 or 4 levels which is similar to the structure of the Schools Award.

***Work value:***

29. During the award modernisation process Level 3 of the Schools Award seems to be the “standard rate” aligned with C10 of the Metal Industry Award. Currently, Schedule A (A.2.3 (d)) states the training level or qualifications for Level 3 is completion of a trades certificate or Certificate III. The Stage 2 research report ([155]) quotes from a submission of the employer association in 2009 explaining how the proposed (and final) classification structure was able to be compared to the

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<sup>13</sup> Crouch, M (2020) Catholic systemic support staff: Time to get equal. Newsmonth December 2020, Independent Education Union of Australia (NSW/ACT Branch). URL: <https://publications.ieu.asn.au/2020-december-newsmonth/news/time-get-equal/>

metal industry classification structure. The Stage 2 research report ([156] states this proposed classification structure was not disputed by relevant stakeholders.

30. The FWC’s Expert Panel handed down the Stage 3 decision in the Aged Care Industry work value case on 15 March 2024 ([2024] FWCFB 150). The Expert Panel commented on the relevance of the “C10 Metals Framework Alignment Approach” to assessing work value of feminised occupations. The Stage 3 decision said the C10 Metals Framework Alignment Approach could operate to inhibit the proper valuation of women’s work ([2024] FWCFB 150, at [90]; also see Stage 2 research report [24] – [37]).

31. The Annual Wage Review Panel decision 2022-23 noted the gender-based difficulties of the C10 Metals Framework Alignment Approach was carried forward into the award modernisation process, and thus the modern awards system ([2023] FWCFB 3500; (2023) 323 IR 332, at [125]).

32. Remarks of direct relevance to the Schools Awards were made by the Expert Panel in the Aged Care Industry Stage 3 decision ([2024] FWCFB 150, at [95]):

*In practice, the classifications and rates of pay in most major modern awards were based on a precursor federal award, or in some cases a State award, and where the C10 Metals Framework Alignment Approach had previously been applied, this was retained. In some cases, as we discuss below, it was applied for the first time. This meant that, to the extent that gender biases had historically been embedded in federal awards for all the reasons we have earlier discussed, this generally migrated into the modern award system. (underlining added)*

33. In short, it is highly likely many of the rates of pay for the classifications and occupations covered by the Schools Award are afflicted by the gender-based difficulties of the Metal Industry Award alignment. Thus, rates of pay in the Schools Award may undervalue the work performed.

34. There are other reasons to support this view.



35. In 2019 the Industrial Relations Commission of New South Wales (IRC of NSW) published a decision regarding an application under the 2000 equal remuneration principle<sup>14</sup>. The decision approved a consent agreement for a new award covering non-teaching staff working in NSW government schools. The new Crown Employees (School Administrative and Support Staff) Award 2019 applied to approximately 18,000 school administrative and support staff. The consent award came into effect after a settlement of the NSW Public Service Association’s pay equity claim with the NSW Department of Education. The settlement included changes to the award classification structure and significant pay increases (NSW Department of Education (2020) Annual Report 2019: 118).<sup>15</sup>
36. While the classification structures of the NSW award and the Schools Award are dissimilar, the work performed by non-teaching school staff is not. For instance, the School Learning Support Officer classification in the NSW award is comparable to the classroom support services classification of the Schools Award. Both classifications apply to the work of Education Aides.
37. The 2019 NSW award was “designed not only to address the gender inequality, but also to modernise the Award” ([2019] NSWIRComm 1082, at [6]). The approved new classifications of the 2019 NSW award were “overdue for re-evaluation” given “the recent rapid change in the nature of the school environment within which the relevant staff work” ([2019] NSWIRComm 1082, at [33]). In our view, it is highly likely similar conclusions could be made regarding the Schools Award.
38. Further, the Stage 2 research report ([157]) states: “There is no clear history of the rates and classifications in this award having been through an assessment on work value grounds”. This observation also has parallels with the 2019 NSW award. As the Full Bench of the IRC of NSW remarked: the last occasion when the IRC of NSW considered the work value of school administrative and support staff was 1993; therefore, an assessment of the value of their work, skill and responsibility was “overdue” ([2019] NSWIRComm 1082, at [18]).

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<sup>14</sup> *Crown Employees (School Administrative and Support Staff) Award* [2019] NSWIRComm 1082.

<sup>15</sup> URL: <https://education.nsw.gov.au/about-us/strategies-and-reports/annual-reports>

*Summary:*

39. There are grounds to question if the pay rates of the School Award appropriately reflect the work value of the non-teaching staff in the school education industry:

- The gender-based difficulties of the Metal Industry Award alignment.
- The lack of evidence that the School Award classifications have been reviewed.
- And the lack of evidence that the rates of pay of the School Award have been subject to a work value assessment.

40. Moreover, the 2024 Aged Care Industry Stage 3 decision said: “The proper assessment of work value, including the proper recognition of the ‘invisible’ skills that characterise these female-dominated jobs, is not to be found in the award classification descriptor for a position but rather in its minimum rate of pay. Whether that rate of pay represents a proper assessment of work value can be determined from the Commission decision which fixed that rate of pay” ([2024] FWCFB 150, at [184]).

41. The Commission decision which fixed that rates of pay for the School Award was the AIRC’s award modernisation decision of September 2009 and “the Full Bench provided no commentary on rates or classifications in the Schools Award” (Stage 2 research report ([152])). The increases in award pay rates since 2009 have been due to flow-on from annual wage review decisions.<sup>16</sup>

42. Lastly, caution is needed to assess the extent of enterprise agreement coverage in the industry, which may suggest the award-reliant segment of the Education Aides occupation is greater than 5 per cent. Hence, the number of Education Aides who are Schools Award dependent may exceed 10,000 in number.<sup>17</sup>

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<sup>16</sup> See for example PR762185, PR740760, PR729335, PR718894, PR606401, and PR579856.

<sup>17</sup> Stage 1 research report: Table 10.1 – 11.9% of 84,000; Table 10.2 – 7.6% of 131,000.