

IN THE FAIR WORK COMMISSION

Matter No: 2018/18 and 2018/20

Section 156 - Four Yearly Review of Modern Awards –*Children’s Services Award 2010 & Educational Services (Teachers) Award 2010*– Substantive review

SUBMISSION OF UNITED VOICE –BACKGROUND DOCUMENT 2

1. This submission is made pursuant to the directions of the President made on 5 July 2019 requiring ‘*particular parties*’ to file a submission responding to the questions set out in the Background Document 2 in relation to the 4 yearly review of the *Children’s Services Award 2010* (‘*the Children’s Services Award*’) and the *Educational Services (Teachers) Award 2010* (‘*the Teachers’ Award*’)(collectively: ‘the Awards’)
2. The Australian Childcare Alliance, Australian Business Industrial and the NSW Business Chamber are collectively referred to as ‘*ACA and others*’ within this submission.
3. This submission traverses a number of areas covered in our submission of factual findings lodged on 29 May 2019 and other submissions. For ease, we have reproduced excerpts from earlier submissions where appropriate.

Request to delay the review of the Awards

4. In paragraph [8] of the IEU’s submission on the background paper filed 10 July 2019, the IEU asks that the determination of United Voice’s allowance claims be delayed until the ERO proceedings are finalised because the 2 proceedings are now ‘*intertwined*’ and continuation of the review of the Awards ‘*will cause difficulties for the ERO proceedings*’ and ‘*unfair prejudice to the IEU*’.
5. We oppose this course of action.
6. Our position continues to be that there is no overlap, and that our allowance claims are discrete claims that do not affect the minimum wages of employees covered by the Awards.
7. Whether or not the current base rates of the Awards are said to be undervalued, our allowance claims, if agreed to, will not substantially affect any undervaluation. First, our allowance claims deal with matters that are not included in the Awards’ current classification structures. Second, in the context of a work value claim, the matters the subject of our allowance claims are not apt to be included in base rates remuneration which necessarily applies to all employees at a particular level. In relation to both functions sought to be dealt with by our allowance claims, namely the Responsible Person role and the Educational Leader role, it would be practically inappropriate to deal with these functions by an adjustment of base rates.

The functions concerned shift between employees at different levels and are not in any practical sense appurtenant to any classification level or capable of being embedded within a classification structure. A fundamental reason why we urge the Commission to varying the Awards to include allowances for being the Responsible Person and an Educational Leader is that the National Quality Framework ('NQF') posits these responsibilities on individual employees who can be engaged at different classification level. The roles move between employees and classifications sometimes within a day. The best illustration of this feature of our allowance claims is the function of a Responsible Person in the context of the Children's Services Award. At the beginning of the day, a level 3 educator who arrives at work at 7.30am and opens a centre may be the Responsible Person; later in the day, a level 6 director may then assume the role and perform the function for most of the day; and, if the director leaves at 5.30pm, a level 2 cook, engaged as a support worker may be the Responsible Person until the centre closes. The Educational Leader function is more static but the NQF only requires one employee to be the Educational Leader. A level 3 under the Children's Services Award might be the Educational Leader within a cohort of other educators also classified at this level who are not obligated to perform this additional function.

8. The plea by the IEU that their claims concerning the Awards in the proceedings C2013/6333 should take precedence over the review of the Awards within the 4 yearly review of modern awards is problematic.
9. The 4 yearly review of modern awards is a statutory obligation of the Commission to conduct a 'review' of each modern award. The review is also an *inter partes* process. The IEU is involved in the review of the Awards as are many others. Section 156(1) of the *Fair Work Act* 2009 ('the Act') requires that '*the FWC must conduct a 4 yearly review of modern awards starting as soon as practicable* (our emphasis) *after each 4th anniversary of the commencement of this Part.*' Section 156(2)(a) states that '*in a 4 yearly review of modern awards, the FWC must review all modern awards.*' The transitional provisions in clause 26(2)(a) of Schedule 1 of the Act states that despite the repeal of Division 4 of Part 2-3, the above provisions continue to apply, in relation to the review of the modern award, as if those provisions had not been repealed.
10. The 4 yearly review of the Awards commenced in 2014, with interested parties required to submit claims in early 2015. The review is incomplete. The Commission's review of the Awards has gone on well beyond the contemplated 4 year timeframe intended by the Parliament. The statutory imperative to conduct a review '*as soon as practicable*' also connotes that the review must at some stage finish '*as soon as practicable*'.
11. The review of the Awards within the 4 yearly review concern many claims and a large number of participants. Both the IEU and the ACA have claims in the review of the Awards.

12. One of the applications that the IEU says should take precedence over the review of the Awards in the 4 yearly review is a variation application pursuant to section 157 of the Act lodged on 17 August 2018. While the Commission has obligations to deal with any application made to it in a timely and efficient manner, the 4 yearly review of the Awards commenced well prior to the IEU's work value application. That broad based *inter partes* nature of the 4 yearly review of the Awards which can be tolerably described as already delayed, has a clear claim to precedence over an award variation lodged in late 2018.
13. The ostensible reason advanced by the IEU for delaying the review of the Awards is that the two proceedings concern the same modern awards and are now '*intertwined*' and that this is causing difficulty to the IEU. From our experience, employer groups frequently attempt to present hurdles to progressive meritorious applications made by unions. There is nothing unusual about this which would warrant the exceptional step of delaying another proceeding.
14. The Commission has an obligation to undertake this review in a timely manner. It is not known when the IEU's ERO/work value case will be determined.
15. If the Commission is considering delaying the determination of our allowance claims, we would seek an opportunity to be heard further on the matter.

Question 2: Which of the findings sought by the ECEC Employers (at [4]) are contested?

16. We contest [4] (1) and aspects of (7). We do not contest 4 as a general proposition, but we do not agree that the ACA claims would improve accessibility or affordability of ECEC services.
17. With respect to (1) this characterisation of the ECEC sector implies it is a '*baby-sitting*' for parents whilst they are at work.¹ This is problematic and contrary to the current regulatory framework. The primary purpose of the ECEC sector is to provide quality education and care for children. This is not inconsistent with facilitating the parents' participation in work. The National Quality Standards emphasise the delivery of educational program and practice that enhances children's learning and development and helps children to build life skills.²
18. We disagree with ACA and others' characterisation of the evidence of Ms Fenech in (7)(a)(i). We note that Ms Fenech did not conclude that a person in day to day charge of a service faces additional legal liability as an individual, at [639] she clarifies that in relation to the person in day to day charge: '*If something goes wrong they're not legally liable, so that's what I meant by that, but they still are responsible for those roles*'.³ Ms Fenech also gave a specific examples on how a person in day to day charge as a Responsible Person has responsibility for overseeing educational programs in [632]:

¹ We elaborated on this point in our submission in reply made on 15 April 2019 at [5] to[19].

² Guide to the NQF, page 93.

³ PN639.

Arndt: *What would a person in day-to-day charge, who's a responsible person, so it's a scenario where approved provider isn't there, nominated supervisor isn't there, person in day-to-day charge - can you give me an example of what in your view that requirement would be, that is, to oversee educational programs?*

Fenech: *Again it's a compliance role. So it's not - it could be consulting with the educational leader to check that, you know, perhaps they have met with a particular educator who was having difficulty; their nominated supervisor or the responsible person may check, you know, how is that going, or it could be, you know - who knows - they could get a spot check on the day that the nominated supervisor isn't there. So a regulatory officer turns up, and it's up to that responsible person to make sure that the educational programs are up to speed, because they're the ones that will have to talk to the authorised officer about the educational programs.⁴*

19. With respect to [4](7)(ii), ACA and others make a broader assertion than is warranted from the question put to Ms Fenech, which was as follows:

Arndt: *Are you aware of any responsibility of a responsible person in the National Quality Framework which only exists in the National Quality Framework?*

Fenech: *I don't know. I can't comment.⁵*

20. With respect to [4](7)(b)(i), Ms Warner was able to acknowledge that NQF standard 7.2.2 of the NQS was relevant to her role of Educational Leader when it was put to her directly.⁶
21. As to [4](7)(c), Ms Hennessy acknowledged that it was her centre manager who was 'ultimately' responsible, but as Educational Leader, her centre manager had 'delegated that responsibility' to her to ensure policies dictated by the NQF are considered and integrated into the programming and curriculum.⁷

Question 4: Which of the findings sought by the ECEC Employers (at [8]) are contested?

22. We contest [8](1), (2), (5), (6),(8), (9), (10) and (11).

23. With respect to (1) we refer to our submission on the background paper filed 9 July 2019:

'[76] no evidence has been presented by ACA and others to justify the statement that 'childcare is an extremely competitive industry in which affordability, opening hours and compliance with an increasingly complex regulatory regime determines the viability of a business.' ACA and others did not establish that opening hours have any significant impact on the viability of operators of childcare centres, let alone that it was one of three key factors in their viability. It emerged during the hearing that

⁴ PN632.

⁵ PN650.

⁶ PN1533-1536.

⁷ PN278-286.

*most ACA witnesses had done no costing or planning on what impact longer opening hours might have on their business.*⁸

24. With respect to (2), we refer to our submission on the background paper filed 9 July 2019: *‘[89]again, there has not been evidence in these proceedings on the impact of the opening hours of services on working parents (aside from the evidence presented by United Voice on the impact on working parents who are ECEC employees). No evidence has been presented from parents who want to utilise centre based care past 6.30pm and as stated above, the two employer witnesses who did survey their clients did not receive feedback that suggested a genuine need for change.’*⁹ We also disagree with the notion that the current span of ordinary hours in the Awards is ‘limited’.
25. With respect to (5), we note again that ACA and others have not presented any evidence from working parents. United Voice witness Ms Wade provides evidence in relation to *ECEC employees* who are working parents and the difficulty such employees face even with the current ordinary span of hours finishing at 6.30pm.¹⁰ ECEC employees who are working parents would face additional stress if the ordinary span of hours was extended past 6.30pm.
26. With respect to (6) this is a disingenuous way of characterising ordinary hours in the ECEC industry in comparison to other industries. In any case, a significant number of ECEC services do not even utilise the full ordinary span of hours in the Awards as present.¹¹
27. With respect to (8), late pick up by parents was infrequent.¹²
28. With respect to (9), most ACA witnesses had done no costing or planning on what impact longer opening hours might have on their business.¹³
29. With respect to (10), we would say there no evidence before the Commission that there is significant parent demand for longer opening hours. Ms Wade’s evidence does not support the proposition that *‘extending the ordinary hours until 7.30pm will increase access to ECEC service allowing parents to work longer or later hours’*. Rather, she indicates that employees at her centre had expressed a desire that their centre close *earlier* than 6.30pm.¹⁴
30. As to (11), an increase of the ordinary span of hours from 6.30pm to 7.30pm *is* likely to have an impact on secondary employment prospects. Whilst Ms Hennessy acknowledged that she was not receiving many disability support work shifts whilst working the 6.30pm finishing

⁸ See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

⁹ As above.

¹⁰ Oral evidence of Wade, PN879-889.

¹¹ See table 1 (on page 6) in our submission in reply filed 15 April 2019.

¹² See paragraphs [129]-[130] of our submission on findings filed 29 May 2019.

¹³ See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

¹⁴ PN879-889

shift¹⁵, she indicated that a 7.30pm finishing shift would make her secondary employment work ‘*pretty much impossible*.’¹⁶

Question 6: Which of the findings sought by the ECEC employers (at [11]) are contested?

31. We contest [11] (4) and (5).
32. With respect for (4), while we agree that many of the employer witnesses expressed a preference for employee agreement, a clause allowing an employer to vary an employee’s roster without notice is inherently unfair.
33. With respect to (5), we disagree that the legislative requirements in the ECEC sector mean that late changes to rosters *without* employee agreement are required. The current Awards provide permit late changes to the roster with employee agreement, and there are numerous other ways in which employers can address unexpected absences. Some of these options are: asking another employee to work additional hours or vary their shift, engaging a casual employee, having a staff member rostered ‘*off the floor*’ (such as the Director or an Assistant Director) step in or using labour hire.¹⁷

Question 9: Which of the findings sought by the ECEC Employers (at [17]) and the AFEI (at [18]) are contested?

34. We contest [17](2),(3),(4),(5),(6). We also contest the findings sought by AFEI in [18](3),(4),(6) and (7).
35. With respect to [17] (1) we agree that a Responsible Person who is not an approved provider or a Nominated Supervisor does not have any additional legal liability. We do not agree with the proposition that the Responsible Person (as person day to day in charge) does not have additional responsibilities in the workplace.
36. With respect to [17](2), we disagree that the duties and responsibilities of a Responsible Person are captured within the Children’s Services Award classifications. We address this in paragraphs [26]-[30] of our submission on findings filed 29 May 2019.
37. With respect to [17](3) the evidence indicated that the employee in the role of Responsible Person acts with a significant level of autonomy and has specific responsibilities that arise from their designation as Responsible Person. For example, Ms Warner gave evidence of her responsibility as a Responsible Person if a child hurt themselves: ‘*so for example if a child was to fall over and hurt themselves the next steps following that would be I would have another lead educator or whoever happened to be the witness to the incident take care of that*

¹⁵ PN339-345.

¹⁶ PN356.

¹⁷ See oral evidence of Viknarasah, PN 1138-1148, Fraser, PN1794-1800, Paton PN2283-PN2296, Maclean PN2486, Chemello PN2715-2719, Mahony PN3971-3972, Hands PN4698-4702.

*child, provide basic first aid. Then an incident report is written, either by myself or by the lead educator that witnessed the incident. Regardless of who writes that I proof read and overlook that form and then sign off as responsible person. The parents are communicated with via phone and also in person when they arrive to collect their child, and then it's my job as responsible person to input that incident report into our online database.'*¹⁸

38. With respect to [17](4), it is uncontested that all educators may communicate with parents and have a role in ensuring safety. However, the Responsible Person has overall responsibility for such matters. The following exchange with employer witness Ms Tullberg is indicative:

***Arrabalde:** ...Like, say for example if it was a centre wide issue that affects the whole centre, not a particular child, and it was a time sensitive issue, who would unify the staff response in the absence of the director? So, for example, if you had a swarm of bees in your playground, they've just descended on there and causing a risk to everybody because you've got your windows open, who would deal with that?*

***Tullberg:** The responsible person at the time.*¹⁹

39. We disagree with [17](5) and refer to paragraphs [21]-[23] of our submission on findings filed 29 May 2019.
40. We dispute [17](6) and refer to paragraphs [39]-[43] of our submission on findings filed 29 May 2019.
41. With respect to [18] we disagree with (3), (4), (6), (7). Points (3) and (4) are similar to points raised by ACA and others, and are addressed above. With respect to [18](6), early childhood teachers can and may take on the role of Responsible Person. We say there is no impediment to the Commission finding that there is merit to inserting similar allowances into the Teacher's Award, as the role of Responsible Person is essentially the same across the Awards. We have responded to [18](7) in paragraphs [45]-[48] in our submission on the background paper dated 9 July 2019.

Question 11: Which of the findings sought by the ECEC Employers (at [21]) and AFEI (at [22]) are contested?

42. We generally contest [21] and [22].
43. To avoid excessive repetition, we respond to [21] as a whole:
- Regulation 118 states that '*the approved provider of an education and care service must designate, in writing, a suitably qualified and experienced educator, co-ordinator or other individual as educational leader at the service to lead the development and implementation of educational programs in the service.*'

¹⁸ PN1540.

¹⁹ PN3743.

- We agree that the NQF does not contain a job description or minimum qualification requirement for Educational Leaders (provided the educator is suitably qualified).
- ACA and others repeatedly refer to the responsibilities and duties of an Educational Leader being unclear. We disagree with this proposition. There was general consensus between the union and employer witnesses on what the role of the Educational Leader entailed on a practical basis within services. We refer to paragraphs [54]-[68] of our submission on findings filed 29 May 2019. For summary, the evidence indicates that Educational Leaders undertake duties including leading programming, mentoring other employees, leading critical reflection and undertaking research to assist in providing a quality service.
- The skill set outlined in Dr Fenech in her report (in paragraph 1.6) identifies the skills required to perform the role of Educational Leader. The skill set identified by Dr Fenech (including skills such as strong communication skills and interpersonal skills, a capacity to lead, mentor, support and influence educators, and capacity to build a learning community) aligns with the evidence given by union and employer witnesses on what work Educational Leaders perform practically in the workplace. For example, Ms Llewellyn provided evidence on the work of the Educational Leader at her centre: *‘She supports the educators to do their program planning. She is a mentor. She does room inspections. She ensures that the program plans are up to date, that the observations and learning stories are educational and of a high level, and any training that may need - she may need to do with the staff to ensure that their observations are - to name a few things.’*²⁰
- We agree that the ACECQA resources provide useful guidance on the role of the Educational Leader. We agree that the ACECQA guide does not determine entitlements for employees. Determinations of employee entitlements are a matter for the Commission.
- We disagree with the claim that the duties of Educational Leaders are already included in the classifications. We refer to paragraphs [69]-[71] of our submission on findings filed 29 May 2019.
- Provision of non-contact time in which to complete work is not compensation for the value of the work being undertaken. In any case, the Awards do not currently provide specific non-contact time for Educational Leaders.
- Finally, Ms Fenech indicated that the academics that she was referring to in the context of cross-examination in paragraphs PN612-613 were *‘education*

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academics'.²¹ No negative inference can be drawn from the lack of explicit consideration of remuneration issues by education academics. Further, the proposition of ACA and others that '*nor is there any support for additional remuneration within the NQF*' is misleading. The NQF does not set out pay rates, allowances or deal with any employee remuneration issues. That is beyond the scope of the NQF.

44. We have addressed the matter raised by AFEI in [22](1) in paragraphs [27]-[30] of our submission on the background paper filed 9 July 2019.
45. With respect to AFEI's propositions in [22](2), an Educational Leader would be supervised, generally by the Centre Director (except for circumstances in which the Educational Leader is the Centre Director). We disagree with the statement that the Educational Leader only exercises limited independent judgment and discretion.
46. With respect to [22](4) and (5) we have addressed these matters previously. The former in paragraphs [17]-[18] in our further submission in reply filed 29 April 2019 and the latter in paragraphs [37]-[39] in our submission on the background paper filed 9 July 2019.

Question 13: Which of the findings sought by the ECEC Employers and AFEI (at [25] and [26]) are contested?

47. We contest all of [25] and [26](2) and (3).
48. In respect of [25](1) and [26](2), we disagree that the Awards' current provision of 2 hours of non-contact is sufficient in the context of a minimum safety net or that issues only arise where employees are provided with less than 2 hours non-contact time. We refer to paragraphs [84]-[91] of our submission on findings filed 29 May 2019.
49. We dispute [25] (3). The programming requirements under the NQF are onerous and we have detailed those in paragraphs [123]-[155] of our outline of submissions filed 15 March 2019. The use of templates does not detract from this, as educators are required to program in a manner that takes into account the needs of each child.²²
50. As to [26] (3), that some employers may re-distribute duties or provide additional non-contact time in order to address the insufficiency of non-contact time in the Awards suggests the non-contact time clauses require revision.

Question 15: Which of the findings sought by the ECEC Employers and AFEI (at [29] and [30]) are contested?

51. We contest all of [29] save for the proposition that *some* employers do pay for employees to undertake First Aid and CPR qualifications. We contest [30].
52. With respect to [29] and [30] we say the following:

²¹ PN681-683.

²² Guide to National Quality Framework, page 96.

53. There is sufficient and credible evidence before the Commission to establish our claim for training expenses to be reimbursed and time spent in training to be considered time worked. We refer to paragraphs [93]-[101] of our submission on findings filed 29 May 2019.
54. In respect of [29] (3), we say the proposition made by ACA and others is not a relevant consideration. If the variation proposed by United Voice was made, the relevant question in determining whether the training course fee and time was to be paid would be whether the employer required the employee to undertake that training.

Question 17: Which of the findings sought by the ECEC Employers and AFEI (at [33] and [34]) are contested?

55. We contest [33](2) and [34].
56. We disagree with the proposition that employees can necessarily access and use laundry facilities at an ECEC centre. We refer to paragraph [6] of our submission on the background document filed 9 July 2019. We disagree with ACA and others' characterisation of Ms Bea's evidence. It would be expected that centre laundry would take priority over individual employees washing their shirts. There are also obvious difficulties in an employee leaving *'the floor'* and attempting to use laundry facilities in a sector that has ratio requirements.
57. We disagree with [34]. We refer to paragraphs [102]-[108] of our submission on findings filed 29 May 2019.

Question 19: Which of the findings sought by the ECEC Employers and AFEI (at [37] and [38]) are contested?

58. We contest [38]. Whilst we agree that some employers (including several during these proceedings) do provide a hat and sunscreen, we disagree that there is no basis to vary the Children's Services Award. Our proposed variation would provide more certainty for employees.

**United Voice
19 July 2019**