



President's statement

Occupational segregation and gender undervaluation

Justice Ross, President

Melbourne, 4 November 2022

[1] The Full Bench handed down a decision in Aged Care Work Value Case today (the Aged Care Decision).¹ The decision and a summary of the decision are both available on the Commission's website.

[2] In the Work Value–Aged Care Case, the Full Bench is considering 3 applications to vary modern awards to increase the minimum wages of aged care sector workers in the *Aged Care Award 2010*, *Nurses Award 2020* and the *Social, Community, Home Care and Disability Services Award 2010*. The Applications were made under s.158(1) for the Commission to vary a modern award under s.157 of the *Fair Work Act 2009* (the FW Act). The Full Bench noted that

‘At the heart of these proceedings is the Applicants’ contention that the variation they seek to modern award minimum wages they seek are ‘justified by work value reasons’ as required by s.157(2).’

[3] Chapter 3 of the Aged Care Decision deals with the relevant legislative framework in detail.

[4] In a Statement dated 9 June 2022² the Full Bench expressed the following *provisional* views:

1. The relevant wages rates in the Aged Care Award 2010, the Nurses Award 2020 and the Social, Community, Home Care and Disability Services Industry Award 2010 have not been properly fixed.
2. It is not necessary for the Full Bench to form a view about why the rates have not been properly fixed.
3. The task of the Full Bench is to determine whether a variation of the relevant modern award rates of pay is justified by ‘work value reasons’ (and is necessary to achieve the modern awards objective), being reasons related to any of s.157(2A)(a)-(c) the nature of the employees’ work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.

¹ [2022] FWCFB 200.

² [2022] FWCFB 94.

[5] The provisional views were confirmed in a Statement dated 5 August 2022³. In the Aged Care Decision, the Full Bench noted:

‘It has therefore been accepted that, in these proceedings, we are not required to form a view as to why the rates in the relevant awards have not been properly fixed, including by making a finding as to whether or not the minimum rates are affected by gender undervaluation.

That being said, we accept the expert evidence that as a general proposition work in feminised industries, including care work, has been historically undervalued and that the reason for that undervaluation is likely to be gender based. We also accept that the evidence pertaining to gender undervaluation provides a useful context for the assessment of the work value and skills utilised in feminised industries, including in the aged care industry. This statement sets out the principles relating to gender undervaluation from the Aged Care Decision and sets out other modern awards that may fall within the definition of a female-dominated industry. It also deals with the proposed Undergraduate Qualifications Review.’⁴

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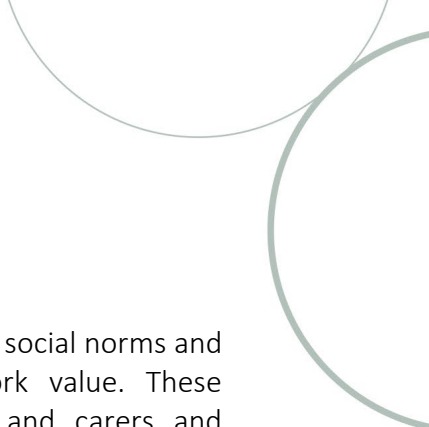
Gender based occupational segregation

[7] In Chapter 7.3 of the Aged Care Decision, the Full Bench dealt with evidence of gender undervaluation in the aged care sector and accepted the following principles:

1. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices.
2. Undervaluation occurs when work value is assessed with gender-biased assumptions. The reasons for gender-based undervaluation in Australia include the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.
3. Gender-based undervaluation in the employment context occurs when work value is assessed with gender-biased assumptions which means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.

³ [2022] FWCFB 150.

⁴ [2022] FWCFB 200, [355]-[356].

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4. Gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value. These assumptions are impacted by women's role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.
 5. The barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:
 - changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework.
 - procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.
 - conceptual considerations including the subjective notion of skill and the "invisibility" of skills when assessing work value in female-dominated industries and occupations.
 6. The approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations. In particular:
 - (i) The requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations. These limitations in the capacity of tribunals to properly value the work arise because any potential errors in the valuation of the work may have predated the last assessment of the work by the tribunals.
 - (ii) Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work, The time frame or datum point for the measurement of work value which limit assessment of work value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.

- (iii) The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards.’[footnotes omitted].⁵

[8] As noted in proposition 2, occupational segregation is one of the reasons for gender-based undervaluation. Occupational segregation that is gender-based refers to the concentration of men and women in different work occupations⁶.

[9] The Workplace Gender Equality Agency (WGEA) uses the following terms when describing the gender segregation in the Australian workforce:

- Female-dominated industry (60% or more women) •
- Male-dominated industry (40% or less women)
- Mixed industry (41% to 59% women).⁷

[10] WGEA uses the Australian and New Zealand Standard Industrial Classification (ANZSIC) to categorise its data. The industries that are described as female-dominated for WGEA’s latest reporting period are:

- Health care and social assistance (79% women)
- Education and Training (64% women)

[11] However, the following industries have a majority of female employees (over 50%):

- Retail trade (57%)
- Accommodation and food services (53%)
- Financial and Insurance Services (52%)

[12] In 2012, the Fair Work Commission undertook a project that ‘mapped’ modern awards to the industries categorised by the ANZSIC to assist with statistical analysis of modern

⁵ [2022] FWCFB 200 [758].

⁶ Definition of ‘Occupational gender segregation’ from Blackburn, R. M., Browne, J., Brooks, B., & Jarman, J. (2002). Explaining gender segregation. *The British journal of sociology*, 53(4), 513-536;

⁷ Workplace Gender Equality Agency (2019), ‘Gender Segregation in Australia’s Workforce’, Factsheet Series, April.

awards.⁸ The below lists map the industries described by WGEA as female-dominated and those with a majority of female employees to the relevant modern awards:

Health care and social assistance (79%)

- *Medical Practitioners Award 2020*
- *Nurses Award 2020*
- *Health Professionals and Support Services Award 2010*
- *Ambulance and Patient Transport Industry Award 2020*
- *Aged Care Award 2010*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Educational Services (Schools) General Staff Award 2020*
- *Local Government Industry Award 2020*
- *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020*

Education and Training (64%)

- *Educational Services (Teachers) Award 2020*
- *Children's Services Award 2010*
- *Educational Services (Post-Secondary Education) Award 2020*
- *Higher Education Industry – General Staff – Award 2020*
- *Higher Education Industry – Academic Staff – Award 2020*
- *Professional Diving Industry (Recreational) Award 2020*

Retail trade (57%)

- *Vehicle Repair, Services and Retail Award 2020*
- *General Retail Industry Award 2020*
- *Meat Industry Award 2020*
- *Seafood Processing Award 2020*
- *Hospitality Industry (General) Award 2020*
- *Business Equipment Award 2020*
- *Nursery Award 2020*
- *Pharmacy Industry Award 2020*
- *Commercial Sales Award 2020*

⁸ Preston, M, Pung, A, Leung, L, Casey, C, Dunn, A and Richter, O (2012) 'Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 Report', Research Report 2/2012, Fair Work Australia.

Accommodation and food services (53%)

- *Hospitality Industry (General) Award 2020*
- *Restaurant Industry Award 2020*
- *Fast Food Industry Award 2020*
- *Registered and Licensed Clubs Award 2020*

Financial and Insurance Services (52%)

- *Banking, Finance and Insurance Award 2020*

[13] Commission staff sought further data from the Australian Bureau of Statistics Survey of Employee Earnings and Hours to determine whether it was possible to find the percentage of female employees covered by each of the mapped awards listed above. Based on the available data,⁹ the following awards could be considered female dominated:

Award name	Proportion of female employees covered
<i>Fast Food Industry Award 2010</i>	60.8%
<i>General Retail Industry Award 2020</i>	67.0%
<i>Hospitality Industry (General) Award 2020</i>	65.8%
<i>Health Professionals and Support Services Award 2020</i>	91.2%
<i>Registered and Licensed Clubs Award 2020</i>	62.7%
<i>Educational Services (Post-Secondary Education) Award 2020</i>	59.4%
<i>Educational Services (Schools) General Staff Award 2020</i>	70.2%
<i>Educational Services (Teachers) Award 2020</i>	96.4%
<i>Restaurant Industry Award 2020</i>	61.4%
<i>Children's Services Award 2010</i>	96.1%

⁹ ABS, *Microdata and TableBuilder: Employee Earnings and Hours, Australia*, May 2021.

[14] The Full Bench in the Aged Care Work Value Decision determined that an interim increase in the modern award minimum wages applicable to direct care workers is justified by work value reasons. In reaching this decision, the Full Bench had particular regard to the report of Associate Professor Junor¹⁰ who applied the Spotlight Tool to the relevant roles. The Spotlight Tool is a job and skills analysis tool designed as an aid in identifying, naming and classifying ‘invisible skills’ used in undertaking service work processes that are not directly observable. ‘Invisible’ in this context means ‘hidden’, ‘under-defined’, ‘under-specified’ or ‘under-codified’.¹¹ The Full Bench concluded that:

‘Assoc Prof Junor’s evidence was cogent, probative and relevant to our assessment of whether a variation of modern award minimum wages in the relevant awards is ‘justified by work value reasons’ (s.157(2)(a)).’

[15] During the Aged Care Case the Unions relied on the evidence of some 89 lay witnesses (72 employee lay witnesses and 17 union officials) and 6 expert witnesses. The Joint Employers relied on the evidence of 9 lay witnesses. The Commission also published a number of Background Documents as well as a Research Reference List of 665 documents consisting of: 202 published research articles and books; 68 Australian working papers and reports; 9 international working papers and reports; 114 Australian Government reports; 2 international government reports; 22 data sources; 189 cases referred to in submissions and witness evidence; and 59 awards, variations and determinations referred to in submissions and witness evidence.

[16] Although the Commission can vary a modern award on its own motion pursuant to s.157, it is apparent from the Aged Care case that cases of this type require significant evidence from those with experience in relevant industries, supported by appropriate experts.

[17] There were significant areas of agreement between the parties in the Aged Care Case and a consensus statement was filed which assisted in narrowing the issues in dispute.

[18] The Commission is available to facilitate discussions between parties who may consider making work value or equal remuneration applications to other modern awards in the future.

Undergraduate Qualifications

[19] On 27 August 2019, I issued a statement (*August 2019 Statement*)¹² which set out the a following *provisional* view in relation to 29 awards (at Attachment A) with classifications that require undergraduate degrees:

¹⁰ Honorary Assoc Prof Anne Junor, *Fair Work Commission matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010* dated 28 October 2021, as amended 5 May 2022 (Junor Report).

¹¹ Junor Report at [10], [138]–[140].

¹² [2019] FWC 5934.

'My *provisional* view is that the 29 awards with classifications requiring undergraduate degrees should be referred to a separate Full Bench for review and that the Full Bench commence its review with the four awards listed at [10] for efficiency purposes (priority group). However it will be necessary for this Full Bench to take into account the outcome of the IEU's work value application in respect of the Teachers Award. Accordingly the review of modern awards listed in Attachment A will commence after the determination of the IEU's application to vary the Teacher's Award. The review of these awards will be conducted on the Commissioner's own motion pursuant to s. 157 of the Act.'

[20] Paragraph [10] of the *August 2019 Statement* provided as follows:

'[10] There are currently 29 other modern awards that include classifications applying to employees who are required to hold undergraduate qualifications. These modern awards are set out at Attachment A ranked in order by the highest proportion of award-reliant employees. The top four modern awards with the highest levels of award reliance are:

- *Children's Services Award 2010*;
- *Social, Community, Home Care and Disability Services Industry Award 2010*;
- *Health Professionals and Support Services Award 2010*; and
- *Nurses Award 2010*'.

[21] Interested parties were invited to comment on:

- the provisional view set out at [13] of the August 2019 Statement;
- the accuracy of the list of awards at Attachment A to the Statement (including whether they have an interest in other awards that should be part of this list)
- whether the Full Bench should consider additional awards as part of the priority group.

[22] Initial submissions were received in September 2019 from the following parties:

- The Pharmacy Guild of Australia (the Pharmacy Guild)
- APESMA
- ABI and the NSW Business Chamber (ABI)
- Australian Nursing and Midwifery Federation (ANMF)
- Australian Council of Trade Unions (ACTU)

- National Tertiary Education Industry Union (NTEU)
- Collieries' Staff and Officials Association
- Independent Education Union of Australia (IEU)
- United Voice
- Australian Industry Group (Ai Group)
- Australian Manufacturing Workers' Union (AMWU)

[23] Submissions in reply were received in October 2019 from the following parties:

- Ai Group
- IEU
- ABI
- Australian Federation of Employers and Industry (AFEI)
- ACTU

[24] On 9 September 2022, I issued a statement dealing with the background to the proposed Undergraduate Qualifications matter and referring the Pharmacy Award to a reconstituted 4 year review Full Bench for determination.¹³ The 9 September statement did not deal with the 29 awards proposed to be the subject of the Undergraduate Qualifications matter.

[25] In their initial submission, the Ai Group raised some potential issues in relation to the proceedings being initiated at the Commission's own motion under s.157 of the FW Act. It submitted:

'22. On one view, s.157 does not expressly grant the Commission power to conduct a wide-ranging review of the classifications in a number of modern awards on its own motion.

23. Whilst s.157(3)(a) grants the Commission power to make a determination on its own motion, it is perhaps less clear whether the Commission has power to institute proceedings of the nature here contemplated on its own motion, given that no posited variation has been identified in any of the awards.

¹³ [2022] FWC 2405

24. We note that in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, Allsop CJ, North and O’Callaghan JJ made the following comments about the different statutory task under s.157, as compared to s.156:

“The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157 (1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.”

25. In light of our primary proposition regarding the timing of any proposed proceedings, we do not here seek to deal with the issue in further detail. We may, however, seek to be heard further in this regard in due course.’¹⁴

[26] The ABI in reply to the Ai Group submitted that:

‘4.1 It is unclear at this stage whether Ai Group submissions dated 20 September 2019 concerning s.157 of the Fair Work Act 2009 (Cth) are a flirtation or are intended to be seriously pressed.

4.2 If it is the latter, then at the appropriate time, we will provide submissions on this point to assist the Commission further.’¹⁵

[27] The AFEI also concurred with the Ai Group’s submissions at paragraph [18]–[24], in relation to the Commission’s powers to institute such proceedings. In particular, the AFEI agreed that while ss.157(1)(a) and 157(3)(a) empower the Commission to make a determination varying a modern award on its own initiative, this provision does not expressly provide a power to commence a process of review of modern awards.

[28] The ACTU submitted that the Ai Group submissions ‘are not accompanied by any conclusion or argument in favour of or against the adoption of the provisional view’.

[29] Section 157 provides that the Commission may make a determination varying a modern award if the Commission is satisfied that making the determination is necessary to achieve the modern awards objective:

¹⁴ Ai Group submission, 20 September 2019, at para 22-25.

¹⁵ ABI submissions in reply, 4 October 2019, at para 4.1-4.2.

157 FWC may vary etc. modern awards if necessary to achieve modern awards objective

(1) The FWC may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

- (a) the variation of modern award minimum wages is justified by work value reasons; and
- (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

(2A) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
- (c) the conditions under which the work is done.

(3) The FWC may make a determination or modern award under this section:

- (a) on its own initiative; or
- (b) on application under section 158.

[30] I note that, since the Ai Group made the submission referred to at [25] above, the Commission inserted Schedule X into the majority of modern awards on its own motion. In the 2020 Commission matter dealing with the insertion of Schedule X into modern

awards ([2020] FWCFB 1837), the Commission expressed a *provisional* view that the new schedule may be included in a modern award pursuant to ss.136(1)(a) and (c), and s.139(1)(h) of the FW Act and that, taking into account the relevant s.134 considerations, the modern award variations proposed were necessary to achieve the modern awards objective.

[31] The Full Bench stated:

[9] We note here that no party contested our *provisional* view that the terms proposed to be included in Schedule X may be included in a modern award. Further, no party contested the Commission's power to make the variations proposed on the Commission's own initiative pursuant to s.157 of the *Fair Work Act 2009* (Cth) (the Act). ACCI advanced the following submission in respect of the Commission's power to vary modern awards on its own initiative:

'Section 157(3) of the Act expressly empowers the Commission to act on its own initiative (or otherwise on application) which the Commission in these proceedings is doing.

Prior to the repeal of section 156, the scheme of the Act was that it provided:

- (a) for reviews of modern awards on a 4-yearly cycle at the initiative of the Commission (s 156); and
- (b) a mechanism for the variation, making etc of modern awards outside of this 4 yearly cycle (s 157) at the initiative of the Commission or on application.

Both sections 156 (now repealed) and 157 should be understood in the context of what modern awards are under the Act.

Modern awards are "regulatory instruments" setting minimum standards the Commission has an overarching duty to ensure that they meet the modern awards objective.

This was affirmed by the Commission in *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* (AM2014/305):

"[27]...As the Commission has observed on a number of occasions, modern awards are very different to awards of the past. Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, modern awards are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applied."

- a. In this context, it should not be seen as controversial that section 157 provides for the Commission to act on its own initiative.

Previously outside of the 4 Yearly Review process but now at large, the Commission may seek to inquire into whether a modern award is meeting the modern awards objective rather than simply stand by awaiting a 'party' to apply to agitate such a case if at all.

This squarely fits with the nature of modern awards under the Act, sections 134, 284 and section 3 of the Act.'

[32] The Commission's usual procedural powers apply to the exercise of powers under s.157 of the FW Act. While the Commission may only make a determination varying a particular modern award pursuant to s.157(3) if the Commission is satisfied that making the determination is necessary to achieve the modern awards objective, the Commission has broad powers as to the manner in which it may inform itself in relation to any matter before it. I note that the Revised Explanatory Memorandum to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* explained the remaining framework of the FW Act (that is, s.157) as follows:

'This framework allows changes to a modern award where emerging social and economic matters demonstrate that change is necessary. For example, in exercising its modern award functions, the FWC is required to take into account a range of criteria, such as the need to promote social inclusion through increased workforce participation. This requires the FWC to consider the changing labour market and the manner in which work is evolving. It must also promote flexible modern work practices and the efficient and productive performance of work, which again requires the FWC to look beyond the way work has been performed historically and to make sure the safety net of terms and conditions continues to meet community expectations.'¹⁶

[33] Consistent with the Commission's approach in the Schedule X matter, I do not consider that the Commission is constrained from dealing with the Undergraduate Qualifications matter in the manner proposed. However, the Commission does not intend to take any further steps in this matter on its own motion at this time. It is apparent from the Aged Care Decision, that the assistance of parties in making applications, gathering and testing evidence and making submissions is the most effective way of informing the Commission. The Commission is available to assist in facilitating discussions between parties who choose to pursue similar work value claims to vary a modern award. I note that there is considerable overlap between the awards at Attachment A and the awards in female dominated industries as set out earlier in this statement.

PRESIDENT

¹⁶ EM [7].



ATTACHMENT A

Black Coal Mining Industry Award 2020

Higher Education Industry—Academic Staff—Award 2020

Higher Education Industry—General Staff—Award 2020

Rail Industry Award 2020

Banking, Finance and Insurance Award 2020

Health Professionals and Support Services Award 2020

Medical Practitioners Award 2020

Nurses Award 2020

Airport Employees Award 2020

Hydrocarbons Field Geologists Award 2020

Professional Employees Award 2020

Surveying Award 2020

Educational Services (Post-Secondary Education) Award 2020

Educational Services (Schools) General Staff Award 2020

Educational Services (Teachers) Award 2020

Book Industry Award 2020

Architects Award 2020

Live Performance Award 2020

Electrical Power Industry Award 2020

Broadcasting and Recorded Entertainment Award 2020

Ambulance and Patient Transport Industry Award 2020

Social, Community, Home Care and Disability Services Industry Award 2010

Local Government Industry Award 2020

Water Industry Award 2020

Aboriginal Community Controlled Health Services Award 2020

Legal Services Award 2020

Animal Care and Veterinary Services Award 2020

Children's Services Award 2020

State Government Agencies Award 2020