

BEFORE THE FAIR WORK COMMISSION

S158 – Variation to Modern Award

Fair Work Act 2009

Matter No: AM2018/9

Independent Education Union of Australia

Re Educational Services (Teachers) Award 2010

SUBMISSIONS FOR THE IEU

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Introduction

1. These are the Applicant (**IEU**)’s submissions in support of its application under s.158 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a variation to the *Educational Services (Teaching) Award 2010* (**the Modern Award**). References to legislative provisions in these submissions are to the FW Act unless otherwise identified. They are to be read with the grounds and reasons set out in Annexure A to the application (**the Grounds**). In particular, the Grounds address each of the matters that the Commission is to consider when applying the Modern Awards Objective and the Minimum Wages Objective.

2. The effect of the variation sought is to alter cl.14.1 in the following manner:

14.1 *The minimum salary per annum payable to a full-time employee will be determined in accordance with the provisions of clause 13—Classifications, and the following table.*

Level	Per year
	\$
1	50,017 55,543
2	51,049 58,534
3	52,438 61,615
4	54,329 64,696
5	56,222 67,776
6	57,984 70, 857
7	59,746 73,838
8	61,637 77,019
9	63,534 80,099
10	65,423 83,179
11	67,317 89,341
12	69,208 92,422

3. The proposed new rates adjust the current rates in two respects: see Table A to the Grounds. First, the internal relativities are adjusted to remove inappropriate internal

compression at the higher levels. Second, there is an increase of 17.5%. In the alternative, the IEU seeks a uniform increase of 25%.

4. For the reasons that follow, the claimed variation is:
 - a. justified by work value reasons per s.157(2)(a); and
 - b. necessary to make outside the four-year review process in order to achieve the modern awards objective as set out at s.134, per s.157(2)(b).
5. In short, the variation will ensure that the minimum rates within the Modern Award provide an appropriate minimum standard of remuneration for early childhood, primary and secondary school teachers that properly reflects the work they do. They are rates that reflect the inherent nature and value of that work, and changes in work value, being changes both since the rates now in the Modern Award were first established, and since the Modern Award was made.
6. Without the variation:
 - a. the Modern Award's ongoing relevance and fairness will continue to decrease; and
 - b. award-reliant teachers (noting in particular the heavy concentration of award reliance in the early childhood sector) will not be properly paid for their work.

The statutory framework and general principles

7. This application is made under s.158 item 1(b). It is uncontroversial that the IEU, which has constitutional coverage of early childhood, primary and secondary school teachers in non-government schools and early childhood education and care, has standing to bring the application.
8. The application involves the variation of Award minimum wages. The Commission must, per s.157(2), be satisfied that:
 - a. the variation is justified by "*work value reasons*"; and
 - b. it is necessary to make the variation outside the system of annual wage reviews and the 4-yearly review system to achieve the modern awards objective.

s.157(2)(a) – work value reasons

9. "*Work value reasons*" is defined at s.156(4) as:

Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;*
- (b) the level of skill or responsibility involved in doing the work;*
- (c) the conditions under which the work is done.*

10. While this definition appears in the context of the section prescribing the four-yearly review of modern awards, there is no reason to suppose that the phrase has a different meaning at s.157.
11. Notably, s.157(2)(a) makes no reference to *change* in work value. The focus is on work value as a discrete concept, rather than specifically on changes in work value over time. The task for the Commission is thus to assess the value of the particular work and, from that point, determine whether a variation to the rates set in the Modern Award is justified on that basis.
12. What flows from this is that the various matters prescribed by the National Wage Case Principles (**the Principles**) developed by the Australian Industrial Relations Commission,¹ or the various state wage fixing principles related to work value changes, are not directly relevant to the considerations required by s.157(2)(a). In particular there is:
 - a. no threshold requirement to demonstrate a “change in the nature of the work [constituting]...a significant net addition to work requirements” (principle 3.2.4(a));
 - b. no strict requirement to “justify any change to wage relativities” either internally or, more significantly, externally, to avoid “leapfrogging” (principle 3.2.4(a));
 - c. no need to measure the work against the date of operation of the second structural efficiency adjustment (that is, around 1990) (principle 3.2.4(c)); and
 - d. no obligation to disregard work value changes previously taken into account in fixing wage rates (principle 3.2.4(d) and (h)).
13. That said, the decisions of the AIRC considering the Principles, and related State-based decisions, are still of use in identifying the proper approach to considering the

¹ *Safety Net Adjustments and Review Decision 1994*, Print L5300 at Attachment A at p153; reported at 56 IR 114 [1994]. These Principles continued virtually unchanged until and including the 2005 Safety Net Review, PR002005.

concept of work value, and its expression in monetary terms. In practical terms, it will be of assistance to consider work value in the context of change over identified periods, both for illustrative purposes and because a significant change could rationally be a “reason” within the meaning of s.157(2)(a) (and make the variation ‘necessary’ within the meaning of s.157(2)(b), discussed below). This is particularly true in the context of an industry where awards – at least in NSW – have been the focus of work value review relatively recently.

14. The significance of the departure in s.157(2)(a) from a change-focused approach is to broaden the Commission’s discretion, and the range of circumstances in which minimum award wages can be altered; it does not render previous decisions irrelevant.
15. Taking those matters into account, the specific items in s.157(2)(a) would be interpreted as follows:
 - a. the ‘nature of the work’ includes the nature of the job and task requirements imposed on workers, the social context of the work and the status of the work;
 - b. assessing the “skills and responsibilities” involved in the work includes:
 - i. consideration of initial and ongoing required qualifications, professional development and accreditation obligations, surrounding legislative requirements and the complexity of techniques required of workers;
 - ii. the level of skill required; and
 - iii. the amount of responsibility placed on the employees to undertake tasks;
 - c. the “conditions under which work is performed” refers to the “environment in which work is done”.

The Modern Award Objective

16. The Modern Awards Objective is set out at s.134(1):

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) *the need to promote social inclusion through increased workforce participation; and*

(d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*

(da) *the need to provide additional remuneration for:*

(i) *employees working overtime; or*

(ii) *employees working unsocial, irregular or unpredictable hours; or*

(iii) *employees working on weekends or public holidays; or*

(iv) *employees working shifts; and*

(e) *the principle of equal remuneration for work of equal or comparable value; and*

(f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*

(g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*

(h) *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

17. The primary question in these proceedings is whether the minimum wages prescribed by the Modern Award provide a *'fair and relevant minimum safety net'*. This is so because, if the answer is yes, the variation – while it might be nevertheless desirable – will not be *'necessary'* within the meaning of s.157(2)(b): *SDA v NRA (No 2)*.² A secondary element is whether the variation is necessary at this point in time: i.e. outside the four-yearly review or annual wage review processes.
18. The considerations set out at 134(1)(a)-(h) are mandatory considerations in answering this question, although neither alone nor together are necessarily determinative. Questions of weight given to each is a matter for the Commission in each individual determination. They do not confine the range of matters which may be taken into account.

² *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 per Tracey J.

19. For the purposes of the (currently ongoing) 2014 Four Yearly review, the Commission has proceeded on the basis of a presumption that, *prima facie*, modern awards under review did achieve this objective at the time they were made.³
20. However, this presumption is not insurmountable. It is equally open, on the terms of s.157(2)(b), for the Commission to conclude that a variation is necessary to achieve the modern awards objective because the Modern Award either never met the Modern Awards Objective or, because of changing circumstances, it no longer does.
21. In either case, it is incumbent on an applicant under s.158 to make out a substantive merit-based case for the variation, including by reference to the current operation of the Modern Award and the likely impact of any variation on employers and employees: *Re Security Services Award*.⁴ Here, in short, the IEU must demonstrate:
 - a. that the current wage rates in the Modern Award are set at levels which mean that it does not provide a safety net which is both fair and relevant; and
 - b. that the proposed variation will rectify this.
22. In the context of minimum wages, the words “fair” and “relevant” should be interpreted as referring to rates which properly remunerate workers for the value of their work, taking into account all surrounding factors, and are not so low compared to general market standards as to have no relevance to the industry, for example in the context of bargaining.
23. The Commission is not confined to the precise terms of the variation sought by the IEU: s.599. If satisfied of the first element set out above, but not the second, the Commission is nevertheless required to make an amendment to ensure that the Modern Award does meet the Modern Award Objectives.

The current Award rates

Award Modernisation

24. The Modern Award was made during Stage 3 of the Modern Award modernisation process.⁵ Stage 3 commenced on 30 January 2009.⁶ Initial drafts, and submissions in respect of key issues included wages, were exchanged between stakeholders.

³ *Four Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

⁴ *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

⁵ Statement – Procedure for Carrying Out Award Modernisation Process [2008] AIRCFB 708

⁶ Statement – Award Modernisation [2009] AIRCFB 100

Notably, the IEU initially submitted that “*the rates of pay for teachers in federal awards....no longer act as fair and effective minimum rates in the industry*” and urged the Commission not to include minimum rates in the Modern Award at all⁷. The IEU ultimately proposed that the rates in the *Victorian Independent Schools – Teachers – Award 1998 (VISTA 1998)* be used, as it was the Federal award which regulated the greatest number of teachers.⁸

25. The Commission published an exposure draft which did not explicitly set out the source of the rates of pay on 22 May 2009,⁹ nor did the accompanying decision.¹⁰ However, the rates of pay in the Modern Award as made on 4 September 2009¹¹ matched the rates in the VISTA (with minor rounding differences) at the time.¹² In these circumstances, the Commission can be satisfied that the rates in the Modern Award were drawn from VISTA 1998.

The Victorian Independent Schools Award 1998 - history

26. On 1 June 1994, the *Teachers (Victorian Government Schools Interim) Award 1993 (Interim Government Schools Award)* was made.¹³ This was the first Federal award made governing teachers in government schools in Victoria, and replicated a pre-existing State Award. Shortly afterward, an interim award for independent schools was made.
27. In 1995, the AEU applied for a variation to the Interim Government Schools Award to increase wages by 4% on work value grounds. An interim increase of 1.8% was granted on 16 October 1995, as the Full Bench was satisfied both that a special case had been made out and that an increase of at least 1.8% was justifiable on work value grounds.¹⁴ Ultimately, on 1 March 1996 the Award applying to government schools (by then, the *Teachers (Victorian Government Schools) Conditions of Employment Award*

⁷ IEU Submissions 6 March 2009 at [41], available at http://www.airc.gov.au/awardmod/databases/education/Submissions/IEUA_education.pdf, accessed 19 November 2018.

⁸ IEU Submissions, 28 April 2009 at [27]-[33], available at http://www.airc.gov.au/awardmod/databases/education/Submissions/IEUA_further2_edu.pdf, accessed 19 November 2018.

⁹ Exposure Draft – Educational Services (Teachers) Award 2010, available at <http://www.airc.gov.au/awardmod/databases/education/Exposure/teachers.pdf>, accessed 19 November 2018

¹⁰ Statement – Award Modernisation [2009] AIRCFB 450.

¹¹ *Educational Services (Teachers) Award 2010*, PR988937

¹² See, e.g. the comparative rates in the Educational Services (Other than higher education) Schools Non-Government Comparison – Federal Awards – Wage Rates – Adults, published as part of the award modernisation process.

¹³ Print L2535 (decision) and Print L3637 (award).

¹⁴ *Re Teachers (Victorian Government Schools – Interim) Award 1994*, Print M6311.

1995) was varied on work value grounds to modify the classification structure to match the above-award Professional Recognition Program career structure which had been implemented in some schools by the Victorian government (this being the primary basis on which the Full Bench concluded that there had been sufficient work value changes to justify the variation).¹⁵

28. Shortly thereafter, the Victorian Independent Schools – Teachers – Award 1996 (**VISTA 1996**) was made which, in addition to some other minor changes, re-established pay parity with the Award applying to government schools. No separate work value decision was issued.
29. The VISTA 1998 was made by the Australian Industrial Relations Commission on 21 August 1998, following a review of the VISTA 1996 under Item 51 of Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (i.e. as part of award simplification and consolidation).¹⁶ This did not involve any reconsideration of the rates in the VISTA 1996.
30. From this point, the rates in the VISTA 1998 Award were not the subject of any work value consideration, and did not change other than through the application of the annual safety net increase amounts, which as predominantly flat dollar amount had a tendency to compress relativities between classifications at the higher levels of the scale.¹⁷
31. In short, the rates in the VISTA 1998, and thus the Modern Award, have not been the subject of review on work value grounds since at least 1995.

Changes in teaching work since 1996 and 2010

32. Developments in teaching theory and practice in the last two decades, and the consequent changes to the value of teachers' work, are set out in detail in the expert reports of:
 - a. Dr Susan Irvine, Associate Professor, School of Early Childhood and Inclusive Education, Faculty of Education, University of Queensland;

¹⁵ *Re Teachers (Victorian Government Schools) Conditions of Employment Award 1995*, Print M9746.

¹⁶ Print Q5168

¹⁷ Print T8799; Print T0998; PR908805; PR920149; PR935821; PR950320 and PR962314.

- b. Dr Frances Press, Professor in Early Childhood Education, Charles Sturt University; and
 - c. Dr Tania Aspland, Dean – Education Policy and Strategy, Australian Catholic University.
33. In addition, the IEU relies on the lay evidence of:
- a. early childhood teachers Margaret Gleeson, Jenny Finlay and Gabrielle Connell;
 - b. primary school teachers Luke Donnelly, Aleisha Connellan, and Phillip Margerison;
 - c. secondary school teachers Anthony Cooper, Simon Huntley, Clint Fraser, Larry Grumley, Mark McKinnon and Ruth Pendavignh; and
 - d. IEU officials Keith Heggart, Cathy Hickey and Chris Watt;
- all of whom give direct evidence of the nature of teachers' work and of the rapidity of change.
34. The IEU also relies on the following evidence filed in respect of its Pay Equity application, insofar as that evidence goes to describing the work of early childhood teachers and primary school teachers, including the nature of the work, the level of skill and responsibility involved in doing the work and the conditions under which the work is done, and the history of industrial regulation of that work:
- a. expert reports of Dr Sue Dockett, Dr Frances Press and Dr Susan Irvine;
 - b. early childhood teachers Amanda Sri Hilaire, Margaret Gleeson, Emily Vane Tempest, Emma Cullen, Gabrielle Connell, Lauren Hill and Lily Ames;
 - c. primary school teachers Anthony Atkinson, Philip Margerison and Luke Donnelly; and
 - d. IEU and AEU officials James Jenkins-Flint, Lisa James, Pam Smith, John Spriggs, Martel Menz and Carol Matthews.
35. What follows is a summary of the IEU's evidence in general terms, identifying the nature of the work of teachers and the major areas of work value change since the rates in the Modern Award were set.

The nature of the work

36. Over the last two decades, teaching has been the focus of a continuing and multi-layered reform agenda. The Melbourne Declaration on Educational Goals for Young Australians, made in 2008 and signed by all Education Ministers, has shaped education policy over the last decade. As explained in Dr Irvine's report at [19]-[25], this agenda has focused on improving educational outcomes for all children, including those with complex needs, and generally raised accountability, transparency and expectations for the education sector. This in turn has increased the complexity and volume of teachers' work.
37. One expression of this change has been the introduction of a standardised national curriculum at each level of schooling, being the Early Years Learning Framework at early childhood, and the Foundation – Year 12 Australian Curriculum. As set out at Part 7 of Dr Aspland's report, the Australian Curriculum was introduced in 2013 after a lengthy period of consultation, development and change, over which time teachers were required to significantly adapt and develop their teaching practices. It involves a greater focus on what Dr Irvine describes as "*summative assessment of individual learning*" (at [50]) and related changes day to day and ongoing observation and assessment techniques. Similarly, the Early Years Learning Framework, mandatory since 2009, has significantly changed the nature of teaching work in an early childhood setting by formalising new pedagogical understandings about the importance and nature of early childhood education and imposing rigorous new content and outcome expectations.
38. A significant alteration in the nature of teaching work has been the increase in the integration of technology in the classroom. This goes beyond tools to improve productivity; recent developments in technology and connectivity have fundamentally changed the way in which information is communicated and accessed. It is now a curriculum requirement and a general community expectation that technology will be both a specific focus area and generally integrated into educational systems. Teachers in all areas now use computer programs to complement their face-to-face teaching work. One example is the idea of "flipped learning" where what would have once been one lesson is broken into two: a video is prepared by the teacher and viewed by the students ahead of time explaining the concepts, and the class time is taken up with individual instruction and assistance.
39. The nature of teachers' work has been affected by changes in pedagogical understanding and practices, and in particular a shift to a focus on individual child

outcomes rather than collective assessment (integrated into the curriculum assessment regime as described above). Teachers are now expected to differentiate and modify their teaching plan for each individual student, to take into account individual capacity and particular needs. At primary and secondary level, this can mean teaching a lesson or conducting an assessment in a different manner for each student; for early childhood teachers it requires an individual plan for each student, who at that age can be at significantly different developmental stages. This has significantly increased the complexity of teaching work.

40. Changing demographics of the student body over the last twenty years have affected the nature of teacher's work. The most significant alteration has been the increased mainstreaming of students with complex special needs, and the associated support and monitoring requirements placed on teachers. Teachers now need to be alert to a range of issues including increasingly serious allergies, physical and intellectual disabilities, and emotional disorders, and to adjust their teaching accordingly. This has been particularly significant in early childhood with the advent of equal access funding, as Ms Findlay's statement sets out. In addition, teachers are increasingly confronted with students with complex personal issues, including more common family unit disruption, and must adapt accordingly. This is coupled with developments in approaches to discipline, primarily a move away from an authoritarian style, and an increased focus on enabling achievement, making the management of difficult students more challenging in an environment where there are more of them.

The level of skill and responsibility

41. The changes, and in particular the increased complexity, higher expectations, and use of technology, discussed above have led to a consequent increase in the level of skill required by teachers in discharging their day to day duties. The curriculum changes have, by their nature, required teachers to perform more complex work, and upskill themselves over short periods of time to meet a rapid pace of change. This is reflected in alterations to the assessment regime: the curriculum changes at a primary and secondary have been accompanied by a focus on national standardised testing, and teachers have been required to learn new skills to understand, analyse and integrate the data flowing from these test results into each student's learning plan. Similarly, early childhood teachers have in recent years been required to prepare complex day-to-day reports on each child's learning outcomes (as opposed to a simpler description of activities). In this sense, the basic skills required of a teacher have become more complex, and additional skills are now required to perform the work.

42. This increased skill is reflected in changes in qualification requirements for teachers, and the ongoing accreditation regime. At the time the Modern Award rates were set, teaching required (in general) a three-year degree. By the time the Modern Award was made, registration as a teacher required a four-year degree in all states and territories: Irvine at [26]-[27]. Since then, increased standards have been imposed on pre-service teachers, both in terms of prerequisite study, the introduction of the Literacy and Numeracy Test for Initial Teacher Education, and performance assessments during the training program. Post-qualification registration requirements have similarly become more onerous, including from 2018 for early childhood teachers. Teachers are now required to complete annual minimum hours of ongoing professional development, and have their teaching performance evaluated. The Australian Professional Standards for Teachers was introduced in 2011, demonstrating an increased level of professionalisation, and is now integral to the career path of teachers. This demonstrates the fundamental increase in the skills required of teachers entering the workforce and throughout their careers.
43. These ongoing accreditation and registration requirements reflect a greater level of accountability, driven by both an express policy focus involving an “*explicit link between quality teaching, student learning outcomes and the nation’s future society and economic prosperity*”, and increased community – particularly parental – expectations of accessibility. Teachers are now required to engage with parents in greater detail and, due to technological changes, with significantly more frequency than in earlier years, which as well as adding to workload requires the development of specific interpersonal and time-management skills. This is particularly so in early childhood teaching, where developmental issues are increasingly able to be identified by teachers and raised with parents; these are complex communications that require the exercise of a high level of interpersonal skill.
44. The level of responsibility exercised by teachers is also reflected in the range of surrounding legislation governing their work, including child protection legislation. These standards, and the obligations imposed on teachers by them, have become more significant over the last decade. In early childhood teaching, the important role and level of responsibility has been recognised in recent years by mandated increases to the minimum teacher to student ratios in early childhood centres.

Conditions under which work is performed

45. In addition, the conditions under which teachers perform work has changed markedly. Most notably, the traditional classroom structure – rows of desks with a teacher

lecturing at the front – has changed. As Mr Margerison sets out, increasingly schools are moving to teaching in ‘agile space’ with multiple classes and year groups in a single large area. This increases not only the complexity of the work (in that more nuanced supervisory tactics are required to manage a large and diverse group) but also the level of noise, and the number of children teachers are required to interact with at any one time.

46. The increasing integration in technology into teachers’ work has altered the conditions under which the work is performed in the sense that it has made teachers more accessible after hours. Although teaching has never strictly been a 9-5 job, teachers are increasingly required to be contactable outside of hours, effectively extending the working day significantly and, like many professional occupations, increasingly removing the division between work and home life.

The variation is justified by work value reasons

47. As the evidence will demonstrate, teaching work is inherently of substantial value. It is complex professional work which requires the exercise of a high level of skill, conducted in often difficult conditions. Further, as summarised above there have been significant increases in the value of that work since the Modern Award was made, and since the rates that award was based on were set.
48. As noted above, teachers now:
 - a. are required to complete more lengthy and complex programs of university study to qualify;
 - b. must meet set standards and participate in ongoing professional development to maintain professional registration;
 - c. exercise more complex skills in their day to day work in the classroom, including technological integration completely outside of contemplation in 1996;
 - d. have been and are required to adapt their work practices and skills to adjust to a rapid pace of change; and
 - e. work in increasingly challenging and complex work environments, both through changes in the nature of the classroom and a greater diversity within the student body.

Comparison with NSW teachers pre 2006

49. The deficiencies in the Modern Award rates, and in particular their failure to properly reflect the work value of teachers today, is clearly illustrated by comparing them to the rates set for teachers in NSW between 1990 and 2009. During that period the rates of pay for teachers in government, non-government and Catholic schools were repeatedly and comprehensively reviewed on work value grounds. A flowchart tracking the history of work value cases in NSW is at Schedule A to these submissions, for illustrative purposes.
50. The most recent special case in that regard, in respect of NSW Government school teachers, was conducted during 2003 and 2004. There was no dispute between the parties that there had been “*a significant net addition to work requirements*” for teachers since the relevant datum point (1991).¹⁸ Specifically, the Commission found that:
- a. the pace and extent of curriculum change, and the shift to outcomes-based learning;
 - b. related changes in the nature of assessment and reporting of student performance;
 - c. the introduction of state-wide standardised testing;
 - d. the formalisation of cross-curriculum content;
 - e. the introduction and greater integration of vocational education and training in schools;
 - f. the rapid increase in technological developments, the integration of these matters into teaching and changes in the way information is disseminated in the digital age;
 - g. increases in student aggression and alterations in methods of discipline;
 - h. the increasing mainstreaming of children with special needs; and

¹⁸ *Re Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* [2004] NSWIrcomm 144 at [4]

- i. increasingly rigorous child protection legislation and associated reporting requirements;

reflected significant increases in work value which teachers had not previously been compensated for. Unsurprisingly, the same changes are demonstrated on the evidence filed in these proceedings.

51. Ultimately, an increase of 12% was awarded (being a 5.5% interim increase and an additional 6.5% final increase). These increases flowed into the Catholic sector awards by way of a special case concurrent with the case applying to government school teachers. Catholic employers agreed significant pay rises should be awarded but there was no consent as to quantum.¹⁹
52. The rates in the *Teachers (Non-Government Pre-Schools) (State) Award* and the *Teachers (Non-Government Early Childhood Services Other Than Pre-Schools) (State) Award* were similarly reviewed on a work value basis in:
 - a. 2001,²⁰ with a 20% increase awarded;
 - b. 2006,²¹ with a 13.5% increase awarded; and
 - c. 2009,²² with a 12% increase awarded,

bringing these largely private sector rates on various dates close to parity with primary and secondary teachers. There is no reason to think that the work value changes that were identified as justifying these increases were unique to NSW; as set out above they were replicated (and continued) at a federal level.

53. Schedule B contains tables:
 - a. comparing the NSW rates as at 1 January 2010 with the Modern Award Rates at that time; and

¹⁹ *Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) (State) Award 2004 and other awards* [2004] NSWIRComm 159

²⁰ *Re Teachers (Non-Government Pre-Schools) (State) Award* IRC2261 of 2000, *Re Teachers (Non-Government Early Childhood Services Other Than Pre-Schools) (State) Award* IRC2262 of 2000

²¹ *Re Teachers (Non-Government Early Childhood Services Other Than Pre-Schools) (State) Award* [2006] NSWIRComm 4

²² *Re Teachers (Non-Government Early Childhood Services Other Than Pre-Schools) (State) Award* [2009] NSWIRComm 198

- b. comparing the current Modern Award rates to the NSW rates as they would be had each federal minimum award increase been applied to the 2010 rates.
54. As these tables demonstrate, even if there had been no change in the value of the work performed by teachers in the near-decade between when the Modern Award wage rates were set and today, these rates fall well below the outcomes that result if properly work-valued rates had been used instead.
55. What also emerges is that the relativities between classifications in the Modern Award are significantly compressed when compared to the award structure in the NSW awards. Rather than a deliberate decision, this appears to be a product of flat-rate increases to the VISTA 1998.
56. This pattern is replicated across all states. Schedule C sets out a comparison table between the Modern Award rates and those paid to Government school teachers in each state. The State rates are consistently between 31% to 45% higher.
57. Although these rates are for government-employed workers – i.e. persons for whom the Modern Award has never had direct relevance – there can be no serious suggestion that there is any difference in the work of a teacher in the non-government sector, particularly given the high degree of ultimate government control and regulation of these workers. This is reflected in the relevant rates paid to teachers in independent schools who are covered by enterprise agreements, a snapshot of which is at Schedule D: these rates reflect or exceed government school rates.
58. The rates in the NSW awards were set pursuant to a statutory test to set “*fair and reasonable conditions of employment for employees*”: s11 of the Industrial Relations Act 1996 (NSW). An award made pursuant to such a statutory test determined the minimum rate of pay to be paid. There is no reason to consider such a statutory requirement should result in rates higher than rates set against a standard that requires “*a fair and relevant minimum safety net of terms and conditions*”: s134.
59. The rates in the NSW awards were set pursuant to State Wage Case principles. The modern award objective and the concept of “fair and relevant” minimum rates allows a far broader range of considerations than the State Wage Case principles did. There is no reason to conclude that this section requires, or even permits, a lesser rate than that set under those more restrictive principles.
60. These matters serve to confirm that the Commission can be satisfied that:

- a. the rates in the Modern Award did not properly reflect the work value of teaching at the time the Award was made;
- b. the rates have fallen further behind since 2010 due to the pace of change in teaching; and
- c. the variation sought by the IEU is justified on work value reasons.

The variation is necessary

The variation is necessary to achieve the modern awards objective

61. It is implicit in the division between s.157(2)(a) and (b) that a variation to award wages will not be necessary solely because it is justified on work value reasons: if this was so, there would be no work for s.157(2)(b) to do. More is needed.
62. The primary consideration is whether the Modern Award minimum rates provide a fair *and* relevant safety net for teachers. In this matter, the Commission would be satisfied that this is not so for the following reasons:
63. **First**, the current Modern Award rates cannot be said to be fair, as they:
 - a. did not, at the time they were made, properly reflect the value of teaching work; and in any case
 - b. do not now reflect that value, with the disparity having increased since the Award was made.
64. This creates a situation where award reliant workers are paid rates which lag considerably behind their peers. This disparity, given its degree and consistency, cannot be solely attributed to successful bargaining – particularly, for example, in NSW, where the difference has partly been the result of arbitrated work value decisions. This is inherently unfair; it is particularly so in circumstances where award reliance is concentrated in a particular sub-sector (early childhood education) which is recognised as being no less (indeed many say more) socially and economically valuable, and involving at least the same level of skill.
65. **Second**, the current Modern Award rates have fallen so far below what the majority of employees covered by the Award are paid that they do not functionally operate as a ‘safety net’ – the relevant workers have too far to fall if their alternative industrial arrangements ceased to apply. In that sense, they are not a fair safety net.

66. **Third**, because of this distance from the prevailing market rate, the rates do not form a realistic starting point, or have any real capacity to inform collective bargaining or individual negotiations. As such, they cannot be said to be a relevant safety net.
67. **Fourth**, as set out in detail in the grounds to the IEU's application each of the relevant considerations set out at s.134(1) are either neutral (i.e. those relating to particular patterns of work) or, more commonly, weigh strongly in favour of making the variation. This suggests that the variation is necessary in the sense that the Award will not meet the modern awards objective unless it is varied.
68. **Fifth**, the current rates improperly compress relativities between classifications. The classification structure is based on the growth in skill level between teachers based on years of service; the rates of pay must properly reflect this in order to be considered fair. The compression of relativities at the top end of the scale means this is currently not the case.
69. The relativity adjustment proposed by the IEU rectifies this and also reflects the standards now imposed by the APST, in particular the delineation between Graduate, Proficient and Highly Accomplished teachers (and their relative position in the classification structure).

The variation must occur outside the four-yearly review and the annual wage review

70. Secondly, it is necessary to make the variation at this point in time: i.e. outside the four-yearly review system and the annual wage review.
71. While the 2014 4 yearly review is still ongoing, there is no practical prospect of this claim being able to be raised therein. The Commission has indicated that the next 4 yearly review will not commence until the 2014 review has concluded and interested parties – who are legion – have had time to consider the utility of immediately recommencing a review process.²³ There is legislation currently before the parliament (albeit stalled) which will remove the 4 yearly review process entirely.²⁴ Hence, an application to review rates as a matter of practicality needs to be considered through a separate process.
72. Further, this variation is not one that is suited to review through the 4 yearly review system. By its nature a 4 yearly review is a process that considers a potential need to

²³

²⁴ *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017*

adjust awards having regard to changes in industrial standards or conditions in the intervening period. It is not a process suited to an application that seeks a fundamental review rates of pay in a single award based not on changes in a four year period, but requiring a comprehensive review of the nature of teaching work.

73. As to the annual wage review, it is not a process that permits examination of changes specific to a particular award. Although theoretically the Commission could as part of that process identify a need to vary a particular award, in practice it is conducted as review of rates generally, by reference to generally applicable economic factors, which may give rise to general, uniform increases. The variation sought in this case is not one that rests on changes that apply generally to employees. The minimum wages objective is set out at s.284; work value at large for particular industries is not one of the relevant considerations. In short, it provides an inappropriate mechanism to conduct a work value enquiry into a specific award.

Conclusion

74. The Australian education system has been the subject of radical, focused review and reform over the past two decades. The pace of change has been particularly significant since 2010, as increasingly rigorous national standards to shape and monitor educational outcomes have been imposed. Correspondingly, teachers are required to have and use significantly higher skills in their work, perform a wider and more complex range of tasks, and work in more challenging environments.
75. The modern award must, if it is to provide a *“fair and relevant safety net”*, be varied to reflect this.
76. The IEU’s primary claim is not for a blanket increase: instead, it first adjusts the inappropriate compression of internal relativities, and then applies an increase of 17.5%. For the reasons set out above, this approach is necessary as otherwise the skills of more experienced teachers will not be properly remunerated.
77. In the alternative, in the event that the Commission is not minded to adjust the internal relativity outcome currently provided by the Modern Award, an increase of 25% to all rates should be applied.

INGMAR TAYLOR
GREENWAY CHAMBERS
26 NOVEMBER 2018

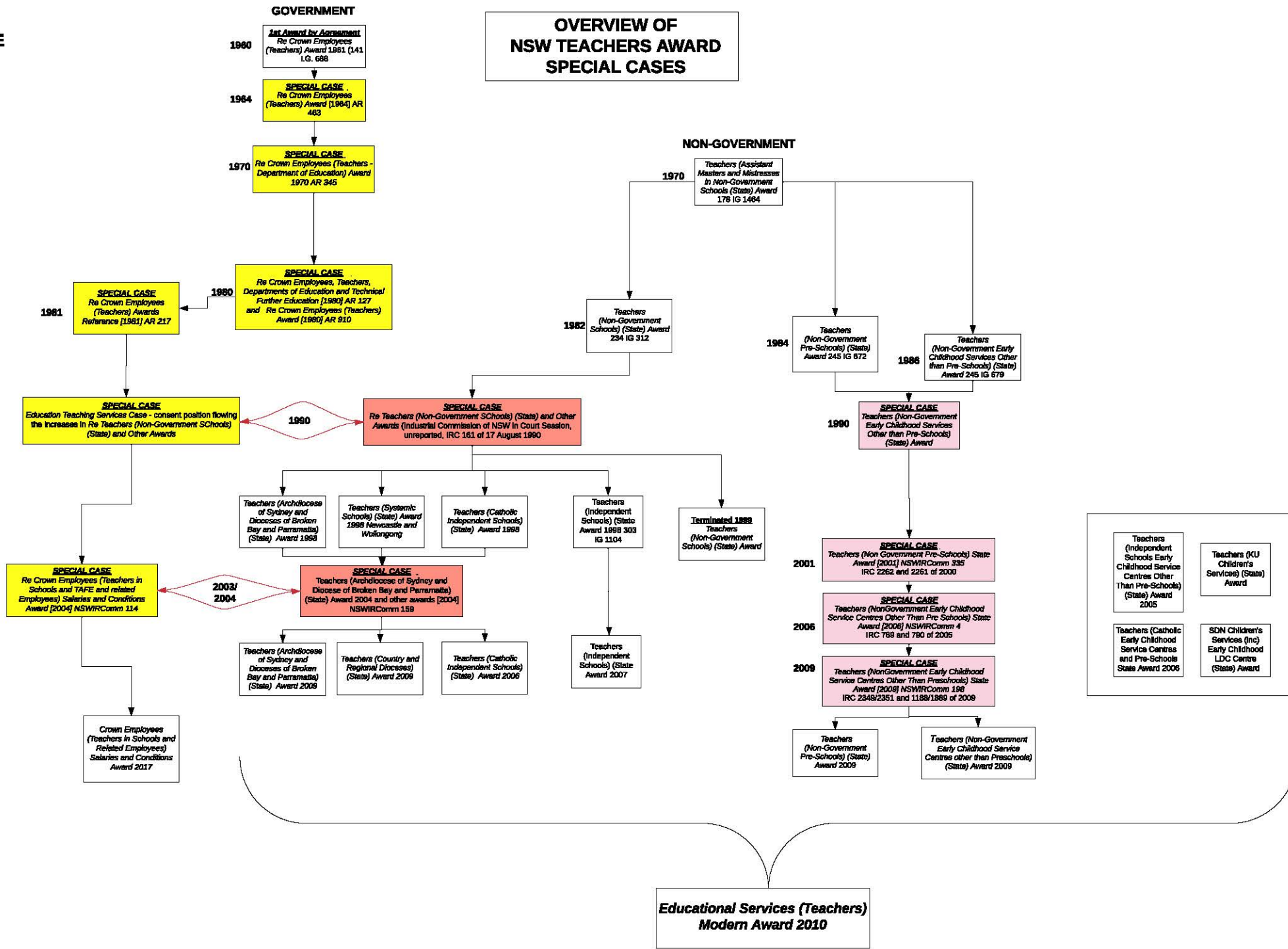
LUCY SAUNDERS
GREENWAY CHAMBERS

SCHEDULE A

OVERVIEW OF NSW TEACHERS AWARD SPECIAL CASES

TIMELINE

- 1963
- 1962
- 1964
- 1965
- 1966
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- 2010



Schedule B

Table B.1 Annual Salaries for four year trained teachers – MA77, NSW government school teachers and NSW early childhood teachers awards - as at 1 January 2010

MA77 Level	MA77 Rates	Internal Relativities	NSW Government School Teachers *	Internal Relativities	NSW Early Childhood Teachers #	Internal Relativities
3	\$40,201	100%	\$54,749	100%	\$43,946	100%
4	\$41,701	104%	\$57,565	105%	\$46,671	106%
5	\$43,201	107%	\$60,389	110%	\$49,294	112%
6	\$44,597	111%	\$63,212	115%	\$52,205	119%
7	\$45,993	114%	\$66,031	121%	\$54,909	125%
8	\$47,493	118%	\$68,853	126%	\$57,210	130%
9	\$48,993	122%	\$71,671	131%	\$59,494	135%
10	\$50,493	126%	\$74,496	136%	\$62,074	141%
11	\$51,993	129%	\$81,656	149%	\$64,558	147%
12	\$53,493	133%	\$81,656	149%	\$64,558	147%

* Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2009 (NSW)

Teachers (Non-Government Pre-Schools) State Award 2009 (Serial C7334)

Table B.2 Annual Salaries for four year trained teachers – MA77, NSW government school teachers and NSW early childhood teachers awards - NSW rates adjusted for Federal minimum wage increases

MA77 Level	Current MA77 rates	Internal Relativities	Adjusted Government School rates	Internal Relativities	Adjusted Early Childhood Teacher rates	Internal Relativities
3	\$52,438	100%	\$70,792	100%	\$57,162	100%
4	\$54,329	104%	\$74,345	105%	\$60,600	106%
5	\$56,222	107%	\$77,909	110%	\$63,909	112%
6	\$57,984	111%	\$81,471	115%	\$67,582	118%
7	\$59,746	114%	\$85,027	120%	\$70,994	124%
8	\$61,637	118%	\$88,588	125%	\$73,897	129%
9	\$63,531	121%	\$92,144	130%	\$76,779	134%
10	\$65,423	125%	\$95,708	135%	\$80,035	140%
11	\$67,317	128%	\$104,742	148%	\$83,169	145%
12	\$69,208	132%	\$104,742	148%	\$83,169	145%

Schedule C

MA77		IEU	Awards/Agreement covering public sector teachers across Australia									Differentials			
Lvl	Rates	Claim	NSW	QLD	#VIC	WA	SA	TAS	ACT	NT	Average	State Avg v MA77		State Lowest v MA77	
From	Jul-18		Jan-18	Jul-18	Oct-18	Dec-18	Oct-17	Mar-18	Apr-18	Oct-16	State	\$	%	\$	%
3	\$52,438	\$61,615	\$67,248	\$70,081	\$67,558	\$70,137	\$68,126	\$68,159	\$68,022	\$69,801	\$68,642	\$16,204	31%	\$14,810	28%
4	\$54,329	\$64,696	\$70,708	\$73,507	\$70,051	\$76,760	\$71,638	\$71,671	\$71,644	\$73,302	\$72,410	\$18,081	33%	\$15,722	29%
5	\$56,222	\$67,776	\$74,177	\$76,997	\$72,636	\$83,820	\$75,153	\$75,360	\$75,264	\$76,804	\$76,276	\$20,054	36%	\$16,414	29%
6	\$57,984	\$70,857	\$77,645	\$80,619	\$75,316	\$87,027	\$78,664	\$79,249	\$78,886	\$80,304	\$79,714	\$21,730	37%	\$17,332	30%
7	\$59,746	\$73,938	\$81,108	\$83,945	\$78,096	\$90,361	\$82,187	\$83,328	\$82,508	\$83,805	\$83,167	\$23,421	39%	\$18,350	31%
8	\$61,637	\$77,019	\$84,572	\$87,391	\$80,977	\$93,824	\$85,699	\$87,569	\$86,129	\$89,601	\$86,970	\$25,333	41%	\$19,340	31%
9	\$63,531	\$80,099	\$88,035	\$90,877	\$83,965	\$97,423	\$89,213	\$91,634	\$89,750	\$93,102	\$90,500	\$26,969	42%	\$20,434	32%
10	\$65,423	\$83,179	\$91,505	\$93,032	\$87,063	\$101,163	\$93,965	\$96,233	\$95,786	\$96,603	\$94,419	\$28,996	44%	\$21,640	33%
11	\$67,317	\$89,341	\$100,299	\$97,297	\$90,276	\$105,049	\$98,806	\$97,763	\$101,821	\$100,104	\$98,927	\$31,610	47%	\$22,959	34%
12	\$69,208	\$92,422	\$100,299	\$97,297	\$101,260	\$105,049	\$98,806	\$97,763	\$101,823	\$100,104	\$100,300	\$31,092	45%	\$28,089	41%

SCHEDULE D

TASMANIA

The Friends' School (Teachers) Enterprise Agreement 2018

	1.5.18	1.5.19 +3%
Step 1	\$61,353	\$63,194
Step 2	\$63,290	\$65,188
Step 3	\$65,278	\$67,236
Step 4	\$67,271	\$69,289
Step 5 4yt entry	\$69,262	\$71,339
Step 6	\$72,819	\$75,003
Step 7 5yt entry	\$76,573	\$78,871
Step 8	\$80,891	\$83,410
Step 9	\$85,158	\$87,713
Step 10	\$89,501	\$92,186
Step 11	\$94,096	\$96,919
Step 12	\$98,431	\$101,384
SCT Step 1	\$101,882	\$104,938
SCT Step 2	\$102,901	\$105,988

VICTORIA

Penleigh and Essendon Grammar School (Teacher, Kindergarten Teacher, Kindergarten assistant and School Assistant Staff) Agreement 2018

Levels	1.10.18 (3.25%)	1.10.19 (3.25%)
Level 11	\$106,356	\$109,813
Level 10	\$102,930	\$106,275
Level 9	\$99,502	\$102,736
Level 8	\$96,079	\$99,202
Level 7	\$92,653	\$95,664
Level 6	\$89,229	\$92,129
Level 5	\$85,803	\$88,591
Level 4	\$82,387	\$85,056
Level 3	\$78,952	\$81,518
Level 2	\$75,527	\$77,982
Level 1	\$72,102	\$74,445

VICTORIA**Mount Scopus Memorial College and Gandal Besen House Teaching Staff Agreement 2017**

	1.2.18	1.2.19
Graduate		
G1 4 yr entry rate	\$71,839	\$73,707
G2	\$73,887	\$75,808
<i>Accomplished</i>		
A1	\$78,160	\$80,192
A2	\$80,386	\$82,476
A3	\$82,678	\$84,828
A4	\$85,036	\$87,247
A5	\$87,457	\$89,731
<i>Expert</i>		
E1	\$90,606	\$92,962
E2	\$94,350	\$96,803
E3	\$97,275	\$99,804
E4	\$105,969	\$108,724

VICTORIA**Carey Baptist Grammar School Employee Agreement 2018**

Level	2018	2019
Permission to Teach	\$75,281	\$77,690
Level 1	\$77,870	\$80,362
Level 2	\$81,350	\$83,953
Level 3	\$85,211	\$87,938
Level 4	\$88,967	\$91,814
Level 5	\$93,635	\$96,631
Level 6	\$97,518	\$100,639
Level 7	\$103,035	\$106,332
Level 8	\$106,281	\$109,682
Level 9	\$111,925	\$115,507
Level 10*	\$118,503	\$122,295
Level 11*	\$124,125	\$128,097

* Discretionary steps

WESTERN AUSTRALIA

Christ Church Grammar Teachers EBA 2018-2021

STEP	2018	2019	2020
	1.50%	2.00%	2.00%
STEP 1	\$63,707	\$64,981	\$66,280
STEP 2	\$67,577	\$68,929	\$70,307
STEP 3	\$71,444	\$72,872	\$74,330
STEP 4	\$75,915	\$77,434	\$78,982
STEP 5 (4YT entry)	\$80,079	\$81,680	\$83,314
STEP 6	\$83,652	\$85,325	\$87,032
STEP 7	\$87,228	\$88,972	\$90,752
STEP 8	\$91,693	\$93,527	\$95,397
STEP 9	\$96,603	\$98,535	\$100,505
STEP 10	\$100,618	\$102,630	\$104,683
STEP 11	\$104,195	\$106,278	\$108,404
STEP 12	\$108,661	\$110,834	\$113,051
STEP 13	\$113,127	\$115,389	\$117,697

WESTERN AUSTRALIA

Methodist Ladies College Teachers EBA 2018-2020 (inclusive AL Loading)

Level	2017	2018	2019	2020
1	\$62,388	\$63,636	\$64,909	\$66,208
2	\$66,177	\$67,501	\$68,852	\$70,229
3	\$69,970	\$71,370	\$72,797	\$74,252
4	\$74,344	\$75,831	\$77,348	\$78,895
5 (4 YT)	\$78,426	\$79,995	\$81,595	\$83,227
6	\$81,925	\$83,564	\$85,236	\$86,940
7	\$89,791	\$91,587	\$93,419	\$95,288
8	\$94,602	\$96,495	\$98,424	\$100,393
9	\$98,540	\$100,511	\$102,522	\$104,572
10 (HAT based barrier)	\$102,032	\$104,073	\$106,155	\$108,278
11	\$106,408	\$108,537	\$110,707	\$112,922

12	\$110,780	\$112,996	\$115,256	\$117,562
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WESTERN AUSTRALIA

Presbyterian Ladies College Teachers Agreement 2017-2019 (inclusive AL Loading)

Band Level	1-Jan-17	1-Jan-18	1-Jan-19
1 (4YT entry)	\$77,559	\$79,110	\$80,692
2	\$81,020	\$82,640	\$84,293
3	\$88,802	\$90,578	\$92,390
4	\$93,558	\$95,429	\$97,338
5	\$97,455	\$99,404	\$101,392
6	\$100,912	\$102,930	\$104,989
7	\$105,244	\$107,349	\$109,496
8	\$109,562	\$111,753	\$113,988

QUEENSLAND

Brisbane Grammar School Enterprise Bargaining Agreement 2016

		1.7.17
Band 2	Step 1	\$75,653
	Step 2	\$76,821
	Step 3	\$80,483
	Step 4	\$84,870
	Step 5	\$88,920
Band 3	Step 1	\$92,290
	Step 2	\$95,678
	Step 3	\$99,046
	Step 4	\$102,612

QUEENSLAND**Presbyterian and Methodist Schools Association Enterprise Agreement 2017**

	1.7.18
Graduate Teacher 1 (4yt)	\$70,033
Graduate Teacher 2	\$73,284
Graduate Teacher 3	\$76,535
Proficient Teacher 1	\$83,035
Proficient Teacher 2	\$86,286
Proficient Teacher 3	\$89,536
Proficient Teacher 4	\$92,787
Proficient Teacher 5	\$96,038
Proficient Teacher 6	\$99,288
Proficient Teacher 7	\$103,962

QUEENSLAND**The Queensland Anglican Schools Enterprise Agreement 2015**

	1.1.17
Step 1	\$67,554
Step 2	\$70,620
Step 3	\$73,686
Step 4	\$78,796
Step 5	\$81,862
Step 6	\$84,928
Step 7	\$88,505
Step 8	\$92,082
Step 9	\$96,579

SOUTH AUSTRALIA**St Peter's College Enterprise Agreement 2015**

Increment Step	1/2/2017	1/2/2018
Step 1	\$67,872.11	\$69,229.55
Step 2	\$72,102.13	\$73,544.17
Step 3 (4 YT entry)	\$78,056.26	\$79,617.38
Step 4 (5 YT entry)	\$81,224.48	\$82,848.96
Step 5	\$85,457.73	\$87,166.88
Step 6	\$88,894.09	\$90,671.97
Step 7	\$92,729.97	\$94,584.56
Step 8	\$96,568.01	\$98,499.37
Step 9	\$100,400.67	\$102,408.68
Step 10	\$104,100.86	\$106,192.87
Advanced Skills Teacher 1 (Discretionary Step)	\$107,539.37	\$109,690.15
Advanced Skills Teacher 2 (Discretionary step)	\$112,596.45	\$114,848.37

SOUTH AUSTRALIA**Prince Alfred College Enterprise Agreement 2016**

Classification	1-Aug-18
1	\$67,685.00
2	\$71,962.00
3 4 YT Entry	\$77,309.00
4 5 YT Entry	\$81,189.00
5	\$85,066.00
6	\$88,939.00
7	\$92,822.00
8	\$96,698.00
9	\$100,572.00
10	\$104,314.00

SOUTH AUSTRALIA**Seymour College Inc Enterprise Agreement 2017**

Teachers Band 1	Feb 2018	Feb 2019
Band 1 Step 1	\$66,225	\$67,483
Band 1 Step 2	\$70,406	\$71,743
Band 1 Step 3 (4YT entry)	\$75,642	\$77,079
Band 1 Step 4 (5YT entry)	\$79,431	\$80,941
Band 1 Step 5	\$83,226	\$84,807
Band 1 Step 6	\$87,018	\$88,671
Band 1 Step 7	\$90,814	\$92,540
Band 1 Step 8	\$94,606	\$96,404
Band 1 Step 9	\$98,399	\$100,269
Band 1 Step 10	\$102,060	\$103,999
Band 1 Step 11	\$104,804	\$106,795