

2 May 2017

Ms Lyn Beverley
Committee Secretary
Senate Finance and Public Administration References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: FPA.SEN@aph.gov.au

Dear Committee Secretary,

Please find below the responses from United Voice to questions taken on notice at the Senate and Public Administration References Committee public hearing in Sydney on 26 April 2017 regarding the Inquiry into gender segregation in the workplace.

1. HANSARD, Pages 14-15

Ms Venville: With respect to the technical details, I want to be mindful that we do have the case on foot, so I will go through what I can put forward and give an overview of where we are now. As Helen mentioned, we did lodge an application to the Fair Work Commission in July 2013. They took the approach of looking at the legal and conceptual framework of part 27 applications first before deciding our substantive case—the reason being, as you heard previously, that the Saxe case was quite unique. They took the approach of, 'Okay, we need a bit of a framework to guide these applications.' That occurred in 2014 and there were hearings and submissions on that, but no decision was handed down from the Fair Work Commission on the legal and conceptual framework until late 2015. And that decision—which was from a full bench of the Fair Work Commission—was that you need a male comparator, as you have heard previously.

United Voice had to assess the case that they had already built up on the basis of the Saxe case, which said you did not require a male comparator, and we basically had to start again. In September last year we put forward an amended application which set out our comparator for the application, being certain classifications in the Manufacturing and Associated Industries and Occupations Award 2010. We had a short mention before the president of the Fair Work Commission, Justice Ross, in October 2016, and we were awaiting a decision. Sorry, if I can just go back—the mention before Justice Ross was about our proposed approach to the case, which was to deal with our comparator first before going into the entire case, the reason being that it would be more efficient.

Our argument was why would you put the whole case forward and go through the costs and the length of that when you did not like the comparator at the beginning—why not just decide it first at a preliminary point?

There were written submissions lodged in response to that, and it was only a couple of weeks ago that we received the listing for a full bench on 16 May about our proposed approach and, obviously, for directions. That is a technical overview of where we are.

Senator LINES: What have the employers submitted?

Ms Venville: The employers submitted that it is not clear what our argument is; therefore, they

cannot respond. They also said that it is contrary to the act in terms of efficiency and fair and just proceedings in terms of their perspective.

Senator LINES: To use a metal trade comparator—is that the objection?

Ms Venville: No, the objection is more to the preliminary point.

Senator LINES: To break the case up?

Ms Venville: Yes, to break the case up. They were the main thrusts of the arguments.

Senator LINES: So the majority of employers in the early childhood sector are opposing the case?

Ms Venville: They are more the employer bodies.

Senator LINES: They are who are opposing the case?

Ms Venville: Sorry—when I say employer bodies, I mean the Australian Industry Group, Australian Business Industrial and the Commonwealth.

Senator LINES: Does AIG have early childhood sector members?

Ms Venville: I might have to take that on notice, if I can.

The Australian Industry Group has not appeared on behalf of employers in the early childhood sector but rather as an interested party to the equal remuneration proceedings. Only the Australian Business Lawyers and Advisors has appeared on behalf of the Australian Childcare Alliance.

To clarify, the parties that appeared at that Mention on 19 October 2016 and filed subsequent submissions have opposed our suggested course of action for the Fair Work Commission to deal with our comparator as a separate preliminary matter. They have not opposed the use of the metal trades comparator in particular. More broadly, no employer or employer organisation has directly opposed the substantive case.

2. HANSARD, Page 15

Senator LINES: Ms Gibbons, you mentioned costs. Do you have a figure for what it has cost the union so far to run a case that you have had no results from?

Ms Gibbons: I could not give you the exact cost; we could take that on notice. What I know is that lawyers are not cheap. We have spent significant resources on hiring external lawyers as well as having a fairly extensive team in house that has been working on this the whole time.

United Voice has spent approximately \$1.37 million on the equal remuneration case for early childhood educators to date.

3. HANSARD, Page 15

Senator KAKOSCHKE-MOORE: Looking overseas to some of your colleagues or equivalents who are perhaps working in Canada or the UK or the United States, what is their experience like in terms of pay equity? Are they also seeing these significantly lower rates of pay that we are seeing here in Australia for people undertaking these caring and education roles?

Ms Gibbons: A number of people have given evidence that this is something that is consistent in other jurisdictions, in other places in the world. I was heartened, though, to see what happened in New Zealand and to see that the New Zealand government has done something about that and has negotiated an outcome that will actually see some movement in the equal pay gap for care workers in New Zealand. This is certainly something that exists elsewhere in the world; we are not an orphan in this problem. However, the gender pay gap here is really significant and certainly our gender segregation is enormous and not improving.

Senator KAKOSCHKE-MOORE: Do you feel that the state of gender segregation and the gender pay gap are worse in Australia than in some comparable jurisdictions?

Ms Gibbons: I would have to take that on notice in terms of coming up with direct comparisons.

The overall rate of gender segregation across industries and occupations has remained constant in the OECD for decades.¹ Underneath this overall continuity in segregation levels, however, countries with lower levels of segregation have continued on the path to integration, while those with higher levels of segregation have experienced even greater levels.²

In the 1980s, Australia was renowned for having the most gender segregated workforce in the OECD area.³ Although we are no longer the most extreme – our levels of gender segregation have since been eclipsed by the US and the UK – the level of gender segregation in industries and occupations in Australia remains exceedingly high. In 2010, for instance, gender segregation levels were higher in Australia than they were in France, Greece, Israel, Poland, New Zealand and Portugal.⁴

Within the EU, care workers (home care workers and early childhood educators) are the most feminised occupational category, with women comprising at least 80 per cent of the workforce, and in many member states that figure reaches past 90 per cent, with the Netherlands experiencing particularly high levels of feminisation (97.5 per cent), compared to Austria's 86.3 per cent.⁵ In the UK, ECEC is as strongly gender segregated as Australia, with the Equal Opportunities Commission describing the sector as a 'gender ghetto' with the male share of its workforce hovering between 2 and 3 per cent.⁶

4. HANSARD, Page 16

CHAIR: We have had evidence from other witnesses that they perceive a lack of capability of work valuation for feminised industries at the commission. Is that your perception, and what role, if any, has the pay equity unit played in your case?

Ms Gibbons: I could not comment on the lack of capability. I am not sure whether Nikki wants to make any comment around that. I have not had any engagement with the pay equity section of the Fair Work Commission and I am not sure whether there was any in the past.

Ms Venville: Yes, I do have something to add to that. The pay equity unit, as I understand it, did produce some reports that were used, initially, when the unit was set up, including a round table that United Voice participate in, in terms of setting that legal and conceptual framework. For more specific information I would have to take that on notice.

¹ Rawstron, K. (2012) 'Diverging Paths: Occupational Sex Segregation, Australia, and the OECD', *The Australian Sociological Association Annual Conference 2012: Emerging and Enduring Equalities*, Australia: TASA.

² Rawstron, K. (2012)

³ Pocock, B. (1998) 'All Change, Still Gendered: The Australian Labour Market in the 1990s', *Journal of Industrial Relations*, 40:4, p. 590

⁴ Rawstron, K. (2012)

⁵ European Commission's Expert Group of Gender and Employment (EGGE) (2009) *Gender segregation in the labour market: Root causes, implications and policy responses in the EU*, p. 79.

⁶ Equal Opportunities Commission (EOC)(2003) *How can suitable, affordable childcare be provided for all parents who need to work?*, EOC submission to the Work and Pensions Select Committee Inquiry, February 2003, p. 3, cited in Rolfe, H. (2006) 'Where are the men? Gender segregation in the childcare and early years sector', *National Institute Economic Review*, 195, p. 103.

The Pay Equity Unit was established at the Fair Work Commission in March 2013. Its function was to provide the Commission with specialist pay equity research and information related to pay equity under the *Fair Work Act 2009* (Cth) (Fair Work Act).⁷ The research priorities of the Pay Equity Unit included:

- procuring and managing external research into equal remuneration under the Fair Work Act;
- collecting data on pay equity matters; and
- reviewing existing pay equity research and cataloguing data for future research.⁸

In September 2013, a paper was published that canvassed a proposal for how the Pay Equity Unit could consult with parties to the equal remuneration case about data/information which would be relevant to the Case and produce a data report.⁹ Early in 2014, United Voice participated in a research roundtable discussion facilitated by the Pay Equity Unit. As a result of this discussion, on 28 March 2014 the Pay Equity Unit published 'Data report – preschool and long day care sector.'¹⁰ The Pay Equity Unit also procured independent research into equal remuneration under the Fair Work Act to assist parties pursuing an equal remuneration order.¹¹ Further research by the Pay Equity Unit can be found on their Fair Work Commission's website.¹²

As we are not near arguing our substantive application, the research in these reports has been of limited use. United Voice understands that the Fair Work Commission received specific funding for the unit which has now ceased. To this extent, the Pay Equity Unit has played a very minimal role for the case.

The next response addresses whether we perceive the Fair Work Commission lacks capability of work valuation for feminised industries.

5. HANSARD, Page 17

CHAIR: I observed that you have thoughts about a reform agenda and a law reform agenda for the act itself. The companion piece is often institutional reform. Is the Fair Work Commission the place where these things ought to be dealt with? If so, are there any changes to its institutional arrangements or capabilities that need to be pursued? If not, is there some alternative pathway that you think would work better?

Ms Venville: In terms of the Fair Work Commission and whether they ought to be dealing with these matters, I say, yes, it is an industrial issue and we would not support taking that out of the industrial relations arena. Specifically, as Helen mentioned before, we are unique in Australia in that we have an awards system that has industry and occupational coverage. So, in terms of covering a highly feminised segregated industry, we should have the capability to do that through an awards system.

⁷ Fair Work Commission, *Pay equity research*, <https://www.fwc.gov.au/resources/research/pay-equity-research>.

⁸ Pay Equity Unit, *Proposal for facilitated consultation on data for C2013/5139*, Fair Work Commission, <https://www.fwc.gov.au/documents/sites/caeremuneration/papers/peu-consultation%20paper-19-sept-2013.pdf>, p 2.

⁹ Ibid.

¹⁰ Pay Equity Unit, *Data report– preschool and long day care sector*, Fair Work Commission, 2014, <https://www.fwc.gov.au/documents/sites/caeremuneration/papers/data-report-preschool-long-day-care-sector.pdf>.

¹¹ Layton, R, Smith, M and Stewart, A, *A Report for the Pay Equity Unit of the Fair Work Commission, Equal Remuneration under the Fair Work Act 2009* (Fair Work Commission, 2013).

¹² See <https://www.fwc.gov.au/resources/research/pay-equity-research#field-content-1-heading>.

In terms of an alternative, there have been approaches that we have thought about of a pay or agenda equity panel. The Fair work Commission has had expert panels on the annual wage review and the superannuation default funds, and those panels include people outside the commission who are not members but are part-time members with particular expertise in an area. If you look at the annual wage review, they have expertise in economics and so forth. It might be an idea to have academics or economists brought in who have specific knowledge on the pay disparity that women face and the issues that come down to that. But, in terms of specifics, we could take that on notice and provide the committee with further information and detail.

United Voice is committed to pursuing equal pay for early childhood educators under the current equal remuneration provisions of the Fair Work Act. We do not believe that educators should now have to wait for legislative amendment to receive the professional pay and recognition they deserve.

In the decision on the legal and conceptual framework of Part 2–7,¹³ the Fair Work Commission took a technical and black letter law approach to equal remuneration matters. Departing from the single previous authority, the Commission explicitly rejected gender-based undervaluation to assess whether there is equal remuneration for work of equal or comparable value. We must now establish a male benchmark and make a comparison to assess whether the objective has been met. This approach questions whether the Fair Work Commission can fully appreciate particular gender-based issues that contribute to the undervaluation of many highly feminised industries.

As our submission outlined, we support a review of Part 2–7 and for amendments that will ensure applicants seeking to address systemic gender-based undervaluation have mechanisms available which are less difficult and expensive, and compels the Fair Work Commission to take a more active role in addressing equal remuneration.

A more facilitative approach to addressing pay inequity is required. For example, this may be amending the Fair Work Act to constitute a panel consisting of Commission members and external part-time members with expertise in gender equity, work and family, industrial and anti-discrimination law and economics. Expert panels are not new in industrial relations. Similarly constituted panels appear in the Fair Work Act for the annual wage review and for the 4 yearly reviews of default fund terms.¹⁴ They have also appeared in recent (although now repealed) industrial legislation in the *Road Safety Remuneration Act 2012* (Cth). These panels consist of both Commission members and appointed part-time external members with knowledge or expertise in a number of fields. For example, the Expert Panel for annual wage reviews requires three panel members to have knowledge or experience in workplace relations, economics, social policy and business, industry or commerce.¹⁵

The purpose of the panel for equal remuneration matters would be to:

- develop and set equal remuneration principles from extensive consultation with interested parties;
- conduct informal inquiries into a broad range of pay inequity matters and provide the President with a report with recommendations for consideration by a Full Bench; and
- conduct research into pay equity.

Such a panel would require exclusive funding and administrative support within the Fair Work Commission, including explicit legislative reporting requirements on its functions and deliverables.

¹³ *Equal Remuneration Decision 2015* [2015] FWCF 8200.

¹⁴ *Fair Work Act 2009* (Cth) ss 620(1) and 620(1A).

¹⁵ *Ibid* s 620(1)(b).

Establishing this panel in the Fair Work Act requires legislative amendment. However, there is no reason why, without external part-time members, the Commission could not deal with equal remuneration matters in a similar manner currently under its powers to inform itself in s. 590 of the Fair Work Act. It used this power to establish the research roundtable discussion facilitated by the Pay Equity Unit which resulted in the data report. Amending the Fair Work Act to provide for a panel to deal with equal remuneration matters and to inquire into specific issues affecting highly feminised industries would make seeking a remedy under Part 2–7 less difficult, expensive and more efficient.

6. HANSARD, Page 17

Senator LINES: Ms Venville, you outlined to us before the way the union is structuring its argument for the commission. Presumably, you get to the May date and you await a decision—how long is a piece of string?—but is that decision in and of itself appealable? Is that an appealable decision?

Ms Venville: I will have to take that on notice. I apologise; I have not actually considered that. You never structure a case waiting to appeal it.

The decision would be capable of judicial review in the Federal Court of Australia.

Yours Sincerely,

Helen Gibbons
Assistant National Secretary