

IN THE FAIR WORK COMMISSION

AM2018/18 and AM2018/20

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**FOUR YEARLY REVIEW OF MODERN AWARDS - CHILDREN'S SERVICES  
AWARD 2010 AND EDUCATIONAL SERVICES (TEACHERS) AWARD 2010**

**SUBMISSIONS FILED ON BEHALF OF ACA, ABI and NSWBC**

15 March 2019

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## PART A: INTRODUCTION

### 1. THE APPLICATION

- 1.1 On 30 September 2016 and 23 February 2017 the Australian Childcare Alliance (**ACA**), Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**) (collectively, the **Applicants**) filed draft determinations<sup>1</sup> seeking to vary the:
- (a) Children’s Services Award 2010 (**Children’s Services Award**); and
  - (b) Educational Services (Teachers) Award 2010 (**Teachers Award**),
- (collectively, the **Awards**).
- 1.2 As both Awards cover employees working in the early childhood education and care sector , the draft determinations for each Award seek similar variations to the Awards in the manner set out below (**ACA Claims**).

### 2. THE ORDINARY HOURS CLAIM

- 2.1 The Applicants have filed a claim seeking to vary the ordinary hours under the Teachers Award and the Children’s Services Award (**Ordinary Hours Claim**). Currently the Awards identify that ordinary hours may be worked between 6.00 am and 6.30 pm. The Applicants seek a variation to the Awards such that ordinary hours may be worked between 6.00 am and 7.30 pm.

### 3. THE ROSTERING CLAIM

- 3.1 The Applicants have also filed a claim seeking 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 roster in circumstances where:
- (a) another employee has provided less than 7 days notice of their inability to perform a rostered shift; and
  - (b) 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**).

### 4. THE APPLICANTS

#### **Australian Childcare Alliance**

- 4.1 ACA is the peak body in the early childhood education and care (**ECEC**) sector. It is a not-for-profit, member based and member funded organisation. It has a national membership base of approximately 2,500 members.
- 4.2 ACA is made up of constituent State organisations in New South Wales, Victoria, Queensland, South Australia and Western Australia.<sup>2</sup> The membership of each State body

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<sup>1</sup> ACA, ABI & NSWBC, Draft Determination filed 30 September 2016 - Children’s Services Award 2010; ACA, ABI & NSWBC Draft Determination filed 23 February 2017 - Educational Services (Teachers) Award 2010

<sup>2</sup> Association of Quality Childcare Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare Queensland Inc; Childcare South Australia; Childcare Association of Western Australia.

collectively represents over 3,000 early childhood education and care centres, making up approximately 70% of the all privately owned long day care services in Australia. ACA's membership includes the following types of services:

**Table 1: ECEC Services**

| <u>Type of ECEC Service</u>                          | <u>Description</u>   |
|--|--|
| Childcare Centres                                    | Childcare centres provide regular full-time or part-time childcare in places specially built or adapted for childcare. Childcare centres may be run by private operators, local councils, community organisations, employers and non-profit organisations. This can include long day-care centres, occasional care, nurseries, family based childcare, Vacation Care, adjunct care, in-home care, kindergartens and preschools |
| Long Day-Care (including private and non-for-profit) | Long day care is usually open for 10 or more hours per day, five days per week for at least 48 weeks per year and takes children from 6 weeks to under 6 years. Children can attend part-time or full-time childcare. It can be a privately owned centre of a non-for-profit centre.   |
| Outside School Hours Care                            | Outside School Hours Care is supervised care and recreation for primary school-age children on before and after school.  |
| Occasional Care                                      | Occasional care provides intermittent care for children aged 0–5 years. Unlike long day care, children do not need to be enrolled for particular days each week. Occasional care can be used on a flexible basis, for example while you study in the library, attend an appointment, or if you need respite care.  |
| Nurseries  | Nurseries cater for children who 6 weeks to 2 years old.   |
| Family based childcare                               | Family-based childcare is provided at the home of the carer who operates independently. Hours of care vary and may be negotiated between the carer and the parent. Carers can nominate the ages of children they care for, but may take children 0-12 years of age who need before and after school or vacation care.  |
| Vacation Care  | Vacation care is supervised care and recreation for primary school-age children on public holidays and pupil free days.  |
| Adjunct Care   | Adjunct care is provided at places like shopping centres and gyms often offer care for short periods of up to 3 hours, while the parent or carer stays on the premises.  |
| In-home Care   | In-home care is delivered in the family home targeted to assist parents or carers who are unable to access other mainstream childcare options such as those who work non-standard hours, are geographically isolated or have families with challenging and complex needs.  |
| Kindergartens  | Kindergarten services offer early childhood education programs to help prepare children for school.  |
| Preschools   | Preschool is a planned educational program for children in the years before a child commences school. Children are usually aged between 3 and 5 years. Preschool may take place in a range of settings including a purpose built building, in a community setting, a school, as part of a long day care centre or a mobile or visiting service.  |
| Early Childhood Intervention Programs                | Early Childhood Intervention provides specialised support and services for infants and young children with disability and/or development delay and their families to help their development, well-being and participation in family and community life.  |
| Mobile Children's Service                            | A mobile service generally operates from a van or other vehicle which travels through a particular geographic area and sets up a childcare service in a local hall or other premises. These services may offer occasional care, preschool care or long day care. Service is offered once a week, or more often, depending on regional needs and hours vary.  |

4.3 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

4.4 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009* (Cth).

## 5. THE PARTIES SUPPORTING THESE SUBMISSIONS

5.1 This outline of submissions is also supported by the National Outside School Hours Care Association (**NOSHSA**) who are also represented by Australian Business Lawyers & Advisors in these proceedings.

5.2 NOSHSA represents the outside school hours care sector throughout Australia and has over 3,310 services that are members across Queensland, New South Wales, Victoria, Tasmania, ACT, Western Australia and North Territory.

## 6. EVIDENCE FILED

6.1 In support of its position, the Applicants relies upon:

- (a) the witness statement of Karthiga Viknarash dated 1 March 2019 (**Viknarash Statement**);
- (b) the witness statement of Melinda Ackerman dated 1 March 2019 (**Ackerman Statement**);
- (c) the witness statement of Julie Ann White dated 4 March 2019 (**White Statement**);
- (d) the witness statement of Sarah Elizabeth Tullberg dated 4 March 2019 (**Tullberg Statement**);
- (e) the witness statement of Rosina Maree Smith dated 1 March 2019 (**Smith Statement**);
- (f) the witness statement of Ann Marie Chemello dated 1 March 2019 (**Chemello Statement**);
- (g) the witness statement of Kristen McPhail dated 1 March 2019 (**McPhail Statement**);
- (h) the witness statement of Nicole Louise Llewellyn dated 11 March 2019 (**Llewellyn Statement**);
- (i) the witness statement of Alison Wharton dated 4 March 2019 (**Wharton Statement**);
- (j) the witness statement of Alexandra Hands dated 12 March 2019 (**Hands Statement**);
- (k) the witness statement of Katy Paton dated 14 March 2019 (**Paton Statement**);
- (l) the witness statement of Jae Dean Fraser dated 14 March 2019 (**Fraser Statement**);
- (m) the witness statement of Pam Avril Maclean dated 14 March 2019 (**Maclean Statement**);

(n) the witness statement of Kerry Joseph Mahony dated 14 March 2019 (**Mahony Statement**),  
(Collectively, the **Witness Statements**).

## PART B: THE PRE-REQUISITES APPLICABLE TO VARYING A MODERN AWARD

### 7. LEGISLATIVE FRAMEWORK APPLICABLE TO 4 YEARLY REVIEW

7.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in the *4 yearly review of modern awards – plain language re-drafting – standard clauses* decision issued on 18 July 2018<sup>3</sup> and more recently summarised in the *4 yearly review of modern awards – Alpine Resorts Award Decision*.<sup>4</sup> The main propositions may be summarised as follows:

- (a) section 156(2) provides that the Fair Work Commission (Commission) must review all modern awards and may, among other things, make determinations varying modern awards;
- (b) “review” has its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”;<sup>5</sup>
- (c) the discretion in s.156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the *Fair Work Act 2009 (Cth)* (**FW Act**) relevant to the conduct of the review;
- (d) in particular the Modern Awards Objective in s 134 applies to the review;
- (e) the Modern Awards Objective is very broadly expressed,<sup>6</sup> and is a composite expression which requires that modern awards, together with the NES, provide “a fair and relevant minimum safety net of terms and conditions”, taking into account the matters in ss.134(1)(a)–(h);<sup>7</sup>
- (f) fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;<sup>8</sup>
- (g) the obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;<sup>9</sup>
- (h) no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;<sup>10</sup>

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<sup>3</sup> [2018] FWCFB 4177 at [3]-[13].

<sup>4</sup> [2018] FWCFB 4984.

<sup>5</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38].

<sup>6</sup> *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

<sup>7</sup> [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]-[44].

<sup>8</sup> [2018] FWCFB 3500 at [21]-[24].

<sup>9</sup> *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].



- (i) it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;<sup>11</sup>
- (j) the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;<sup>12</sup>
- (k) in giving effect to the Modern Awards Objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;
- (l) what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;<sup>13</sup>
- (m) the matters which may be taken into account are not confined to the s 134 considerations;<sup>14</sup>
- (n) section 138, in requiring that modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the Modern Awards Objective and (to the extent applicable) the minimum wages objective, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;<sup>15</sup>
- (o) what is necessary to achieve the Modern Awards Objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;<sup>16</sup>
- (p) where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.<sup>17</sup>

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<sup>10</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

<sup>11</sup> *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

<sup>12</sup> See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

<sup>13</sup> As above at [28]-[29].

<sup>14</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [48].

<sup>15</sup> *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [45]

<sup>16</sup> See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

<sup>17</sup> As above at [46].

## PART C: CONTEXT OF THE ACA CLAIMS - TWO AWARDS COVERING THE ECEC SECTOR

### 8. AWARD MODERNISATION

8.1 The Applicants have previously sought for all employees in the ECEC sector to be covered by one modern award: the *Children's Services Award 2010*. While this remains the preference of ACA, this claim is not pursued in this review.

8.2 It is however important to understand this context in assessing the ACA Claims which seek consistent, sustainable and practical terms for childcare services across the two relevant awards.

8.3 In the Award Modernisation Process, the issue of appropriate award coverage for preschool teachers was raised by the Full Bench. There was strong support for the inclusion of preschool teachers in awards covering the 'children's services and early childhood education industry'. Equally there were arguments put that preschool teachers should be covered by an occupational award.<sup>18</sup>

8.4 The Full Bench stated:

*After considering the submissions and the proposals advanced by the interested parties we have decided at this stage that it is more appropriate to include preschool teachers in an occupational award covering both primary and secondary school teachers. We have taken into consideration in reaching this view, the qualifications required by early childhood education teachers, their capacity to work in schools and preschools as well as childcare centres, the lack of any relationship between teaching and children's services employees in terms of classification structures and the differences in conditions of employment.<sup>19</sup>*

8.5 The Full Bench also made the following comment:

*We understand that government policies will lead to an increase in the number of preschool teachers employed in childcare centres. It is, however, also likely that those policies will mean that access to early childhood education for children who are not in long day care will continue to be provided through preschools, kindergartens and preschool facilities attached to schools. The focus on the provision of early childhood education by university qualified teachers is appropriately reflected by their inclusion in an occupational award, the Educational Services (Teachers) Award 2010.<sup>20</sup>*

8.6 It is significant that since 2012 the government has implemented national legislation that requires childcare centres:<sup>21</sup>

- (a) to employ childcare workers who held or were working towards holding a certificate III in childcare; and

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<sup>18</sup> [2009] AIRCFB 865.

<sup>19</sup> [2009] AIRCFB 865 at [61].

<sup>20</sup> As above.

<sup>21</sup> See Education and Care Services National Law Act 2010; See applicable State acts on the ACECQA website <https://www.acecqa.gov.au/nqf/national-law-regulations/national-law>.

- (b) to employ 50% of all childcare workers in a centre were required to have or be working towards diploma qualifications;
  - (c) to hire a full-time degree qualified teacher for centres with 25 or more children in attendance.<sup>22</sup>
- 8.7 Some State funding of preschool programs has become linked to having a degree qualified teacher running the program.
- 8.8 Prior to the 1950s Childcare was largely an unregulated, informal industry. The industry started being regulated in the 1980s. By 2012, significant qualification requirements began being imposed by the government as part of further 'professionalising' the industry. However, obtaining a particular qualification has not changed the nature (or the duties) of the job. Many centre operators will advise that their employees all do the same job (caring and educating children) and that all employees are required to work 'on the floor' and assist children with day-to-day needs (as part of the requirements of the job. This is irrespective of what qualification they hold (cert III, diploma, teaching degree).
- 8.9 The Applicants submit that the role of a 'teacher' in a childcare centre more closely aligns with the role of other educators in childcare centres than it does with teachers in schools. The main reason for this is that there is no formal curriculum (like in a school) and teachers and educators largely perform the same tasks.<sup>23</sup>
- 8.10 If the industry is to continue to operate with two awards, these two awards must be consistent in terms of ordinary hours and rostering arrangements of its employees who (despite differing qualifications).

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<sup>22</sup> If operating more than 50 hours per week.

<sup>23</sup> See ACA Outline of Submissions dated 28 May 2018 (ERO/Work Value Case).

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## PART D: ORDINARY HOURS CLAIM

### CONTEXT OF THE ORDINARY HOURS CLAIM

#### 9. ORDINARY HOURS - CHILDREN'S SERVICES AWARD 2010

##### Award Modernisation Process

- 9.1 In 2009, as part of the award modernisation process, the drafting of the ordinary hours clause in the *Children's Services Award 2010* was primarily done by consultation with interested parties. Submissions were filed by several parties as to why the ordinary hours shouldn't be 6.00am - 6.30pm.<sup>24</sup>
- 9.2 The ordinary hours clause proposed at that time (by way of the Exposure Draft) appears to have been modelled from the:
- (a) *Children's Services (Victoria) Award 2005* (Pre-reform Award); and/or
  - (b) NSW - *Miscellaneous Workers' - Kindergatens Child Care Centres (State) Award* (NAPSA); and/or
  - (c) the *Child Care (SA) Award* (NAPSAs),
- which contained a span of hours ending at 6:30pm.

##### Some awards/submissions were not considered

- 9.3 However, at the time that clause was drafted it failed to consider and accommodate the fact that:
- (a) several pre-reform awards and NAPSAs had a contrasting span of hours that ended at 7.00pm;<sup>25</sup> And
  - (b) there may have been a demand from customers (parents) to have centres stay open until 7.00pm.
- 9.4 This evidence was provided by way of submissions, albeit no employer party supported those submissions with any witness statements from centre owners or parents whose children were in care at the time.

##### Employer parties raised concerns

- 9.5 Submissions provided (by employer parties) at that time, did acknowledge that:
- (a) some states were being disadvantaged by the decrease in ordinary hours (as their span of hours ended at 7.00pm and was being shortened to 6:30pm);<sup>26</sup>
  - (b) 6.30am to 6.30pm, did not reflect the practical operating requirements of the Industry (even in 2009);<sup>27</sup>

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<sup>24</sup> Submissions filed on behalf of Australian Childcare Centres Association and Australian Community Services Employers Association dated 16 October 2009

<sup>25</sup> As above at [10.5]

<sup>26</sup> In particular QLD, ACT, NT, TAS - see Submissions filed on behalf of Australian Childcare Centres Association and Australian Community Services Employers Association dated 16 October 2009; YMCA Australia - Exposure draft feedback Children's Services Award 2010 (undated) 2009

- (c) a span of hours ending at 6.30pm did not cater for Centre's whose employees needed to close the centre, secure equipment and carry out other tasks such as covering the sand pit and putting toys and equipment away after children have been picked up.<sup>28</sup>
- 9.6 Employer parties also raised concerns that a span ending at 6.30pm was too early and that centres:
- (a) needed flexibility to roster ordinary hours from as early as 6.00am to as late as 7.00pm, depending on the needs of the community;<sup>29</sup> and
- (b) could not afford to operate on the basis of paying staff regular overtime, so would have to reduce hours of operation unless the Exposure Draft contained a wider spread of hours.<sup>30</sup>
- 9.7 Employer parties ultimately submitted that a 7.00pm close would be more suitable.
- 9.8 This context is important to demonstrate that:
- (a) in 2005, Queensland, Northern Territory, Tasmanian and Federal Family Day Care Services centres in Australia had demand for a 7pm close (and ordinary hours in their State/Pre-reform awards reflecting this);<sup>31</sup> and
- (b) in 2009, some centres<sup>32</sup> in Australia (depending on the needs of their particular community) had a demand for a 7.00pm close.<sup>33</sup>

Consensus of the major parties

- 9.9 Notwithstanding the above, the AIRC Award Modernisation Full Bench Decision<sup>34</sup> noted that:

*Following submissions and consultations on the exposure draft changes have been made to this award to reflect the consensus of the major parties on span of hours, minimum shift lengths, overtime for part-time employees and junior rates.*<sup>35</sup>

[Our emphasis added]

- 9.10 As a result of this 'consensus' between the parties (which, in effect involved 'trading off' some award conditions for others) the Children's Services Award ordinary hours became 6.00am - 6.30pm. This is unsurprising given that the reality of the award modernisation process was not that of an extensive arbitral testing but largely an administrative exercise where consensus played a major part.

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<sup>27</sup> Submissions filed on behalf of Australian Childcare Centres Association and Australian Community Services Employers Association dated 16 October 2009 at [10.1]

<sup>28</sup> Submissions filed on behalf of Australian Childcare Centres Association and Australian Community Services Employers Association dated 16 October 2009 at [10.3].

<sup>29</sup> YMCA Australia - Exposure draft feedback Children's Services Award 2010 (undated) 2009 at [13].

<sup>30</sup> As above.

<sup>31</sup> YMCA Australia - Exposure draft feedback Children's Services Award 2010 (undated) 2009 at [10.3]

<sup>32</sup> Centres that were members of Australian Childcare Centres Association and Australian Community Services Employers Association in 2009.

<sup>33</sup> YMCA Australia - Exposure draft feedback Children's Services Award 2010 (undated) 2009 at [13].

<sup>34</sup> [2009]AIRC FB 945.

<sup>35</sup> As above at [69].

## 2 Yearly Review (2012)

### Employer parties request ordinary hours be extended until 7.00pm

9.11 As working hours and workforce participation of parents increased (and the unworkability of a 6:30pm close started to become apparent) employer parties again sought an extension of the ordinary hours (from 6:30pm to 7pm) in the 2 Yearly Award Review Proceedings in 2012.

9.12 The peak body (known then as ACCA) in the ECEC sector submitted that:

*It is axiomatic to observe that the ordinary operating hours of long day care services is a reflection of the demand among users of that service. It is ACCA's understanding that one of the key determinants in the spread of ordinary hours in a Modern Award is the typical operating times for businesses in the relevant industry or industries. While this is not unique to child care, there is a combination of policy factors peculiar to the children's services industry which seems to require an Award hours clause which appropriately reflects sector operating hours and parental demand.*

*First - while not sufficient justification in itself for an alteration in the spread of hours – the minimal profit margins and relatively low incidence of enterprise bargaining within the funding-reliant child care sector result in a particular sensitivity to award overtime.<sup>36</sup> It is therefore not uncommon for centres to encounter a difficult decision as to whether to extend their operating hours or incur overtime costs. With little room for the absorption of such costs, either choice has an impact on the availability or affordability of childcare.*

*Perhaps more importantly, the availability and affordability of child care has been recognised as one of the variables responsible for the trend increase in Australian female labour force participation. This trend has been widely reported in labour market data and publications.<sup>37</sup> Moreover, there is evidence which suggests the demand and use of child care services is particularly responsive to changes in their affordability.<sup>38</sup>*

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<sup>36</sup> See clause 21.1(c) of the Hospitality Industry Award 2010 and 26.2(e) of the Food, Beverage and Tobacco Manufacturing Award 2010 each set out in Appendix A.

<sup>37</sup> See, for example, Gong, Xiaodong, Robert Breunig and Anthony King. 2010. Treasury Working Papers: How responsive is female labour supply to childcare costs – new Australian estimates; and Childcare availability, quality and affordability: Are local problems related to maternal labour supply. Canberra: Department of the Treasury. Xiaodong et al concluded that if childcare prices increased by 1%, the employment rate of married mothers with young children would be expected to decrease by 0.3% and the total number of hours worked (labour supply) by married mothers would decrease by 0.7%; Office of Early Childhood Education and Child Care. 2010. State of Child Care in Australia. Canberra: Department of Education, Employment and Workplace Relations.

<sup>38</sup> Australian Bureau of Statistics (ABS). 2008. Childhood Education and Care. (Cat. no. 4402.0) Canberra: ABS. This survey reported that 17% of parents who had an unmet demand for childcare chose not to use childcare due to its cost; McNamara, Justine, Rebecca Cassells and Rachel Lloyd. 2005. Persistence of problems with child care: evidence from the HILDA survey. Canberra: National Centre for Social and Economic Modelling.; JWS Research. 2010. What Parents Want Survey. Logan City: Australian Childcare Alliance.

*In addition to benefiting centres and the consequent advantages for users of childcare services, there are also distinctly individual benefits which may be realised by the slightly increased spread. For instance, the change in the spread would be beneficial for an employee who requests to work eight hour days but is unable to arrive at work at or before 10:30am or 11:00am.*

*This variation is also consistent with the Queensland Child Care Industry Award - State 2003 (NAPSA) and the Tasmanian Child Care and Children's Services Award (NAPSA), both of which contained a spread of hours from 6:00am to 7:00pm.*

*The issue of extended hours of care is the subject of public debate as evidenced by a recent press release from United Voice "Around-the-clock Child Care: Time for a reality check, says Union" of 31 July 2012 which included comments that Child Care is a critical service for working families and the economy and that greater flexibility was desirable.*

- 9.13 The claim to extend ordinary hours to 7.00pm was not granted by the Commission on the basis that:
- (a) no case had been advanced for the application;
  - (b) there was no evidence supporting the claim;<sup>39</sup> and
  - (c) the consequence of the employer application would be a reduction in overtime payments to employees.
- 9.14 The Decision did however quote United Voice's comments that "*if we are to deal with it [the ordinary hours claim] at all it should be revisited in the 4 yearly review, not on this occasion*".<sup>40</sup>

#### **4 yearly review (2019)**

- 9.15 The current test to be applied by the Commission, has been outlined in detail in Section 7 above and is essentially to apply the Modern Award's Objective to the ACA claims, which we will do in detail below.
- 9.16 The Applicant by way of these submissions is advancing a significant case for the amendment of ordinary hours and providing supporting evidence in a way it has not done in the past 10 years.
- 9.17 The reason for advancing a case at this time is that the current ordinary hours clause in the modern award is increasingly unsustainable and must be updated for the modern award to be consistent with (or at the very least, considerate of) social and community demands and ECEC regulations.

#### **10. ORDINARY HOURS - TEACHERS AWARD 2010**

- 10.1 During the Award Modernisation Process in 2009, it was discussed that if employees in the ECEC sector were to be covered by two different awards, those awards would need to have consistent terms and conditions, including ordinary hours.<sup>41</sup>
- 10.2 The Teachers Award did not (and still does not) have a span of ordinary hours.

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<sup>39</sup> [2012] FWA 9296 at [65].

<sup>40</sup> [2012] FWA 9296 at [64].

<sup>41</sup> [2009] AIRCFB 945 at [40].

- 10.3 The Children's Services Award span of ordinary hours is 6.00am - 6.30pm.
- 10.4 As such, Schedule B to the Teachers Award was inserted in 2009, which is essentially a carve out for teachers employed in early childhood services operating for at least 48 weeks per year. Amongst other conditions, this schedule provides a span of ordinary hours which is consistent with the Children's Services Award of 6.00am - 6.30pm.<sup>42</sup>
- 10.5 In light of this, any change the Applicants are seeking to the Children's Services Award must be mirrored in the Teachers Award.

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<sup>42</sup> See Schedule B, Educational Services (Teachers) Award 2010.



## SUMMARY OF THE ORDINARY HOURS CLAIM

### 11. FINDINGS RELEVANT TO THE GRANTING OF THE ORDINARY HOURS CLAIM

11.1 Support for the Ordinary Hours Claim can be found in the evidence filed.

11.2 In summary, the Applicants submit that the Full Bench should grant the Ordinary Hours Claim on the basis that:

#### Role and Characteristics of the ECEC Sector

- (a) The primary purpose of childcare is to provide a place for young children to be when their parents are unable to care for them in the home because they are at work.<sup>43</sup>
- (b) The ECEC sector supports all Australian families and has the power to facilitate workforce participation leading to better outcomes for the economy and employment growth.<sup>44</sup>
- (c) Current government programs, (including the current subsidy arrangements) encourage both parents (and particularly mothers) to work because it is good for the economy.<sup>45</sup>
- (d) 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.<sup>46</sup>

#### Experience of Parents within the ECEC Sector

- (e) Affordability and accessibility of childcare for Australian families are current issues facing the ECEC sector generally.<sup>47</sup>
- (f) Childcare need to accommodate parent (customer) demand at an affordable price or parents will go elsewhere.<sup>48</sup>
- (g) Accessibility and affordability of childcare are extremely important factors that, if not provided, can discourage parents, particularly women, from working.<sup>49</sup>
- (h) Limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women).<sup>50</sup>
- (i) Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable childcare.<sup>51</sup>

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<sup>43</sup> Viknarash Statement at [40], Ackerman Statement at [19]; Smith Statement at [21].

<sup>44</sup> Maclean Statement at [46], [54]-[55], Tullberg Statement at [87]; Llewellyn Statement at [53]-[54]

<sup>45</sup> Llewellyn Statement at [45]-[55]; Viknarash Statement at [62]-[63]; Fraser Statement at [37].

<sup>46</sup> Maclean Statement at [56] – [57]; Mahony Statement at [38]; Fraser Statement at [99] - [104].

<sup>47</sup> Viknarash Statement at [110]; Ackerman Statement at [61]; Smith Statement at [85]-[90]. *Childcare and Early Childhood Learning - Productivity Commission Inquiry Report* (31 October 2014).

<sup>48</sup> Chemello Statement at [20]; Llewellyn statement at [18]; Wharton Statement at [15]-[16]; Tullberg Statement at [26]-[27]; Smith Statement at [11]; Ackerman Statement at [11]; White Statement at [33]-[34]; Maclean Statement at [56] – [57]; Hands Statement at [41]; Fraser Statement at [89].

<sup>49</sup> Smith Statement at [87]; Mahony Statement at [42].

<sup>50</sup> Paton Statement at [46].

<sup>51</sup> [2018] FWCFB 1692 (Family Friendly Decision); White Statement at [63].

- (j) 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.<sup>52</sup>
- (k) 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. This pattern suggests that the ordinary hours of the childcare industry should commence earlier and conclude later than other industries.<sup>53</sup>
- (l) Parents who utilise childcare services work in all industries.<sup>54</sup>
- (m) 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'.<sup>55</sup>
- (n) Many parents face increasingly long commuting times due to the distance of their home from work, reliability of public transport and an increase in traffic around major cities.<sup>56</sup>

#### **Effect of Current Ordinary Hours Award Conditions**

- (o) The span of ordinary hours in the Children's Services Award and Teachers Award currently finish at 6:30pm.
- (p) The cessation of ordinary hours at 6:30 in the childcare industry is identical to or earlier than 46% of modern awards. This means that, at least in respect of modern awards, 'overtime has begun' in the childcare industry at a point where many working parents are still completing 'ordinary hours' in other industries (or travelling to pick-up their children).
- (q) There is a demand from parents for childcare centres to stay open past 6:30pm due to their own work commitments.<sup>57</sup>
- (r) In order to avoid the payment of overtime, some childcare providers require parents to pick-up their children at 6:30 pm (i.e. the end of ordinary hours).<sup>58</sup>
- (s) 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.<sup>59</sup>

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<sup>52</sup> [2018] FWCFB 1692 (Family Friendly Decision); Mahony Statement at [38]-[40].

<sup>53</sup> Maclean Statement at [41] – [42]; Paton Statement at [43]-[44].

<sup>54</sup> Maclean Statement at [53]; Paton Statement at [43].

<sup>55</sup> Maclean Statement at [53].

<sup>56</sup> Fraser Statement at [53] - [54]; Mahony Statement at [45].

<sup>57</sup> White Statement at [36]-[40]; Tullberg Statement at [29]-[40]; Maclean Statement at [37] – [39]; Fraser Statement at [51]; Paton Statement at [43] - [44], [64]; Mahony Statement at [39]; Hands Statement at [33] - [35].

<sup>58</sup> Fraser Statement at [55]; Paton Statement at [41] - [42]; Hands Statement at [37] - [39].

<sup>59</sup> Maclean Statement at [40]-[42]; Fraser Statement at [55]; Paton Statement at [29]; Mahony Statement at [40]; Hands Statement at [43].

- (t) It is a common experience of childcare centres that, notwithstanding a clearly defined closure time of 6:30pm, parents are often late necessitating the payment of overtime.<sup>60</sup>
- (u) Commuting to and from work and work commitments are the main reasons parents cite to centre operators for why they cannot pick-up their children by 6:30pm.<sup>61</sup>
- (v) Some centres charge late fees as a deterrent to late parents, further exacerbating unaffordability issues within the industry.<sup>62</sup>
- (w) Some centres do not charge late fees, which means, given parents commonly pay a 'day rate', those centres are incurring overtime liability without the generation of any additional income to offset this.<sup>63</sup>
- (x) Unplanned overtime caused by parents collecting their children after 6:30pm causes some disability for childcare employees who are unable to identify, with certainty, their finishing time.<sup>64</sup>

#### **Likely Effect of Granting of the Ordinary Hours Claim**

- (y) Extending ordinary hours until 7:30pm will increase the hours of operation of centres and make childcare more accessible for Australian families.<sup>65</sup>
- (z) Extending ordinary hours until 7:30pm will make childcare more sustainable for ECEC operators who are currently deterred from staying open past 6:30pm due to the significant costs associated with 2 employees being paid at overtime rates, despite demand from parents.<sup>66</sup>
  - (aa) Extending the ordinary hours until 7:30pm will increase workforce participation to benefit Australian families and the Australian economy in that it will allow parents to work longer hours.<sup>67</sup>
  - (bb) Extending ordinary hours until 7:30pm will make childcare more affordable for parents by pushing back or removing the "late fees" charged to parents when they arrive after 6:30pm.<sup>68</sup>

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<sup>60</sup> Maclean Statement at [40] – [43], [47]; Fraser Statement at [53] - [54]; Paton Statement at [35] - [39]; Hands Statement at [33]-[35].

<sup>61</sup> Wharton Statement at [32]-[35], White Statement at [41]-[45], Tullberg Statement at [29]-[40], Llewellyn Statement at [33]; Maclean Statement at [42], [55]; Fraser Statement at [47]; Hands Statement at [34];

<sup>62</sup> Maclean Statement at [52]; Paton Statement at [42]; Paton Statement at [28]-[29]; Mahony Statement at [42] - [44]; Hands Statement at [41].

<sup>63</sup> White Statement at [41]-[45]; McPhail Statement at [42]; Maclean Statement at [51] - [52].

<sup>64</sup> Viknarash Statement at [47]-[49]; Smith Statement at [44]; Fraser Statement at [51]; Mahony Statement at [40]; Hands Statement at [43]-[44].

<sup>65</sup> Maclean Statement at [56] - [57]; Fraser Statement at [48]; Paton Statement at [30], [32] - [34]; Mahony Statement at [47]; Hands Statement at [45] - [46]; Childcare and Early Childhood Learning - Productivity Commission Inquiry Report (31 October 2014).

<sup>66</sup> Maclean Statement at [38]; Paton Statement at [28], [35]-[36]; Hands Statement at [31].

<sup>67</sup> Fraser Statement at [51]; Mahony Statement at [47]; Childcare and Early Childhood Learning - Productivity Commission Inquiry Report (31 October 2014); Paton Statement at [43]-[44]; Hands Statement at [34] - [35]

<sup>68</sup> Paton Statement at [43]; Childcare and Early Childhood Learning - Productivity Commission Inquiry Report (31 October 2014).

- (cc) Extending the ordinary hours until 7:30pm would service to remove the 'unpredictability' of overtime which will benefit childcare workers who are rostered on the 'closing shift' in that those employees could simply be rostered to work the additional time.<sup>69</sup>

11.3 The Applicants expand on these proposed findings and refer the Full Bench to the relevant evidence as follows.

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<sup>69</sup> Fraser Statement at [51]; Paton Statement at [34]; Mahony Statement at [40 ]; Hands Statement at [44].

## SUBMISSIONS IN SUPPORT OF THE ORDINARY HOURS CLAIM

### 12. ROLE AND CHARACTERISTICS OF THE ECEC SECTOR

- 12.1 The market for ECEC services is large, diverse and growing, and it touches the lives of practically every family in Australia.<sup>70</sup>
- 12.2 The role of ECEC services is predominately to provide a safe and secure environment with quality caregivers, so that parents have the peace of mind of knowing their children are safe while they work.
- 12.3 ECEC services provide key opportunities for children's development and social engagement, and enable families to engage fully in the labour market.
- 12.4 The ordinary hours for childcare centres should reflect the fact that working parents need childcare services to operate both before and after their working day (to accommodate pick-up and drop off). The maintenance of a system which operates under 'overtime' conditions during standard (and necessary) hours of operations is not consistent with the primary role of caring for children during the time that their parents are at work.

#### **Australian children using childcare**

- 12.5 According to the Department of Education and Training's - *Early Childhood and Child Care in Summary June Quarter 2018 Report (June 2018 Report)* around 1.2 million children were enrolled into 18,782 formal childcare services across the country.<sup>71</sup>
- 12.6 Formal childcare is commonly defined in the ECEC sector to mean long day care centres, family day care and occasional care services that children attend in the years before going to school.
- 12.7 Once formal schooling begins, some children attend before or after school care and/or vacation care programs which are also considered to be formal in nature.

#### **Informal care**

- 12.8 Supplementing this formal network of ECEC services,<sup>72</sup> is a host of informal (largely unregulated) care and early learning arrangements provided by relatives, neighbours, playgroups, nannies, and au pairs. Informal carers, particularly grandparents also tend to be relied on when suitable formal care is not available or is too costly for the hours that parents work.<sup>73</sup> Use of Informal care has been decreasing since 2011.<sup>74</sup>

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<sup>70</sup> ALRC Report 84 - *Seen and heard: priority for children in the legal process*; ABS unpublished data prepared for the Inquiry 22 July 1997; and 44020DO001\_201706 Childhood Education and Care, Australia, June 2017 - Table 1.

<sup>71</sup> *Early Childhood and Child Care in Summary June Quarter 2018*; The Australian Children's Education & Care Quality Authority Quarterly Report - ACECQA states 15,628 services.

<sup>72</sup> Department of Education and Training's - *Early Childhood and Child Care in Summary June Quarter 2018 Report*.

<sup>73</sup> Childcare and Early Childhood Learning - Productivity Commission Inquiry Report (31 October 2014)

<sup>74</sup> ABS - 4402.0 Childhood Education And Care, Australia, June 2017.

## Increase in formal care of children

- 12.9 Conversely, the use of formal care has increased from 13.6% in 2011 to 17.4% in 2017<sup>75</sup> and with it the number of formal services has expanded substantially over the past five years to cater for the additional demand.<sup>76</sup>

| State and territory | Number of children using approved child care <sup>1</sup> | Number of families using approved child care <sup>1</sup> | Number of approved child care services | Estimated Child Care Benefit (CCB) entitlement <sup>2</sup> ('000) | Estimated Child Care Rebate (CCR) entitlement <sup>2</sup> ('000) | Estimated number of families receiving CCR <sup>1</sup> |
|---------------------|---|---|--|--|---|---|
| NSW                 | 423,280   | 297,610   | 6,500                                  | \$229,385  | \$302,894   | 265,160   |
| Vic.                | 314,000   | 217,070   | 4,347                                  | \$191,671  | \$215,176   | 195,990   |
| Qld                 | 288,110   | 197,850   | 3,750                                  | \$173,819  | \$185,464   | 181,660   |
| SA                  | 84,220  | 57,700  | 1,369                                  | \$33,912   | \$46,377  | 54,010  |
| WA                  | 99,180  | 70,830  | 1,813                                  | \$42,539   | \$67,275  | 65,110  |
| Tas.                | 22,580  | 15,780  | 397                                    | \$9,607  | \$12,495  | 14,720  |
| NT                  | 9,900   | 7,020   | 210                                    | \$3,730  | \$7,998   | 6,520   |
| ACT                 | 30,240  | 20,870  | 396                                    | \$7,267  | \$24,363  | 19,030  |
| <b>Australia</b>    | <b>1,269,260</b>  | <b>882,540</b>  | <b>18,782</b>                          | <b>\$691,931</b>   | <b>\$862,041</b>  | <b>800,390</b>  |

<sup>1</sup> As families and children may use services in more than one state or territory and due to rounding, the sum of the component parts may not equal the Total.

Source: Department of Education and Training administrative data.

Source: *Early Childhood and Child Care in Summary June Quarter 2018 Report*

- 12.10 The *Childcare and Early Childhood Learning - Productivity Commission Inquiry Report* (31 October 2014) (**Productivity Commission Report**) found the workforce participation rate of mothers combined with a growing community awareness of the importance of early learning for child development has led to more families using formal care.<sup>77</sup>
- 12.11 The most attended childcare services within Australia are:
- outside school hours care which accounts for 56.1% of all formal services; and
  - long day care services which accounts for 39.8% of all formal services.<sup>78</sup>
- 12.12 Furthermore, almost 900,000 of the 1.2 million children attending care use a service in a major city of Australia.<sup>79</sup> Major cities are the places affected most by parents working in the CBD (which may be far away from home or the childcare centre) and long commute times which are subject to traffic or transport issues.

<sup>75</sup> Australian Bureau of Statistics, 4402.0 - *Childhood Education and Care, Australia, June 2017*

<sup>76</sup> *Childcare and Early Childhood Learning - Productivity Commission Inquiry Report* (31 October 2014)

<sup>77</sup> *Childcare and Early Childhood Learning - Productivity Commission Inquiry Report* (31 October 2014)

<sup>78</sup> June Quarter 2018, *Early Childhood and Child Care in Summary June Quarter 2018 Report* at [page 10]

<sup>79</sup> *Early Childhood and Child Care in Summary June Quarter 2018 Report* at [page 4]

| Service type                     | Major cities of Australia | Regional <sup>1</sup> and Remote Australia <sup>2</sup> | Total <sup>3</sup> |
|----------------------------------|---------------------------|---|--------------------|
| Long Day Care                    | 524,470                   | 172,450   | 694,830            |
| Family Day Care and In-Home Care | 119,980                   | 34,770  | 153,570            |
| Occasional Care                  | 2,990                     | 2,310   | 5,300              |
| Outside School Hours Care        | 373,450                   | 81,330  | 453,850            |
| <b>Total<sup>3</sup></b>         | <b>994,800</b>            | <b>281,040</b>  | <b>1,269,260</b>   |

<sup>1</sup> Includes Inner and Outer Regional

<sup>2</sup> Includes Remote and Very Remote

<sup>3</sup> As children may use more than one service type in more than one region in any particular quarter and due to rounding, the sum of the component parts may not equal the Total.

Source: Department of Education and Training administrative data.

Source: *Early Childhood and Child Care in Summary June Quarter 2018 Report*

### ECEC services impacted by the ACA Claims

- 12.13 The ACA Claims impact formal care providers whose employees are covered by the Children's Services Award and/or the Teachers Award. Practically, this means long day care providers and outside school hours care providers who represent approximately 96% of the industry.<sup>80</sup>
- 12.14 In terms of the State distribution of these services, New South Wales had the largest share of children attending formal childcare (33.3%), followed by Victoria (24.%) and Queensland (22.7%).

### The Applicants' Representation of those Services

- 12.15 As at the date of this submission ACA represents approximately 3,363 formal services across Australia.
- 12.16 To ensure these businesses are adequately represented in the advancement of the ACA Claims, Witness Statements have been provided from:
- owner/operators from South Australia, Western Australia, New South Wales, Victoria and Queensland;
  - small and medium service providers (with 1-24 centres);
  - private long day care providers;
  - not-for-profit long day care providers; and
  - outside school hours care providers.
- 12.17 The ACA Claims apply to any service provider who has coverage under the Awards, which we estimate, will directly impact 95.5% of the services in the ECEC industry.<sup>81</sup>

## 13. REGULATION OF THE ECEC INDUSTRY

- 13.1 Childcare employers are subject to complex regulations that impact their ability to roster employees and arrange their hours on a daily basis. The most difficult State and Federal regulations to comply with include:

<sup>80</sup> This figure excludes informal care services such as grandparents etc.

<sup>81</sup> As above

- (a) educator-to-child ratios - depending on the age and number of children who attend the centre each day;<sup>82</sup>
- (b) teacher-to-child ratios - depending on the number of children who attend the centre each day;<sup>83</sup>
- (c) qualification of staff ratios - to ensure at least 50% of the employees in the Centre on any given day are Diploma Qualified (the remaining employees must be at least Certificate III qualified),<sup>84</sup>

(collectively the **Childcare Regulations**).

13.2 The Witness Statements acknowledge the regulatory burden on the ECEC sector and that the current regulatory system (including the Awards) is not easy to understand or sustainable.<sup>85</sup>

13.3 Business owners must balance the Childcare Regulations against compliance with the requirements of the Awards.<sup>86</sup>

13.4 To compound matters, the childcare industry is susceptible to a high degree of regulatory change including changes to:

- (a) government funding (for kindergarten and preschool programs);
- (b) government subsidies or rebates to parents placing their children in care;<sup>87</sup>
- (c) health, food and occupational health and safety requirements for children;<sup>88</sup>
- (d) privacy laws and collection of children's medical and personal information;
- (e) educational standards (in which each centre is assessed) including the:
  - (i) National Quality Framework (**NQF**);
  - (ii) National Quality Standards (**NQS**); and
  - (iii) Early Years Learning Framework (**EYLF**).<sup>89</sup>
- (f) terms and conditions of employment associated with:
  - (i) employing an early childhood teacher (**ETC**) under the Teachers Award;

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<sup>82</sup> *Education and Care Act and Education 2010 (Vic) and Education and Care Services National Regulations 2010*; Tullberg Statement at [55]; Chemello Statement at [50]-[51]; Smith Statement at [48]-[52]; White at [51]-[52]; Fraser Statement at [60]-[63]; Maclean Statement at [61] - [63]; Paton Statement at [48]; Mahony Statement at [49] - [52]; Hands Statement at [52].

<sup>83</sup> Llewellyn Statement at [59]; Tullberg Statement at [60]-[64]; Chemello Statement at [54]; Smith Statement at [55]-[62]; White Statement at [53]; Fraser Statement at [64]-[65]; Maclean Statement at [71] - [74]; Paton Statement at [56]-[59]; Mahony Statement at [58] - [61]; Hands Statement at [57]-[58].

<sup>84</sup> Llewellyn Statement at [59]; Wharton Statement at [46]-[49]; Chemello Statement at [52]; McPhail Statement at [53]-[57]; Smith Statement at [53]-[54]; Fraser Statement at [66]; Maclean Statement at [64]; Paton Statement at [53]-[54]; Mahony Statement at [56] - [57]; Hands Statement at [54].

<sup>85</sup> Mahony Statement at [76]; Maclean Statement at [98]; Viknarash Statement at [38]; White Statement at [51]-[55]; Smith Statement at [48]-[64]; Chemello Statement at [34].

<sup>86</sup> Maclean Statement at [95]; Statement of Fraser at [68]-[70].

<sup>87</sup> Fraser Statement at [31] - [41]; Viknarash Statement at [62]; Llewellyn Statement at [38]

<sup>88</sup> Tullberg Statement at [51].

<sup>89</sup> Fraser Statement at [56] - [59]; Paton Statement at [50]; Mahony Statement at [53]-[54]; Maclean Statement at [58]; Hands Statement at [47]-[51]; Viknarash Statement at [64]-[83]; White Statement at [51]-[55]; Tullberg Statement at [51]-[64].



- (ii) employing other educators in a childcare centre under the Children’s Services Award;
- (iii) the FW Act including the National Employment Standards.

**The Awards and their relationship to the ECEC industry**

- 13.5 It is apparent from the McPhail Statement, that when it comes to compliance with regulatory requirements, a difficult balancing act arises for centre owners. Owners tend to prioritise all the regulations by what is best for the children. This is particularly the case when legislation is not workable or has not kept up with the changing nature of the industry.
- 13.6 The Llewellyn Statement outlines that the Awards have been, ‘left behind’ in terms of their relevance to the ECEC industry and desperately need updating both in terms of terminology and practical relevance (such as ordinary hours and rostering arrangements). Other regulatory requirements, such as educator:child ratios seem to have a higher compliance rate than the award conditions. Again, the evidence suggests that owners are prioritising regulations by what is ‘best for the children.’
- 13.7 The Tullberg Statement suggests the Awards need a detailed understanding of all the other regulatory requirements that impact the sector before the Commission makes any changes.<sup>90</sup> The ACA Claims have been proposed after having considered each of the existing legislative requirements that the ECEC sector is already subject to.

**14. EXPERIENCE OF PARENTS WITHIN THE ECEC SECTOR**

**ECEC operating hours are restricting the working hours of parents**

- 14.1 A number of parents struggle to find ECEC services that meet their needs and enable them to increase their work commitments or they make substantial adjustments to work hours to accommodate available care or fit in with school hours (9:00am-3:00pm).<sup>91</sup>
- 14.2 Limited operating hours of services restrict the working hours of parents as at least one parent must pick their child up from care before the end of the span of hours or they incur a late fee. The Witness Statements outline that late fees range from \$1 - \$5 per minute to \$35 per 15 minutes.<sup>92</sup> These late fees are used as deterrents to ensure parents pick their children up on time which helps centres manage their staffing arrangements, closing time and minimise overtime payments to employees who have been rostered to close the centre.<sup>93</sup> Several witnesses state they charge the late fee to re-coup costs, other witnesses notify parents of the late fee (and put it in a policy) but rarely charge it as they feel it adds pressure to already stressed families.<sup>94</sup> Several witnesses’ state that this late fee contributes to the affordability issue with childcare as the government does not subsidise any hour that a parent is late to pick-up a child.<sup>95</sup>

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<sup>90</sup> Tullberg Statement at [87].

<sup>91</sup> Productivity Commission Report - Overview and Recommendations at page 9.

<sup>92</sup> Viknarash Statement at [41]; Ackerman Statement at [36]; Smith Statement at [41]; McPhail Statement at [42]; Chemello Statement at [39]; Wharton Statement at [33]; Tullberg Statement at [31]; Llewellyn Statement at [35]; Hands Statement at [36]; Paton Statement at [40] - [42]; Fraser Statement at [55].

<sup>93</sup> Fraser Statement at [55]; Llewellyn Statement at [35]; Chemello Statement at [39]; Tullberg Statement at [29]-[31].

<sup>94</sup> Mahony Statement at [42]-[44]; Maclean Statement at [51]-[52]; Viknarash Statement at [42]; Ackerman Statement at [35].

<sup>95</sup> Mahony Statement at [44]; Ackerman Statement at [36]; Llewellyn Statement at [52]-[55].

- 14.3 The Witness Statements suggest 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 seems to be a practical and efficient solution to maximise time at work whilst also considering the affordability of childcare (e.g.; centres in the CBD cost more per day). However, in practice this means that parents must finish work with enough time to travel to the childcare centre to pick-up their child 'on time'.<sup>96</sup>
- 14.4 The current industry closing time of 6.30pm is modelled off the span of hours in the Awards and does not reflect the increasingly long commuting times that parents (particularly in Sydney, Melbourne and Brisbane) are facing as they travel to and from work.<sup>97</sup>
- 14.5 Limited childcare operating hours also restricts the working hours of those with primary carriage of the caring responsibilities (often mothers). Approximately 70% of women are in some kind of paid employment, either part-time or full-time and women account for approximately 43% of the paid workforce. In 1997 nearly half (49%) of mothers with children under 4 years of age worked.<sup>98</sup> However, there is a strong (constrained) preference from Australian parents for at least one parent to work part-time, particularly when children are young. This is in stark contrast to many other OECD countries.<sup>99</sup>
- 14.6 Despite the increased workforce participation of women, women with family responsibilities are still shouldering a disproportionate responsibility for cooking, cleaning and other household work.<sup>100</sup> The rate of participation of women in the workforce is influenced by their relationship status, the age of the youngest child and the cost and availability of childcare.<sup>101</sup>
- 14.7 Several studies also acknowledge that increasing a partner's (predominately men) ability to participate in 'home caring and pick-up' duties as well as creating a culture at work where full-time working men are encouraged to participate in child caring responsibilities (by their employers) would benefit female participation in the workforce.<sup>102</sup>
- 14.8 The Applicants submit that extending the opening hours of childcare centres is encouraging and promoting the role of full-time working men in picking up children after work. As discussed, sharing 'home and caring' responsibilities between partners promotes workforce participation and may also have the effect of moving more women from part-time work into full-time work.

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<sup>96</sup> McPhail Statement at [43]; Wharton Statement at [32-35]; Tullberg Statement at [33]; Fraser Statement at [43]-[47].

<sup>97</sup> White Statement at [41]-[45]; Wharton Statement at [32]; Tullberg Statement at [33]; Statement of Fraser at [45]; News.com - Global Urban mobility Index shows Sydney and Melbourne more traffic snarled than many major cities (4 December 2018).

<sup>98</sup> Productivity Commission Report - Overview and Recommendation

<sup>99</sup> As above.

<sup>100</sup> Bittman & Pixley, 1997.

<sup>101</sup> McDonald, 1999 a & b.

<sup>102</sup> Household, Income and Labour Dynamics in Australia (HILDA) - Statistical Report 2018.

### **Affordability and Accessibility are issues for parents**

- 14.9 Affordability and accessibility are concerns for Australian parents with children in care. The result of this is that childcare centres need to accommodate parent demands at an affordable price or parents will go elsewhere.<sup>103</sup>
- 14.10 Affordability and accessibility are concerns for the ECEC sector generally and there is constant conversation about what government funding is available to make childcare more affordable for families, or more accessible for those in need.
- 14.11 The childcare out-of-pocket costs for families are determined by a combination of the daily fees services charge, the type of childcare used, the amount of care used by families for their children and the amount of Australian Government subsidies that families are entitled to.
- 14.12 According to the June 2018 Report, before the Australian Government childcare subsidies were taken into account, out-of-pocket costs for families varied from:
- (a) 29.1% of weekly disposable income for families earning a gross income of \$35,000 per year; to
  - (b) 9.5% for families earning a gross income of \$215,000 per year.
- 14.13 After Australian Government childcare subsidies, out-of-pocket costs were significantly reduced, varying from 8.0% for families earning a gross income of \$35,000 per year to 4.7% for families earning a gross income of \$215,000 per year.<sup>104</sup>

### **Regulatory restrictions on centres impact workforce participation**

- 14.14 The span of ordinary hours in the Awards is restricting childcare centres opening hours. The evidence from witnesses suggest that centre operators are currently deterred from staying open past 6:30pm, despite customer demand, as it is prohibitive to pay overtime rates to multiple employees after 6.30pm.<sup>105</sup> Two employees are generally rostered to close a childcare centres for safety reasons and/or because this is best practice according to ACECQA guidelines.<sup>106</sup>
- 14.15 The cost of paying two employees at overtime rates is generally passed on to the consumer (parents) by way of late fees or a centre increasing its daily rates.<sup>107</sup> This impacts how affordable childcare is for families.
- 14.16 Workforce participation is affected by many factors other than childcare including flexible work arrangements, government subsidies and support of partners. However, the accessibility and affordability of childcare are extremely important factors that (if not provided) can discourage parents from working.<sup>108</sup>

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<sup>103</sup> Chemello Statement at [20]; Llewellyn statement at [18]; Wharton Statement at [15]-[16]; Tullberg Statement at [26]-[27]; Smith Statement at [11]; Ackerman Statement at [11]; White Statement at [33]-[34]; Mahony Statement at [44]; Hands Statement at [43].

<sup>104</sup> June Quarter 2018, *Early Childhood and Child Care in Summary June Quarter 2018 Report*.

<sup>105</sup> Paton Statement at [30]; White Statement at [35]; Tullberg Statement at [36]-[39]; Chemello Statement at [44].

<sup>106</sup> Ackerman Statement at [24]-[25]; Smith Statement at [76]; Chemello Statement at [43]; Maclean Statement at [48]; Hands Statement at [39]; Paton Statement at [38].

<sup>107</sup> Fraser Statement at [55]; Paton Statement at [42]; Hands Statement at [39]; Chemello Statement at [39]; Wharton Statement at [33]; Ackerman Statement at [35].

<sup>108</sup> PwC Women in Work Index: [Closing the gender pay gap](#) (March 2018) at page 10.

### **Flexible working arrangements**

- 14.17 Australian industries require greater flexibility from their workforces and this appears to be benefiting the economy as it increases workforce participation. As a result, the nature of work is changing, with decreasing unemployment and considerable variation in work arrangements for those who are employed. An increasing proportion of Australians work non-standard hours resulting in greater variation in the hours of work, the pattern of work across the year and, in some instances, the places of work.
- 14.18 Flexibility can also be granted by way of family friendly working arrangements. Family friendly working arrangements have been considered in great detail by the Full Bench of the Fair Work Commission in the Family Friendly Working Arrangements Decision dated 26 March 2018 (**Family Friendly Decision**).<sup>109</sup> The Full Bench made the following findings based on the material and evidence before it:<sup>110</sup>
- (a) The accommodation of work and family responsibilities through the provision of flexible working arrangements can provide benefits to both employees and their employers.
  - (b) Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable childcare.
  - (c) 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.
  - (d) The majority of employees who request flexible working arrangements seek a reduction in working hours. Parents (predominantly women) seek part-time work to manage parenting and caring responsibilities. The next most common type of flexibility sought is a change in start/finish times and a change in days worked.
  - (e) There are strong gendered patterns around the rate of requesting and the kinds of alterations sought. Women make most of the requests for flexible working arrangements. Women do most of the unpaid care work and seek to adapt their paid work primarily by working part-time.

### **Government rebates and subsidies**

- 14.19 The new Child Care Subsidy which launched in July 2018 was also intended to increase workforce participation by implementing more beneficial subsidies for families whose primary caregiver returns to work.
- 14.20 For parents to determine how much Child Care Subsidy they are eligible for the Department of Human Services will look at a family's combined income (**Means Test**)<sup>111</sup> and the hours of work that each parent participates in (**Activity Test**).<sup>112</sup> Lastly, the Department will cap the amount of subsidy a family will receive based on the type of approved childcare the family uses and the child's age. For example, long day care is capped at \$11.77 per hour. Meaning a family will have to pay for the difference (per hour) between \$11.77 and the actual amount the centre charges.

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<sup>109</sup> [2018] FWCFB 1692 (Family Friendly Decision).

<sup>110</sup> [2018] FWCFB 1692 at [392].

<sup>111</sup> Department of Human Services: Child Care Subsidy - How much can you get.

<sup>112</sup> As above.

## 15. ECEC SECTOR CAN BE IMPROVED

15.1 In 2015, the Productivity Commission Report acknowledged that the ECEC sector could be improved because:

- (a) families were struggling to find quality childcare and early learning that is flexible and affordable enough to meet their needs and to participate in the workforce;<sup>113</sup> and
- (b) services need to operate in a system that has clear and sustainable business arrangements, including regulation, planning and funding.<sup>114</sup>

## 16. EFFECT OF CURRENT ORDINARY HOURS AWARD CONDITIONS

### Ordinary hours should reflect the workplaces of majority of Australian parents

- 16.1 Given that the primary purpose of childcare services are to provide a place for young children to be when their parents are unable to care for them in the home because they are at work, the Applicants submit that the span of ordinary hours in the Awards should reflect majority of Australia parents workplaces.
- 16.2 Three out of four Australian's are now working in a service industry.<sup>115</sup> Service based industries that have seen an increase and are projected to continue to grow include health care and social assistance, professional, scientific and technical services, retail trade, construction and education and training.<sup>116</sup> Health care and social assistance is the largest employing industry with large number of new jobs created.<sup>117</sup> This can be attributed to an ageing population, NDIS scheme and increase in demand for childcare services.<sup>118</sup>
- 16.3 There has also been growth in "nonstandard" employment types, including self-employment, agency employment, consultancy contracts, atypical contracts with more than one employer, independent contractor arrangements and seasonal work.<sup>119</sup>
- 16.4 The range of parental working patterns to be accommodated by childcare providers, their flexibility and unpredictability now present much more complexity than even a decade ago. The trend of lengthening of the average working week (past 45 hours) also has far-reaching implications for the ECEC sector as a service provider to those families.<sup>120</sup>
- 16.5 With an increasing number of both parents now in the workplace, the number of parents relying on formal childcare arrangements has increased.<sup>121</sup>

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<sup>113</sup> Productivity Commission Report (2014) - Overview and Recommendations at iv; Childcare and Early Childhood Learning - Productivity Commission Inquiry Report (31 October 2014).

<sup>114</sup> As above.

<sup>115</sup> Service industry includes all industries that are not manufacturing, construction, mining, agriculture, forestry and fishing, electricity, gas, water and waste services. See also Department of Jobs and Small Business - [Australian Jobs 2018](#).

<sup>116</sup> Department of Jobs and Small Business - Australian Jobs 2018.

<sup>117</sup> As above.

<sup>118</sup> Department of Jobs and Small Business - Newsroom: [Health Care and Social Assistance jobs on the rise](#) (10 September 2018).

<sup>119</sup> Productivity Commission Report (2014) - Overview and Recommendations.

<sup>120</sup> Many Australians are actually working less than the 'standard' working week of 35–44 hours and at the same time as there has been an increase in those working more than 45 hours; Childcare and Early Childhood Learning - Productivity Commission Inquiry Report (31 October 2014).

<sup>121</sup> Childcare and Early Childhood Learning - Productivity Commission Inquiry Report (31 October 2014).

## Ordinary Hours and the Modern Award System

- 16.6 The current modern award system provides an indication of the working hours for those that work in service based industries in Australia as follows:

| Industry                                 | Modern Award   | Ordinary Hours (Start) | Ordinary Hours (End) |
|--|--|------------------------|----------------------|
| <b>Service Based Industries</b>          |  |                        |                      |
| <b>Health Care</b>                       | <i>Aboriginal Community Controlled Health Services Award 2010</i>      | 7am                    | 7pm                  |
|  | <i>Fitness Industry Award 2010</i>                                     | 5am                    | 11pm                 |
|  | <i>Health Professionals and Support Services Award 2010</i>            | No span of hours.      | No span of hours.    |
|  | <i>Medical Practitioners Award 2010</i>                                | No span of hours.      | No span of hours.    |
|  | <i>Nurses Award 2010</i>   | 6am                    | 6pm                  |
|  | <i>Animal Care and Veterinary Services Award 2010</i>                  | 6am                    | 9pm                  |
|  | <i>Ambulance and Patient Transport Industry Award 2010</i>             | No span of hours.      | No span of hours.    |
| <b>Social Assistance</b>                 | <i>Labour Market Assistance Industry Award</i>                         | 6am                    | 8pm                  |
|  | <i>Social, Community, Home Care and Disability Industry Award 2010</i> | 6am                    | 8pm                  |
|  | <i>Supported Employment Services Award 2010</i>                        | 6am                    | 6pm                  |
| <b>Professional</b>                      | <i>Journalist Published Media Award 2010</i>                           | No span of hours.      | No span of hours.    |
|  | <i>Clerks - Private Sector Award 2010</i>                              | 7am                    | 7pm                  |
|  | <i>Legal Services Award 2010</i>                                       | 7am                    | 6:30pm               |
|  | <i>Market and Social Research Award 2010</i>                           | No span of hours.      | No span of hours.    |
| <b>Scientific and Technical Services</b> | <i>Professional Employees Award 2010</i>                               | No span of hours.      | No span of hours.    |
|  | <i>Architects Award 2010</i>   | 8am                    | 6pm                  |
|  | <i>Surveying Award 2010</i>  | 6am                    | 6pm                  |
| <b>Retail Trade</b>                      | <i>Pharmacy Industry Award 2010</i>                                    | 7am                    | 12am                 |

|                               |  |  |  |
|-------------------------------|--|--|--|
|                               | <i>General Retail Award 2010</i>                                     | 7am                                    | 9pm                                    |
|                               | <i>Saturday</i>  | 7am                                    | 6pm                                    |
|                               | <i>Sunday</i>  | 9am                                    | 6pm                                    |
|                               | <i>Vehicle Manufacturing, Repair, Services and Retail Award 2010</i> | 6am                                    | 6pm                                    |
| <b>Construction</b>           | <i>Building and Construction General On-Site Award 2010</i>          | 7am                                    | 6pm                                    |
|                               | <i>Joinery and Building Trades Award 2010</i>                        | 6am                                    | 7pm                                    |
|                               | <i>Mobile Crane Hiring Award 2010</i>                                | 6am                                    | 6pm                                    |
| <b>Education and Training</b> | <i>Education Services (Post-Secondary Education) Award 2010</i>      | 7am                                    | 7pm                                    |
|                               | <i>Education Services (Schools) General Staff Award 2010</i>         | 7am                                    | 6pm                                    |
|                               | <i>Education Services (Teachers) Award</i>                           | No span of hours unless long day care. | No span of hours unless long day care. |
|                               | <i>Higher Education Industry - Academic Staff - Award 2010</i>       | No span of hours.                      | No span of hours.                      |
|                               | <i>Higher Education Industry - General Staff - Award 2010</i>        | 6am                                    | 7:30pm                                 |

16.7 Further, if we look at the ordinary hours across the modern award system more generally, of the 154 modern awards:

- (a) 58.52% have a span of hours that ends at 6pm or later;
- (b) 25.19% have a span of hours that ends at 6:30pm or later;
- (c) 18.52% have a span of hours that ends at 7pm or later; and
- (d) 21.48% have no span of hours at all.

16.8 Witness Statements filed in these proceedings state that:

- (a) there is a demand from parents working in all different industries for centres to close later than 6.00pm or 6.30pm;<sup>122</sup>
- (b) late pick-ups (after the centres closing time of 6 or 6:30pm) are common and/or increasing;<sup>123</sup>
- (c) parents have other parents (or grandparents) pick-up their children when they are running 'late';<sup>124</sup>

<sup>122</sup> Llewellyn Statement at [36]; Tullberg Statement at [40]; Paton Statement at [43]-[44].

<sup>123</sup> Smith Statement at [39]-[44]; Viknarash Statement at [43]-[45]; Llewellyn Statement at [36]; Tullberg Statement at [30]; Wharton Statement at [32]; Fraser Statement at [53]-[54]; Hands Statement at [33]-[34];

- (d) centres charge late fees to try and re-coup the costs associated with overtime payments (incurred from late pick-ups after ordinary hours have ended);<sup>125</sup> and
  - (e) centres will consider changing their operating hours (to satisfy demand from parents) if the span of hours in the Awards is extended to 7.30pm.<sup>126</sup>
- 16.9 The Witness Statements in these proceedings also acknowledge that the role of childcare is to support parents who work in all different industries and workplaces.<sup>127</sup> Considering many services are choosing to close at 6.30pm, a thirty minute window to finish their own work and then arrive at the centres is not long enough having regard to the following:
- (a) that families working hours;<sup>128</sup>
  - (b) those parents catching public transport;<sup>129</sup>
  - (c) the distance of the childcare centre from work;<sup>130</sup> and
  - (d) those parents driving to and from work (especially if their workplace is located in the CBD).<sup>131</sup>
- 16.10 Thirty minutes travel time is unsustainable for parents working in Sydney or Melbourne CBD (who finish at 6.00pm), who rely on childcare services near their homes which could be 40 minutes to 2 hours away by train or car at peak-hour.<sup>132</sup> For parents finishing work earlier (say, 5.00pm or 5.30pm) it is still difficult (if not impossible) to reach a centre on time if those parents travel a considerable distance to work, there is an accident on the freeway or the train/bus has delays.

## **17. LIKELY EFFECT OF GRANTING THE ORDINARY HOURS CLAIM**

### **Increasing parental workforce participation**

- 17.1 The Applicants submit that the ECEC sector should encourage parental participation in the workforce.
- 17.2 The Productivity Commission Report estimated that in 2014 there was up to 165,000 parents (on a full-time equivalent basis) who would like to work, or work more hours, but are not able to do so because they are experiencing difficulties with the cost of, or access to, suitable childcare. These are parents (mostly mothers) who are currently either not in the labour force or are working part-time.<sup>133</sup>

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<sup>124</sup> White Statement at [45].

<sup>125</sup> Smith Statement at [41]; Llewellyn Statement at [36]; Tullberg Statement at [31]; Wharton Statement at [33]; Chemello Statement at [39]; Hands Statement at [36]-[37]; Fraser Statement at [55].

<sup>126</sup> White Statement at [35]; Llewellyn Statement at [36]; Tullberg Statement at [37]; Statement of Fraser at [46]; Statement of Hands at [31]-[32]; Statement of Paton at [28]; Statement of Maclean at [37]-[38]; Statement of Mahony at [38]-[39].

<sup>127</sup> Maclean Statement at [27]; Fraser Statement at [45]; Tullberg Statement at [33].

<sup>128</sup> White Statement at [35]-[40]; Llewellyn Statement at [33].

<sup>129</sup> White Statement at [35]-[40]; Tullberg Statement at [33].

<sup>130</sup> White Statement at [35]-[40]; Ackerman Statement at [31]; Smith Statement at [40].

<sup>131</sup> Fraser Statement at [45]; Hands Statement at [33]; White Statement at [35]-[40].

<sup>132</sup> Fraser Statement at [45]; White Statement at [41]-[45]; Wharton Statement at [32]; Tullberg Statement at [33].

<sup>133</sup> Childcare and Early Childhood Learning, Productivity Commission Inquiry Report, Overview and Recommendations 31 October 2014 at page 11.



- 17.3 It is useful to note that in the late 1970's women's workforce participation was 43 per cent. It has since increased to its highest level of 60.5 per cent.<sup>134</sup> Women are half the world's working-age population but generate only 37% of GDP.<sup>135</sup>
- 17.4 PwC estimates the potential long-term economic gain across the OECD from increasing women in work to be a boost in total GDP of over US\$6 trillion, an increase of 12 per cent.<sup>136</sup> Additionally, PwC estimates there is a potential gain of 10% in Australian GDP by increasing the number of women in work.<sup>137</sup>
- 17.5 If the Ordinary Hours Claim was granted, the Applicants submit that on the evidence before the Commission, extending ordinary hours until 7.30pm would:
- (a) increase the hours of operation of centres and make childcare more accessible for Australian families.
  - (b) make childcare more sustainable for ECEC operators who are currently deterred from staying open past 6.30pm due to the significant costs associated with two employees being paid at overtime rates, despite demand from parents.
  - (c) increase workforce participation to benefit Australian families and the Australian economy in that it will allow parents to work longer hours.
  - (d) make childcare more affordable for parents by pushing back or removing the late fees charged to parents when they arrive after 6:30pm.
  - (e) remove the 'unpredictability' of overtime which will benefit childcare workers who are rostered on the 'closing shift' in that those employees could simply be rostered to work the additional time.

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<sup>134</sup> Sydney Morning Herald: There's a female jobs boom, and it's good for the whole economy (7 March 2018)

<sup>135</sup> McKinsey Global Institute: The Power of Parity: How advancing women's equality can add \$12 trillion to global growth (2015) at page 25.

<sup>136</sup> PwC Women in Work Index: Closing the gender pay gap (March 2018) at page 10.

<sup>137</sup> As above.

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## PART E: THE ROSTERING CLAIM

### CONTEXT OF THE ROSTERING CLAIM

#### 18. ROSTERING - CHILDREN'S SERVICES AWARD 2010

18.1 As part of the Award Modernisation Process interested parties<sup>138</sup> raised concerns that any rostering clause should only apply to full-time employees as an onerous rostering clause that applied to casuals and part-timers has no regard for staff:child ratios or that parents collecting children late impacts these ratios and is out of the employer's control.<sup>139</sup>

##### **Award Modernisation Process**

18.2 As part of the Award Modernisation Process in 2009, a substantial rostering clause was inserted into the Exposure Draft of the Children's Services Award 2010 (**Original Rostering Clause**). For many States, this was the first time they had seen a clause that required notification of a roster and a 'penalty' to pay overtime if employees were not provided with such notice.

18.3 The Original Rostering Clause appears to have its foundations in the Pre-reform - *Children's Services (ACT) Award 2005*.<sup>140</sup>

18.4 This was the only pre-reform/NAPSA that had a requirement for the employer to provide 7 days notice of a rostering change. In fact:

- (a) majority of the pre-reform/NAPSAs had no notice requirement at all;<sup>141</sup>
- (b) Victoria required 3 days notice;<sup>142</sup> and
- (c) Queensland required 12 hours notice that could be changed by mutual agreement in the case of sickness or unplanned absenteeism.<sup>143</sup>

18.5 It was apparent that regardless of the time period required to provide a roster (12 hours/3 days/7 days), the key industry players maintained that an employee's roster should be able to be changed without any notice:

*Due to illness, unplanned absenteeism, accident, emergency circumstance or unexpected operational requirements (including day to day fluctuations in enrolments/occupancy)...*<sup>144</sup>

18.6 At a time when almost every clause in the award was up for debate, the specifics and importance of the newly imposed rostering clause may have been lost. At the very least,

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<sup>138</sup> Australian Childcare Centres Association and Australian Community Services Employers Association.

<sup>139</sup> Submissions filed on behalf of Australian Childcare Centres Association and Australian Community Services Employers Association dated 16 October 2009.

<sup>140</sup> See clause 7.1.1 of Children's Services (ACT) Award 2005.

<sup>141</sup> Children's Services (NT) Award 2005; Child Care (Long Day Care) WA Award 2005; Miscellaneous Workers Kindergarten and Child Care Centres (State) Award 2006; TAS - Child Care and Children's Services Award; Child Care (SA) Award.

<sup>142</sup> Children's Services (Victoria) Award 2005.

<sup>143</sup> QLD - Child Care Industry Award - State 2003.

<sup>144</sup> ACCA and ACSEA Draft Children's Services and Early Childhood Education Industry Award 2010 - 24 July 2009 - Without Prejudice, Parties Draft Award clause 24.5(c).

there is no mention as to why the key industry players' suggested drafting was rejected and rostering was not mentioned in the concluding Award Modernisation Decision.<sup>145</sup>

18.7 The Original Rostering Clause (requiring 7 days notice) was subsequently inserted into the Children's Services Award.

#### **2 Yearly Review (2012)**

18.8 By 2012, employer groups began noting that it was "*impossible to provide 7 days notice of [a] roster change*".<sup>146</sup>

18.9 To compound matters, in 2012, interested parties sought further amendments to an already impractical rostering clause by requiring that:

- (a) any change to the roster, 'must be recorded in writing and form part of the time and wages records,'<sup>147</sup> and
- (b) an 'emergency' situation should be defined for the purposes of determining a situation where 7 days notice is not required and overtime is not payable.

18.10 Ultimately, these amendments appear to have been agreed to as a part of a much larger deal involving multiple clauses in the Children's Services Award and there is no specific record or decision as to why this clause was amended in favour of the above changes.

#### **4 Yearly Review (2019)**

18.11 The Applicant by way of these submissions is advancing a significant case for the amendment of the rostering clause and providing supporting evidence in a way in has not done so before.

18.12 The reason for advancing a case at this time, is that:

- (a) the current rostering clause in the modern award is not sustainable; and
- (b) the rostering clause must be updated for the modern award to be consistent with (or at the very least, considerate of) employee requests for flexibility, ECEC regulations and the practical application of the clause.

### **19. ROSTERING - EDUCATIONAL SERVICES (TEACHERS) AWARD 2010**

19.1 The rostering clause in the Teachers Award is completely different and inconsistent with the rostering clause in the Children's Services Award. The 'rostering' clause in the Teachers Award appears under the heading part-time employment (clause 10.4(d)(ii)) and requires an employer to set the teaching load and days of attendance, and that this can only be departed from in situations relating to '*funding, enrolment or curriculum changes*'. In such circumstances, 4 weeks' notice of the teaching load or days of attendance must be provided.

19.2 Given the inflexibility of this clause and the ratio requirements in relation to teachers for centres with more than 25 children, it is no surprise that most centres engage teachers on a full-time basis. However, for those centres that engage teachers on a part-time basis, this clause is impractical and unsuitable in long day care and outside school hours care settings.

19.3 During the Award Modernisation Process, the Independent Education Union originally sought for this clause to require 7 weeks' notice to be consistent with schools. Australian

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<sup>145</sup> [2009] AIRCFB 945.

<sup>146</sup> YMCA Australia - Exposure draft feedback Children's Services Award 2010 (undated) 2009.

<sup>147</sup> [2012] FWA 9296.

Federation Employers & Industries submitted that 4 weeks' notice was more appropriate (as that figure came from the NAPSAs that applied to preschool teachers at that time).

19.4 The Applicants believe the concept of providing 7 weeks' notice of a change in roster was to align with changes to the school term and curriculum. Such matters do not concern:

- (a) long day care centres, who do not operate according to school terms (they operate more than 48 weeks a year) and do not run a rigid school curriculum; or
- (b) outside school hours care providers who do not run a curriculum during the hours before and after school.

19.5 The current 4 week notice period in the Teachers Award may work for some services that are connected to a school, but long day care centres that are not (which is a large majority) do not need this onerous requirement.

## SUMMARY OF THE ROSTERING CLAIM

### 20. FINDINGS RELEVANT TO THE ROSTERING CLAIM

20.1 Support for the Rostering Claim can be found in the evidence filed.

20.2 The Applicants submit that the Full Bench should grant the Rostering Claim on the basis that:

#### **Unique Rostering Requirements which arise in Childcare**

- (a) Employees in the childcare industry are routinely unavailable at the last minute due to health and other personal reasons.
- (b) Childcare employers are subject to complex regulations that impact their ability to roster employees including:
  - (i) staff:child ratios - depending on the age and number of children who attend the centre each day;
  - (ii) qualified teacher:child ratios - depending on the number of children who attend the centre each day;
  - (iii) qualification requirements - to ensure at least 50% of the employees in the Centre on any given day are Diploma Qualified (the remaining employees must be at least Certificate III qualified),  
  
(collectively the **Childcare Regulations**).
- (c) Childcare employers are routinely required to replace employees in rosters in situations outside their control and which do not constitute an “emergency”. For example, unwell employees, unavailability, absenteeism and other personal reasons.
- (d) The Childcare Regulations mean that the replacement of an absent employee in a roster is required (as opposed to being optional in many other industries). Further, a replacement employee must have certain qualifications in order to comply with the Childcare Regulations.
- (e) The alternatives to replacing an absent employee in a childcare roster are to:
  - (i) act in breach of the Childcare Regulations with risks of incurring fines, losing a centre’s licence or accreditation status; or
  - (ii) call parents and ask them to pick-up their children from the centre (so the number of children in the centre decreases and as a result the centre returns to being compliant with the Childcare Regulations).

#### **Unique Rostering Limitations which arise in Childcare**

- (f) Generally speaking, using casual employees (or labour hire) to replace absent permanent employees in a roster is to be avoided as:
  - (i) casual employees do not provide ‘consistency of care’ as they are not familiar with the children which is not good for families, the children and the childcare employer’s quality standards;
  - (ii) the likelihood of having an available pool of casuals at short (or immediate) notice is rare;

- (iii) due to lack of training and familiarity with the centre, casual employees are generally less capable.
- (g) It is preferable that permanent employees replace other employees when absent to ensure:
  - (i) 'consistency of care' is provided in accordance with quality standards outlined in the National laws; and
  - (ii) qualification requirements are met so that an employee with a Diploma replaces an employee with a Diploma.

**Operation of the Current Award Conditions and Proposed Variation**

- (h) Currently, the Children's Services Award requires the provision of 7 days notice for a change of roster. If notice is not provided or consent to waive notice is not given in writing, overtime is payable.
  - (i) It is impractical for centres to provide 7 days notice of a change in roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).
  - (j) While there is an ability for permanent employees to waive the 7 day notice requirement in writing and there is some evidence this occurs, the circumstances of this 'consent' appears to be informal (eg; a phone call).
  - (k) The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences and comply with ratio requirements without incurring overtime costs.
- 20.3 The Applicants expand on these proposed findings and refer the Full Bench to the relevant evidence as follows.

## SUBMISSIONS IN SUPPORT OF THE ROSTERING CLAIM

### 21. UNIQUE ROSTERING REQUIREMENTS WHICH ARISE IN CHILDCARE

- 21.1 The ECEC sector is subject to complex regulations that impact a childcare centre's ability to roster their employees.<sup>148</sup>
- 21.2 The Witness Statements outline that some National laws and regulations<sup>149</sup> dictate how a business can roster its educators (including early childhood teachers).<sup>150</sup> Ensuring rosters are compliant with these regulations and running a viable business is complex and time consuming. The most onerous legislative requirements when rostering include:
- (a) staff:child ratios;
  - (b) qualified teacher:child ratios;
  - (c) qualification requirements (ensuring at least 50% of the employees in the Centre on any given day are Diploma Qualified (the remaining employees must be at least Certificate III qualified),

#### (Childcare Regulations).

- 21.3 Many of the witnesses explain their methodology and outline in detail exactly how they roster employees to ensure compliance.<sup>151</sup> What is evident from these summaries is that it is not a simple task and last minute changes can cause significant stress to a business and the person in charge of rostering.
- 21.4 Childcare employees (much like any employee), are routinely unavailable at the last minute due to health and other personal reasons outside of their control. The Witness Statements suggest that employers regularly try to accommodate these employee requests (to swap shifts, change times etc.) rather than force employees to utilise personal leave, annual leave or unpaid leave when such requests arise.
- 21.5 The overwhelming majority of the evidence suggests that accommodating employee requests (to change shifts) is important to employee retention and to satisfy a predominantly female workforce that 'demands' flexibility to run both their working lives and home lives efficiently.<sup>152</sup> Many employers provide evidence that employees 'willingly'

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<sup>148</sup> Llwelley Statement at [68]-[70]; McPhail Statement [61]-[73]; Chemello Statement at [65]-[75]; Ackerman Statement at [49]; Wharton Statement at [53]-[64]; Tullberg Statement at [75]-[87]; Viknarash Statement at [89]-[100]; White Statement at [59]-[62]; Smith Statement at [70]-[84]; Mahony Statement at [48]; Maclean Statement at [58 - 60]; Fraser Statement at [60]; Paton Statement at [54]-[55]; Hands Statement at [62].

<sup>149</sup> *Education and Care Services National Law 2010* was passed by Victoria and adopted by other states and territories; *Education and Care Services National Regulations 2011*.

<sup>150</sup> Llwelley Statement at [60]-[66]; McPhail Statement [58]-[60]; Chemello Statement at [57]-[60]; Ackerman Statement at [42]-[55]; Wharton Statement at [50]-[52]; Tullberg Statement at [65]-[75]; Viknarash Statement at [84]-[88]; White Statement at [59]-[61], Smith Statement at [65]-[75]; Hands Statement at [68]; Paton Statement at [54]; Fraser Statement at [60]; Maclean Statement at [65]-[67]; Mahony Statement at [48].

<sup>151</sup> Llwelley Statement at [60]-[66]; McPhail Statement [58]-[60]; Chemello Statement at [57]-[60]; Ackerman Statement at [42]-[55]; Wharton Statement at [50]-[52]; Tullberg Statement at [65]-[75], Viknarash Statement at [84]-[88]; White Statement at [59]-[61], Smith Statement at [65]-[75]; Mahoney Statement at [52], [62]-[68]; Maclean Statement at [67], [75]-[76]; Fraser Statement at [78]-[80]; Hands Statement at [67]-[70]; paton Statement at [62] - [63].

<sup>152</sup> Llwelley Statement at [67]-[74], McPhail Statement [61]-[70], Chemello Statement at [66]-[73], Ackerman Statement at [45]-[54], Wharton Statement at [53]-[55]; Tullberg Statement at [74], Viknarash Statement at [89]-[90]; Hands Statement at [78]; Paton Statement at [60].

consent to changes in the roster last minute because that employee may require a change themselves in the future.

- 21.6 The Childcare Regulations mean that the replacement of an absent employee in a roster is required (as opposed to being optional in many other industries).<sup>153</sup> This is because the Childcare Regulations require ratios to be at a certain level for a service to operate. Further, a replacement employee must have certain characteristics in order to comply with the Childcare Regulations such a Diploma or teaching qualification.
- 21.7 The Witness Statements of McPhail, Viknarash, Ackerman, White, Mahony and Fraser advise that if a centre chose not to replace an employee that was absent, they would have to choose between:
- (a) acting in breach of the Childcare Regulations with risks of incurring fines, losing a centre's licence or accreditation status or being 'shut-down'; or
  - (b) calling parents and ask them to pick-up their children from the centre (so the number of children in the centre decreases and as a result the centre returns to being compliant with the Childcare Regulations).
- 21.8 Both of these alternatives come at a considerable cost to a business and its viability. The evidence suggests that centre operators will replace absent employees in the roster at all costs, whether by:
- (a) engaging casuals (who are unfamiliar with the children and the service);<sup>154</sup>
  - (b) engaging (costly) agency employees;<sup>155</sup>
  - (c) reallocating administrative and management employees (front office, director, manager etc.) to work with children until the ratios become compliant again.<sup>156</sup>

## **22. UNIQUE ROSTERING LIMITATIONS WHICH ARISE IN CHILDCARE**

- 22.1 The ECEC sector is assessed on its 'quality of care' for children. This assessment criteria is set down by the National law and regulations and requires employers to roster and provide care whilst having regard to the assessment criteria. ACECQA assesses and rates childcare centers on this criteria. One of the criteria is providing 'consistent' care to children which fosters their learning and development.
- 22.2 The evidence suggests that caring for children is of the utmost importance to operators. This causes businesses to be in uncomfortable positions when it comes to choosing between the viability of a centre, caring for its employees and providing quality care to children.
- 22.3 The majority of the evidence also suggests that part-time employment is the predominate type of employment in the industry.

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<sup>153</sup> Llwelley Statement at [65]-[66], McPhail Statement [50]-[57], Chemello Statement at [47]-[56], Ackerman Statement at [41], Wharton Statement at [41]-[49]; Tullberg Statement at [51]-[64], Viknarash Statement at [64]-[83]; White Statement at [51]-[55], Smith Statement at [48]-[64]; Hands Statement at [67]-[70]; Paton Statement at [76]-[77]; Mahony Statement at [57], [72]-[74]; [80]-[83]; Maclean Statement at [90]-[94]; Fraser Statement at [68]-[73], [93]-[96].

<sup>154</sup> Maclean Statement at [92].

<sup>155</sup> Mahony Statement at [83];.

<sup>156</sup> Mahony Statement at [82].



- 22.4 A solution to these conflicting requirements appears to be to engage mostly part-time employees, on weekly or fortnightly rosters and allow the part-time employees to change/cancel shifts last minute by negotiating with other employees or consenting to take on a different/extra shift when asked by the employer.
- 22.5 The evidence suggests that employers prefer that permanent employees replace other permanent employees when absent to ensure 'consistency of care' is provided in accordance with quality standards outlined in the National laws.
- 22.6 A number of Witness Statements also raise concerns that engaging casuals or agency employees is not only more expensive but:
- (a) casual employees do not provide 'consistency of care' as they are not familiar with the children which is not good for families, the children and the childcare employer's quality standards;
  - (b) the likelihood of having an available pool of casuals at short (or immediate) notice is rare;
  - (c) due to lack of training and familiarity with the centre, casual employees are generally less capable.
- 22.7 The Children's Services Award also limits the engagement of casuals for 'temporary and relief' purposes<sup>157</sup> and there is some evidence that suggests this has created a culture where many centres do not have an available pool of casuals to turn to because casual employees want to have been regularly engaged by a workplace in order to be available to them for temporary and relief purposes.<sup>158</sup>

### **23. OPERATION OF THE CURRENT AWARD CONDITIONS AND PROPOSED VARIATION**

- 23.1 Currently, the Children's Services Award requires the provision of 7 days notice for a change of roster if this isn't provided then overtime is required to be paid. Firstly, the drafting of this clause is confusing and could be interpreted to mean the employer is required to pay overtime for 7 days (as opposed to paying overtime until the employee's next rostered shift).
- 23.2 Evidence from business owners is that it is impractical for centres to provide 7 days notice of a change in roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).<sup>159</sup>
- 23.3 While there is ability for permanent employees to waive the 7 day notice requirement in writing and there is some evidence this occurs, many of the witnesses suggest that this 'consent' occurs informally (e.g.; a phone call or text message). This is largely because last minute changes to the roster generally occur early in the morning (before 7.00am) or on the weekend.

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<sup>157</sup> Clause 10.5 (b) - Children's Services Award 2010.

<sup>158</sup> Smith Statement at [26], White Statement at [23], Wharton at [26], Ackerman at [12]].

<sup>159</sup> Llwelley Statement at [60]-[66], McPhail Statement [58]-[60], Chemello Statement at [57]-[60], Ackerman Statement at [42]-[55], Wharton Statement at [50]-[52], Tullberg Statement at [65]-[75], Viknarash Statement at [84]-[88]; White Statement at [59]-[61], Smith Statement at [65]-[75]; Fraser Statement at [91]-[94]; Hands Statement at [69], [72]; Paton Statement at [71]; Mahony Statement at [73],[80]; Maclean Statement at [87],[94].

23.4 Further compounding costs for employers is the administrative burden that any agreement to waive the 7 day notice period, must be given in writing. Whilst a text message may suffice for this purpose a number of businesses appear to be getting verbal consent either in person or over the phone. This additional requirement was added in the 2 Yearly Review and is so out of touch with the way the childcare industry operates that employers are generally ignoring this requirement simply making sure they get consent from employees anyway they can to change a roster last minute.

## **PART F: APPLYING THE MODERN AWARDS OBJECTIVE TO THE PRESENT CLAIMS**

### **24. INTRODUCTION**

- 24.1 In exercising its modern award powers, the Fair Work Commission must ensure that modern awards provide “*a fair and relevant minimum safety net*”, taking into account each limb of sections 134(1)(a) to 134(1)(h) of the FW Act.
- 24.2 In the sections that follow, we identify how the factual findings established in the evidence filed by the Applicants support that the proposed ACA Claims will provide a “*fair and relevant minimum safety net*”, taking into account each limb of the Modern Awards Objective.

### **25. CREATING A FAIR AND RELEVANT MINIMUM SAFETY NET**

- 25.1 It is submitted that the Awards will provide a fair and relevant minimum safety once varied in accordance with the ACA Claims.
- 25.2 In the sections that follow, we explain how the ACA Claims further all of the relevant ‘limbs’ of the Modern Awards Objective.

### **26. RELATIVE LIVING STANDARDS AND NEEDS OF THE LOW PAID**

#### Key Relevant findings:

##### **Ordinary Hours Claim**

- Limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women).
- 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
- Extending ordinary hours until 7.30pm will increase the hours of operation of centres and make childcare more accessible for Australian families.
- Extending ordinary hours until 7.30pm will make childcare more affordable for parents by pushing back or removing the late fees charged to parents when they arrive after 6:30pm.

##### **Rostering Claim**

- The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences.

- 26.1 It is an obvious consequence of the Ordinary Hours Claim that the penalties paid to particular employees after 6.30pm may decrease on those days. Indeed it is the reduction of wage rates after 6.30pm that, in the employer submission, will facilitate the considerable social, community and ensuing economic benefits outlined in these submissions.
- 26.2 Despite this, a decrease in the wages payable after 6.30pm does not mean that low paid employees will be worse off on an overall basis. On the contrary, the findings outlined above demonstrate that the proposed changes will:

- (a) allow employees working on the closing shift to have set, pre-determined hours (and no longer be inconveniently asked to work overtime for a undetermined period of time when parents are running late);<sup>160</sup>
- (b) create structured employment between 6.30pm and 7.30pm where none presently exists; and
- (c) enable employees to (still) be paid overtime after working 8 hours in a day or after 7.30pm.<sup>161</sup>

26.3 It is also important to look at the relative living standards and the needs of all low paid Australians. Extending the ordinary hours until 7.30pm will:

- (a) increase the access and availability of childcare services to Australian families;
- (b) increase workforce participation of both parents; and
- (c) decrease the cost of childcare for low paid parents who struggle to arrive by 6.30pm due to long commutes and transport issues getting to and from work.<sup>162</sup>

## 27. THE NEED TO ENCOURAGE COLLECTIVE BARGAINING

27.1 Although collective bargaining has not been the subject of focused evidence from the Applicants, it is submitted that the changes proposed have the potential to increase the prospect of collective bargaining based on a particular centres needs (e.g.; 5.00pm close or 7.00pm close) and how a centre may arrange operating hours to reflect relevant government funding, subsidies, the type of centre they operate and parent demands.

## 28. THE NEED TO PROMOTE SOCIAL INCLUSION THROUGH INCREASED WORKFORCE PARTICIPATION

### Relevant findings:

#### **Ordinary Hours Claim**

- The ECEC sector supports all Australian families and has the power to facilitate workforce participation leading to better outcomes for the economy and employment growth.
- Limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women).
- Accessibility and affordability of childcare are extremely important factors that, if not provided, can discourage parents, particularly women, from working.
- Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable childcare.
- 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.

<sup>160</sup> Maclean Statement at [80]; Hands Statement at [44]; Fraser Statement at [51].

<sup>161</sup> Fraser Statement at [52].

<sup>162</sup> White Statement at [43]; Tullberg Statement at [33].

- Extending the ordinary hours until 7.30pm will increase workforce participation to benefit Australian families and the Australian economy in that it will allow parents to work longer hours.

- 28.1 The evidence to be heard in these proceedings will demonstrate that the Ordinary Hours Claim will generate workforce participation for parents who can utilise childcare services in accordance with their own family and working needs.
- 28.2 The Witness Statements demonstrate that the Rostering Claim will ensure part-time childcare workers are provided with flexibility to 'swap shifts' when required for personal reasons to assist in providing workplace flexibility, which helps employee participation in the workforce and employee retention.
- 28.3 Neither claim will result in any reduction of the workload or hours of work of childcare workers. The vast majority of the evidence suggests childcare workers are rostered for 8 hours per day, which will remain unchanged.

**29. THE NEED TO PROMOTE FLEXIBLE MODERN WORK PRACTICES AND THE EFFICIENT AND PRODUCTIVE PERFORMANCE OF WORK**

Relevant findings:

**Ordinary Hours Claim**

- There is a demand from parents for childcare centres to stay open past 6:30pm due to their own work commitments.
- 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.
- Some centres charge late fees as a deterrent to late parents, further exacerbating unaffordability issues within the industry.
- Some centres do not charge late fees, which means, given parents commonly pay a 'day rate', those centres are incurring overtime liability without the generation of any additional income to offset this.
- Extending ordinary hours until 7.30pm will increase the hours of operation of centres and make childcare more accessible for Australian families.
- Extending ordinary hours until 7.30pm will make childcare more sustainable for ECEC operators who are currently deterred from staying open past 6.30pm due to the significant costs associated with 2 employees being paid at overtime rates, despite demand from parents.

**Rostering Claim**

- Childcare employers are routinely required to replace employees in rosters in situations outside of their control and which do not constitute an 'emergency'. For example, unwell employees, unavailability, absenteeism and other personal reasons.
- It is impractical for centres to provide 7 days notice of a change in roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).

- The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences and comply with ratio requirements without incurring overtime costs.

- 29.1 There is no industrial justification to seek to deter operators from opening their centres past 6.30pm to satisfy the needs of working families. Indeed the primary purpose of childcare is to provide a place for young children to be when their parents are unable to care for them in the home because they are at work.
- 29.2 Ensuring that ordinary hours can be worked over a longer span of hours will facilitate longer operating hours of centres and reflect modern flexible practices, while at the same time ensuring that working parents can utilise childcare services in a manner which is compatible with their own modern working arrangements.
- 29.3 In short, the ordinary hours of childcare centres should reflect the fact that working parents need childcare services to operate both before and after their working day (to accommodate pick-up and drop off). The maintenance of a system which operates under 'overtime' conditions during standard (and necessary) hours of operations is not consistent with flexible and modern work practices and the efficient and productive performance of work.
- 29.4 The evidence discloses however that overtime rates are dis-incentivising employers from staying open past 6:30pm. In relation to the reasons why ordinary hours were originally set at 6:30pm, this decision was merely an agreement between parties, without much forensic assessment of the needs of the industry.
- 29.5 It is the submission of the Applicants, that restrictive ordinary hours are hindering employer opening hours (and in turn workforce participation of Australian families) by operating according to historical and no longer relevant principles.

**30. THE NEED TO PROVIDE ADDITIONAL REMUNERATION FOR EMPLOYEES WORKING OVERTIME AND/OR UNSOCIABLE, IRREGULAR OR UNPREDICTABLE HOURS**

Relevant findings:

**Ordinary Hours Claim**

- 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.
- Unplanned overtime caused by parents collecting their children after 6:30pm causes some disability for childcare employees who are unable to identify, with certainty, their finishing time.
- Extending the ordinary hours until 7.30pm would service to remove the 'unpredictability' of overtime which will benefit childcare workers who are rostered on the 'closing shift' in that those employees could simply be rostered to work the additional time.

- 30.1 Given the Ordinary Hours Claim seeks to vary the definition of 'overtime' (at least in respect to span of hours), this limb is obviously relevant.

30.2 In the submission of the Applicants, 6.30pm-7.30pm should not be considered unsociable hours warranting the payment of overtime. This is especially so given the primary purpose of the childcare industry and the requirement that working parents collect their children *after* the conclusion of their own working hours.

30.3 In the submission of the Applicants, the granting of the Ordinary hours Claim will also facilitate a more regular rostering of employees in the sector, which will remove the current unpredictability of afternoon work which relies on the arrival time of late parents.

### **31. THE PRINCIPLE OF EQUAL REMUNERATION FOR WORK OF EQUAL OR COMPARABLE VALUE**

31.1 This objective does not relate to the present claim.

### **32. THE LIKELY IMPACT OF ANY EXERCISE OF MODERN AWARD POWERS ON BUSINESS, INCLUDING ON PRODUCTIVITY, EMPLOYMENT COSTS AND THE REGULATORY BURDEN**

#### Relevant findings:

##### **Ordinary Hours Claim**

- 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.
- Extending ordinary hours until 7.30pm will make childcare more sustainable for ECEC operators who are currently deterred from staying open past 6.30pm due to the significant costs associated with two employees being paid at overtime rates, despite demand from parents.

##### **Rostering Claim**

- The Childcare Regulations mean that the replacement of an absent employee in a roster is usual required (as opposed to being optional in many other industries). Further, a replacement employee must have certain characteristics in order to comply with the Childcare Regulations.
- The alternatives to replacing an absent employee in a childcare roster are to:
  - act in breach of the Childcare Regulations with risks of incurring fines, losing a centre's licence or accreditation status; or
  - call parents and ask them to pick-up their children from the centre (so the number of children in the centre decreases and as a result the centre returns to being compliant with the Childcare Regulations).
- It is impractical for centres to provide 7 days notice of a change in roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).
- The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences and comply with ratio requirements without incurring overtime costs.

- 32.1 As has already been stated, the findings demonstrate that overtime rates are disincentivising employers from opening at the times that are likely to be productive and profitable for the employers.
- 32.2 The evidence before the Commission demonstrates that a decision to grant the employer claims will materially benefit business by reducing employment costs and the regulatory burden on business. The evidence discloses that, overtime rates in the Awards are serving in some cases to reduce the hours a centre operates and can provide care for Australian families.
- 32.3 Should the ACA Claims be granted, it is apparent on the evidence before the Full Bench that childcare centres will:
- (a) operate for increased hours or alter their hours to better suit their communities needs;
  - (b) provide employees with set finishing hours and decrease the unpredictability of overtime; and
  - (c) be able to practically accommodate absences from staff in a way consistent with a complex regulatory arrangements.

**33. THE NEED TO ENSURE A SIMPLE, EASY TO UNDERSTAND, STABLE AND SUSTAINABLE MODERN AWARD SYSTEM**

Relevant findings:

**Ordinary Hours Claim**

- It is a common experience of childcare centres that, notwithstanding a clearly defined closure time of 6.30pm, parents are often late necessitating the payment of overtime.
- The cessation of ordinary hours at 6.30 in the childcare industry is identical to or earlier than 46% of modern awards. This means that, at least in respect of modern awards, ‘overtime has begun’ in the childcare industry at a point where many working parents are still completing ‘ordinary hours’ in other industries (or travelling to pick-up their children).
- Extending the ordinary hours until 7.30pm would service to remove the ‘unpredictability’ of overtime which will benefit childcare workers who are rostered on the ‘closing shift’ in that those employees could simply be rostered to work the additional time.

**Rostering Claim**

- It is impractical for centres to provide 7 days notice of a change in roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).
- The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences and comply with ratio requirements without incurring overtime costs.

- 33.1 Given the primary purpose of the childcare industry is to provide a place for children to go while their parents are at work, a simple, easy to understand, stable and sustainable



modern award system would include working conditions (and the working of ordinary hours) in the childcare industry which contemplated the fact that working parents need to collect their children following the cessation of their own ordinary hours. Currently, the span of ordinary hours in the Awards does not sufficiently contemplate this.

33.2 Further, the business and societal benefits associated with the ACA Claims (which have been addressed in the other limbs of the Modern Awards Objective) will indirectly lead to a sustainable modern award system in the longer term.

33.3 The Witness Statements outline that the current modern award system is not easy to understand and does not consider or accommodate the other Childcare Regulations that businesses must comply with. This is in part due to the current ordinary hours span and rostering conditions.

**34. THE LIKELY IMPACT OF ANY EXERCISE OF MODERN AWARD POWERS ON EMPLOYMENT GROWTH, INFLATION AND THE SUSTAINABILITY, PERFORMANCE AND COMPETITIVENESS OF THE NATIONAL ECONOMY**

Relevant findings:

**Ordinary Hours Claim**

- The ECEC sector supports all Australian families and has the power to facilitate workforce participation leading to better outcomes for the economy and employment growth.
- Current government programs, (including the current subsidy arrangements) encourage both parents (and particularly mothers) to work because it is good for the economy.
- Limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women).
- 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.
- Extending the ordinary hours until 7.30pm will increase workforce participation to benefit Australian families and the Australian economy in that it will allow parents to work longer hours.

**Rostering Claim**

- The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences and comply with ratio requirements without incurring overtime costs.

34.1 The ECEC sector form a vital part of Australia’s services industry. It supports every industry that has working parents wanting to put their children in care and has the power to get more women into work if they have access to childcare.

34.2 The importance of the services industry to Australia’s economy has grown dramatically in the past four decades. Further, the nature of the Australian economy has transformed from a 9.00am-5.00pm week day economy to a system in which Australians are expected to work longer hours and more irregular working hours.

- 34.3 Australia's economic performance is substantively influenced by a healthy, appropriately regulated childcare industry to support all Australian families.
- 34.4 Clearly, the interests of the Australian economy will be served if variations are made to allow the Awards to provide:
- (a) opening hours past 6.30pm; and
  - (b) flexible rostering arrangements that support parents who need to put their children in care last minute and enable services to provide quality care with appropriately regulated staff:child ratios.
- 34.5 By amending the ordinary hours clause, which has never aligned with Australian working hours and the regulatory framework in the ECEC sector, centres will increase their operating hours, which in turn will generate greater workforce participation and longer working hours. The Commission will accordingly be boosting Australian employment and Australia's performance, competitiveness and long term economic sustainability.

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## PART G: BUSINESS SA CLAIMS

34.6 The Applicants support the claim made by Business SA to remove clause 10.5 of the Children’s Services Award that mandates that casuals are only engaged for, ‘*temporary and relief purposes*’. The Applicants submit that this clause restricts a services ability to engage casual employees on an as needs basis in circumstances where it is not for temporary and relief purposes. Such situations include:

- (a) where an employee requests to be engaged and paid as a casual;
- (b) where casuals form part of a ‘pool’ that is regularly called upon each week to fill gaps in the roster;
- (c) where engaging casuals regularly provides ‘consistency of care’ for children and also ensures that those casuals remain available on an ‘as needs’ basis for the centre that uses them. Evidence suggests that casuals that are not regularly engaged by a centre often make themselves unavailable and take jobs from other centres.<sup>163</sup>

34.7 The Applicants note that Business SA may be withdrawing this claim.

*Filed on behalf of the Applicants by:*

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15 March 2019

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<sup>163</sup> Ackerman Statement at [12].

## ATTACHMENT – THE WITNESS STATEMENTS

6.1 In support of its position, the Applicants relies upon:

- (a) the witness statement of Karthiga Viknarash dated 1 March 2019 ([Viknarash Statement](#));
- (b) the witness statement of Melinda Ackerman dated 1 March 2019 (Ackerman Statement);
- (c) the witness statement of Julie Ann White dated 4 March 2019 ([White Statement](#));
- (d) the witness statement of Sarah Elizabeth Tullberg dated 4 March 2019 ([Tullberg Statement](#));
- (e) the witness statement of Rosina Maree Smith dated 1 March 2019 ([Smith Statement](#));
- (f) the witness statement of Ann Marie Chemello dated 1 March 2019 ([Chemello Statement](#));
- (g) the witness statement of Kristen McPhail dated 1 March 2019 ([McPhail Statement](#));
- (h) the witness statement of Nicole Louise Llewellyn dated 11 March 2019 ([Llewellyn Statement](#));
- (i) the witness statement of Alison Wharton dated 4 March 2019 ([Wharton Statement](#));
- (j) the witness statement of Alexandra Hands dated 12 March 2019 ([Hands Statement](#));
- (k) the witness statement of Katy Paton dated 14 March 2019 ([Paton Statement](#));
- (l) the witness statement of Jae Dean Fraser dated 14 March 2019 ([Fraser Statement](#));
- (m) the witness statement of Pam Avril Maclean dated 14 March 2019 ([Maclean Statement](#));
- (n) the witness statement of Kerry Joseph Mahony dated 14 March 2019 ([Mahony Statement](#)),