
Fair Work Commission: 4 yearly Review of modern awards

**SUBMISSION AS TO FINDINGS TO BE MADE
BY THE FULL BENCH**

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/18 &
AM2018/20)**

**CHILDREN'S SERVICES AWARD 2010
AND EDUCATIONAL SERVICES (TEACHERS) AWARD 2010 -
SUBSTANTIVE ISSUES**

ACA, ABI and NSWBC

29 MAY 2019

1. BACKGROUND

1.1 This submission is made in accordance with the Directions of the Fair Work Commission (**Commission**) issued on 9 May 2019 on behalf of:

- (a) Australian Childcare Alliance Inc. (**ACA**);¹
- (b) Australian Business Industrial (**ABI**); and
- (c) New South Wales Business Chamber (**NSWBC**).

1.2 This submission is also supported by the National Outside School Hours Care Services Alliance (**NOSHSA**) and Junior Adventure Group (**JAG**) who are also represented by Australian Business Lawyers & Advisors in these proceedings.

1.3 Throughout this closing submission the above parties will collectively be referred to as the ECEC Employers.

1.4 This submission addresses each of the substantive claims made by:

- (a) the ECEC Employers dated 15 March 2019;
- (b) the United Voice (**UV**) in submissions dated 15 March 2019;
- (c) the Independent Education Union of Australia (**IEU**) in submissions dated 15 March 2019; and
- (d) the Arrabalde sisters (**Individuals**) in submissions dated 14 March 2019.

(the **Claims**)

1.5 The Claims impact the Early Childhood Education and Care sector (**ECEC**) in respect of the *Children's Services Award 2010* (**Children's Services Award**) and the *Educational Services (Teachers) Award 2010* (**Teachers Award**) (together the **Awards**).

2. SUMMARY OF CLAIMS

2.1 The Claims advanced by the ECEC Employers include:

- (a) a claim to vary the ordinary hours under the Awards. Currently the Awards identify that ordinary hours may be worked between 6.00am and 6.30pm. The ECEC Employers seek a variation to the Awards such that ordinary hours may be worked between 6.00am and 7.30pm (**Ordinary Hours Claim**); and

¹ Association of Quality Childcare Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare Queensland Inc; Childcare South Australia; Childcare Association of Western Australia.

- (a) a claim to vary the rostering arrangements in the Awards so that an employer is exempt from having to provide employees with 7 days notice of a variation in roster in circumstances where:
 - (i) another employee has provided less than 7 days notice of their inability to perform a rostered shift; and
 - (ii) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee's rostered hours so as to replace the absent employee.

(Rostering Claim)

2.2 The Claims advanced by the UV in this matter include:

- (a) a claim to introduce a new allowance for employees assigned to be the Responsible Person at a service (**Responsible Person Allowance**);
- (b) a claim to introduce a new allowance for employees assigned to be the Educational Leader at a service (**Educational Leader Allowance**); and
- (c) a claim to increase the time off the floor away from children (non-contact time) for Room Leaders and Educational Leaders (**Non-contact Time Claim**),

in both the Children's Services Award and the Teachers Award.

2.3 The Claims advanced by the Individuals in this matter are similar to the Responsible Person Allowance and the Educational Leader Allowance sought above.

2.4 The other Claims advanced by UV in relation to the Children's Services Award include:

- (a) a claim seeking the payment of training courses and time worked at those courses (**Training Allowance**);
- (b) a claim seeking the laundry allowance be paid in circumstances where employees wash their clothes using the on-site facilities at the workplace (**Laundry Allowance**);
- (c) a claim to include 'hats and sun protection (including sunscreen)' in the definition of protective clothing and require the employer to either provide these items or reimburse the employee (**Clothing Allowance**);
- (d) a claim to vary the exemption in the higher duties clause so that an employee who is required to perform high duties (to replace a colleague who is attending paid training) is paid higher duties (**Higher Duties Claim**);

- (e) a claim requiring employers who direct their employees to take leave without pay (annual leave) over Christmas to pay ordinary time to those employees in circumstances where they have no accrued any leave (**Annual Leave Claim**).

2.5 The Claims advanced by the IEU in this matter in relation to the Teachers Award include:

- (a) a claim to amend award coverage for Directors of childcare centres with teaching degrees, to be covered by the Teachers Award (and not the Children's Services Award) (**Coverage Claim**); and
- (b) a claim to confirm the minimum payments of a 'quarter day' and 'half day' to casual teachers (**Minimum Engagement Claim**).

2.6 The ECEC Employers set out the findings they seek to have made based on the evidence before the Full Bench below.

3. FINDINGS OF GENERAL APPLICATION

There are a number of findings of general application which the ECEC Employers submit should be made by the Full Bench.

Characteristics of ECEC Sector

It is noted that these findings do not appear to be contested by the other parties.

- 3.1 ECEC is a place for young children to be ‘cared for’ and/or ‘educated’ when their parents are unable to care for them in the home because they are at work.²
- 3.2 The ECEC sector supports Australian families and has the power to facilitate workforce participation leading to better outcomes for the economy and employment growth.³
- 3.3 Current government programs, (including the current subsidy arrangements) encourage both parents (and particularly mothers) to work because it is good for the economy.⁴
- 3.4 Affordability and accessibility of childcare for Australian families are current issues facing the ECEC sector generally.⁵
- 3.5 Accessibility and affordability of childcare are extremely important factors that, if not provided, can discourage parents, particularly women, from working.⁶
- 3.6 Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.⁷

The National Quality Framework

- 3.7 There is a degree of confusion as to the legal effect and status of the elements of National Quality Framework (**NQF**) amongst the participants in the ECEC sector, including whether responsibilities arising from the NQF also arise from other sources.

Some examples sourced from the evidence in the proceedings include:

- (a) Evidence of Dr Fenech:
 - (i) In respect of Responsible Persons, at PN630-PN639, Dr Fenech stated that Section 168 of the National Law requires Responsible Persons to oversee educational programs. Upon review of that section, this appears to be

² Annexure ‘KM-2’ to the Mahony Statement (**Exhibit 38**), page 129

³ Maclean Statement (**Exhibit 25**) at [55], Llewellyn Statement (**Exhibit 39**) at [53]-[54]

⁴ Llewellyn Statement (**Exhibit 39**) at [45]-[55]; Viknarash Statement (**Exhibit 13**) at [62]-[63]; Fraser Statement (**Exhibit 18**) at [37]; Paton Statement (**Exhibit 21**) at [46]

⁵ Viknarash Statement (**Exhibit 13**) at [110]; Annexure ‘KM-2’ to the Mahony Statement (**Exhibit 38**), page 223

⁶ Annexure ‘KM-2’ to the Mahony Statement (**Exhibit 38**), page 223

⁷ [2018] FWCFB 1692 (Family Friendly Decision); Annexure ‘KM-2’ to the Mahony Statement (**Exhibit 38**), page 223

incorrect. As was put to Dr Fenech, being in day-to-day charge of a service (i.e. a Responsible Person who is not an Approved Provider or Nominated Supervisor) does not place any additional legal responsibilities on a person under the National Law (see p 408 of **Exhibit 1** -Guide to the National Quality Framework and Dr Fenech’s own evidence at PN624).

(ii) In respect of the ‘overlap’ between the NQF and Modern Awards, Dr Fenech was not aware whether any of the responsibilities arising for Responsible Persons in the NQF existed only in the NQF (PN650).

(b) Evidence of Ms Warner

(i) Ms Warner provided evidence that her responsibilities as Educational Leader (as set out in paragraph 19 of her statement (**Exhibit 17**)) came from the National Quality Standard.⁸ However, when asked whether she could identify the relevant part of the standard against the responsibilities listed she advised she could not do that.⁹

(ii) Ms Warner also claimed that her duties as a responsible person brought with it additional legal responsibilities (PN1528). This was contradicted by Dr Fenech’s evidence (PN624).

(c) Evidence of Ms Hennissey at PN279-PN286 acknowledged that, despite evidence in her statement at [17] (**Exhibit 6**), she was not responsible for making sure policies dictated by the NQF are considered and integrated into programming and curriculum.

(d) Ms Wade provided evidence at PN772-773, PN782 that she considered the NQF not to fall within the meaning of “*relevant regulations and statutory requirements*” and that her responsibilities as a Director did not require her to comply with the NQF.¹⁰

⁸ PN1474

⁹ PN1475

¹⁰ By way of contrast, the regulatory authority, ACECQA, suggests that the NQF consists of: the National Law and National Regulations; the National Quality Standard (which is a schedule to the National Regulations); the assessment and quality rating process (which is outlined in Part 5 of the National Law); and the national learning frameworks - see p 9 of Exhibit 1.

4. ORDINARY HOURS CLAIM

The following findings are available for the Commission to make, on the basis of the evidence before it.

- 4.1 Childcare is an extremely competitive industry in which affordability, opening hours and compliance with an increasingly complex regulatory regime determine the viability of a business.¹¹
- 4.2 Limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women).¹²
- 4.3 The nature of childcare is that working parents must drop off their children before commencing work and pick-up their children following the completion of their work.¹³
- 4.4 Parents who utilise childcare services work in all industries.¹⁴
- 4.5 Parents routinely choose childcare providers close to their homes so that they can drop off children before travelling to work, and pick-up children on the way home from work. This means that parents must finish work with enough time to travel to the childcare centre to pick-up their child 'on time'.¹⁵ This can be a source of stress:
 - (a) Ms Wade provides evidence of the difficulty her staff (with children) have when their out of school care arrangements finish at 6pm (which is earlier than their employer's close time of 6:30pm). Ms Wade describes this as 'really hard' (PN883):

They have to ask friends within the - their school friends, so the children's school friends, parents and ask upon them to pick up children and look after them. They have to get babysitters, they need to look family members travelling from out of town up to half an hour to an hour out of town to pick up their children. So yes, it's just a lot of pressure externally on them.¹⁶
 - (b) See Exhibit 32 Annexure to Statement of James at p 52:

At the end of the day, parents likewise struggled if their formal care closed at a time that was earlier than needed.

¹¹ Maclean Statement (**Exhibit 25**) at [56] – [57]; Mahony Statement (**Exhibit 38**) at [38]; Fraser Statement (**Exhibit 18**) at [99] - [104]

¹² Paton Statement (**Exhibit 21**) at [46]

¹³ Maclean Statement (**Exhibit 25**) at [41] – [42]; Paton Statement (**Exhibit 21**) at [43]-[44]

¹⁴ Maclean Statement (**Exhibit 25**) at [53]; Paton Statement (**Exhibit 21**) at [43]

¹⁵ Maclean Statement (**Exhibit 25**) at [53]

¹⁶ PN884

- 4.6 The cessation of ordinary hours at 6:30pm in the ECEC industry means ‘overtime has begun’ at a point where many working parents are still completing ‘ordinary hours’ in other industries (or travelling to pick-up their children).¹⁷
- 4.7 Unlike employers in other industries, childcare employers do not have unilateral control on when centres can close. If parents do not attend ‘on time’ to collect children, childcare centres are required to stay open, incurring unplanned overtime liability.¹⁸
- 4.8 It is an experience of childcare centres that, notwithstanding a clearly defined closure time of 6:30pm, parents can be late necessitating the payment of overtime.¹⁹
- 4.9 Extending ordinary hours until 7:30pm may increase the hours of operation of certain centres.²⁰
- (a) Mr Mahony advised he supported the claim for an extension of the ordinary hours from 6:30pm to 7:30pm.²¹ In response to being asked whether it would make it cheaper for him to keep his centres open he responded: *“in that hour we may have outside of the current customer base, people who would want care for their children because of their own work requirements, but who we can't currently attract because we are in a position where the extra overtime hours would have to be actually paid.”*²²
- (b) Ms Paton said she might extend the hours of her centre if the ordinary hours were extended: *“the more flexibility I can provide the better”*.²³
- 4.10 While there is relatively little evidence before the Full Bench in these proceedings as to the extent of parental demand for later operating hours, extending the ordinary hours until 7:30pm will increase access to ECEC service allowing parents to work longer or later hours:²⁴
- (a) Ms Wade provided evidence at PN885 that her employees had requested her centre closes earlier so they can collect their children.
- (b) Ms Maclean provided evidence that *“we have had possibly in the last four years,*

¹⁷ This is evident from spans of hours in other modern awards

¹⁸ Maclean Statement (**Exhibit 25**) at [40]-[42]; Fraser Statement (**Exhibit 18**) at [55]; Paton Statement (**Exhibit 21**) at [29]; Mahony Statement (**Exhibit 38**) at [40]; Hands Statement (**Exhibit 43**) at [43]

¹⁹ Maclean Statement (**Exhibit 25**) at [40]; Fraser Statement (**Exhibit 18**) at [53] - [54]; Paton Statement (**Exhibit 21**) at [35]; Hands Statement (**Exhibit 43**) at [33]-[35].

²⁰ Fraser Statement (**Exhibit 18**) at [48]; Paton Statement (**Exhibit 21**) at [30]

²¹ PN3942

²² PN3942

²³ PN2186

²⁴ Fraser Statement (**Exhibit 18**) at [51]; Mahony Statement (**Exhibit 38**) at [47]; Paton Statement (**Exhibit 21**) at [43]-[44]; Hands Statement (**Exhibit 43**) at [34] - [35]

again, anecdotally, possibly five families ask if there was any chance of staying open a little bit later because they start work a little later and finish it. So they rush to achieve a 6.30 pick-up time.”²⁵

- 4.11 The increase of the ordinary hours span from 6.30pm to 7.30pm is unlikely to have any material effect on secondary employment, given the extension is for one hour only:
- (a) Ms Hennessy at PN344 acknowledged that her current pattern of work to 6.30pm (in line with the current award) prevented her from obtaining shifts in her secondary employment in any event. An extension to 7.30pm would have no effect on this situation.
- 4.12 Specific findings as to weight of evidence are:
- (a) Annexure LJ-7, referred to at [47] of Ms James’ supplementary statement (**Exhibit 33**), apparently containing feedback from members as to the ECEC Employer’s proposed claims is of absolutely no probative weight. The ‘feedback’ is anonymous and untestable.
 - (b) Ms Bea’s evidence in her supplementary statement **Exhibit 9** at [5] as to the effects of working until 6.30pm and 7.30pm should not be accepted. Under cross-examination (PN420-PN425) Ms Bea’s evidence was that she had never worked until 6.30pm. This directly contradicts **Exhibit 9** at [5].

5. ROSTERING CLAIM

The following findings are available for the Commission to make, on the basis of the evidence before it.

- 5.1 Roster changes with less than 5 days’ notice are common in the ECEC sector.

This is unlikely to be controversial however evidence was heard in the proceedings establishing this including:

- (a) Ms Wade acknowledges that she has to change the rosters frequently, being “*it can happen five days a week*” (PN895);
- (b) Ms McPhail at (PN3017); and
- (c) Mr Mahony at (PN3969).

- 5.2 Roster changes within the ECEC sector currently largely occur by agreement and staff are generally accommodating:

²⁵ PN2490

- (a) Ms Viknarash (PN1102, PN1114);
- (b) Mr Fraser (PN1795-6);
- (c) Ms Chemello (PN2719);
- (d) Ms Hands (PN4698).

5.3 The maintenance of ratios required by legislation is complex and difficult, particularly in regional areas:

- (a) Ms Wade at PN918:

It does make it really hard. We don't have agencies up here so Randstad Education is not in regional Queensland, which proves really difficult. Whereas when you're working in Sydney services you can call on agencies and get agency staff to work with you straight away. There is a lack of qualified educators in our regional area which proves to be really difficult, especially if you want to maintain your staff ratio qualification requirements.

- (b) Ms Wade at PN920:

It takes time and persistence and it also puts people in a state of anxiety, stress in terms of breaking any laws or breaching any laws, and then we've got to report that to the Department of Education.

- (c) Ms Chemello at PN2710:

Unfortunately, we are a regulated industry and my first protocol is to look after the children and the families, as well as the employees, but we are regulated so I do have to stick to having the appropriate qualifications replaced with a person that has called in sick. I don't have the luxury to just say, "Well, we'll open up half an hour later", or get a cert III to open up. We actually have to replace the person with the exact qualifications that are then called in. Unfortunately, we're in a dilemma whether - no, in the perfect world it would be lovely to have your roster and not change. However, in our world which is our industry, that is not our perfect world.

- (d) Ms Paton advised there are some difficulties obtaining agency casuals in a regional area.²⁶
- (e) See also Statement of Mr Mahony (**Exhibit 38**) at [48]-[68].

²⁶ PN2293

5.4 There is no evidence before the Full Bench that ECEC employers are likely to arbitrarily or unfairly utilise a rostering provision amended by the Rostering Claim. To the contrary, much of the ECEC employer evidence focused on a preference for employee agreement:

(a) Mr Fraser at PN1812, PN1816.²⁷

(b) Ms Chemello at PN2727:

I don't think it's good for our team to force anybody to do anything, so we work collaboratively so we have a good working partnership.

(c) Ms Tullberg at PN3564:

We wouldn't force a staff member to change their shift within seven days, and we don't have need to change someone's roster within a seven day period at present. It would be nice to be able to give them some more flexibility to be able to change it but it's not - we're not asking - I'm not asking to change the provisions of the seven day roster for a need to do to be nasty to staff.

(d) Ms Paton provided evidence that she would “always seek to request something of someone before demand it, as a human”.²⁸

(e) Mr Mahony at PN3973:

You wouldn't force someone who wasn't rostered to come in? Oh, gosh, no. There's no coercion. We're a very teamly(sic) group of people and we work together closely and respect each other's needs.

5.5 Notwithstanding a general reluctance from employers to ‘force’ employees to undertake work without their agreement, the legislative requirements placed on the ECEC sector mean that, in some circumstances, late changes to the roster are required:

(a) Ms Chemello at PN2710 states:

Unfortunately, we are a regulated industry and my first protocol is to look after the children and the families, as well as the employees, but we are regulated so I do have to stick to having the appropriate qualifications

²⁷ Critically, Mr Fraser’s evidence between PN1809-PN1823 relates to a scenario put to him by the IEU where an employer simply decides, presumably for costs reasons, to reduce staff - this is not what the Rostering Claim contemplates - the Rostering Claim involves two elements: (1) another employee has provided less than seven days’ notice of his/her inability to perform a rostered shift; and (2) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee’s rostered hours so as to replace the absent employee.

²⁸ PN2305

replaced with a person that has called in sick. I don't have the luxury to just say, "Well, we'll open up half an hour later", or get a cert Ill to open up. We actually have to replace the person with the exact qualifications that are then called in. Unfortunately, we're in a dilemma whether - no, in the perfect world it would be lovely to have your roster and not change. However, in our world which is our industry, that is not our perfect world.

- (b) Mr Fraser explained that *"if we - a potential of being in breach of the regulations, then, no, we don't have an opportunity to wait for them to agree."*²⁹ He went further to explain:

*... we want to be able to make changes based on the organisation. So if we have extra children arrive earlier than planned or if we have children stay later than previously planned or what our trends show us, we want to be able to make the necessary change to meet our obligations under the national standards without having to ask the employee to agree or make them ..."*³⁰

*... We need to make quick change to meet the regulations.*³¹

- (c) Under cross examination Ms Hands was asked if she wanted to be able to change employees' shifts without agreement. She said she did want to do this *"if she had to ... to make the centre legal"*.³² Further she was asked if she needed the ability to force someone to change their shifts, and she responded again that "legally" she might.³³

6. EDUCATIONAL LEADER ALLOWANCE

The following findings are available for the Commission to make, on the basis of the evidence before it.

- 6.1 The NQF does not identify what qualifications, experience or skills are required for a person to be the Educational Leader. There is also no job or role description in the NQF identifying what an Educational Leader is required to do:

- (a) Dr Fenech at PN531-PN535.

²⁹ PN1778

³⁰ PN1776

³¹ PN1777

³² PN4680

³³ PN4697

- 6.2 The only duty of Educational Leaders imposed by the National Law is to “*lead the development and implementation of educational programs in the service*”³⁴ however what this responsibility actually entails is unclear:
- (a) ACECQA Resources (including the Educational Leader Resource (**Exhibit 5**) and the Role of the Educational Leader document (**Exhibit 2**) provide guidance as to the duties of an Educational Leader but these guides do not determine legal responsibilities or entitlements.
- 6.3 The ‘skill-set’ identified by Dr Fenech as being required by Educational Leaders is not required in any legal or practical sense:
- (a) In respect of Educational Leaders, at PN538-PN544, Dr Fenech made a claim that Standard 7.2.2 could not be fulfilled with a requisite skill-set identified in the Guide to the National Quality Framework, notwithstanding those skills were not itemised anywhere (PN545), not all educational leaders possessed those skills (PN557) and that she was unaware of any ECEC centre not meeting the quality standards on the basis that its Educational Leader did not possess those skills (PN567).
- 6.4 Given the lack of definition of the duties of an Educational Leader, the role of an Educational Leader is not clear, with several union witnesses providing evidence of ‘Educational Leader duties’ which were either not performed by them or also performed by others:
- (a) Ms Warner listed “*preparing observations and photos for each child* as a responsibility of the educational leader in her statement (**Exhibit 17**) at [19(a)]. Under cross-examination, Ms Warner admitted that this was actually the job of the lead educator of each room.³⁵
- (b) Notwithstanding that Ms Hennessy’s evidence at 18(f) of her statement (**Exhibit 6**) was that as educational leader she was required to observe interactions between educators and children and provide feedback, at PN305-PN308 she acknowledged that “*almost anyone*” in a centre did this and that it was a “*team effort*”.
- (c) Ms Hennessy also acknowledged that most educators at the centre communicate with parents about educational programs and children's progress (PN291-294) and that this wasn’t confined to educational leadership. This is consistent with Ms Viknarasah’s evidence which confirmed that every educator has a role in considering and monitoring how children are going from day to day and week to week.³⁶

³⁴ S118 of the National Law

³⁵ PN1488 - PN1490

³⁶ PN1336

- (d) Ms Warner provided evidence that her educational leader role under the NQS required her to undertake research (PN1495) however stated that the quantity of that research was not specified (PN1514). It was unclear where this responsibility was derived from.
- (e) Ms Mravunac provided evidence that, despite not being an Educational Leader, she developed, planned and assessed programming, ensured it was implemented and determined the educational direction of the centre (PN4467-PN4472). Ms Mravunac acknowledged that, despite not being an educational leader, she was the driving force behind educational leadership at her centre (PN4484).

6.5 The duties of an Educational Leader are already included in the classifications under the relevant Awards³⁷:

This can be established through review of the Awards but was also dealt with in evidence

- (i) Ms Hennessey's current duties as a Level 3 under the Children's Services Award included the implementation of the children's program under supervision.³⁸
- (ii) Ms Warner admitted that she is "*responsible in consultation with the assistant director or director for the preparation of implementation and evaluation of a developmentally appropriate program for individual children or groups*" which is a duty specifically itemised in level 4 of the Children's Services Award.³⁹ Ms Warner who is an educational leader also admitted that "*to a degree*" she already mentors educators in relation to their educational practice in her role as 2IC.⁴⁰
- (iii) Mr Mahony confirmed orally that he pays his educational leader (who is also the assistant director at one centre but the educational leader at both centres) as a level 5 under the Children's Services Award.⁴¹ He acknowledges that he does this because, "*I believe the award in fact covers that additional work that is related to the educational role*".⁴²

³⁷Tullberg Statement (**Exhibit 35**) at [96]; Brannelly Statement (**Exhibit 34**) at [47]-[49],[53]

³⁸ PN264 - PN275

³⁹ PN1485

⁴⁰ PN1493

⁴¹ PN4022

⁴² PN4099

- (iv) Ms Viknarasah advised that in smaller services the educational leader and director are usually the same person.⁴³
- (v) Mr Fraser advises: *"I typically appoint our assistant centre managers as the educational leader in the service."*⁴⁴

6.6 Even if the duties of Educational Leader were in addition to those already found in the relevant awards (which is denied), Educational Leaders are already compensated for this work in that they provided with non-contact time to perform these duties under the relevant awards:

- (a) As Ms Viknarasah explains:

*In terms of what extra work they would do, it would be in lieu of what - the hours that they'd spend in their work. So if I'm doing the vegetable garden I'm doing that for an hour a week instead of sitting with the children and educating them. If I'm being an educational leader I'm doing that an hour a week instead of sitting with the children and educating them.*⁴⁵

- (b) This appears to be the design of the NQF, with Dr Fenech providing evidence that *"To be effective, the role of an educational leader requires time allocation in addition to and quarantined from other responsibilities"*.⁴⁶

6.7 There is no explicit academic support for the introduction of additional remuneration for Educational Leaders (PN612-PN613), nor is there any support for additional remuneration within the NQF (PN614).

⁴³ PN1269

⁴⁴ PN1933

⁴⁵ PN1327

⁴⁶ PN513

7. RESPONSIBLE PERSON ALLOWANCE

The following findings are available for the Commission to make, on the basis of the evidence before it.

7.1 A Responsible Person who is not an Approved Provider or a Nominated Supervisor (an educator in day to day charge) does not have any additional legal responsibilities:

(a) See Dr Fenech at PN624.

(b) Mr Fraser's statement (**Exhibit 18**) at [115]:

... there is not any additional legal requirements and responsibilities as the ultimate responsibility of the centres falls on the Approved Provider. It is important to note that it is the Approved Provider who has liability of the centre, never the Responsible Person.

(c) Ms Viknarash's Statement (**Exhibit 13**) at [115]:

In my Centres, the "Responsible Person" will only not be the Director or Assistant Director for a short amount of time that day. During that short amount of time there will be a "Responsible Person" who will just be a point of call for the Centres for a short amount of time. This person has no practical additional work such as creating rosters, buying equipment or furniture or programming and planning for the Centres as the UV suggests. The "Responsible Person" is not responsible legally at any point for the other educators or staff members as this is still the ultimate responsibility of the Nominated Supervisor.

(d) Ms Tullberg at PN3671 provided evidence that:

the regulations actually don't put any responsibility onto the responsible person. There's no charges or anything that can actually be placed onto the person, it just stated we actually need to have one. There's no fines that can be imposed on the responsible person like there can be on approved provider or nominated supervisor.

7.2 The duties and responsibilities of a Responsible Person are already captured in the Children's Services Award classifications Levels 4-6.

This can be established through review of the Awards but was also dealt with in evidence

- (a) Ms Tullberg provided evidence that “Level 4, 5 and 6 have classifications in there which do sort of cover off the same areas as responsible people.”⁴⁷ Ms Tullberg did concede that it is “technically” possible for a responsible person to be a Level 3 (that is a Certificate III employee that performs no duties associated with being responsible).
- (b) Ms Mravunac identified at PN4511 that her duties as Responsible Person were already captured in her role as Director.
- (c) When asked about the difference between her responsibilities as responsible person and a nominated supervisor, Ms Wade’s evidence at PN824 indicated that her role as a nominated supervisor was broader than her responsibility as a responsible person, not vice versa.

7.3 UV greatly overstate the responsibilities that a Responsible Person must undertake (solely by virtue of being a Responsible Person). The evidence suggests that employees who are assigned to be Responsible Person while the Approved Provider or Nominated Supervisor are absent do not make strategic decisions or act with autonomy:

- (a) Ms Farrant provides evidence at PN3361:

It's always my practice to make sure that if there are any difficulties that arise, or problems or queries, that my staff who are certified supervisor is now that they can always ring me; or if they can't get on to me, they can always ring our assistant director to get some guidance or some clarity around any situation that may arise.... Any difficulties, they call you? Yes, anything that they don't feel confident about.

- (b) Ms Llewellyn gave evidence that a Responsible Person in her absence:
 - (i) did not have any additional duties (PN4365);
 - (ii) would never be required to resolve staffing issues (PN4366-PN4372); and
 - (iii) does not make any independent decisions (PN4376).
- (c) Ms Mravunac acknowledged receiving calls from Responsible Persons when she was absent from her centre (PN4488) and that before any decisions were made about the centre, she was informed (PN4498). Ms Mravunac’s evidence was that:

⁴⁷ PN3690

- (i) these calls sometimes required her to organise replacement staffing (PN4492-4);
 - (ii) complaints would not be dealt with by 'replacement' Responsible Persons (PN4499);
 - (iii) no changes to policies would be implemented by 'replacement' Responsible Persons (PN4500);
 - (iv) formal meetings with parents would not be held by 'replacement' Responsible Persons (PN4501).
- (d) Ms Wade acknowledged at PN814 that should feedback be received by another Responsible Person while she was not at the centre, she would become involved in making a decision about it. At PN723 Ms Wade admits to contacting the centre on her days off regarding critical incidents⁴⁸ and debt collecting.⁴⁹
- (e) Ms Warner at PN1519 acknowledged that she had contacted her director when there had been any incidents, any staffing issues, any parent inquiries and that she was required to implement her directors instructions if instructions are provided (PN1520-1).

7.4 The evidence suggests that the duties of a Responsible Person claimed by UV are not necessarily unique to Responsible Persons in an ECEC Centre. For example:

- (a) Communication with parents is not a responsibility limited to Responsible Persons:
 - (i) Evidence of Ms Tullberg at PN3704:

[If] an incident happened in the toddler room it wouldn't be the kindergarten teacher that would ring the parent, it would be the room leader in the toddler room, so that person would be the responsible person at the time. So it's not always going to be the responsible person. Would the responsible person have some role in the management of the incident? Maybe, during that time. They may or may not, it depends on the circumstances.
 - (ii) The evidence at 7.3 above concerning the autonomy of Responsible Persons is also relevant to this finding.

⁴⁸ PN724

⁴⁹ PN725

- (b) Ensuring safety is also not a responsibility limited to Responsible Persons:
- (i) Ms Warner acknowledges that she is “*responsible for ensuring a safe environment in maintained for staff and children*” even when she is not the responsible person.⁵⁰
 - (ii) Ms Chemello states that Responsible Persons have no additional involvement in relation to critical incidents at her centre. She says: “*all my staff have got first aids, so anyone can attend an accident within the service, then the protocol is to call the co-ordinator.*”⁵¹
 - (iii) Ms Viknarasah states “*any educators duties are similar to a responsible person in terms of their duty of care to the children.*”⁵²
 - (iv) Ms Mravanuc at PN4505 states that all staff are required to ensure a safe environment is maintained.
 - (v) Ms Tullberg’s evidence was that responsible persons do not interact with parents in relation to an incident anymore than a room leader would (PN3699).
 - (vi) Ms Tullberg at PN3708:

The responsible person would have some involvement in ensuring that the child was going home with the right person, you'd agree with that proposition? Parents all have to sign in and out their own children. They have key code access to the service. As long as the parent's been identified by a staff member and knows who that parent is, again I wouldn't necessarily say that the responsible person at the time is the person who identifies that parent. I see where you're going. In general, yes, the responsible person would be the person that would deal with an incident in the service but it's not always going to be the case.

7.5 The duties and responsibilities of the Responsible Person role are not new and were not created as a result of the National Laws and Regulations.⁵³

⁵⁰ PN1523-4

⁵¹ PN2810

⁵² PN1218

⁵³ Tullberg Statement (**Exhibit 35**) at [93], Maclean Statement (**Exhibit 25**) at [102]-[103]; Brannelly Statement (**Exhibit 34**) at [41]-[42]

7.6 The creation of a Responsible Person Allowance would be difficult to administer:

(a) Mr Fraser confirmed under cross examination at PN1863 that administering the responsible person allowance would be

complex to administer because the proposed allowance that's been put forward must be multiple payments across multiple people across five days a week. So across the fortnight it's 10. So I could have three responsible people on on one day at one centre, so across seven centres that would be multiple payments across the payroll period at different levels.

(b) Ms Tullberg advised under cross examination, that in terms of administering an hourly responsible person allowance *"it would be an actual calculation based on every single day they worked. So it would be more complex than you probably think it may be."*⁵⁴ She further acknowledged that:

*it would be difficult because the way we manage it it's the person who - the person who's responsible is the person - is the most qualified person in the oldest room at the time, until the next most senior person comes in. So say the director arrived at 7 o'clock in the morning one day and didn't arrive until 7.30 the next day, it would be a change every single day on the shift times for that responsible person in the morning.*⁵⁵

Ms Tullberg concluded that *"It just adds another complexity to having to roster and more paperwork for employers"*.⁵⁶

8. NON-CONTACT TIME CLAIM

The following findings are available for the Commission to make, on the basis of the evidence before it.

8.1 The Awards' current provision of 2 hours non-contact time is sufficient within the context of a *minimum* safety net.

(a) The Fraser, Mahony, Llewellyn and McPhail Statements outline that 2 hours is sufficient and that additional time would not add to the quality of programming or the service.⁵⁷

⁵⁴ PN3670

⁵⁵ PN3671

⁵⁶ PN3673

⁵⁷ Fraser Statement (**Exhibit 18**) at [130]; Mahony Statement (**Exhibit 38**) at [110]; Llewellyn Statement (**Exhibit 39**) at [103]

(b) Those union witnesses who had complaints concerning insufficient non-contact time appear to not be receiving their requisite time under the relevant Awards. This is a failing of management (and potentially staff) and not the safety net:

(i) Ms Bea (at PN481) gave evidence that she received the minimum 2 hours non-contact time in her role for the first two months in a role. When asked if she was able to complete her necessary duties in that period she responded “yes”.

(ii) Ms Wade’s evidence in respect of non-contact time should be treated with caution. Notwithstanding that in response to questioning Ms Wade made the repeated claim that ‘2 hours was not enough time’ (PN861, PN863, PN865), aspects of Ms Wade’s evidence on this point were not clear.

By way of example, Ms Wade claimed lead educators in her centre always received 2 hours contact time (PN855) while identifying that whether lead educators were able to complete programming in their allocated time was dependent on child behaviour and whether non-contact time was interrupted due to a requirement to be on the floor (which was apparently 80% of the time) (PN848). Her evidence was that she would ‘try to’ make up the two hours of non-contact time later (PN851). This evidence, and how it is consistent with a centre which ‘always’ provides 2 hours contact time was not explained.

8.2 The programming requirements under the current NQF are no more onerous than historical requirements, with technology making programming easier, and creating less work and less time entering the data.

(a) The Full Bench heard evidence concerning ‘template’ programming methods being used - See Statement of Ms Wade at [55] as well as evidence that development of program or curriculum is not necessarily undertaken by Educational Leaders, but rather management (See evidence of Hennssy at PN289).

9. TRAINING ALLOWANCE

The following findings are available for the Commission to make, on the basis of the evidence before it.

9.1 There is insufficient evidence before the Full Bench to establish this claim. That which has been filed appears solely directed at CPR and First Aid course fees.

- 9.2 The evidence discloses that some employers pay for all employees to undertake First Aid and CPR qualifications, notwithstanding that this is not required.⁵⁸
- 9.3 In the event that employers are required to pay employee time for training, employers would be more selective about who is allowed to attend rather than continuing to pay for the course for all employees.⁵⁹
- 9.4 There is no credible evidence that employees are being forced into training which they do not wish to pay for:
- (a) Ms Wade's first statement at [48] alleges that some staff members struggle to pay for training and have to use rent or groceries money to pay for training - this evidence is unsupported and should be afforded little weight.

10. LAUNDRY ALLOWANCE

The following findings are available for the Commission to make, on the basis of the evidence before it.

- 10.1 It is not appropriate to pay employees an allowance to wash their uniforms in situations where:
- (a) the employee is washing their uniform during work time (eg; at a cost to the employer) or the employee's uniform is washed by someone else at the centre (eg; another employee or Director);⁶⁰
 - (b) the employer pays for electricity, water, detergent;⁶¹ and
 - (c) there is no cost to the employee.⁶²
- 10.2 To the extent that ECEC Centres have laundry facilities onsite, these can be accessed and used by employees:
- (a) Mr Fraser gave evidence that the laundry facilities at his centre were not busy (PN1969).
 - (b) Ms Chemello gave similar evidence (PN2829).
 - (c) Ms Llewellyn advised she has two washers and dryers onsite that her employees can

⁵⁸ Mahony Statement (**Exhibit 38**) at [101]; Tullberg Statement (**Exhibit 35**) at [106]; McPhail Statement (**Exhibit 28**) at [101]-[103]

⁵⁹ Mahony Statement (**Exhibit 38**) at [102]; Tullberg Statement (**Exhibit 35**) at [108]; McPhail Statement (**Exhibit 28**) at [103]

⁶⁰ PN4804 and PN4805

⁶¹ McPhail Statement (**Exhibit 28**) at [106]; Llewellyn Statement (**Exhibit 39**) at [100]

⁶² Mahony Statement (**Exhibit 38**) at [105]

use.⁶³ In response to questions about employees having difficulty accessing the machines, Ms Llewellyn stated that there is, *“definitely opportune time for them to wash their uniform if needed.”*

- (d) The evidence of Ms Bea in respect of the use of laundry facilities (PN437-PN447) should be dealt with cautiously. Her evidence that two washing machines were in perpetual operation is not consistent with the evidence of other witnesses in the proceedings (with the obvious caveat that those witnesses were located at other centres). Likewise Ms Bea’s evidence as to the impossibility of marking a shirt with an identifying mark, a situation apparently leaving her no recourse but to undertake single shirt wash cycles appears to defy common sense.

11. CLOTHING ALLOWANCE

There was little evidence in support of this claim.

The following findings are available for the Commission to make, on the basis of the evidence before it.

- 11.1 Some ECEC employers already provide hats and sunscreen to staff (See Mr Mahony at PN4027, Ms Llewellyn at PN4027, Ms Hennessy at PN331-2)

12. HIGHER DUTIES CLAIM

- 12.1 There are no relevant evidentiary findings which can be made in respect of this claim.
- 12.2 As such, there is insufficient evidence before the Full Bench to establish this claim.

13. ANNUAL LEAVE CLAIM

- 13.1 There are no relevant evidentiary findings which can be made in respect of this claim.
- 13.2 While there was some evidence adduced which suggests that some centres do not undertake a shutdown over Christmas or undertake a 2 week shutdown, the evidence of Ms Brannelly at PN3504 stated that *“the majority a lot of services do close over the two weeks during the Christmas holidays - but usually services are open for between 48 and 50 weeks of the year”*.
- 13.3 Given the above, there is insufficient evidence before the Full Bench to establish this claim.

⁶³ PN4320

14. COVERAGE CLAIM

The following findings are available for the Commission to make, on the basis of the evidence before it.

- 14.1 Aspects of the IEU's evidence that suggested that specific advantages were derived by a director through the completion of a teaching degree should not be accepted. By way of example:
- (a) A teaching qualification attained prior to 2012 would not have included content on the current legislative system applying in ECEC: See Ms Farrant at PN3273, PN 3278, Ms Frend at PN3836.
 - (b) A teaching qualification does not necessarily entitle the holder to knowledge about research undertaken more recently than their degree: See Ms Farrant PN3295.
 - (c) Ms Farrant accepted that human resources and recruitment were not part of her teaching qualification and admitted that these were gained through skills obtained during ongoing professional development (see PN3280 and PN3281; Farrant Statement (**Exhibit 31**) at [7.3]).
 - (d) Ms Mravunac at PN4461 accepted that her degree did not, as claimed in her statement, assist encouraging family input in the 'Net Promoter Score'.
- 14.2 The mere fact that a Director has a qualification as a Teacher does not necessarily mean their contribution as a Director is more valuable:
- (a) Mr Fraser gave evidence that an understanding of the early years learning framework is something that any level early childhood educator would gain through their qualifications, whether it's certificate III or diploma or bachelor (PN1638).
 - (b) Mr Fraser also stated:

I do not agree that a Certificate III or Diploma is unable to provide insight into the needs of children, some of my educators are parents with over 20 years' experience in the ECEC sector and whilst they may only hold a Certificate III or a Diploma, their knowledge and understanding of children and development is significantly deeper than that of a bachelor qualified teacher who has just graduated or even been a teacher for 5-10 years. Hands on experience is incredibly valuable in the ECEC sector.⁶⁴

⁶⁴ Fraser Statement (**Exhibit 18**) at [147]

- (c) Ms Viknarasah stated:

I do not believe that having a teaching qualification allows a greater depth of understanding and the most significant factor I have found is world experience and general knowledge of the individual as well as if the individual has had children of their own and their experiences as a parent. I agree somewhat, that it is generally easier for someone with a degree to potentially articulate issues in writing however I do not believe that this has a significant impact on their role as a Director.”⁶⁵

- (d) Ms Farrant accepted at PN3326-3328 that educators were ‘credible’, ‘knew what they were talking about’ and that many had a ‘great deal of experience’.

14.3 Findings as to evidence:

- (a) The evidence of Ms James at [31] of her statement (**Exhibit 32**) as to one centre’s interpretation of the Children’s Services Award is of no probative value and should be afforded no weight in these proceedings.

14.4 The Commission should not make a finding that the attainment of a teaching degree will necessarily make a director more credible in the eyes of staff or parents:

- (a) The evidence of teaching qualified directors about the perceptions of staff and parents is self-serving and mostly hearsay. For example:
- (i) Ms Farrant’s statement at [11] is unsupported opinion about the views of other people. Where cross-examined about this at PN3314-3315 she qualified her evidence to state that it was her view that it was ‘essential’ to have at least the same qualification to ensure “*best outcomes, best practice*”. Ms Farrant acknowledged at PN3317 that centres do exist without degree qualified Directors.
- (b) Ms Mravunc’s evidence at [12] of her statement that “*there is an expectation amongst staff that as Director I should hold tertiary qualifications*” should be given limited weight. This is hearsay about her staff’s opinion.
- (c) Likewise Ms Mravunac’s evidence at [17] of her statement (**Exhibit 42**) that
- “Because I am the only tertiary educated early childhood teacher, parents look to me for advice and value my contributions to the child’s education.*

⁶⁵ Viknarasah Statement (**Exhibit 13**) at [156]

Parents expect consultation in these meetings with a qualified early childhood teacher”

should be given limited weight. This is hearsay about parents’ opinion.

- (d) Ms Frend’s evidence at 13.12 of her statement (**Exhibit 37**) that: *“Parents of children within the Preschool are more confident in my ability to run an education organisation knowing that I have a thorough understanding of early childhood education through by teaching degree”* should also be given limited weight. This is hearsay about parents’ opinion which cannot be tested.

15. MINIMUM ENGAGEMENT CLAIM

15.1 No evidence was put forward regarding this issue at the hearing.

15.2 To the contrary, evidence provided in the ACA/ABI Statements suggests that:

- (a) many ECEC employers do not engage casual teachers (as they do not provide continuity of care and are expensive);⁶⁶ and
- (b) those that do employ casuals, are aware of clause 14.5 and how to correctly calculate a quarter day/half day for a casual under that award.⁶⁷

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

On behalf of Australian Childcare Alliance Inc, Australian Business Industrial, the New South Wales Business Chamber Ltd

29 May 2019



as per

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⁶⁶ Viknarasah Statement (**Exhibit 13**) at [161]; Mcphail Statement (**Exhibit 28**) at [118]; Llewellyn Statement (**Exhibit 39**) at [107]; Tullberg Statement (**Exhibit 35**) at [113]; Mahoney Statement (**Exhibit 38**) at [121]

⁶⁷ Viknarasah Statement (**Exhibit 13**) at [162]; Tullberg Statement (**Exhibit 35**) at [114]