

Fair Work Commission: 4 yearly review of modern awards

SUBMISSIONS

CHILDREN'S SERVICES AWARD 2010

EDUCATIONAL SERVICES (TEACHERS) AWARD 2010

AUSTRALIAN CHILDCARE ALLIANCE INC.

AUSTRALIAN BUSINESS INDUSTRIAL

THE NSW BUSINESS CHAMBER LTD

11 DECEMBER 2020

1. BACKGROUND

- 1.1 These submissions are made on behalf of:
- (a) Australian Childcare Alliance Inc. (**ACA**);
 - (b) Australian Business Industrial (**ABI**);
 - (c) New South Wales Business Chamber (**NSWBC**),
(together the **ECEC Employers**).
- 1.2 These submissions respond to the Fair Work Commission Statement (**Statement**)¹ dated 26 November 2020, which seeks submissions in response to the United Workers Union submission dated 10 November (**UWU Submission**).
- 1.3 The UWU Submission states that providing additional non-contact time for Educational Leaders under the Children’s Services Award 2010 (**Children’s Services Award**) and not the Educational Services (Teachers) Award 2010 (**Teachers Award**) creates an unintended inconsistency in the application of the decision issued on 10 June 2020 (**June Decision**) across both awards.

2. UWU CLAIM & JUNE DECISION

- 2.1 The June Decision granted a claim to provide an additional two hours non-contact time for employees who are appointed Educational Leaders (the **Claim**) but only under the Children’s Services Award.
- 2.2 On 10 November 2020, the UWU Submission stated that: *“The result of these omissions is to not give full effect to the previous Decisions of the Commission”* and sought for the inconsistency in granting the Claim in one award (and not both) to be rectified.
- 2.3 However, the June Decision provides no reasoning as to why the Claim and draft determination filed by UWU on 15 March 2019² in relation to the Teachers Award was not considered and ultimately accepted or rejected by the Commission.
- 2.4 As a consequence, it appears that no decision has been made in relation to the Claim for the Teachers Award. If such a decision has been made, it appears to have been inadvertently omitted from the June Decision.

3. ECEC EMPLOYER POSITION

- 3.1 In a practical sense, the June Decision has created an inconsistency between the relevant awards. However, a variation to ‘cure’ that inconsistency must be justified on its own merits³, that is, the Commission must be satisfied that the relevant legislative principles (identified in the June Decision and not repeated here) are satisfied in relation to the Teachers Award in addition to the Children’s Services Award.

¹ [2020] FWCFB 5176

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201818-20-sub-corr-uv-150319.pdf>

³ Section 156(5) of the *Fair Work Act 2009* (Cth)

- 3.2 Noting that the Commission is undertaking a broad evaluative function, we observe that following questions are likely to be relevant to the Full Bench in making any further determination:
- (a) whether Educational Leaders can be both ECTs (covered by the Teachers Award) and Educators (covered by the Children's Services Award) (this is uncontroversial);
 - (b) whether the evidence provided by Dr Fenech, Ms Hennessy and Ms Llewellyn (as it was used for the Children's Services Award June Decision) is also relevant to the Teachers Award;
 - (c) whether the evidence obtained in relation to Educational Leaders and their duties applies across both awards (including evidence relating to the Educational Leader Allowance claim, a claim which obviously overlaps with the Claim) is relevant to granting the Claim in the Teachers Award;
 - (d) whether the same cogent reasons for granting the Claim apply to both awards;
 - (e) whether Educational Leaders who are also ECTs perform the same Educational Leader 'duties' as non-degree qualified employees in ECEC (which is uncontroversial);
 - (f) whether the difference between the wages of employees under the Teachers Award and employees under the Children's Services Award warrant a differential treatment of the Educational Leader role in relation to non-contact time;
 - (g) whether the 'duties' of Educational Leaders are already considered or covered by the classification structure in the Teachers Award.
- 3.3 We note that our clients opposed the introduction of the Claim prior to the June Decision in relation to both awards.
- 3.4 We nonetheless acknowledge that the Full Bench's findings in June Decision relating to the Children's Services Award are likely transferable in large part to the Teachers Award. Notwithstanding that we have not varied our position on the Claim in the Teachers Award, we do not propose to advance any substantive submission that the circumstances applying in the Teachers Award warrant a different outcome to that applying in the Children's Services Award.

Filed on behalf of the Australian Childcare Alliance, Australian Business Industrial and the NSW Business Chamber Ltd

11 December 2020