Australian Federation of Employers and Industries (AFEI)

Submission in Reply to Applicants' Submissions—Proposal for a Preliminary Hearing concerning the Comparator Issue. Matter Nos: C2013/5139 and C2013/6333

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BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009

Title of matter: Application for an Equal Remuneration Order

Section: 302

Matter number: C2013/5139 and C2013/6333

Applicants: United Voice (UV) and Australian Education Union (AEU)

Respondents: The Australian Federation of Employers & Industries (AFEI) & Ors

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SUBMISSIONS OF AFEI IN REPLY TO APPLICANT UNIONS' SUBMISSIONS FOR PRELIMINARY HEARING TO DEAL WITH THE COMPARATOR ISSUE

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1. These submissions are filed in accordance with the directions made 19 October 2016.

2. These submissions respond to the Unions' proposal that the Commission hold a preliminary hearing – estimated at one day - to deal with the 'comparator' issue.

3. For the reasons which follow in these submissions, the AFEI submits that the Commission should decline the proposed course. Briefly stated, the AFEI position is this:

    a. Given its criticality, the determination of the comparator should not be treated as a preliminary issue but rather is integral to the whole of the proceedings;

    b. An estimate of one day understates the criticality of the issue to the proceedings and is otherwise unrealistic;

c. The proposition that, in its decision of 13 January 2005,[1] the former AIRC established a comparator appropriate to the proposed proceedings is unsound and should not be accepted; and

d. The decision of 13 January 2005 will not otherwise assist the Commission on the issue of the appropriate comparator.

4. The 'comparator issue' is a key issue concerning the exercise of the Commission's jurisdiction at s.302(5). To attempt to determine such a critical issue in the manner proposed by the Unions would likely lead to a truncation of the consideration of this key issue with the potential further consequence that the merits are neither fully nor properly ventilated. It is submitted that such an outcome would not be compatible with the requirement at s. 578(b) to consider the merits of the matter. The Commonwealth, in its correspondence of 18 October 2016[2], makes a valid criticism of the Unions' proposal and draws attention to the type of problem that might arise through the Unions' proposed course.

5. Further, this ERO application is the first since the *Equal Remuneration Order – Jurisdictional Decision* [2015] FWCFB 8200 and in view of this, it may be considered a 'major case' with the potential to function as a 'test case' for future ERO applications. In balancing the matters that must be taken into account in performing its functions, the Commission should recognise the significance of this course of action for future applications.

6. The Unions rely on the decision in *Australian Liquor, Hospitality and Miscellaneous Workers' Union re Childcare Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 – re Wage rates-("the 2005 Case"),* which the Unions claim has already established proper comparators for the Certificate III and Diploma Level classifications under the *Children's Services Award 2010 (the Children's Services Award),* that is the C10 and C5 classifications respectively under the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award).

[1] Print PR954938, 13 January 2005.

[2] Referred to in Union submission of 26 October 2016 at [25].

7. The Unions now propose that the 2005 Case - which concerned the fixation of properly set minimum award rates - should now be adopted as comparators for the purpose of this ERO application. As noted at paragraph 3 above, the proposition that the 2005 Case established a comparator appropriate to the proposed proceedings is unsound, and the decision will not otherwise assist the Commission. A consideration of the 2005 Case follows.

The 2005 Case

8. The 2005 Case reached two broad conclusions, namely that:

   a. *"…. the changes in the nature of the work which are detailed in section 5 of this decision constitute a significant net 'addition to work requirements' within the meaning of the work value principle."* [at 365]

   and that;

   b. for the purposes of the proper fixation of rates for the key classification levels in the child care awards *"the rate at the AQF Diploma level should be linked to the C5 level in the Metal Industry Award. Further, it is appropriate that there be a nexus between the CCW level 3 on commencement classification in the ACT Award (and the certificate III level in the Victorian Award), and the C10 level in the Metal Industry Award."* at [367]

9. In ascertaining whether the award minimum wages had been properly fixed, the AIRC utilised its established approach to the adjustment of award minimum rates first established by the *August 1989 National Wage Case decision.* The Full Bench noted:

   > *"That process was designed to facilitate award reform by providing a clear understanding of award relationships one to another*" at [145].

10. Speaking to the traditional approach of adjusting minimum rates, at [154] the AIRC noted:

    > *"The MRA principle was designed to establish a consistent pattern of minimum rates in awards covering similar work thereby removing inequities and providing a stable foundation for enterprise bargaining.*

That objective is as important now, perhaps even more important, than it was in 1989"

11. Further, the 2005 Case illustrates a principle which was elucidated in an earlier 1998 decision of the AIRC which clarified that:

> *"the rates in the award under review should be examined to ascertain whether they equate to rates in other awards which have been adjusted in accordance with the August 1989 approach with particular reference to the current rates for the relevant classifications in the Metal, Engineering and Associated Industries Award 1998 – Part 1"*

12. Thus the AIRC's task in its 2005 Case was fulfilling a specific minimum wage fixation objective – and which is fundamentally different from that which the Commission is undertaking in immediate proceedings.

13. Since the 2005 Case, moreover, the Commission has continued to apply the same approach to the setting of properly fixed minimum wages in modern awards generally. Presently the minimum award rates for the CIII qualification classification level in modern awards generally are, at least in a practical sense, aligned to the C10 classification in the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award).

14. The task facing the Commission in the present ERO applications, however, is significantly different. Rather than seeking to rectify disparate minimum rates, the Unions' application in the immediate proceedings is concerned with across-the board increases in remuneration of 33%.

15. The 'comparator issue' is not a question that can be quickly disposed of. This is particularly so noting the complexity of the Unions' proposition that all employees at a CIII qualified modern award classification can be automatically compared with the Manufacturing C10 classification. This is a question which would inevitably require detailed consideration of the diversity of work and remuneration of the alleged comparator employees in that classification, one which is considerably more diverse than under the pre modern award Metal industry award.

16. Given that the 2005 Case was made within a legislative framework different from part 2-7 of the FW Act, it would be unsound to dispose of the comparator issue without thorough testing through comprehensive, probative and compelling evidence.

17. Further, if successful, this Application will lead to a 33% increase in remuneration in the sector. It is not an overstatement to say that the effects will be profound and long term. An issue of this significance should not be approached as a mere benchmark exercise. Rather, it demands a detailed approach from the applicant Unions including probative comparator evidence for each classification for which it is said that there is a male comparator group performing work of equal or comparative value.

18. A consideration of the above submissions does not prevent the Commission from finding that group of male workers are conducting work that is of an equal or comparable value to the female comparator group. Rather, the 'comparator issue' is a matter of significant weight and substance to be determined with reference to a wide range of factors. The Unions are required to make their case if it is their intention to use this comparator group, and not simply rely on the 2005 case which was conducting an essentially different task to the one presently before the Commission.

19. There are three further aspects to the 2005 Case which justify a cautious approach to the proposal that the comparator issue can be dealt as a preliminary matter.

20. First, there appears to be a dearth of witness evidence from the industries then covered by the Metal Industry Award. The witness list at [193] of the decision indicates that witnesses were overwhelmingly drawn from, or associated with, the child care and children's services industries. In the circumstances, the case will not assist in the immediate proceedings because it does not represent a comprehensive consideration of the circumstances of work within the industries then covered by the Metal Industry Award.

21. Second, the matter was heard during the period November 2002 to May 2004 and so even if there had been such evidence before the AIRC, that evidence could not be readily accepted as contemporary evidence of the work now performed in those

industries. On this point, the industries covered by the Metal Industry Award are likely to have changed in the decade since the decision. The extent to which such changes have had a material effect upon work in the industry would also be a matter of significance to the immediate proceedings. The Unions proposed course leaves no (or insufficient) room for that consideration.

22. Third, the modern award known as the Manufacturing and Associated Industries and Occupations Award 2010 is not a mere replication of the former Metal Industry Award. It should be an uncontroversial point that this modern award covers a wider range of industries, classifications and occupations than the Metal Industry Award. The extent to which this might be a relevant consideration in the context of the immediate proceedings is not certain – but this only compounds the need for caution.