

FAIR WORK ACT 2009

Equal Remuneration Case

Application by the Australian Municipal, Administrative, Clerical and Services Union and others for an equal remuneration order in the social and community services industry

Matter Number: C2010/3131

Final Submission by the
Chamber of Commerce and Industry of Western Australia

28 March 2011

Standing and Profile of CCIWA

1. CCIWA has been the peak council of Western Australian business associations for over 100 years, with more than 6,000 employer members across all industries and geographical regions of WA.
2. Originally established in 1910 as the WA Employers Federation, CCIWA as it is today was formed in 1992 by an amalgamation of the Western Australian Chamber of Commerce and Industry and the State's then largest employer organisation, the Confederation of Western Australian Industry.
3. CCIWA is a non-profit organisation with membership open to businesses of any size.
4. CCIWA has extensive involvement on behalf of its members in workplace relations matters across all of these industries.
5. CCIWA's activities include:

- a. Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- b. Business representation on a range of statutory and business boards, committees and other fora.
- c. Representing business in state and national fora including Fair Work Australia and Safe Work Australia.
- d. Research and policy development on issues concerning Western Australian business.
- e. The publication of leading business surveys and other information products.

Scope of CCIWA Submission

6. CCIWA's submission is in relation to the role and powers of Fair Work Australia (FWA) to deal with the claim by the Australian Services Union (ASU) and other unions pursuant to Part 2-7 of the *Fair Work Act 2009* (FW Act).
7. CCIWA reiterates support for standards of equal remuneration for work of equal or comparable value and promotes the practice of equal remuneration for work of equal or comparable value among businesses in WA.
8. CCIWA submits the ASU claim, however, is in effect a claim to increase minimum rates and is not proven. The claim must address and satisfy the criteria under the FW Act to ensure it will not lead to an outbreak of claims from other industries.
9. CCIWA's submission seeks only to address threshold issues surrounding legislative processes that must be followed in dealing with a claim under Part 2-7; it does not extend to all of the elements of the factual content of the claim.
10. The Outline of Contentions filed by the CCIWA on the 15 December 2010 is to be taken as CCIWA's final submission, together with the additional matters that follow.
11. The additional matters are as follows:
 - (a) Clarifying the scope of application of the proposed Equal Remuneration Order;
 - (b) Absorption;
 - (c) Increased salaries in Amended Application dated 23/12/10;
 - (d) Work value;

- (e) Cannot apply Queensland ER Case outcomes to national system employers and employees; and
 - (f) Phasing-in of any increase.
12. Several aspects of the CCIWA's Outline of Contentions are reiterated in summary form as a preamble to the 'additional Matters'.

Support for ACCI submission

13. CCIWA supports the submission by the Australian Chamber of Commerce and Industry dated 28 March 2011.

CCIWA reiterates its' response to several aspects of the Applicants' Claim

14. The Applicants seek to increase award minimum rates without establishing who forms the comparator group and without proving that work performed by employees to whom the order applies is equal to work performed by employees in a comparator group.
15. The criteria to be satisfied under the FW Act is different from each of the state jurisdictions vis a vis statutory context, construction and history.
16. The unions in this case are misconceived in attempting to apply one statutory context to another.
17. The claim attempts to apply the rates from the *Queensland Community Services and Crisis Assistance Award – State 2008* (the Queensland SACS Award) to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the Modern SACS Award).
18. If the proposed Equal Remuneration Order (ERO) was made, the rates in the Modern SACS Award would be replaced by terms of an instrument that has no force within the national system conflicting with the objectives of the FW Act, the modern award objectives and the minimum wages objective.
19. CCIWA contends that any wage or salary adjustment incorporated into the ERO must be done on the basis of work value.
20. This is consistent with the manner by which equal remuneration claims have been determined since the Equal Pay Principle was developed in the *Equal Pay Case 1972*¹ that found claims should be determined following work value comparisons.
21. This requires work value comparisons with a comparator group.

¹ National Wage and Equal Pay Cases 1972 (1972) 147 CAT 172, page 179

22. CCIWA submits the unions have failed to clearly identify which employees fall into comparator groups, whether comparisons represent truly like-with-like positions and therefore how work value is proven.
23. The unions claim that SACS industry workers throughout Australia should be paid the same rates of pay as apply to SACS industry workers in Queensland.
24. In support of their claim in Western Australia the unions rely on the evidence of Patricia Anne Branson.
25. Ms Branson's evidence relies on four position descriptions:
 - (a) City of Joondalup, Youth Worker, Mobile Youth Service, Level 4
 - (b) City of Joondalup, Youth Outreach Worker, Community Development and Libraries, Level 5
 - (c) City of Joondalup, Youth Activities Services Officer, Level 6
 - (d) City of Joondalup, Senior Youth Worker (Warwick), Level 4/5
26. Ms Branson asserts the work performed by members of WA ASU Branch is "*representative of the work done by employees in the SACS sector generally although of course the work varies from program to program*"²
27. In support of her claim in reference to employees in the WA public service, Ms Branson states that when comparing the salaries of Level 1 employees: "*...the equivalent commensurate level in the modernised SACS award **appears to me** on the basis of my knowledge and work in both sectors to be level 5*". (Emphasis added)
28. There is no attempt to demonstrate the work value of the employees covered by the claim is the same as the work value of the employees in the comparator group. In fact, it is not clear precisely which positions form the comparator group and accordingly whether the positions are like-with-like.
29. Reference to a group of four job descriptions with no supporting detail as to how the work value of the positions in the comparator group compare with WA SACS industry employees provides no basis to prove the claim.
30. There is no verifiable objective evidence provided by the ASU to substantiate its' claim the rates payable to WA public service employees should apply to employees in the WA SACS industry.
31. Fair Work Australia must be satisfied that a decision to include new rates of pay that provide significant pay increases can be supported on work value grounds.

² Statement of Evidence of Patricia Anne Branson, paragraph 12

32. The unions concede their claim must be justified on work value grounds but do not discharge their burden of proof in demonstrating that work value grounds exist to support the claim and the grounds are satisfied.

Additional Matters

Clarifying the scope of application of the proposed Equal Remuneration Order

33. Prima facie the coverage and application of the Equal Remuneration Order (ERO) appears to broadly mirror the reach of the Modern SACS Award.
34. Paragraphs 1.2 and 3.4ff of the AG submission³ indicates that several groups of employees will not be covered by the proposed ERO.
35. Although clause 4 of the proposed ERO refers to exclusions [see clause 4.2]⁴, CCIWA is of the view that it is not clear upfront as to which groups of employees are caught by those exclusions.
36. Clause 4.3 of the proposed ERO also raises issues about how it is intended to apply to any employee in the sector who may be award free (perhaps unlikely) or alternatively may work within the areas identified in clause 4.1 of the Modern SACS Award but who are (also) covered by one or more of the awards identified in clause 4.2 of the Modern SACS Award.
37. These matters require written clarification by the ASU as a matter of urgency.

Absorption

38. Clause 4.3 also raises the issue as to the treatment of overaward payments, i.e. amounts paid by employers to employees that exceed the wages and other monetary entitlements required by awards, or in this case, an ERO.
39. It is CCIWA's view that any monetary increases arising from an ERO can be absorbed into such overaward payments when an employer is not otherwise obliged to maintain the overaward payment.
40. The Queensland Equal Remuneration (Queensland ER) case considered 'absorption' and determined the increases may be absorbed into any formal or informal over-ward payment.⁵

Increased salaries in Amended Application dated 23/12/10

41. CCIWA notes the salaries determined in the Queensland ER case⁶ have been increased by the application of the 2009 and 2010 Queensland State Wage

³ Equal Remuneration case Fair Work Australia Australian Government submission - 4 March 2011

⁴ "This subclause operates to the exclusion from coverage in this Order"

⁵ Paragraph 7.4, A/2008/5, Queensland Industrial Relations Commission 6 May 2009

⁶ A/2008/5, Queensland Industrial Relations Commission 6 May 2009

Cases (SWC) ⁷ together with the application of an Equal Remuneration Component of 1 per cent.

42. This has resulted in increases to the classifications and pay points ranging from between nearly \$2000 to \$5,000 to the originally determined salaries.
43. It is the view of CCIWA these increases, which are not based on any work value assessment, reinforce our concerns about the lack of veracity of the original work value assessments done within the context of the Queensland ER case.

Work value, is the work undervalued?

44. In paragraph 124 of the ASU's Final Submission [28 February 2011] indicates that "*...the issues of whether the work is undervalued involves two considerations:*

(a) Is the work low paid

(b) Does the level of pay properly reflect the skills, qualifications and conditions under which work is performed?"

45. The consideration of 'low paid', which has no universally accepted definition, is not particularly relevant nor is the phrase "*...skills, qualifications and conditions under which work is performed*".
46. CCIWA contends the single most important criterion for determining the value of work is by application of the 'work value' principle. In other words, assessing the work value of the work actually performed together with the requisite skills and/or training (if any) for the work to be undertaken competently.

Cannot apply Queensland ER Case outcomes to national system employers and employees

47. CCIWA also contends the outcomes of the Queensland ER case in 2009⁸, which resulted in a new award: *Queensland Community Services and Crisis Assistance Award - State 2008* (Queensland Award), cannot be applied to or otherwise relied on by the ASU in substantiating its' claim for an ERO to apply to national system employers and employees.
48. The Queensland Award reflects at best the circumstances applicable to state jurisdiction employers (i.e. that are not constitutional corporations) and employees. These circumstances are in striking contrast to those employers in Queensland or any other state that were covered by federal awards.

⁷ B/2009/42, 21 August 2009 and B/2010/21, 10 August 2010.

⁸ A/2008/5, Queensland Industrial Relations Commission 6 May 2009

49. FWA must therefore satisfy itself the ASU evidence about positions, job roles and responsibilities necessarily substantiates its' assertion that each and every position is undervalued when compared to accepted comparators.
50. CCIWA contends the ASU, if it is to demonstrate the alleged 'undervaluing' must be able to show that a majority of these positions, or a representative sample of relevant groups, within a Modern SACS Award classification band across each and every jurisdiction in Australia.
51. It is also essential the ASU establish that if such undervaluing is identified, it is not as a result of systemic under or incorrect classification (under the Modern SACS Award), but instead is because of an undervaluing on a gender basis when compared with work of equal or comparable value.
52. ASU therefore needs to adduce verifiable evidence that positions are correctly classified and the work undertaken by the employee in that position is performing work that is undervalued when compared with work of equal or comparable value.
53. CCIWA's view is that verifiable evidence must include signed off genuine position descriptions and position holder (sworn) witness testimony.
54. CCIWA submits the following processes are mandatory to meet the FW Act criteria:
 - (a) conduct a work value assessment of the current Modern SACS Award classification levels/descriptors against comparator classification systems that have also been subject to a work value assessment and benchmarked accordingly;
 - (b) test the veracity of the adduced position documentation and witness testimonies;
 - (c) verify that each of those positions have been correctly classified in relation to the Modern SACS Award;
 - (d) assess each of the documented positions against comparator positions that have been the subject of a work value assessment.
55. In comparing remuneration under the Modern SACS Award with accepted comparator rates of remuneration, the comparator rates must have been established through a work value assessment only, not those negotiated as part of an enterprise bargaining agreement.

56. CCIWA echoes the view in the Victorian Government submission⁹ that the material provided by the ASU may be “...an insufficient basis for the FWA to be satisfied the work performed by each of the classifications in the SACS sector.... is comparable to specific classes of workers in the Victorian public service.”
57. CCIWA, reiterates its' view¹⁰ that in relation to the evidence adduced in relation to Western Australia, there is a demonstrable paucity of verifiable evidence, not only in relation to the ASU's assertions that work performed under the Modern SACS Award is comparable to work performed in the WA public sector, but also the failure to comprehensively provide position documentation of positions under all the Modern SACS Award classifications.

Phasing-in of any increase

58. In Western Australia, there are employers who were previously award free and were only subject to the *Minimum Conditions of Employment Act 1993* that became a NAPSA. This is likely to mean that for those employers the quanta of any increase will be substantially greater than those who were bound by a predecessor federal award.
59. If FWA award any increases under an ERO, it is requested that such increases be phased in over several years and the obligation to pay such increases by employers is dependent on necessary government funding to cover the salary increases.
60. This and other matters relating to phasing were canvassed during the Queensland ER Case. The Commission determined half yearly instalments over a four year period.¹¹
61. In addition, employers should also be given the opportunity of a 'liberty to apply' framed as follows:

“Liberty to apply is reserved for any employer who is bound by this ERO and needs to reduce and/or postpone terms that add to their labour cost on the grounds of very extreme or serious economic adversity.

The merit of the application will be determined in the light of the particular circumstances of each case and any relevant material will be rigorously tested.

⁹ Paragraph 105, *Submissions of the Minister for Employment and Industrial Relations for the State of Victoria – 21 March 2011.*

¹⁰ See paragraph 63 to 72 of its Outline of Contentions -15 December 2010

¹¹ Paragraph 7.3, A/2008/5

The impact on employment at the enterprise level of the increase in labour costs is a significant factor that will be taken into account in assessing the merit of the application.”

Conclusions

62. CCIWA reiterates it takes no issue with the Applicants seeking proper remuneration levels for employees, but stresses these levels must be justifiable on work value grounds.
63. To accept the claim without an examination of the work value of all positions sought to be subject to increases in minimum rates is contrary to the Act.
64. The scope of the proposed ERO requires clarification.
65. Any monetary increases arising from an ERO are to be absorbed into such over award payments when an employer is not otherwise obliged to maintain the over award payment.
66. CCIWA contends the outcomes of the Queensland ER case in 2009¹², which resulted in a new award: *Queensland Community Services and Crisis Assistance Award - State 2008* (Queensland Award), cannot be applied or otherwise relied on by the ASU in substantiating its' claim for an ERO to apply to national system employers and employees.
67. If FWA award any increases under an ERO, it is requested that such increases are phased in over a minimum of four years and the obligation to pay such increases by employers is dependent on necessary government funding to cover the salary increases in full.
68. If the claim is granted in its current form, the impact on services within the community services sector will be significant, particularly in what appears to be the likely absence of government funding.
69. Further, there is a significant danger of flow on to other industries if all of the requirements of the legislation are not met and the Applicants are not held to account in proving their case.

¹² A/2008/5, Queensland Industrial Relations Commission 6 May 2009