



FAIR WORK  
AUSTRALIA

## DECISION

*Fair Work Act 2009*

s.302—Equal remuneration order

s.160—Variation of modern award

### Equal Remuneration Case

**Australian Municipal, Administrative, Clerical and Services Union and others**  
(C2010/3131)

**Australian Business Industrial**  
(AM2011/50)

JUSTICE GIUDICE, PRESIDENT  
VICE PRESIDENT WATSON  
SENIOR DEPUTY PRESIDENT ACTON  
COMMISSIONER HARRISON  
COMMISSIONER CARGILL

MELBOURNE, 1 FEBRUARY 2012

### DECISION OF JUSTICE GIUDICE, SENIOR DEPUTY PRESIDENT ACTON, COMMISSIONER HARRISON AND COMMISSIONER CARGILL

#### INTRODUCTION

[1] This decision relates primarily to an application made by the Australian Municipal, Administrative, Clerical and Services Union (ASU) on its own behalf and on behalf of a number of other unions for an equal remuneration order under Part 2-7 of the *Fair Work Act 2009* (the Act) in the social, community and disability services industry throughout Australia (the SACS industry). The details of the application and the relevant circumstances are set out in the *Equal Remuneration Case—May 2011 Decision* published on 16 May 2011 (the May 2011 decision).<sup>1</sup> This decision also deals with an application by Australian Business Industrial (ABI) to vary the *Social, Community, Home Care and Disability Services Industry Award 2010*<sup>2</sup> (the modern award) under s.160 of the Act. ABI's application was lodged on 30 September 2011 and amended on 1 December 2011.

[2] In the May 2011 decision we summarised our findings as follows:

“[291] In this decision we have concluded that for employees in the SACS industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment. We consider gender has been important in creating the gap between pay in the SACS industry and pay in comparable state and local government employment. And, in order to give effect to the equal remuneration provisions, the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation. We have reached some preliminary views about how that might be done, recognising that simply adopting the pay rates resulting from the

Queensland Equal Remuneration decision is not appropriate. It is desirable, however, that we give the parties the opportunity to make further submissions on the matters.”<sup>3</sup>

[3] We then indicated that we would be interested to know the views of the parties on a number of matters. Those matters were:

- “1. The nature of the alterations, if any, that should be made to the classifications and associated wage rates in the *Social, Community, Home Care and Disability Services Industry Award 2010* [MA000100] having regard to the Commonwealth’s previous submission concerning graduate wage rates in that modern award.
2. The extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations, including how the amount of the gender related undervaluation of the work of the classifications in the industry should be calculated and concrete estimates of that gender related undervaluation.
3. The amount or amounts, either dollar or percentage, to be included in any equal remuneration order and estimates of the cost.
4. The phasing-in of any equal remuneration order and the effect of such phasing on the transitional provisions in the modern award.
5. The form of any equal remuneration order, including whether it should specify the particular wage rates that are to apply to the classifications in the modern award, or a monetary or percentage addition to the wage rates for the classifications in the modern award and whether it should provide for salary packaging and absorption of any overaward payments.
6. Whether the quantum in any equal remuneration order could or should be included in the modern award having regard, amongst other things, to the operation of the better off overall test.”<sup>4</sup>

[4] We made provision for further submissions and encouraged the parties to hold discussions. Further hearings were scheduled for 8 to 10 August 2011. Many parties filed further submissions in June and July 2011. The hearings scheduled for 8 to 10 August 2011 were postponed until late October 2011 to permit discussions between the parties to continue. On 24 October 2011, the Commonwealth sought a further adjournment for the same purpose. The adjournment was granted. On 17 November 2011, the applicants and the Commonwealth lodged a Joint Submission setting out a number of agreed matters. In particular, the submission contained an agreed outcome, subject to some matters of detail.

## **THE JOINT SUBMISSION**

[5] The parties to the Joint Submission have agreed on an equal remuneration order, which is expressed in percentage terms as an addition to the modern award rate. The percentages and the resulting additions to modern award rates at each level are shown in the following table:

Modern award classification	Addition to modern award rate		Modern award rate plus equal remuneration order
	%	\$	\$
<b>Level 2</b> Year 1	18	6 324.53	42 103
Year 2	18	6 773.31	43 678
Year 3	19	7 267.30	45 293
Year 4	20	7 849.57	46 892
<b>Level 3</b> Year 1	20	7 849.57	46 892
Year 2	22	8 867.34	49 036
Year 3	22	9 055.25	50 079
Year 4	23	9 813.01	51 671
<b>Level 4</b> Year 1	28	11 928.00	54 907
Year 2	27	11 844.77	55 950
Year 3	28	12 850.55	58 082
Year 4	29	13 443.82	59 692
<b>Level 5</b> Year 1	33	15 449.60	62 824
Year 2	33	16 065.87	64 457
Year 3	33	16 525.64	66 043
<b>Level 6</b> Year 1	36	18 468.63	69 107
Year 2	36	18 380.41	70 145
Year 3	35	18 304.18	71 195
<b>Level 7</b> Year 1	38	20 392.17	74 404
Year 2	38	20 845.95	75 984
Year 3	38	21 303.73	77 568
<b>Level 8</b> Year 1	41	23 417.72	80 803
Year 2	41	23 841.49	82 353
Year 3	41	24 346.27	83 984

[Source: Exhibit ASU 141.]

[6] The resulting minimum wage at each pay point, shown in the final column of the above table, is said to be the equivalent of the current rates in the *Queensland Community Services and Crisis Assistance Award – State 2008*<sup>5</sup> (Queensland SACS award). The Joint Submission proposes that the increases should be phased in over the period from 1 December 2012 to 1 December 2018.

[7] Chapter 2 of the Joint Submission deals with the extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations. That chapter sets out a method of validation based on comparisons with wages payable in the public sector for comparable work. The approach is summarised in the following passage:

“2.9 The method the Government and the applicants propose in this submission first identifies differences in the value of comparable work nationally, by the reference to appropriate public sector comparator rates, and then proposes a means of ensuring that, for SACS workers nationally, there will be equal remuneration for work of comparable value. In this way the Bench is able to ensure that there will be equal remuneration for the employees to whom the ERO proposed by this application will apply, as required by s. 302(1).”<sup>6</sup>

[8] The starting point for the validation is the Full Bench’s conclusion, expressed in the May 2011 decision, that at a generalised level the value of the work in the SACS industry is comparable to the value of work of employees delivering similar programs and services in state and local government employment.<sup>7</sup> The Joint Submission identifies rates payable in each jurisdiction to employees said to be responsible for delivering similar programs and services to those in the SACS industry. The public sector rates so identified are then compared with the minimum wages in the modern award and the difference calculated at each level. This is referred to as the “public sector pay differential”. The next step in the process involves an attempt to identify the proportion of the public sector pay differential attributable to gender considerations. Various studies concerning the extent of the unexplained portion of the gender wage gap were referred to. In particular, the study of Cassells and others and its finding that 60 per cent of the gender pay gap is unexplained by factors other than gender was relied on.<sup>8</sup> The Joint Submission utilises “caring work” as a proxy for gender considerations. To take two examples by way of illustration, jobs at Level 2 were said to be comprised of 96 per cent caring work and jobs at Level 8 were said to be comprised of 56 per cent caring work. The “caring work” percentages at each level were then applied to the public sector pay differential in order to put a monetary value on the extent of gender-based undervaluation. The proportion of caring work, involving both direct and indirect caring, for each level is based on a study that the applicants commissioned from Dr Anne Junor and Dr Celia Briar.<sup>9</sup>

[9] The results of these calculations are shown in Table 5 of the Joint Submission as amended during the hearing. That table is reproduced as Attachment A to this decision. The rates in the final column of Attachment A are said to be the Queensland SACS award rates. This method of calculating and compensating for gender-based undervaluation was said to justify the rates which would result from the agreed equal remuneration order. We note that in Attachment A the percentages proposed to be included in the order are rounded to the nearest whole number.

[10] The Joint Submission also sought to validate the rates which would result from the agreed equal remuneration order by using a comparison of award rates for comparable positions in the public sector. The comparisons were made between the Level 3 Year 1 rate in the modern award and rates for the equivalent classification levels in public sector awards applicable to comparator positions. On average, the public sector award rates were 18 per cent above the modern award Level 3 Year 1 rate. The relativities in the Queensland SACS award were then applied throughout the modern award classification structure to the increased Level 3 Year 1 rate. The resulting rates were said to validate those generated by using caring work to calculate gender-based undervaluation.<sup>10</sup>

[11] Chapter 3 of the Joint Submission deals with remedy. The parties to the Joint Submission acknowledged that the agreed equal remuneration order will result in rates which are lower than those which would result from the use of caring work as a proxy for gender-

based undervaluation. They advanced two reasons. The first is to achieve national consistency. The second relates to the cost of implementing the care-based method and the potential employment effects.<sup>11</sup> The Joint Submission accepts that the order should operate as a percentage in addition to modern award rates and proposes that the precise percentage amounts can be worked out once the decision on remedy has been made.

**[12]** The proposals in relation to the phasing-in of the order are set out in the following passage:

“3.10 The Government and the applicants submit that FWA should adopt the following approach to the implementation of the wage rates as proposed in this submission:

- a) Phasing in of the new rates of pay should commence from 1 December 2012.
- b) The full phasing in of the final pay rates should occur over a six year period (with the first instalment paid on 1 December 2012 and the final instalment implementing the full rates paid for all workers no later than 1 December 2018).
- c) Recognising that different employees may transition to the new pay rates at different times, the total cost of the transition arrangements should not exceed the total cost that would apply if all categories of employees were to transition to the new rates in equal annual instalments paid on 1 December of the years 2012 to 2018 inclusive.
- d) Transitional arrangements should allow those employees who are to receive a lesser quantum of increase to transition at a faster rate than employees who are to receive a higher quantum of increase.
- e) That the arrangements are workable for employers to administer.”<sup>12</sup>

**[13]** Under the heading of “Minimum wage adjustments and transitional arrangements”, the Joint Submission deals with the transitional arrangements under the modern award and foreshadows an application to vary those arrangements. That application was dealt with in our decision of 22 December 2011.<sup>13</sup> It was also submitted that “barriers to bargaining that exist in the SACS sector will take time to ameliorate” and accordingly it would be “appropriate and desirable from a national consistency perspective given the Queensland order for an additional loading of one per cent per annum to be awarded in December of each of the years 2012, 2013, 2014 and 2015”.<sup>14</sup> It was said that these amounts would be short-term compensation during the transition to a new funding and workplace relations environment.

**[14]** The Commonwealth drew our attention to the Prime Minister’s announcement on 10 November 2011 that the Australian Government would provide over \$2 billion during the six-year implementation period. It is committed to fund its share of the programs which it funds directly and also in proportion its share of the joint state/federal funding through specific purpose payments and national partnership payments. While the way in which those funding commitments will be applied will be the subject of discussions between relevant parties, it was made clear in submissions that the Australian Government is committed to meeting its share of the burden that will flow from any decision that is given in this case and there is no suggestion of a limit at the figure of \$2 billion.

[15] A number of employers and other interested persons and bodies expressed support for the proposals in the Joint Submission. A list of those which had lodged letters of support was tendered by the Commonwealth.<sup>15</sup> The bodies on that list, other than employers, included the National Pay Equity Coalition and the Women's Electoral Lobby, the Council to Homeless Persons and the Australian Council of Social Service. The Australian Council of Trade Unions (ACTU) made oral submissions in support of the Joint Submission. In particular, it urged us to reject suggestions that implementing the proposals would lead to claims for flow-on increases in other industries. The Australian Human Rights Commission supported the methodologies established in the Joint Submission for evaluating the extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations. It submitted that economic consequences, such as capacity to pay, funding and employment, can only be taken into account when considering the implementation arrangements. Other submissions made in support or partial support of the Joint Submission are considered below in dealing with the submissions made by State and Territory Governments and by employers and employer bodies.

## **SUBMISSIONS OF STATE AND TERRITORY GOVERNMENTS**

[16] We deal now with the submissions made by the State and Territory Governments. Following the May 2011 decision, submissions were received from the Australian Capital Territory, New South Wales, Queensland, South Australian, Tasmanian and Victorian Governments. The submissions responded to the matters identified in that decision. Following the Joint Submission, further submissions were received from the ACT, NSW, Queensland, South Australian and Victorian Governments. Some of these governments also made oral submissions.

### **Australian Capital Territory**

[17] The ACT Government filed a written submission on 28 July 2011 and a letter dated 9 December 2011. The submission summarised a survey of wages and entitlements paid by SACS industry employers in the Australian Capital Territory which was conducted between December 2010 and February 2011.<sup>16</sup> The survey showed that at least 83.87 per cent of SACS industry employees in the ACT are paid overaward salaries and the actual proportion is likely to be higher.<sup>17</sup> It was submitted that this demonstrates that the salaries of such employees are set by the market. The high proportion of overaward payments was attributed to the lowest unemployment and highest workforce participation rates of any state or territory, relatively high levels of indexation growth in the ACT SACS industry funding models, multiple competing employers and the absence of non-urban regions in the ACT.<sup>18</sup> The ACT Government supports the proposals in the Joint Submission.

### **New South Wales**

[18] The NSW Government filed supplementary contentions on 2 August 2011. In those contentions, it rejected any suggestion that there is a burden on non-applicant parties to disprove the link between gender and undervaluation, and said that it would be beyond statutory power to make an equal remuneration order providing greater remuneration for the employees to whom it applies than is payable to workers performing corresponding roles in the public sector. It also contended that any equal remuneration order should form part of, or be referred to in, the modern award.<sup>19</sup>

[19] In further supplementary contentions filed on 6 December 2011, the NSW Government referred to the Joint Submission and emphasised that to ensure the ongoing viability of the SACS industry, the amount of any wage increases flowing from this case needs to be sustainable and consistent with the requirement to ensure equal remuneration.<sup>20</sup>

[20] The overall budget impact on New South Wales of the remedy proposed in the Joint Submission and the NSW Government's policy of escalating the wages component of non-government organisations' funding was estimated to be between \$977 million and \$1.65 billion over the seven financial years affected by the proposed phase-in period.

[21] The NSW Government said the approach in the Joint Submission suffers from a number of limitations, including that it involves "reference to median rates of comparator award classifications, rather than actual comparators in relation to particular roles";<sup>21</sup> it is unconventional in relying on the extent of caring work carried out by a small group of SACS industry workers as a proxy for undervaluation; and the wage rates used to construct the national comparators have not been discounted to reflect non-gender components.

[22] With respect to the claim for a 1 per cent equal remuneration component to remedy impediments to bargaining and create national consistency on rates of pay, the NSW Government submitted that the conditions leading to the awarding of the equal remuneration component by the Queensland Industrial Relations Commission (QIRC) in *Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others*<sup>22</sup> (the Queensland Equal Remuneration decision) are not present in this matter. It submitted there has been no finding here that barriers to bargaining have contributed to the gender undervaluation of the work in the SACS industry, the claim would reduce the incentive to bargain, and national consistency is not required by Part 2-7 of the Act.<sup>23</sup>

[23] The NSW Government concluded that the outcome of the case should not be regarded as setting a precedent.

## **Tasmania**

[24] The Tasmanian Government filed a written submission on 29 July 2011. It submitted that an equal remuneration order and variation of the modern award should be made "to the extent that such an order can sustainably address the historical inequities in remuneration that have persisted for SACS workers".<sup>24</sup> It pointed out that its funding in the area is focused on outputs, although research has indicated that a significant proportion of the funding is allocated to wage-related expenditure.<sup>25</sup> It said that the potential impact on employment and services should be considered in determining how and over what period pay equity is achieved.

## **Queensland**

[25] In a letter dated 6 December 2011, the Queensland Government indicated that it does not object to the outcomes proposed in the Joint Submission.

## **South Australia**

[26] The South Australian Government filed a submission on 7 December 2011 supporting the remedy proposed in the Joint Submission.

## **Victoria**

[27] The Victorian Government filed further submissions on 29 July 2011 and 6 and 12 December 2011. While it reiterated its support for pay equity and the making of an equal remuneration order to address undervaluation attributable to gender, it submitted that in fashioning an appropriate remedy we should also give consideration to matters such as the impact on the SACS industry, SACS funding bodies and the broader economy.<sup>26</sup> It estimated that the cost of the proposals in the Joint Submission for Victoria, excluding the four 1 per cent increases, would be between \$900 million and \$1.1 billion over six years.<sup>27</sup> The four 1 per cent increases would cost an additional \$200 million over six years.<sup>28</sup>

[28] The Victorian Government maintained that the principal causes of the disparity in wages between the SACS industry and state and local government employment are the role of government funding and the superior bargaining outcomes in the public sector. Other factors, including gender, have had less impact. It submitted that the applicants bear the onus of proving the extent to which rates are undervalued because of gender.<sup>29</sup>

[29] It also submitted, in response to the Joint Submission, that any remedy could not award “better than equal” wages compared to the relevant comparator workforce.<sup>30</sup> The methodologies used in the Joint Submission for calculating remedy were criticised because they do not discount the comparator wage rates for bargaining outcomes. The median national comparator rate, based on state public sector enterprise agreement rates, and the average national comparator rate, based on state public sector awards, result in higher rates of pay for many SACS industry workers in Victoria compared to their alleged public sector comparators. The “caring factor”, used in the Joint Submission as a basis for determining remedy, was considered to be of little value as it is based on a sample size of only 17 care workers; has never been suggested as a means of measuring the extent of undervaluation; and the inclusion of “indirect care” leads to a skewed percentage of “caring” work being attributed to those in the upper echelons of management of the SACS industry.<sup>31</sup>

[30] The Victorian Government also submitted that the four 1 per cent increases sought in the Joint Submission should not be included in the equal remuneration order because it has not been demonstrated that the difference in bargaining outcomes between the SACS industry and the comparator workforce is due to gender.

[31] The Victorian Government said that any order should be separate from, but read in conjunction with, the modern award, provide as necessary for the disaggregation of the remedy as between various states and territories, and should be phased in over a six-year period commencing on 1 December 2012.<sup>32</sup>

## **EMPLOYER SUBMISSIONS**

[32] Employers and employer associations made a variety of submissions on the questions posed in the May 2011 decision. The Joint Submission served to crystallise the position of

many employers. Employers who subsequently made submissions amounting to unqualified support for the Joint Submission included:

- Jobs Australia
- Anglicare (Canberra & Goulburn)
- St Vincent de Paul Society
- Hanover Welfare Services
- Inclusion Melbourne
- Domestic Violence Victoria
- Connections UnitingCare.

[33] Other employer groups raised concerns about the need for full funding of the claim in the course of expressing support for the proposed outcome. For example, National Delivery Services submitted that not-for-profit service providers have no capacity to pay for wage increases without increased government funding. The National People with Disabilities Carer's Council submitted that increases that were not fully funded will result in service reductions. Other employers who expressed similar concerns included Berry Street, Home Ground Services, the Federation of Community Legal Services, and the Association of Neighbourhood Houses and Learning Centres.

[34] Catholic Social Services Australia submitted that inadequate funding would impact adversely on jobs, the people seeking services and the community more generally. It submitted that at the time of the hearings, in December 2011, 75 per cent of its services remained unfunded to meet the proposed wage increase.

[35] A number of employer organisations and individual employers made submissions opposing the proposals in the Joint Submission. We deal now with some of those submissions.

### **Australian Industry Group**

[36] The Australian Industry Group (Ai Group) submitted that it is essential that we adopt a very careful, methodical and rigorous approach. It did not identify an amount which would be needed to address the gender inequality which the tribunal has found to exist, but put forward an analysis intended to assist the tribunal to determine the appropriate amount.

[37] It relied on a study published in *The Economic Record* for the proposition that at all levels of the wage distribution, public sector employees receive a wages premium unrelated to gender.<sup>33</sup> The premium is significant in most cases—ranging from 15 per cent to 25 per cent, except in the 90th percentile, where the difference is much less.

[38] It submitted that it must be assumed that public sector rates are set on a gender neutral basis and rates which are higher than the lowest rate are not influenced by gender. Hence, the lowest public sector rate should be considered and discounted for factors that are not related to gender.

[39] Ai Group submitted that a number of factors should be considered, including the need to ensure that awards remain relevant and that their role as the safety net is not undermined, the need to avoid disturbing relativities in the safety nets that operate in different industries, the need to encourage collective bargaining and the need to avoid undermining the low paid

bargaining provisions of the Act. In relation to the transitional arrangements, Ai Group proposed that the term of any equal remuneration order should expire two years after the final step in the phasing-in process to permit enterprise bargaining to develop.

[40] In responding to the Joint Submission, Ai Group took issue with the extent of the unexplained portion of the gender wage gap in the Cassells study.<sup>34</sup> Ai Group relied on academic literature indicating that the unexplained gender wage gap is significantly smaller at lower ends of the wages distribution.<sup>35</sup> It also submitted that the methodology for establishing gender-based undervaluation based on the proportion of caring work has not been properly established.

### **Australian Federation of Employers and Industries**

[41] The Australian Federation of Employers and Industries (AFEI) submitted that as no suggestion has been made that rates in the public sector have been influenced by gender, the starting point for any comparison must be the lowest discounted public sector rates for comparable work. It further submitted that the public sector comparator rates should be discounted for the well-established public sector premium and discounted further by the productivity component of public sector rates. It pointed to the movement in rates above the policy caps of 2.5 per cent and submitted that discounts should have regard to the extent of these movements. It estimated that for New South Wales, based on wage movements between 1997 and 2010, the discount should be 14.9 per cent.

[42] AFEI also submitted that the applicants had failed to demonstrate that the difference between public and private sector rates of pay is gender-based and that a partial discounting of the asserted public sector comparator rates demonstrates that there is no gender-based pay gap to justify an equal remuneration order. In the alternative, it submitted that any order should be minimal given the SACS industry's reliance on constrained government funding and the potential for leap-frogging.

[43] AFEI disputed the existence of an unexplained gender pay gap based on conceptual studies, relying instead on findings that there is no systematic gender wage gap for care workers in the SACS industry.<sup>36</sup> It also submitted that the methodology put forward in the Joint Submission for measuring gender undervaluation is unreliable. It contended that it has not been established that there is any connection between the proportion of care work and the causes of higher public sector wages. It submitted that the award comparator proxy rates are not a useful measure because of the numerous flaws in the comparisons, such as the lack of a precise job match and the additional components of public sector wages.

### **Australian Chamber of Commerce and Industry**

[44] The Australian Chamber of Commerce and Industry (ACCI) submitted that the proposals in the Joint Submission constitute a claim for comparative wage justice with the public sector as the differences in pay have not been demonstrated to be gender-based. Although it may not be possible to determine the degree of undervaluation with precision, the approach must involve an appropriate amount of rigour to determine why differences in pay exist. ACCI said:

“Pay increases under the s.302 process should be awarded only on a rigorous basis. This is essential to (a) protect the integrity of wages policy and safety net scheme and (b) prevent

expectations of flow-on with resultant industrial unease and unrest created by unrealistic expectations of flow-on. The fact that the Tribunal has not been able to indicate the quantum of gender related undervaluation which currently exists, is an indication that this application should not succeed and the Tribunal should not exercise its discretion.”<sup>37</sup>

[45] ACCI submitted that the applicants have failed to isolate and quantify a gendered component of rates for comparable work. The application has a broad, industry-wide basis and the comparisons made with the public sector are simplistic. The methodology in the Joint Submission is inconsistent with the intention of Parliament, contrary to the objects of the Act and “key binding and relevant international conventions”.<sup>38</sup> As a general principle, industry-wide claims should not be permitted under Part 2-7 of the Act.

[46] Finally, ACCI raised an issue concerning our jurisdiction under Part 2-7. The substance of the point is that in making comparisons with the rates for employees in the public sector we are limited to comparisons with the rates paid by national system employers to national system employees, namely: Victorian local government and public service employees, Tasmanian local government employees, and employees of the Australian Government and of the Territories.

### **Australian Business Industrial**

[47] ABI submitted that the task of identifying the quantum of gender undervaluation may be assisted by identifying instruments that are demonstrably gender neutral. Comparisons with public sector awards and agreements, however, are not useful because of the presence of other factors, including a general public sector premium. ABI rejected reliance on private sector agreements for similar reasons.

[48] However, ABI submitted that the consent award rates in the non-government SACS industry in New South Wales are a useful guide because of their consensual development over many years, the application of the New South Wales Equal Pay Principle, historical consideration of difficulties in bargaining in the sector and the female characterisation of the work.

[49] ABI urged us to be cautious about adopting the rationale and approaches contained in the Joint Submission. It submitted that the comparator rates should be modified to remove misleading and extraneous factors. According to ABI, one way of confining the differential to genuine gender-based factors is to apply the assessment of Cassells that 60 per cent of differences in earnings between men and women workers are because of simply being female.<sup>39</sup> This would involve applying this percentage to the differences in salaries between public sector wages and the modern award. ABI submitted that this “washes out” other public sector considerations and adopts a sound and reasonable approach to the assessment of the extent of gender-based undervaluation.<sup>40</sup>

### **Chamber of Commerce and Industry Western Australia**

[50] The Chamber of Commerce and Industry Western Australia submitted that the applicants have not addressed the questions posed in the May 2011 decision. They have failed to quantify the degree of gender-based undervaluation and, as they bear the onus of establishing the case, the claim must fail. It submitted that making an order which does not satisfy the necessary criteria would be likely to lead to other unions putting forward

unsubstantiated demands that would be costly to defend and potentially unsustainable if implemented.

### **Queensland Community Services Employers' Association**

[51] The Queensland Community Services Employers' Association submitted that it is affected by instruments derived from the QIRC Equal Remuneration decision in 2009. It is concerned that rates in the relevant Queensland instrument were increased by \$20 and 3.4 per cent in September 2010 and September 2011 respectively, and believes that the amounts are incorrect. It has been involved in meetings with the Fair Work Ombudsman in Queensland to ascertain the correct legal obligations, but at the time of its submission was not aware of the outcome. It believes that the Joint Submission uses incorrect rates derived from the QIRC decision and that they should not be adopted in this case.

### **Mission Australia**

[52] Mission Australia operates in the fields of employment services and community services under different enterprise agreements and funding arrangements. The employment services operations are not covered by the claim and are not considered to be female dominated.

[53] Mission Australia submitted that no case has been made out for the non-service delivery employees involved in administration, facilities management, cleaning and food service. If an order is made in relation to these groups of employees, it will result in inequity with similar employees working in other industries and between the two groups of employees employed by Mission Australia. At Level 2 of the community services structure the effect of the claim will be that administrative and non-care employees in community service operations will be paid between 4.8 and 21.7 per cent higher than the employees performing the same work in its employment services operations. It submitted that this inequity will result from the fact that the employment services work is not female dominated.

[54] Mission Australia submitted that the historical gap between public and private sector rates should be removed from the analysis because it is not gender-based. The resultant difference would be the only amount that could be justified as the amount of gender-based undervaluation.<sup>41</sup>

## **CONCLUSIONS**

[55] In the May 2011 decision, having indicated that we intended to make an equal remuneration order, we recommended that the parties enter into discussions with a view to reaching agreement on the terms of an order. The Joint Submission contains an agreement between the Commonwealth and the applicants on the main elements of an order. Although the Commonwealth is not a SACS industry employer, it plays a very important funding role, both directly and through the provision of funds to the states.

[56] An important, though provisional, view expressed in the May 2011 decision is that any equal remuneration order we make should take the form of an addition to rates in the modern award.<sup>42</sup> In light of the submissions we have now received, we confirm that conclusion.

**[57]** The issue has particular importance in this case because we are dealing with an industry of great size and diversity. Were we concerned with a single employer the issue may not arise in the same way. In that case it may only be a question of ordering equal remuneration as between the employees in the claimant group and the employees in the comparator group. As we indicated in the May 2011 decision, complications arise because of the industry-wide nature of the application and the diversity of the industry in question.<sup>43</sup>

**[58]** While the May 2011 decision dealt with the gap between rates in the SACS industry and rates in state and local government agreements, there is no justification for establishing a nexus between an equal remuneration order and market rates in state and local government. Attempting to establish such a link would be fraught with difficulty. Which rate or rates should be chosen? At what level or levels should the nexus be established? When should adjustments be made? Apart from these issues, there is also a difficulty in establishing a link to rates which are determined by market forces. Many factors influence market rates and it is clear that not all of the factors are gender-related. It is also important to be aware of the potential for wage levels resulting from an equal remuneration order to feed back into, and place pressure on, enterprise bargaining. If market rates were to be influenced by an equal remuneration order, it could be inconsistent with the equal remuneration provisions. We also agree with those who submitted that the equal remuneration provisions should not be used to facilitate what are in effect claims for parity with rates in the public sector.

**[59]** We said in the May 2011 decision:

“We agree that it would be wrong to conclude that the gap between pay in the sector with which we are concerned and pay in state and local government employment is attributable entirely to gender, but we are in no doubt that gender has an important influence. In order to give effect to the equal remuneration provisions in these complex circumstances, we consider that the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation.”<sup>44</sup>

**[60]** This approach, of attempting to identify the extent to which gender has inhibited wages growth in the SACS industry, was central to the May 2011 decision and remains central to our consideration of remedy. The adoption of percentages based on the modern award rates is consistent with that approach.

**[61]** For these reasons, we have decided that any equal remuneration order we make should be based on the wages in the modern award. The proposals in the Joint Submission are consistent with that requirement. Importantly, the percentage additions to the modern award wages, as varied from time to time in annual wage reviews, will provide an ongoing remedy for the part gender has played in inhibiting wages growth in the SACS industry.

**[62]** Following from our reasons for this conclusion, we have reservations about the two methods used in the Joint Submission to justify the percentages which are proposed at each modern award level. In particular, we do not think it would be appropriate to endorse any percentage or other relationship between the wages resulting from an equal remuneration order and wages in state and local government agreements or in an award. To the extent that comparisons with wages in state and local government agreements and awards provide a snapshot at a particular point in time they are useful in a general way. Given the almost universal support for phased implementation of any order under s.304 of the Act, it is

inevitable that there will be a lengthy implementation period. There will be further growth in bargained and award wages in state and local government over the implementation period. In the circumstances, comparisons with current wage levels should be treated with some caution. We return to this matter later.

**[63]** We note the reliance placed on caring work as a proxy for gender-based undervaluation. Attempting to identify the proportion of work which is caring work at the various classification levels is consistent with one of the principal conclusions in the May 2011 decision.<sup>45</sup> In our view, however, the application of the care percentages suggested to the public sector pay differentials results in wage levels which are too close to current public sector pay levels. Pay levels which, as we have said, are determined by market forces. In some cases, the rates derived from the agreed percentages would exceed current public sector rates for comparable work, although this is highly unlikely to occur in fact as the rates will not be fully implemented until the conclusion of the phasing period, by which time public sector rates will have increased. We also have some doubts about the inclusion of indirect care in the definition of caring work. Despite these reservations we take the view that in general terms the percentages proposed in the Joint Submission are appropriate.

**[64]** There is widespread support for the proposals. While AFEI, Ai Group, ABI, the constituent members of ACCI and some individual employers oppose the proposals, many employers support them. A number of employers, if not most, are also concerned about funding issues. While not determinative, in an area where an exercise of broad judgment is called for, the level of agreement is important.

**[65]** The Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share. On the other hand there are significant risks which need to be considered. For example, there will be an impact on employers in relation to programmes and activities which are not government funded. As a number of opponents of the proposals pointed out, any order we make has the potential to affect employment levels and service provision where costs cannot be recovered. We are also concerned about the effect on the finances of a number of the states. We have decided that in the circumstances these risks can be satisfactorily addressed by an extension to the length of the implementation period.

**[66]** The percentages we have decided on at the various modern award levels in response to the proposals set out in paragraph 5 of this decision are as follows:

- Level 2—19%
- Level 3—22%
- Level 4—28%
- Level 5—33%
- Level 6—36%
- Level 7—38%
- Level 8—41%

**[67]** These percentages are in line with the proposals in the Joint Submission. As we have already indicated, however, we have decided to extend the length of the agreed implementation period. The percentage loadings will be introduced over eight years, in nine equal instalments, commencing on 1 December 2012 and ending on 1 December 2020. This extends the implementation period proposed in the Joint Submission by two years. This

extension is in recognition of the potential effects of the equal remuneration order on employment and service provision, and on state finances. Historically, growth in wages in agreements applying to state and local government employment has exceeded growth in wages in federal awards over similar periods. On that assumption, by December 2020, the gap between the wages derived from the operation of the equal remuneration order and wages in state and local government agreements will have increased. As time goes on the gap will continue to grow.

**[68]** We deal now with the proposal for cumulative annual loadings of 1 per cent over the first four years of the implementation period. The parties to the Joint Submission proposed, under the heading “Minimum wage adjustments and transitional arrangements”, a loading of 1 per cent per annum in December of each of the years 2012, 2013, 2014 and 2015 to recognise impediments to bargaining in the industry and to provide national consistency with the position in Queensland. It was said that these amounts would “provide short term compensation for the SACS industry for its historical inability to bargain while it transitions to the new funding and workplace relations environments.”<sup>46</sup>

**[69]** We have already indicated that the percentages proposed at each level are too close to current public sector wage levels. For this reason and because of the concerns we have already expressed about the potential impact of the order, we have decided that the proposed loadings, totalling a 4 per cent addition to wages, should be subject to the same implementation arrangements as the percentage additions to wages at each level. Therefore our order will provide for a loading of 4 per cent to be introduced in nine equal instalments over the period 1 December 2012 to 1 December 2020.

**[70]** A number of parties proposed methods for estimating the extent to which the gap between wages in the SACS industry and wages in the public sector is attributable to gender. The Joint Submission refers to a number of studies which identify a proportion of the gender pay gap which is unexplained by factors other than gender. Particular emphasis was placed on a study which found that 60 per cent of the gender pay gap is attributable to gender considerations. Other studies estimated other percentages, mostly higher than 60 per cent. ABI submitted that 60 per cent was an appropriate proportion of the gap between wages in the SACS industry and wages for comparable work in the public sector to attribute to gender.

**[71]** Ai Group submitted that gender influences can be removed from public sector rates by discounting for factors not related to gender. It relied on a study which estimated that the appropriate discount ranges from 25 per cent at the 25th percentile to 15 per cent at the 75th percentile, although the difference at the 90th percentile is much less.

**[72]** As we have already explained, we do not think that it is appropriate to fix a relationship between the rates derived from the equal remuneration order and public sector rates. It is worth pointing out, however, that if historical differences in rates of growth in award rates and public sector agreement rates are maintained, it is likely that by 2020, at most levels, the wages resulting from the order will account for less than 60 per cent of the difference between the rates for the modern award classifications and the public sector comparator classifications used in the Joint Submission. Equally, on the same assumptions, the public sector discount proposed by Ai Group is likely to be achieved at most levels. While we are aware of various criticisms made of the public sector comparator rates selected, those criticisms do not affect the overall growth rates in public sector wages.

[73] We are prepared to make an equal remuneration order in the terms indicated. Such an order will ensure that for the employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value. The percentage additions at each wage level and the further 4 per cent loading will be introduced in nine equal instalments on 1 December in each of the years 2012 to 2020.

[74] We note that the transitional provisions in Schedule A to the modern award were amended in January 2012. The transitional provisions recognise that there are SACS industry employees covered by this decision whose current minimum wage, in a transitional minimum wage instrument or award-based transitional instrument, is lower or higher than the minimum wage for their classification in the modern award. Consideration should be given to the interaction between the transitional provisions and the implementation arrangements for the equal remuneration order. We encourage the parties to review the position to ensure there are no unintended consequences and that in any one year the overall cost impact is appropriate.

## **OTHER MATTERS**

[75] In the May 2011 decision we sought the views of the parties in relation to a number of specified matters. We set those matters out at the commencement of this decision. There are some matters which remain to be addressed. We deal with them now.

[76] The first matter concerns the availability of salary packaging in relation to the amount of any equal remuneration order. In the May 2011 decision we said we did not think it appropriate to regard the possible benefits of salary packaging as equivalent to remuneration.<sup>47</sup> However, we left open the issue of whether any equal remuneration order should provide for salary packaging. Not all parties made submissions on this matter. Some who did misunderstood the Full Bench's remarks and addressed a different question. Few parties addressed the question which we raised. The Commonwealth submitted that salary packaging should be provided for in the equal remuneration order. Because of the terms of s.306 of the Act, unless the order deals with salary packaging explicitly, that section will preclude any enterprise agreement, whether made before or after the order, allowing for salary packaging. Ai Group submitted that the order should contain a note about salary packaging for the purposes of s.324 of the Act to clarify the situation. In our view, it would be appropriate to provide that any amounts payable under the equal remuneration order could be subject to salary packaging, complementing the provisions of the modern award in that respect.<sup>48</sup>

[77] The next matter is whether the order should provide for the absorption of overaward payments. There was general support for absorption. We think it is appropriate that the order should include a provision similar to clause 2.2 of the modern award.

[78] The final matter is whether the order should form part of the award or stand alone. Most parties took the view that the order should stand alone. Of the parties who addressed the operation of the better off overall test for enterprise agreements, most took the view that the benefit of the order would be protected by the terms of s.306 of the Act regardless of the operation of the better off overall test. We agree. The order should stand alone. Steps will be taken to include a notation in the modern award alerting readers to the existence of the order.

## THE ABI APPLICATION

[79] We deal now with an application made by ABI to vary the modern award in relation to minimum wages for graduates. The starting point for consideration of the application is the following passage from the May 2011 decision:

“[262] We next deal with a submission made by the Commonwealth concerning the modern award rates. The submission deals with the fixation of rates in the modern award, in particular the rates for graduates, and traces the relevant award history. [Australian Government, Outline of contentions, 18 November 2010.] The submission suggests that the graduate rates may not have been properly translated from predecessor awards when the classification structure in the modern award was finalised by the Full Bench of the AIRC in late 2009. In the Commonwealth’s submission, the potential loss of relativity for graduates is between 2.3–2.7 per cent. In our view this matter requires further investigation. If an error occurred in the fixation of the rates and relativities in the modern award, or if the existing relativities were departed from for no good reason, the situation should be rectified.”<sup>49</sup>

[80] ABI submitted that there are errors of the kind suggested in the Commonwealth’s submission. It submitted that the entry point for the 3-year graduate and 4-year graduate should each go up one pay point to correct a misalignment of the wage rates when the modern award was made in 2009. While contending that the errors identified are not directly relevant to the operation of the equal remuneration provisions, ABI submitted that it would be desirable to correct the errors in order to ensure a known base for the operation of the equal remuneration order. We could amend the modern award using powers available under other provisions in the Act. There was general agreement to the application and no opposition to it. It is based on the reinstatement of the wage levels fixed for 3-year and 4-year graduates respectively by the Australian Industrial Relations Commission in the *Social and Community Services (Queensland) Award 2001* in 2002.<sup>50</sup> We grant the application including the consequential amendments to the classification definitions in the modern award.

[81] The Commonwealth submitted that in order to fully restore the relativities fixed in 2002, it would also be necessary to increase the rates for graduates by \$164.10 per annum and to then apply that increase at every level in the classification structure. No other interested person or body supported this proposal. The Commonwealth does not have the capacity to make an application for a determination varying a modern award. Since no person or body with that capacity has sought a determination, we would be required to make a determination on our own motion. In the circumstances, we do not think it would be appropriate to act on our own motion.

## FINALISATION OF THE ORDERS

[82] We require the applicants to file draft orders to give effect to this decision within 21 days.

PRESIDENT

## **DECISION OF VICE PRESIDENT WATSON**

### **INTRODUCTION**

[83] I am respectfully unable to agree with the conclusion of the other members of the Full Bench expressed in paragraphs 62–73 of the majority decision. In my view the applicants in this matter have failed to establish that the salary increases sought are consistent with the legislative provisions under which the application has been made.

[84] The case is unprecedented by reference to international equal pay cases. It does not seek equal pay for men and women in a single business, or in an industry. Rather, it seeks to establish a large minimum overaward payment for all men and women in the entire SACS industry to a level approaching public sector wage levels. It has more in common with a case based on comparative wage justice than equal pay. In my view the applicants have failed to establish key ingredients of their claim. In particular, it has not been established that:

- the public sector is an appropriate equal remuneration comparator,
- the wage gap between the not-for-profit SACS industry and the public sector is primarily due to gender-based undervaluation, and
- it is appropriate to effectively extract the entire SACS industry from the enterprise bargaining framework of the Act for the foreseeable future.

For these reasons the claim should be rejected.

[85] The approximately 150 000 employees covered by this application are employed to assist the most vulnerable members of Australian society. The employers—approximately 4000 mostly small not-for-profit organisations—had their origins in voluntary charity work and still perform a significant amount of their work through volunteers. Employees covered by the modern award are primarily engaged in the delivery of services funded by governments. Governments previously conducted many of these services themselves but have moved the delivery of the services to the not-for-profit sector because it was considered that the not-for-profit sector could deliver the services in a more efficient and cost-effective manner. The employers are therefore heavily reliant on government funding for the programs in which employees are engaged.

[86] It is indisputable that employees in the SACS industry deserve more recognition and reward for the work they undertake. It is also indisputable that the organisations that deliver the services deserve to be funded in a manner that enables them to attract, retain and fairly reward qualified employees to perform the valuable services to those most in need. These factors clearly have strong emotional appeal and might have been relevant if broad arbitral discretion was available. However, the factors are not relevant to the primary statutory test Fair Work Australia is required to apply in relation to this application.

### **THE NEED FOR A CAREFUL AND RIGOROUS APPROACH**

[87] The application is to make an equal remuneration order which is only available if it is established that there is not equal remuneration for men and women workers who perform work of equal or comparable value. The applicants have not sought to make comparisons

between women's pay and men's pay. They have consistently sought to make comparisons between levels of pay in the SACS industry and the rates paid to government employees who perform similar work.<sup>51</sup> The highly unusual nature of this case highlights the need for very careful scrutiny of all elements of the case.

**[88]** In the May 2011 decision, the Full Bench found that gender is an important influence on the level of wage rates in the SACS industry and required the parties to make further submissions on the extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations. This task requires an adjudication as to the extent of gender-based undervaluation in the SACS industry. The application also requires a consideration of various discretionary factors which might bear upon the making of an order. It is imperative that a careful and rigorous analysis is applied to these tasks. The test must be clear, the conclusion must be based on accurate findings and all relevant circumstances must be taken into account.

**[89]** Equal pay for men and women employees performing equal or comparable work is recognised as a fundamental right by major human rights instruments and the International Labour Organization. Legislative remedies exist in various jurisdictions including the European Union, the United Kingdom (UK), the United States of America (US) and Canada. In the United Kingdom, despite legislation existing for about 35 years, the number of new applications has increased markedly in recent years. In 2004–05, 8229 new applications were made. This increased to 44 013 new equal pay applications in 2006–07.<sup>52</sup> The increase in applications has led to the time taken for determining applications increasing to up to 8–10 years.<sup>53</sup> Of the 20 148 applications determined in 2008–09, 36 were successful.<sup>54</sup> Of the 20 100 determined in 2009–10, 20 were successful.<sup>55</sup>

**[90]** The UK experience highlights the potential for increased equal pay litigation in Australia. To the extent that the claims in the UK are valid, they disclose practices at the workplace inconsistent with legislation and contemporary community standards. To the extent that claims are not valid, they represent an attempt to misapply a legitimate legal remedy. To the extent that the number of applications arises from uncertainty as to the nature of obligations and remedies available it is a sad indictment on those responsible for the laws and their application. In the light of this experience, it is not inconceivable that an increased number of equal pay claims will be made in Australia if, arising from this case, there is ambiguity and uncertainty as to the nature of claims that can be made, the nature of the test to be applied and the findings necessary for a successful case.

**[91]** In Australia, the concept of equal pay has a long history and is universally supported. However, as outlined in the May 2011 decision, previous attempts to obtain equal remuneration orders under the federal legislation have been unsuccessful because of the failure of the applicants to demonstrate that the rates of remuneration arise from discrimination based on gender. There have since been changes to the legislative provisions. For example, as noted in the May 2011 decision, the explanatory memorandum to the Act states that the requirement to demonstrate discrimination as a threshold issue has been removed.<sup>56</sup> Nevertheless, the task of determining whether there is equal remuneration for men and women workers for work of equal or comparable value remains the fundamental requirement for any order.

**[92]** The context of the application and the nature of wage fixing in Australia also emphasises the need for a careful and rigorous approach. Since the 1990s the focus for fixing

actual wage rates has been through a process of enterprise bargaining. Arbitration of wage rates has been limited to the rates contained in minimum rates awards, which each have a work value relationship with other rates in all other minimum rates awards, and very rarely, arbitration when industrial action over enterprise bargaining causes significant damage to the economy. Even when arbitration was more generally available, comparative wage justice was a discredited concept. It was considered that there was nothing anomalous in differences in pay and that comparisons with other groups of employees could not amount to a merit justification for a wage increase.

[93] The applicants are effectively seeking the arbitration of actual rates of pay for the entire SACS industry. The application is based on the concept of equal remuneration aimed at delivering significant wage increases utilising comparisons with wages paid to public sector employees. Media reports have quoted the ACTU as suggesting that the May 2011 decision will help establish a standard for other industries and is a milestone in seeking wage justice for women in all lines of work across Australia.<sup>57</sup> Despite the submissions of the ACTU to the contrary, it is also obvious that the ultimate result will be an important element of the precedent established by the case, especially if, as proposed by the majority, the original claim is granted in full.

[94] These circumstances demonstrate the need for a careful and rigorous approach. Once such an approach is adopted, it is clear, in my view, that the applicants have failed to establish that the rates they seek are justified or appropriate having regard to both the legislative test and the application of discretionary factors. I turn to the reasons for this conclusion.

#### **THE ABSENCE OF A LEGITIMATE COMPARATOR**

[95] On any view various aspects of the claim are highly unusual. An equal remuneration order is sought for both men and women workers. Unlike the remedies available in the UK which require comparisons of relative payments to men and women within a single business, the order is sought across multiple employers for their entire male and female award-covered employees.

[96] Not only is no comparison sought to be made with male employees employed by the same employer—no comparison is sought to be made with male employees of any other employer. The comparison that is sought to be made is with public sector employees who perform similar work. As with SACS industry employees, those employees are also primarily female. It is asserted that the pay of government employees is not subject to gender undervaluation. However, despite raising concerns as to the appropriateness of public sector comparisons in the May 2011 decision,<sup>58</sup> no reliable analysis has been provided of the inherent differences which exist between industries and different employers or the factors which might otherwise explain the reason for the differences in rates of pay.

[97] The UK case law is replete with analysis of the reasons for differences in pay because no breach of equal pay obligations arises where the pay practice is explained by objectively justified factors not related to gender.<sup>59</sup> The concept is that differences in pay, even within a single business, can and do exist for all types of legitimate reasons. A remedy is only available if the difference is because of gender. As I have noted above, differences in pay between employers, let alone between industries, are beyond the scope of UK equal pay laws, apparently because differences in pay between employers are regarded as entirely legitimate

in a market economy. Similar limitations exist under US statutes such as the *Equal Pay Act of 1963*.

[98] In both the UK and US jurisdictions, it is a defence to show that differences in pay are for reasons other than gender. In the case law in both jurisdictions, courts and tribunals examine the reasons for differences in pay in great detail. A remedy can only be granted to the extent that differences in pay are found to be for reasons tainted by gender. The House of Lords has warned that without a reliable comparator and without confining the equal pay remedy to differences because of gender, the equal pay legislation could be called into operation whenever mixed groups of workers are paid differently.<sup>60</sup> Questions of appropriate comparators and causation are important aspects of the case law in other jurisdictions. An inappropriate comparator or an alternative justification for a difference in pay is fatal to an equal pay claim. In Australia, the High Court has emphasised the need for a careful approach to issues of causation in anti-discrimination laws and applied relevant English authorities.<sup>61</sup> A similar approach is required in this matter.

[99] This international perspective and considerations of logic require the claim in this matter to be based on the establishment of a reliable benchmark or comparator and the elimination of any factors not related to gender from any comparisons that can legitimately be made. If a benchmark is sought to be utilised, it must be reliable. It must constitute equal or comparable work in every respect. Generalised comparisons of work between industries are insufficient. Comparable roles must be fully assessed against work value criteria. Remuneration for comparable roles must not contain additional elements such as the inevitable differences in pay between employers and between different industries or superior bargaining outcomes that generally arise in different sectors of employment.

[100] If government employment is sought to be the benchmark for pay in the SACS industry, it must be demonstrated that payment at the level of government employment is the minimum gender neutral level of wages for the SACS industry. As noted in the May 2011 decision, no such presumption can be made.<sup>62</sup> Further, the Full Bench has already stated that it would be wrong to conclude that the gap between pay in the SACS industry and pay in state and local government employment is attributed entirely to gender.<sup>63</sup> The applicants have not established that this conclusion is erroneous or should be departed from.

[101] Further, there is material before this Full Bench that establishes that there is a public sector premium not related to gender in public sector earnings in Australia.<sup>64</sup> It is also evident that there have been superior bargaining outcomes in the public sector which cannot be attributed to gender. The Australian Industrial Relations Commission repeatedly acknowledged this difference and in various arbitrated cases refrained from imposing public sector wages and conditions on private sector employers.<sup>65</sup>

[102] It has not been established that public sector wage levels are a reliable benchmark for gender neutral wages in the not-for-profit sector. In my view the failure to establish a valid benchmark represents a significant flaw in the applicants' case and is a barrier to granting the relief sought in this matter.

## **EVALUATING GENDER-BASED UNDERVALUATION**

[103] There is an additional fundamental flaw in the applicants' case. The claim in this matter can only succeed to the extent that it is demonstrated that differences in pay are

because of gender or to address gender-based undervaluation. In the first submissions made by the applicants since the May 2011 decision, it was asserted that the extent of undervaluation attributed to gender is the difference between what is paid to SACS industry employees under transitional arrangements and the remuneration paid to state and local government employees who perform similar work.<sup>66</sup> This approach was widely criticised by most parties including the Commonwealth as inconsistent with the Act. For example, the Commonwealth contended that an equal remuneration order can only address differences in remuneration that are gender based and the critical issue is the isolation of the gender-based component of the wage gap.<sup>67</sup>

**[104]** In subsequent submissions two techniques contained in the Joint Submission were relied on in an effort to demonstrate the extent of gender-based undervaluation in the SACS industry. The majority decision highlights the difficulties with both of these approaches. There is no reason in logic why the extent of gender-based undervaluation corresponds to the proportion of caring work undertaken by some employees in the classifications in the modern award. Further, the analysis of direct and indirect caring work relied on in the Joint Submission is highly questionable for reasons explained by employer groups in their submissions. The additional comparison of private and public sector wage rates is simply a comparison of those rates. It does not establish the extent of gender-based undervaluation.

**[105]** Nevertheless, the claim is maintained for increases which raise the entitlements of employees to the same level as decided by Commissioner Fisher in the Queensland Equal Remuneration decision. As noted in the May 2011 decision, the Queensland Equal Remuneration decision adopted, with some qualifications, the rates applying to what was found to be comparable work in state and local government employment.<sup>68</sup> In the May 2011 decision the Full Bench explained in detail the reasons why it would be inappropriate to adopt the rates resulting from the Queensland Equal Remuneration decision.<sup>69</sup> There is no reason to alter that conclusion. In relation to the requirement to assess the extent of gender-based undervaluation, the conclusion is equally valid whether the increase is applied immediately or phased in over time.

**[106]** As noted in the May 2011 decision, it is not alleged that the employers in the SACS industry are responsible for any gender-based undervaluation.<sup>70</sup> Employers are constrained by funding arrangements and do not differentiate between male and female employees. Nor is it asserted or admitted that those responsible for funding arrangements are responsible for gender-based undervaluation. Yet as noted in the May 2011 decision, it appears clear that the rates paid to employees in the SACS industry are the direct result of funding arrangements.<sup>71</sup> Governments fund programs based on factors such as limiting the cost of programs to the public purse and the competition that exists for grants. Funding is linked to outputs not inputs. Current levels are linked to historical funding levels. Voluntary labour, budgetary restraints and competition for funding have historically contributed to funding arrangements and continue to do so.

**[107]** The submissions in support of the claim in this matter infer that gender is inextricably entwined within these funding arrangements so that virtually the entire difference between the public sector rates and not-for-profit sector rates is gender related. Submissions in opposition to the claim contend that the funding arrangements are substantially unrelated to gender and do not provide justification for an equal remuneration order to the extent sought of 18–41 per cent. The majority of this Full Bench places significant reliance on the agreement of the

Commonwealth and several major employers in the SACS industry to the increases sought. In my view the case should be decided on the tests required by the applicable legislation.

**[108]** The level of remuneration paid to employees depends on statutory and contractual obligations together with further amounts that may be agreed by an employer. Employers are almost always constrained in the payments they can afford to pay their employees by business circumstances, market conditions, commercial contractual terms or funding arrangements. If required to pay more than they can afford, the additional cost must be offset by a reduction in the number of hours worked by their employees or the number of employees.

**[109]** In the SACS industry the evidence establishes that employers are predominantly constrained from paying their employees more by funding arrangements. In many service contract areas of industry, employers are constrained from paying their employees more by competitive contractual rates.

**[110]** One employer who made submissions in this matter, Mission Australia, conducts some community service operations covered by the modern award and other employment services that are not. It employs various categories of employees, including many not directly engaged in service delivery such as administrative employees, cleaners and food service employees. A high proportion of community service employees are female but in the employment services division, most employees are male. The rates of pay in each division are similar—because of funding arrangements. Mission Australia is concerned that the order sought in this matter will require it to pay different amounts to administrative employees in each division who essentially perform the same work and that the increased rates for employees in its community services division will be because of the predominantly female workforce. This example shows that funding arrangements—and not gender considerations—are a major reason for current pay levels.

**[111]** One can test the proposition advanced by the applicants by reference to other similar circumstances. If a large employer decided to “contract out” catering or cleaning functions to a commercial contractor who provides services at lower costs by paying its predominantly female employees less than the direct employees, would the differential between the pay of direct employees and contractor employees be the result of gender undervaluation? In my view the commercial aspects of such examples are a major factor unrelated to gender.

**[112]** These circumstances lead to the conclusion that the current rates of pay for SACS industry employees are not entirely the result of the circumstance that a significant proportion of employees in the SACS industry are female. The rates are the result of market and funding arrangements which cannot be equated with gender undervaluation. Governments are responsible for the funding arrangements, and hence the wage gap between the SACS industry and the public sector. Any change to that situation must be based on a review of those funding arrangements.

**[113]** Further, no amount of agreement to the claim, or phasing in of the increases, can overcome the legislative hurdle that must be satisfied. The amount of agreement and the emotional appeal of the plight of SACS industry employees and their employers have been heavily relied on in this case. If this case was run under the anomalies principle in the 1980s, these factors would have a significant bearing on the broad arbitral discretion that once existed. But no such discretion now exists.

[114] Agreement could however be highly relevant in a different context. If the employees and employers in the SACS industry were successful in jointly lobbying the government funders to increase funding such as to allow enterprise agreements to be made on more than award minimum rates of pay, the existence of the agreement of the employers would satisfy the major statutory test and all those involved would be lauded for their efforts. Indeed, there appears to be every reason why this should occur and no reason why it should not, in the light of agreement by some governments to increase funding to the SACS industry. However, this case must be judged against the statutory test for equal remuneration orders and the applicants have simply failed, in my view, to demonstrate that increases in pay of the order sought correspond to the extent of gender-based undervaluation.

[115] It is not appropriate to speculate as to what increases are likely to occur in public sector employment and minimum wage adjustments in the future. For one thing, the recent high increases, closer scrutiny of government expenditure and a change to percentage minimum rates adjustments could indicate that the past is no indication of the future. Such an analysis also involves an inconsistent approach to the extent to which superior public sector bargaining outcomes are indicative of gender undervaluation. Estimating the future gap in public sector and SACS industry wages is certainly no substitute for a reliable finding on the extent of gender-based undervaluation. Such a finding is required if this claim is to succeed. No such reliable finding that justifies the extent of the claim can be made on the evidence adduced in this matter.

#### **DISCRETIONARY FACTORS**

[116] Even if a case of gender-based undervaluation is made out, the applicants would also need to satisfy Fair Work Australia that it is appropriate to make an order for increases at a particular level. This arises from the discretion vested in Fair Work Australia in relation to equal remuneration orders. The discretionary considerations involved in this matter are many and varied as explained in the May 2011 decision.<sup>72</sup> When a claim for an order providing for significant increases in wages is involved, the impact on enterprise bargaining looms as a significant factor.

[117] The objects of the Act include achieving productivity and fairness through an emphasis on enterprise-level collective bargaining.<sup>73</sup> The provisions of the Act further this objective by providing very limited availability for any other method of achieving increases in actual rates of pay. Arbitration is of course not generally available. Enterprise bargaining is a process which enables employees and employers at the workplace level to develop actual terms and conditions which suit the circumstances of the enterprise. The mere participation in the process of enterprise level discussions and agreement making has an important impact on workplace culture and employee and employer alignment. Every group of employees in Australia is required by these provisions to seek agreement to wage increases or improvements in conditions with their employer. In many cases, the economic circumstances of the employer or the bargaining power of employees results in wages and conditions remaining at or near the level of the award safety net.

[118] The effect of granting the claim is that over the phasing-in period all employees in the SACS industry will have access to additional annual wage increases on top of the award safety net in addition to increases to award wages arising from annual wage reviews. When the order is fully phased in, there will be an ongoing entitlement to be paid well above the award. Funding arrangements at this stage are uncertain and many employers expressed

concern at the situation if increased funding does not match new obligations. It is correct to observe that no government indicated that it would not meet increased funding obligations to enable payments to be made in accordance with the order without cuts in services or reductions in hours worked by employees. However, if this claim is granted, it is unlikely that future funding will exceed the obligations under the award and the accompanying equal remuneration order.

[119] The consequences of this are clear. If the claim in this matter is granted, it is inevitable that there will be very little or no enterprise bargaining in the entire SACS industry for very many years, probably decades. To selectively extract an entire industry from the enterprise bargaining legislative framework is a change of mammoth proportions. It is significant enough for the SACS industry alone. The precedent it creates for many other industries who cannot afford to pay significantly above the award and are female dominated highlights the need for great caution. It is not an overstatement to suggest that the future status of enterprise bargaining in this and other industries with similar attributes is at stake.

[120] Further, as indicated above, there is every reason why funding arrangements should be altered to allow employers in the sector to reach enterprise agreements with their employees for wages above the award safety net. Given the commitments or preparedness to fund increases arising from an equal remuneration order, there does not appear to be any reason why this increase in funding should not occur for enterprise bargaining purposes. Such an approach would not disturb the application of the central enterprise bargaining concepts of the Act to this industry and potentially other similar industries.

[121] In my view, these additional factors lead to the conclusion that the claim for increases of the magnitude sought should not be granted in the circumstances of this case.

## CONCLUSION

[122] This is a highly unusual case, unprecedented by international standards, in which the applicants are seeking to use the concept of equal remuneration for men and women workers to achieve significant above-award wage increases for both men and women workers in an entire industry. The case is seen as a test case of the equal remuneration provisions of the Act. These features require a very careful and rigorous approach to be adopted by Fair Work Australia.

[123] When subjected to such scrutiny, it is clear that the claim in this matter must fail.

[124] There has not been a satisfactory basis for establishing that public sector work is an appropriate comparator for employees in the not-for-profit SACS industry. In addition there is no basis for a finding that the extent of gender-based undervaluation is 18–41 per cent above award wage levels. It follows that an equal remuneration order providing for increases of that magnitude cannot validly be made.

[125] Further, the significant impact of the claim on enterprise bargaining in the SACS industry and other comparable industries militates against the claim being granted. The alternative of increased funding for enterprise bargaining in the SACS industry is a far more appropriate course of action.

**[126]** For these reasons, which are explained in more detail above, I do not consider that the applicants have made out a case for granting an equal remuneration order providing for increases above the award of between 18 and 41 per cent. In the circumstances of this matter, any such order would be inconsistent with the relevant statutory requirements and an inappropriate exercise of the discretion of Fair Work Australia. In my view the claim cannot succeed.

VICE PRESIDENT

*Appearances:*

*P Lawson* of counsel, *T Slevin* of counsel and *M Irving* of counsel with *K Harvey* and *J Wright* for the Australian Municipal, Clerical and Services Union and others.

*H Borenstein SC* with *M Harding* of counsel for the Australian Government.

*R Doyle SC* with *S Moore* of counsel and *K Bugeja* for the Minister for Employment and Industrial Relations for the State of Victoria.

*K Eastman* of counsel and *L Doust* of counsel with *G Boyd* for the Minister for Finance and Services for New South Wales (formerly appearing for the New South Wales Minister for Industrial Relations).

*P Garrison* of counsel for the Minister for Community Services and the Minister for Industrial Relations for the Australian Capital Territory.

*W Ussher* with *B O'Brien* and *L Booth* for the Queensland Attorney-General and Minister for Industrial Relations.

*R Warren* of counsel with *G Brack*, *D Makins*, *T Doyle* and *G Allen* for the Australian Federation of Employers and Industries.

*S Smith* with *M Mead* for the Australian Industry Group.

*J Fetter* with *E Thornton* for the Australian Council of Trade Unions.

*B Briggs* and *S Haynes* for Australian Business Industrial.

*D Grozier* for Australian Business Industrial and National Disability Services.

*M Pegg* for Jobs Australia.

*D Gregory* with *D Mammone* for the Australian Chamber of Commerce and Industry.

*C Howell* of counsel with *M Lindley* and *B Ackers* for the Australian Human Rights Commission.

*B Lawrence* of counsel with *A Matreve* and *M Cusack* for the Catholic Commission for Employment Relations and Catholic Social Services Australia.

*C Smith* for the Australian Council of Social Service.

*R Davidson* for Mission Australia.

*S Hammond* for the National Pay Equity Coalition and the Women's Electoral Lobby.

*G Muir* for the Queensland Community Services Employers Association Incorporated.

*L Maloney* for the Australian Childcare Centres Association and the Australian Community Services Employers Association.

*S Bibby* with *J Lawton* for the Community Employers of Western Australia.

*D Jones* with *C Harris* for the Chamber of Commerce and Industry Western Australia.

*D Proietto* for Open Families Australia Incorporated.

*Hearing details since May 2011 decision:*

2011.

Melbourne–Sydney (by video link):

October 24.

November 28.

December 7–8.

<sup>1</sup> [2011] FWAFB 2700.

<sup>2</sup> MA000100.

<sup>3</sup> [2011] FWAFB 2700.

<sup>4</sup> [2011] FWAFB 2700 at para 292.

<sup>5</sup> The rates at Levels 6, 7 and 8 exclude the 7.5 per cent loading which is payable under the Queensland SACS award. The rates at Level 8 include the final instalment of Commissioner Fisher's Order which is payable from 9 January 2012.

<sup>6</sup> Applicants and Australian Government, Joint Submission, 17 November 2011 at para 2.9.

<sup>7</sup> [2011] FWAFB 2700 at para 242.

<sup>8</sup> R Cassells, Y Vidyattama, R Miranti and J McNamara, *The impact of a sustained gender wage gap on the Australian economy*, Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs, November 2009, cited in the Joint Submission at para 2.28.

<sup>9</sup> C Briar and A Junor, *Community Sector Work: Proportion of Client Based Care by Modern Award Level October 2011*, Australian School of Business Research Report, University of New South Wales, cited in the Joint Submission at Attachment 1.

<sup>10</sup> Joint Submission at para 2.62.

<sup>11</sup> *ibid.*, at para 3.3.

<sup>12</sup> *ibid.*, at p. 27.

<sup>13</sup> [2011] FWAFB 8800.

<sup>14</sup> Joint Submission at paras 3.16 and 3.17.

<sup>15</sup> Exhibit Commonwealth 8.

<sup>16</sup> ACT Government, Further written submissions, 28 July 2011 at para 1.3.

<sup>17</sup> *ibid.*, at para 2.34.

<sup>18</sup> *ibid.*, at para 2.38.

<sup>19</sup> NSW Government, Supplementary contentions, 2 August 2011 at paras 39, 51.

<sup>20</sup> NSW Government, Supplementary contentions, 6 December 2011 at para 42.

<sup>21</sup> *ibid.*, at para 27.

<sup>22</sup> [2009] QIRComm 33; (2009) 191 QGIG 19.

<sup>23</sup> NSW Government, Supplementary contentions, 6 December 2011 at paras 22, 25.

<sup>24</sup> Tasmanian Government, Further submission at para 5.2.

<sup>25</sup> *ibid.*, at paras 3.2–4.

<sup>26</sup> Victorian Government, Further submissions, 29 July 2011 at para 7.

<sup>27</sup> Exhibit Vic 5, Attachment B, Statement of Georgina Grant at para 19.

<sup>28</sup> Victorian Government, Further submissions, 6 December 2011 at para 29.

<sup>29</sup> Victorian Government, Further submissions, 29 July 2011 at paras 43–45.

<sup>30</sup> Victorian Government, Further submissions, 6 December 2011 at para 3.

<sup>31</sup> *ibid.*, at para 13.

<sup>32</sup> *ibid.*, at paras 37–38.

<sup>33</sup> JD Baron and DA Cobb-Clarke, *Occupational Segregation and the Gender Wage Gap in Private- and Public-Sector Employment: A Distributional Analysis*, *The Economic Record*, vol 86, No. 273, June 2010, pp. 227–46.

<sup>34</sup> *op. cit.*, R Cassells, et al. 2009.

<sup>35</sup> HJ Kee, *Glass Ceiling or Sticky Floor? Exploring the Australian Gender Pay Gap using Quantile Regression and Counterfactual Decomposition Methods*, Discussion Paper No. 487, March 2005, The Australian National University, Centre for Economic Policy Research Discussion Paper.

<sup>36</sup> G Meagher and N Cortis, *The Social and Community Services Sector in NSW: Structure, Workforce and Pay Equity Issues* April 2010, p. 29 and p. 30 at Table 7, cited in AFEI Further Submission on Remedy, 2 December 2011 at para 18.

<sup>37</sup> Australian Chamber of Commerce and Industry, Submission, 29 July 2011, at para 13.

<sup>38</sup> *ibid.*, at para 50.

<sup>39</sup> op. cit., R Cassells, et al. 2009.

<sup>40</sup> Australian Business Industrial, Further submission, 2 December 2011 at paras 3.2–4.

<sup>41</sup> Mission Australia, Submission, 29 July 2011 at para 35.

<sup>42</sup> [2011] FWAFB 2700 at para 285.

<sup>43</sup> *ibid.*, at para 277.

<sup>44</sup> *ibid.*, at para 282.

<sup>45</sup> *ibid.*, at para 253.

<sup>46</sup> Joint Submission at para 3.17.

<sup>47</sup> [2011] FWAFB 2700 at para 244.

<sup>48</sup> See clause 14—Salary Packaging of the *Social, Community, Home Care and Disability Services Industry Award 2010* [MA000100].

<sup>49</sup> [2011] FWAFB 2700.

<sup>50</sup> AP808848, at clause 22 in particular, and AW796897 PR914950, 5 March 2002.

<sup>51</sup> [2011] FWAFB 2700 at para 277.

<sup>52</sup> Fredman, S, *Reforming Equal Pay Laws*, 2008, 37 *Industrial Law Journal* 193 at 195.

<sup>53</sup> Fredman, S, *The Public Sector Equality Duty*, 2011, 40 *Industrial Law Journal* 405 at 416.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> [2011] FWAFB 2700 at para 234.

<sup>57</sup> Australian Council of Trade Unions, *Campaign—Equal Pay and Better Jobs for Women*, viewed 18 January 2012, <<http://www.actu.org.au/Campaigns/EqualPay/default.aspx>>.

<sup>58</sup> [2011] FWAFB 2700 at paras 277–80.

<sup>59</sup> See, for example, *Glasgow City Council v Marshall*, [2000] IRLR 272 (House of Lords); *Gibson and Others v Sheffield City Council*, [2010] EWCA 63 (Court of Appeal).

<sup>60</sup> *Glasgow City Council v Marshall*, [2000] IRLR 272.

<sup>61</sup> *Purvis v State of New South Wales (Department of Education and Training)*, 217 CLR 92 at 234–6, per Gummow, Hayne and Hayden JJ.

<sup>62</sup> [2011] FWAFB 2700 at para 277.

<sup>63</sup> *ibid.*, at para 282.

<sup>64</sup> Ai Group Submission, 29 July 2011 at 25–45.

<sup>65</sup> See, for example, *CPSU, the Community and Public Sector Union v Employment National Limited*, Print R2508, 26 February 1999; *State of South Australia v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*, PR957094, 8 April 2005.

<sup>66</sup> ASU Submission, 22 June 2011 at 8.

<sup>67</sup> Australian Government Submission, 8 July 2011 at 3.3–7.

<sup>68</sup> [2011] FWAFB 2700 at para 240.

<sup>69</sup> *ibid.*, at paras 263–8.

<sup>70</sup> *ibid.*, at para 278.

<sup>71</sup> *ibid.*, at para 270.

<sup>72</sup> *ibid.*, at paras 273–5.

<sup>73</sup> *Fair Work Act 2009*, s.3(f).

## Attachment A—Exhibit ASU 141

Modern Award Classification	Current SACS Modern Award Rate	Public Sector Comparator Rate	Difference between SACS Modern Award and Public Sector Comparator (Total Undervaluation)	% undervaluation attributable to gender (based on Junor and Briar)	Undervaluation attributable to gender	Gender Neutral Wage Outcome (SACS Modern Award rate plus Undervaluation attributable to gender)	% increase from Modern Award to achieve Gender Neutral Wage Outcome	% increase from Modern Award to achieve Queensland SACS Rates	Queensland SACS rates
Level 2 Year 1	\$35,778.47	\$43,482.00	\$7,703.53	96.00%	\$7,395.39	\$43,173.86	21%	18%	\$42,103
Level 2 Year 2	\$36,904.69	\$44,789.00	\$7,884.31	96.00%	\$7,568.94	\$44,473.63	21%	18%	\$43,678
Level 2 Year 3	\$38,025.70	\$45,846.00	\$7,820.30	96.00%	\$7,507.49	\$45,533.19	20%	19%	\$45,293
Level 2 Year 4	\$39,042.43	\$47,310.00	\$8,267.57	96.00%	\$7,936.87	\$46,979.30	20%	20%	\$46,892
Level 3 Year 1	\$39,042.43	\$49,239.50	\$10,197.07	89.00%	\$9,075.39	\$48,117.82	23%	20%	\$46,892
Level 3 Year 2	\$40,168.66	\$50,964.50	\$10,795.84	89.00%	\$9,608.30	\$49,776.96	24%	22%	\$49,036
Level 3 Year 3	\$41,023.75	\$52,074.00	\$11,050.25	89.00%	\$9,834.72	\$50,858.47	24%	22%	\$50,079
Level 3 Year 4	\$41,857.99	\$54,387.50	\$12,529.51	89.00%	\$11,151.26	\$53,009.25	27%	23%	\$51,671
Level 4 Year 1	\$42,979.00	\$60,892.00	\$17,913.00	85.50%	\$15,315.62	\$58,294.62	36%	28%	\$54,907
Level 4 Year 2	\$44,105.23	\$63,760.00	\$19,654.77	85.50%	\$16,804.83	\$60,910.06	38%	27%	\$55,950
Level 4 Year 3	\$45,231.45	\$65,410.00	\$20,178.55	85.50%	\$17,252.66	\$62,484.11	38%	28%	\$58,082
Level 4 Year 4	\$46,248.18	\$66,468.00	\$20,219.82	85.50%	\$17,287.95	\$63,536.13	37%	29%	\$59,692
Level 5 Year 1	\$47,374.40	\$72,543.00	\$25,168.60	81.00%	\$20,386.57	\$67,760.97	43%	33%	\$62,824
Level 5 Year 2	\$48,391.13	\$74,324.00	\$25,932.87	81.00%	\$21,005.62	\$69,396.75	43%	33%	\$64,457
Level 5 Year 3	\$49,517.36	\$76,543.00	\$27,025.64	81.00%	\$21,890.77	\$71,408.13	44%	33%	\$66,043
Level 6 Year 1	\$50,638.37	\$84,187.00	\$33,548.63	56.50%	\$18,954.98	\$69,593.35	37%	36%	\$69,107
Level 6 Year 2	\$51,764.59	\$89,985.00	\$38,220.41	56.50%	\$21,594.53	\$73,359.12	42%	36%	\$70,145
Level 6 Year 3	\$52,890.82	\$90,372.00	\$37,481.18	56.50%	\$21,176.87	\$74,067.69	40%	35%	\$71,195
Level 7 Year 1	\$54,011.83	\$98,954.00	\$44,942.17	57.30%	\$25,751.86	\$79,763.69	48%	38%	\$74,404
Level 7 Year 2	\$55,138.05	\$103,212.50	\$48,074.45	57.30%	\$27,546.66	\$82,684.71	50%	38%	\$75,984
Level 7 Year 3	\$56,264.27	\$105,572.00	\$49,307.73	57.30%	\$28,253.33	\$84,517.60	50%	38%	\$77,568
Level 8 Year 1	\$57,385.28	\$111,882.50	\$54,497.22	56.00%	\$30,518.44	\$87,903.72	53%	41%	\$80,803
Level 8 Year 2	\$58,511.51	\$115,016.00	\$56,504.49	56.00%	\$31,642.51	\$90,154.02	54%	41%	\$82,353
Level 8 Year 3	\$59,637.73	\$115,016.00	\$55,378.27	56.00%	\$31,011.83	\$90,649.56	52%	41%	\$83,984

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