



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

1057301-1

**VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER SAUNDERS**

C2013/6333

s.302 - Application for an equal remuneration order

**Independent Education Union of Australia
and**

**Commonwealth of Australia as represented by the Department of Education,
Employment and Workplace Relations; Australian Chamber of Commerce and
Industry; Australian Childcare Centres Association; Australian Community Children's
Services; Australian Community Services Employers Association, Union of Employers;
Australian Federation of Employers and Industries; Association of Independent Schools
of South Australia; The Association of Independent Schools of Tasmania Incorporated;
Association of Independent Schools of Western Australia (Inc); Association of Quality
Child Care Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare
Queensland Inc; Childcare South Australia; Child Care Association of Western
Australia; Community Connections Solutions Australia; Australian Municipal,
Administrative, Clerical and Services Union-New South Wales and ACT (Services)
Branch; NSW Business Chamber Limited; The Association of Independent Schools of
New South Wales Limited T/A AISNSW; Catholic Commission for Employment
Relations**

(C2013/6333)

Educational Services (Teachers) Award 2010

s.158 - Application to vary or revoke a modern award

**Independent Education Union of Australia-New South Wales/Australian Capital
Territory Branch**

and

No Respondent for AM2018/9

(AM2018/9)

Educational Services (Teachers) Award 2010

Sydney

9.07 AM, WEDNESDAY, 4 SEPTEMBER 2019

PN1

VICE PRESIDENT HATCHER: All right. Appearances appear to be the same. Mr Taylor.

PN2

MR TAYLOR: Thank you. Can I start by thanking the Commission and the parties for agreeing to rearrange these closing dates due to ill-health on my part. That was much appreciated. I wanted to just identify what we understand to be the timetable for today and tomorrow. It's not entirely clear to me whether the Bench is aware of this but at the time these dates were set down Mr Fagir had indicated that he would be likely unavailable at 2 o'clock today but he would do what he could do clear that.

PN3

He's in the position where he is unavailable at 2 o'clock today and we hope the Bench was aware of that and that was part of the reason why we started early today at 9 and I say I hope because at one point I understood the Bench at least some members of the Bench had something else listed at 2 o'clock that's a completely different matter.

PN4

But in any event, Mr Fagir's position remains what it is and so what we're – what, at least Mr Fagir and I had discussed and I thought it had a wider knowledge, was that I would put our submissions this morning and doing everything I can – there's a lot to get through, before lunch, it may be that we have to go a little past 1 and then Mr Fagir would be on his feet tomorrow.

PN5

VICE PRESIDENT HATCHER: Yes, all right.

PN6

MR TAYLOR: And then of course the other parties after him. The second thing I'd like to do just before I get into the submissions is just put something on the record as to the view that occurred on 1 August 2019. There are some things that we say that emerge from the evidence not the view itself, accepting as we do, that the view does not form evidence.

PN7

But can I just identify for the record and any party who wishes to add to this no doubt may wish to do so when they are on their feet that on 1 August 2019 the Bench accompanied by the parties visited two sites both Early Learning sites, the first being KU Phillip Park, a not for profit long day care centre and the second being Bambini of Lilyfield, a not for profit centre and an ACA member.

PN8

I understand that both centres had a working environment which accorded with the working environment that various witnesses have described and have been seen in photos annexed to witness statements. The sites were functionally identical albeit with different layouts with the bulk of space dedicated to the children, flexible outdoor areas with movable equipment and a very small,

combined office break spaces for staff. Both had demonstrated similar educational programming, both individual and at large. There was documentation present and a centrally – and that documentation was clearly integrated into the day-to-day work.

PN9

Both – at both locations the Bench observed large group activity at the first, KU Phillip Park, the teacher was reading a story to children and I want to say some things about what the evidence demonstrates as to the nature of the task involved.

PN10

At the second – at Bambini at Lilyfield, the Bench observed a group of children learning the alphabet using a video followed by guided questions from the teacher using a smartboard and then were directed to small workstations where they sat at desks and chairs to work on fine motor skills, tasks including tracing letters, building numbers out of matchsticks and related activities while the teacher circulated around the room assisting individual children.

PN11

During the course of my submissions I'm going to refer to some documents and they are – it just seemed it would be more likely that I'd finish on time if I just reproduced them and put them in a folder rather than asking the Bench to keep finding them. So I'm now going to hand the Bench three folders I've provided to the parties earlier.

PN12

If the Bench could open the folders firstly behind tab 1 and 2 are amended applications. We formally seek leave to amend both applications. We do so in both cases as a consequence of increases in rates of pay which have a consequential flow on effect to the claim. The amendment behind tab 1 is to the application for an equal remuneration order. The amendment is to the form of the order and you'll see that what is sought to be amended are the rates that appear with a mark-up on the second and third page.

PN13

As the Commission is aware, our primary claim is to match the rates paid to primary school teachers. The primary school teachers in question have had increases in rates and so if the Commission were to grant the claim and do so in accordance with the legislative requirement to ensure that they're not paid less than these would be the rates. So we formally, firstly, seek leave to amend the application in that regard.

PN14

VICE PRESIDENT HATCHER: Is there any opposition to that? All right. That amendment's allowed.

PN15

MR TAYLOR: The second document is an amendment to the application to vary the Award on a work value basis. As the Bench is aware, the basis of my client's claim in this regard is that there has been significant increases in work value which would justify a substantial percentage increase to rates over the existing

rates. Since the claim has been filed, the existing rates have increased, most recently on 1 July of this year.

PN16

That increase was not an increase that takes – that is referable to work value change and hence we have – we are seeking leave to amend so that we take the existing rates as a starting point as the previous claim did and apply the increases that are sought by the application. That is, firstly, the internal relativity change plus a 17.5 per cent increase as the primary basis of the claim. I formally seek leave to amend that application in that manner.

PN17

MR FAGIR: I should just say that I'd need to formally get instructions but I can't imagine there would be a difficulty and if the Bench hears nothing more from me on this topic, could it be taken that there's no opposition to the amendments.

PN18

VICE PRESIDENT HATCHER: All right. Will someone remind me about any lack of opposition on your part to allow the amendment at an appropriate time.

PN19

MR TAYLOR: The practical effect of these applications is to increase the remuneration of early childhood teachers to rates close – either closer to or to the actual rates paid to other teachers, to primary school and secondary school teachers. Now, there are about 400,000 teachers in this country. Of that about 10 per cent are early childhood teachers but many of them are employed by independent schools or are paid pursuant to arrangements where they get rates of pay which are effectively the same as primary school rates of pay.

PN20

Ms Matthews in her first statement gave evidence and she described various methods used by the Union to identify they're about 15,000 early childhood teachers who would be affected by this application. So something less than 5 per cent of all teachers are the ones who would be practically affected by the two claims. Now, that's something to bear in mind generally in respect of both applications.

PN21

The principle opposition in this case comes from the employers of early childhood teachers in long day care centres, the Australian – what is it – what do you call – ACA Australian Childhood Alliance, is that right?

PN22

UNIDENTIFIED SPEAKER: Childcare.

PN23

MR TAYLOR: Childcare Alliance who say that early childhood teachers actually deserve less than other teachers. They say they have lower work value and in fact their work value is akin to no greater than non-professionally qualified educators.

PN24

VICE PRESIDENT HATCHER: So in respect of the work value claim will there be any non-early childhood teachers who might practically receive an increase in remuneration if the claim was granted in part or in whole?

PN25

MR TAYLOR: We can't rule out the theoretical possibility but we haven't, from our part, identified that there are such teachers. Teachers – primary school, secondary school teachers in this country as the Bench knows being both in the public sector and in the independent sector covered by Enterprise Agreements which largely mirror each other. We can't discount the possibility that there is some outlier small non-Government school for whom there are rates being paid less than the Enterprise Agreement. We don't have any evidence on one way or the other about that unless Ms Matthews said something about it.

PN26

VICE PRESIDENT HATCHER: What about Norfolk Island?

PN27

MR TAYLOR: Yes. I can't help your Honour on Norfolk Island - - -

PN28

VICE PRESIDENT HATCHER: No.

PN29

MR TAYLOR: - - - I'm afraid, one way or the other. So what I was doing really was just saying look, we have these – we have this position where for our part anyway we say early childhood teachers as a matter of fairness and as a matter of fact – sorry, as a matter of fairness deserve no less and as a matter of fact are no different from a work value point of view to other teachers.

PN30

Now, this has, as I said, a consequence for both claims. The first because it's a jurisdictional requirement and the second that the work value case because there is no case led against us that there has been substantial work value change for some 90 per cent of teachers who are not early childhood teachers. Indeed, as we read the ACAs submissions they acknowledge at paragraph 120 and 121 that there has been work value change in respect of all those teachers.

PN31

Now, we say a teacher is a teacher. Let's look at these two teachers. Let's look at this early childhood teacher and a primary school teacher. Let's start at the beginning. They both have the same qualifications. Many as the Bench is aware, will be qualified to teach zero to 12, some will be qualified to teach zero to eight but there is – the qualifications are the same.

PN32

The professional standards that apply are now the same. The Australian Professional Standards for Teachers and the Commission will recall taking witnesses to videos that helped explain the standards. Yes, of course you're teaching an 18-year-old in year 12, you're going to be teaching them different

things than a four-year-old in preschool and you're going to be using different techniques.

PN33

Of course you are but the standards apply equally to teachers who have to adapt to teach different age levels and as the evidence heard, also have to adapt to teach at different individual capacity levels sometimes within the same grade they might be teaching people who are effectively much younger and much older simultaneously. That's what a teacher does.

PN34

So they have the same professional standards and the Commission will recall, we set this out in our written closing submissions, the position of the Catholic Commission for Employment Relations, probably the only party who has appeared – I think the only party who has appeared in these proceedings other than the IEU that actually has any working knowledge of teachers of both early childhood and primary, secondary school level and we've set out their submission.

PN35

It's short and to the point. They acknowledge that given that early childhood teachers have the same qualifications, same professional standards, they have a justifiable basis for seeking the same rate of pay. The only addition was made was to say there will be cost consequences and with great respect, would like the Commonwealth and the State Government to assist us to pay for this difference.

PN36

These two teachers have the same registration requirements now across most of the country, New South Wales, South Australia, Victoria and Western Australia. They all have to justify against those National Standards that they are proficient within three years of graduating. This is something that's come in for early childhood teachers.

PN37

It wasn't previously a registration requirement but it's something that's occurred over the last decade and I said, 'Let's take two teachers,' but in fact as I've demonstrated, you don't have to take two teachers, you can just take one. One person could be doing both of these jobs. Ms Hilaire, for example, gave evidence that she in fact had been both a primary school teacher and an early childhood teacher and on a casual basis working for six months here and then a year there.

PN38

The age of the children. I identified that as a difference although as Schmidt J said in the 2001 decision which we've quoted in our closing submissions, there's a large crossover. That first year at primary school the kindergarten teacher as we call them in New South Wales will be teaching children as young as four and up to six and the teacher in the last year of preschool is going to be teaching children who are four or five and they're going to be teaching them the same things.

PN39

The view that you saw confirmed the evidence, the view of seeing a early childhood teacher teaching children the alphabet and how to write letters. This

was the evidence that you heard from the witnesses that they are at that point assisting children to be ready for school. They are giving them those skills and they get to school, that is what they're doing in the first year at school, they're learning the alphabet, they're learning to recognise numbers. They're doing the same work.

PN40

Now, when it comes to the work, there was a focus on the day-to-day work of a teacher. Now, day-to-day work of a teacher is not, we say, to be understood for the purpose of these proceedings, based on simply a list of steps or activities that they did. One has to understand not just whether they are reading a story as was observed on a view, but they're doing so in a manner that takes – and the evidence was takes a particular approach, a teaching approach.

PN41

So involving instruction in necessary social skills adapted for each child's needs and skill level. So at the start each child's saying his or her age, the different levels of support and coaching that's then provided by the teacher for each child. It's done against the background of long-term programming driven by and adapted to fit the children's interests while remaining focussed on those curriculum, EYLF Learning Outcomes.

PN42

It's not just reading aloud stories, it's engaging the children in a process by asking them questions and so extending their learning, monitoring their capacity to listen, to respond on an individual basis and having so monitored their comprehension levels building that into future learning activities and doing so with educators.

PN43

These activities, both group activities and individual activities may appear to the untutored eye as playing or reading stories but the Bench will be the end of the evidence is now left with a clear understanding that these things, whether they are generated spontaneously in response to a child's interest, or carefully planned, are each specifically constructed to engage and extend the child by reference to the curriculum activities.

PN44

So they're monitoring the child during the day. They're monitoring their needs. They're documenting their progress against developmental milestones and other metrics. They're recording those results. They're developing plans for the child on an individual basis as well as mentoring and supporting colleagues in the room, dealing with parents who come in a variety of guises but one of the things that is a feature, we say, of the changes – and I'm foreshadowing where I'm going to with change is the attitude of parents that's changed corresponding with an increased recognition of professionalism in teachers but directly leading to higher accountability is what are you doing for my child.

PN45

That approach which is we want to see results. We want to see results against benchmarks, we want to see how the child's doing. We want to have that and now in early childhood settings we need that, if we want that feedback on a regular

basis, many of them have got daily communications if not weekly and end of term communications, judging them against criteria and that's what an early childhood teacher is doing.

PN46

It's not just a series of activities, it's taking that academic learning, the learning about the method and philosophy of teaching and applying it to the curriculum and then determining individualised approach to teaching and that is what all teachers do. A primary school teacher is not doing something different. If there are differences the primary school teacher is doing so in an environment where they will have, it's likely, less assistance in the classroom.

PN47

Of course both early childhood and primary school teachers will work with assistants who are there, funded to deal with children who have additional needs but of course in an early childhood context there will be more people in the room but there is no absence of working with learning support officers at a primary school level and they're doing so at a primary school level in an environment where they have many more peers to assist them and provide them with professional guidance and support.

PN48

And you heard some of the evidence of primary school and high school teachers, the level of professional support within a high school, the mentoring, the guidance and the like. So there isn't, we say, a fundamental difference between these teachers which is reflected in the Award of course. The Award is an Award that applies to all teachers and the classifications apply equally to all teachers and no one has suggested that that should change.

PN49

Now, there's some irony in the ACA approach. It seeks as part of the – in response to the ERO case to emphasise that early childhood teachers have been recognised by industrial tribunals since at least 1970 as being the same as other teachers.

PN50

A teacher is a teacher and so Award rates have been set on that basis and they say therefore this notion that they've been undervalued because of any reason but in particular gender should be set aside because tribunals have always recognised them the same and yet in the work value case they say, 'Well, in fact they have lower work value, it's a value no different to educators.'

PN51

And this actually does affect, we say this is where gender considerations come in and I'll come back to that a little later but this attitude of employers that early childhood teachers are no different to educators we say does give rise to and heavily influence the undervaluation and has a gender aspect to it.

PN52

So there's no differences in those categories. Where there is a difference, firstly there's a much higher proportion of early childhood teachers are women. More

than 97, I think, some of the evidence is more than 98 per cent of early childhood teachers are women. That can be compared to primary, secondary school teachers who as a cohort it's something around, I understand, about 74 per cent taken as a whole.

PN53

There is a second significant difference and that is much lower pay. Now, we have updated in – if you turn to the document behind tab 3, we've updated a table which was attached to our reply submission. I think it was attached to our opening submission too, each time we've updated it to reflect increases in rates. What this table seeks to demonstrate is firstly under the heading MA77 what the current rates are and then having set out the current rates that apply to public sector teachers across Australia what the differentials are.

PN54

Now, I need – we need to correct paragraph 2 of our opening submission which had incorrect and too low figures of the difference. You'll see there that compared against the average public sector primary school teacher, early childhood teachers who are paid at the Award rate which the evidence demonstrates is very common, exceedingly common in respect of for profit long day care centre are being paid between 29 per cent and 45 per cent more on average and even if you take the lowest public sector rates across Australia it's 26 per cent to 33 per cent and I think in paragraph 2 we had lower figures than that.

PN55

And can I just draw attention to one matter that is of some historical interest? If the Bench could just look at the MA77 current rates, you'll see that the current rates top out at 71,284 at level 12 and the ERO application when originally filed in 2013 contained within it a note that as a result of a particular transitional provision, New South Wales rates had been preserved up to 30 June 2014 when all State based differences had to be removed.

PN56

Up until 30 June 2014 the level 12 rate was about \$2,000 higher than it is now, that's what, five years ago. Employers in New South Wales were paying \$2,000 more at the top rate and the differences decrease as one goes down to the lower levels and at the time the Bench may not recall submissions that were put way back at the – when we were putting submissions in respect to the principles in the ERO case but we identified that teachers were or had just dropped off a cliff, as we described it, because they had dropped at that level by \$11,000 a year.

PN57

Now, I mention that for – in part because the employers have said how unaffordable claims are and they seem to have forgotten that for a large proportion of teachers who will be covered by these applications which namely teachers in New South Wales who are disproportionately to be affected by this claim, they were in fact paying them more five years ago and yet they say what they say about affordability.

PN58

Now, there are some consequences of the substantial difference in rates, one of them is that difference in pay has a direct effect on a shortage of and a difficulty in recruiting and retaining early childhood teachers. Recruiting them at the point where they've actually graduated and retaining them once they've become experienced.

PN59

I say, 'At the point they've graduated,' because the Bench will recall that long day care centres are required - some of the witnesses made it clear they'd prefer not to have to do it but they're required to have minimum ratios of early professionally qualified teachers because Government at least, unlike them, think that that's very important that children are taught by people with proper university education.

PN60

But as a matter of fact, the Regulations allow them to hire them at the point where they are partway through their degree prior to them being able to be employed as a primary school teacher. Now, the ACA submit that shortage is something that is a recent feature and it really only arises because there's been an expansion in the number of teachers in early childhood that need to be employed.

PN61

At any casual glance at the New South Wales decisions in 2001 and 2009 which I've referred to in our submissions will tell you that shortage has been a persistent problem in this industry and one at least that the Commission there saw as directly affected by differences in pay. Now, these things are multi-factored, we accept that, they're multi-factored but you don't need to have a degree in economics to understand the concept that if there's a 30 per cent difference in pay that is likely to be a factor.

PN62

Now, if there was in fact a shortage of primary school teachers - a shortage of people qualified to teach kindergarten, grades 1, grade 2 then, you know, maybe you'd say, 'Well, this is just a problem we have generally,' but no, there's no shortage there. The shortage is people who are qualified to teach both and we heard evidence from people like Ms Viknarasah who said, 'Look, you know, I've got difficulty holding onto these people once they qualify.'

PN63

We had Ms Kearney giving evidence about the phenomenon of teachers resigning to take up higher paid positions. She was competing in part with not for profit day care centres as well as primary schools. She had no difficulty accepting the proposition that remuneration was a factor in the – a pull factor that she was having to deal with.

PN64

In fact you'll recall that whilst this wasn't a feature of her statement or her evidence-in-chief, in cross-examination it became clear that she in fact was paying, had recently decided to increase the rates of pay for her teachers to rates that were effectively the rates at primary school level and I'll come back to that in the context of evidence about affordability and capacity to pay.

PN65

But it's not a complicated concept to understand that such a big difference in pay is going to affect a shortage and we accept the proposition, lest there be any misunderstanding about that, the shortage is not itself a justification to increase rates of pay. We need to establish in our work value case that there has been substantial work value change but at the point where that is established, the Commission will have to then consider a number of what we call discretionary factors, things that will assist the Commission or guide the Commission one way or the other.

PN66

The ACA in that regard, for example, raises capacity to pay. We raise shortage as being a justification and why is it a justification? Well, for the very same reasons that the New South Wales Commission repeatedly said this was a real problem that needed to be fixed because there is a fundamental public interest in ensuring well qualified teachers are teaching at what is now recognised to be one of the most, if not the most important part of a child's education.

PN67

There are, contrary to my friend's – to ACAs submissions, there is both expert evidence that we have led, none from them, that is, the qualifications of the teachers are important to ensuring the best outcome and there is of course publications which we've put into evidence which say the same thing and I'm going to ask you to turn now to the document behind tab 4 of the folder.

PN68

This is an extract of the document lifting our game, a report prepared by Susan Pasco and Professor Deborah Brennan for every State and Government and the Commonwealth Government. We've extracted some of the key pages and we say that significant weight can be placed on this document which accords closely with expert evidence that we have led in this regard.

PN69

Can I ask if the Bench could turn to, firstly, to page 62, the numbering might be hidden by the staple but it's got a heading The Importance of Quality and the Workforce which is the subject I was just addressing and in particular, if you turn to page 63, I'm using the numbering of the original document, the bundle numbering 0871, you see the heading Workforce in the top right-hand corner and you'll see that the authors commence by identifying that:

PN70

A professional and skilled workforce is fundamental to achieving quality early childhood education and high quality learning and development outcomes.

PN71

At least that's how they start that paragraph. The next paragraph:

PN72

A comprehensive literature review on determinance of quality and childcare found that overall the most influential factors affecting quality across age groups and service settings are the education, qualifications and training of

the workforce. Higher educator qualifications are associated with better child outcomes.

PN73

There's then a reference to the E4Kids Survey which is separately in the evidence and then the next paragraph starting:

PN74

Separate analysis -

PN75

- refers to the longitudinal study of Australian children and what it found and you'll see after the hyphen in that paragraph:

PN76

A child whose teacher had a diploma or degree in early childhood education or childcare gained the most from attending preschool as shown by higher NAPLAN scores.

PN77

The next paragraph:

PN78

A quality service requires a skilled and stable workforce.

PN79

And of course 'Stable,' is important too when you're dealing with issues of not only recruitment but also retention.

PN80

High quality teaching is a skill like any other. It needs to be taught well, maintained over time and refreshed as our understanding of child learning and development increases. Work related in the context of specific professional development contributes significantly to the quality of the program delivered and enhances effectiveness.

PN81

And I've just gone over to page 64 and on that page they identify that poor wages and conditions are a driving factor in respect of educators seeking to leave the profession and in that regard, one has to be careful with some of the ACA submissions in which they've extracted from survey data the percentage of people who wish to leave the profession or unhappy with wages and conditions because of course you've got to understand as the Bench well understands that this is a sector which is in a sense bifurcated.

PN82

There is a large – there is a significant proportion of the sector who are covered by arrangements where the early childhood teachers get primary school level rates of pay which somewhat belies the notion it's unaffordable you can't do it. But putting that aside, if you're talking about something less than half or around half of early childhood teachers who are at rates that are below primary school

teachers, surveys which seek to get the views of all on their conditions has to be taken with that understanding.

PN83

The other thing this document does as the Bench might recall, at an earlier point is – I might have given those copying the material the wrong page numbering. The extract starts at page 53 but that particular section of the paper which is headed Return on Investment from Quality Early Childhood Education starts, I think, a couple of pages earlier but the thrust of both what appears earlier and what's there copied is the, I think, uncontroversial notion that quality early childhood education is a sound long-term investment for this country.

PN84

And so when we're talking about the sorts of matters that have to be taken into account when considering the Minimum Award objective and the Minimum Wages objective and productivity and also considering broader concepts of public interest, steps or changes which improve the quality of early childhood education is not just good for the children concerned, it's something which has a benefit for our nation.

PN85

And so it's in that context that we say that ACA submissions the social value of this work is a distraction or not particularly relevant or necessary to be considered because it's agreed, it's something that we say, 'No, it's not a distraction. It's a very important part of understanding from a discretionary basis why something should be done about the current substantial gap in remuneration.'

PN86

Now, can I turn now to the two claims? As you will have seen from our written submissions and which would have been clear to the Bench in any event, these claims are not mutually exclusive. We seek to vary the Award on work value basis to lift Minimum Award rates to rates that would be still – there'd still be a substantial gap to the rates that apply to 90 per cent of teachers across this country, leaving in place room for bargaining and the like.

PN87

So we seek to increase minimum rates and secondly, we seek an order – an equal remuneration order directing ECTs to not be paid less than primary school teachers and our alternative claim, as you know, is against professional engineers. Now, there is of course no point in me walking the Bench through our arguments in detail but there are some matters that have been raised against us that we anticipated that I do want to say some things about.

PN88

There are a number of things in Mr Fagir's submission that we have only very recently received that go to questions of evidence, particular evidentiary findings that we would respectfully request some time to be able to provide some written reply to, both because of the amount of time we have in the next two days but also because of the amount of time we've had to look at those submissions, we just think that's more efficient and effective way of assisting the Commission. So we'll seek a direction to that effect at an appropriate time.

PN89

But can I ask the Commission to now turn to the next tab of the folder which has got an extract from the Equal Remuneration decision, it's simply extracted the Bench's summary of what must, in effect, be established and this – so this appears under the heading Summary as part of paragraph 367 of the decision and in response to the submission that we failed to identify in respect of our claim that the ECTs be lifted to the level of primary school teachers would fail to identify an appropriate comparator.

PN90

Can we direct attention to the paragraph 6 of this summary which says that:

PN91

The satisfaction of the jurisdictional fact in section 302(5) requires a conclusion that the employees the subject of the application from the Equal Remuneration order receive less remuneration than identified employees of the opposite gender to perform work of equal or comparative value.

PN92

Now, when it comes to meeting the jurisdictional fact we say, 'Well, we have identified two groups.' We've identified women who are early childhood teachers and we have identified employees of the opposite gender, male primary school teachers. So much, we say, is all that is necessary to meet the comparator requirement if we can identify and prove that the comparator group has work and does work of equal or comparative value.

PN93

There is no need for us and there's no impediment to our claim as a matter of pure jurisdiction that we could – the fact that male primary school teachers are not – that the male gender is not predominant amongst primary school teachers. We have identified two groups who do work of equal or comparable value we say for the reasons I've already dealt with and they are of opposite gender. We meet the jurisdictional requirement. It's not any more complicated than that.

PN94

We also need to demonstrate as well as that they do work of equal or comparable value which I've dealt with already, is that they don't have equal remuneration and I've dealt with that already. So we say that our claim in respect of the Equal Remuneration order does not fail at a jurisdictional level and it then falls to the Commission to consider the various discretionary factors which come into play. Now, the ERO decision makes clear that you do not need to establish that the difference in rates arises because of gender. Everyone accepts that proposition.

PN95

Having said that, we accept the proposition that when considering whether to exercise the jurisdiction the Commission will, as a matter of discretion, turn to questions of whether an order would be one that would appropriately reflect the purpose of the part. Now, as to that, we say this. This is an industry that bears all the hallmarks of one where work is undervalued for gender reasons as a matter of fact and can I just stop for a moment and say we accept the proposition that

industrial tribunals have repeatedly and correctly said in effect a teacher is a teacher.

PN96

But as a matter of fact we know that they are significantly undervalued and they share many of the attributes, as identified in the Social Welfare ERO case of industries which are affected by gender undervaluation. They are heavily female dominated. It's hard – I'm not sure there would be an industry that's more heavily female dominated. They are a service industry where the service involves work historically seen as women's work, caring for young children.

PN97

There's low unionisation, very small work – small numbers of employees and the workplaces, high levels of Award reliance and I foreshadowed this a little earlier but in our view it's open to the Commission to take a view that gender whether conscious or unconscious, gender is a feature of the attitude of employers in this industry.

PN98

The ACA led evidence from witnesses who said, in effect, 'Professional qualifications, who cares. What we're after here is people who are good with the children and they aren't any more valuable these teachers than our educators and indeed we don't – if we weren't required to employ them, we wouldn't.' That is no different to Cert IV or Diploma qualified workers.

PN99

Now, this is an industry which has grown from one and it's changed; it's grown from one where it was originally focussed on caring for children so that parents could go to work but over recent - over the last couple of decades has been a recognition that education in addition to caring is an important part of what is provided.

PN100

The effect though, this attitude of employers that teachers are really no better or different than their educators is really an attitude which has, we say, a large component of a view that it's the caring aspect which is an important or critical part of the overall role and it's this type of gendered – we say gendered view about the nature of the role which means that it's not been properly recognised as the separate and high level professional work for what it is. So there is a gender influence.

PN101

VICE PRESIDENT HATCHER: So that's influencing employers' determinations as to what rate of pay they choose to pay their staff but in respect of the Award is there any which indicates that those sort of considerations have historically fed into the rates of pay in the Award?

PN102

MR TAYLOR: When it comes to the Award rates we accept what the employers say that for a long period of time contrary to what their claim is on work value, it's been accepted that the work value on an early childhood teacher is the same as a

work value of a primary school or secondary school teacher and they should be paid the same. So that's the way in which the Award has gone about it. There has certainly been historical views that it is women's work and we had - - -

PN103

VICE PRESIDENT HATCHER: Sorry, who's views are these?

PN104

MR TAYLOR: Well, community views.

PN105

VICE PRESIDENT HATCHER: In terms of Award rates don't you - - -

PN106

MR TAYLOR: Yes.

PN107

VICE PRESIDENT HATCHER: - - - obviously have to attribute this to the relevant wage setting body at the time who made the rates?

PN108

MR TAYLOR: Yes. We don't – we accept the proposition that when it comes to Award rates the rates have been set on the same basis but when it comes to the ERO claim we're seeking to lift rates to actual rates and there is, we say a gendered influence as to why the Award rate which is not set on a difference which between primary school and early childhood teachers that would – at all and so you can't point – if you can't point to a difference you can't point to a gender difference so just isn't a difference and the actual rates that are being paid.

PN109

When it comes to the Work Value case, we do say that there are – because of this very high proportion of the workforce that are women, there are reasons why the Minimum Award objective requirement to have regard to aspects of equal pay and discrimination is relevant, and it is both relevant because it would be – it is disproportionately affecting female teachers, there is a much higher proportion who are women who are at the early childhood level, that is the current difference in pay. And we also say that, as a general proposition, enhancing early childhood education generally has a positive effect on – to use one of those politician's expressions, working parents, but particularly has a benefit to women who are working who are more likely at the moment at least in our society to otherwise be the person for whom the caring and education falls on.

PN110

But when it comes to the ERO claim, we accept the proposition that there must be some – that the Commission would accept that it is appropriate, consistent with the policy behind the division, to make the order, and in that regard we say it is appropriate because there is, in fact, a gendered influence on the difference between the rates of pay, for the reasons I have dealt with. And secondly, and you will see from our written submissions, because we say that one of the principal ways in which the well-known and established gender pay gap in this country is

going to be addressed is by lifting the actual rates of pay of feminised or heavily feminised groups of workers in the workforce.

PN111

VICE PRESIDENT HATCHER: Let me just go back to my question – in respect of the work value claim, is there any material that suggests that gendered assumptions have fed into the rates which have been set for teachers?

PN112

MR TAYLOR: I do not think we put that submission, no.

PN113

Now, turning to the way in which we put the case separately, in respect of comparison to professional engineers, you will have seen that the way we approach our case – and I am now only dealing with this at a high level – is that there is firstly a focus on the same essential qualification requirements, the same – not only need for a professional degree, but an expectation and a necessity to use the learning that one gets from that degree in the work. And we point to levels of – and which is, I might say, as the employers identify, although they seek to use it against us in the work value case, something that is recognised by the award system – that these teachers are professionals, and are working at a professional level. Just like professional engineers, and you will see from our submissions that we identify certainly in the early years, which is where our claim rests, graduate level and experienced level after five years, the level of responsibility is certainly not less for a teacher who is much less likely to be supervised and as the employers themselves put – or ACA at least, puts – are doing the whole of the job pretty much from day one. Which can be contrasted to professional engineers.

PN114

Now, in the ERO case, which the bench will still have behind tab five, at paragraph nine, the full bench identified, in the penultimate sentence, that job evaluation techniques may be useful in comparing work where the work being compared is different occupations in industries. And I think that recognised, we say correctly, that traditional work value criteria are somewhat harder to apply when you are dealing with occupations which are quite different. And one has to be careful when comparing occupations which are quite different, not to bring to bear gendered notions that work that is perhaps traditionally, or in community folklore, seen as more likely to be capable of being done well by men. Work involving maths, or machinery, or computers – is necessarily of higher value than work involved in, for example, teaching. Job evaluation techniques are one method which seek to compare jobs that can be quite different. We, as the bench is aware, led evidence from Ms Issko which sought using the CED – Cullen Egan Dell – methodology to compare graduate and experienced early childhood teachers, which graduate and experienced professional engineers, and found – to use the language of the Act, and the equal remuneration decision, that the jobs were comparable. That is, that the point scores that are generated were essentially the same.

PN115

The only area of expert evidence that was put on by the employers was in this area. So, Mr Khoury, for the ACA and Mr Egan, for AFEI, then examined that job

evaluation analysis. And as you will have seen from our closing submissions, and as you will recall, they agreed, in essence, with what Ms Issko had found – that is, that the jobs are essentially the same size. Mr Khoury took a graduate early childhood teacher and compared that to what he described as a junior civil design engineer. A junior civil design engineer on his evidence was not someone on their first day at work, but someone who had had some limited work experience, and found them to be effectively the same job size, and Mr Egan similarly, whilst he came up with different figures, accepted that the differences were negligible, and of no great consequence. I am not quoting him, but it was evidence to that effect.

PN116

It is perhaps, against that background, that you do not find in the ACA's submissions in writing, as we have seen them, any reference to the evidence of Mr Khoury and Mr Egan. What there is is a critique of job-sizing as being useful at all, and Ms Issko's evidence in particular. We say that when it comes to job-sizing evidence versus work value, traditional work value tasks, we accept that job-sizing is not taking into account the conditions under which workers perform. But if you are talking about early childhood teachers and professional engineers, you are not, we say, going to find that the conditions under which professional engineers work is such that that would lead to a significant change in work value, higher than a teacher. Early childhood teachers are working in noisy environments, physically demanding environments, where they have to respond quickly to circumstances that might change over which they have as much control as they can bring to a room full of three and four-year-olds, but ultimately they have to work in a difficult environment. Professional engineers would work in a variety of environments, ranging from a mining site in the middle of a desert through to sitting happily in an office with a set of tasks and a computer, and little other distraction. And so – we do not think that that factor is going to be a significant alteration. What job sizing does do is analyse those things which are part of a work value exercise, the skill and responsibility. And for time purposes, I did not include it in the folder, but if you go to Ms Issko's reply statement, the criteria that are used and the sub-criteria that are used in the job sizing, they accord, we submit, with a high degree of crossover with the approach that would be taken in a work-value, traditional work value exercise. They are looking at expertise – that is the heading, expertise – and beneath that, knowledge and experience, breadth of the job, and the interpersonal skills required. Not, of course, what the person actually has, but what would be required for a job, and you might recall me cross-examining Mr Egan as to how he could say that a professional engineer needed higher interpersonal skills than a teacher. Judgement is the next broad category, and that includes two things – job environment, and reasoning. But job environment is not the conditions in which the workers perform, but rather is measuring the degree to which a position holder must vary the work and develop new techniques. So, the extent to which they are, in effect, as teachers have to do, taking a situation and adapting quickly to that situation and using a new technique. So, if a child has a problem with a particular form of grip, how – what technique is going to be best? Is it going to be playing with Play-Doh, is that going to help them? Is it going to be giving them modelling, showing them how it is done, and the like? And Accountability is the third factor, and that deals with the accountability to the employer, the independence, and influence and the involvement are the three sub-headings.

PN117

Now, the last thing I wanted to say on the ERO case is just as to the form of the order and the way in which it would be implemented. We are conscious, of course, of section 304, which allows for any change to be graduated, and brought in. No party has put submissions as to the precise form of the order, and we accept that the bench inevitably would seek some assistance from the parties, having made the principle decision to make such an order as to the precise form of the order and how it might come into effect.

PN118

Can I turn, now, to the section 157 application, the application to increase the rates on work value grounds. Again, there will be a level this morning of being relatively high level, taking into account that we have written submissions. There will be some aspects of detail which we have picked up in our friend's submissions, which I can deal with. But as I said, I think most of that is probably better left both from a time point of view and because we have not had time to respond to some written document that deals with some of the factual matters that are said to be reached by the ACA's written submission.

PN119

Firstly, can I start with datum point. The parties, I think, are of the same view that the Act does not require any particular datum point. But also, of the same view, that nevertheless, there is some benefit in determining – to avoid double-counting – over what period of time it is since a tribunal last considered 'What are the appropriate rates of pay?' And both parties have approached it on that basis. The Aca, though, reject the submissions that we have put that the appropriate datum point, to the extent that one has regard to one, is that when the rates were reviewed by the Federal Commission in respect of Victorian teachers in 1995. And they do so on three bases – can I just respond to those three bases.

PN120

The first is that they make the submission which we have no difficulty with that the modern award was made in 2010 and, prima facie, set appropriate rates. So much can be accepted without in any way suggesting that the Commission at that time paid any regard to work value change since 1995, it clearly did not. It simply took, and the detail of this is set out in our opening submission, that was filed prior to the case re-commencing, from paragraph 24 onwards, in our what we have called 158 submissions. We've set out the detail of how it came about that the Victorian Independent Schools Teachers Award, abbreviated to VISTA, came to have the rates it did which were then simply adopted when the modern award was made and we identify that those rates were last considered on a work value basis in 1995 and then were simply adopted in 2010.

PN121

There's no suggestion - there's some statement, I think, in the ACA submissions that the rates before the Full Bench in 2010 were controversial. That may or may not be a reference to the fact that my client said that those rates were so unwieldy low that it better there be no rates in the award but ultimately the Commission decided to simply continue to apply what was effectively the only federal rates that were then in existence.

PN122

The ACA points to two other points in time which they say have some relevance to this Commission, the first of which is a decision of Watson SDP which is behind tab six of the folder. This was an application to make an award that would apply to some specific independent schools in Victoria and you'll see that from paragraph 2:

PN123

A minimum safety net of conditions to operate in respect of early childhood teachers engaged by named independent schools in the state of Victoria.

PN124

Paragraph 2 says that those teachers are currently award free. We know as a matter of fact that independent schools are and have been historically covered by enterprise agreements which pay much higher rates of pay and so it would appear that this award was coming nevertheless to be made against a background in which these employees were not currently award covered. The Senior Deputy President, at paragraph 6, simply finds, on a consent basis, that the minimum wages are properly fixed by reference to those found in the VISTA award that I referred to earlier and says, we say quite correctly, in about the third sentence:

PN125

There's nothing to suggest that the early childhood context would warrant different rates.

PN126

Which we say is absolutely right as a matter of broad principle. The other thing that's worth noting in this paragraph 6 is the sentence that starts at the bottom of page 4:

PN127

Further, the minimum rates proposed fall within the range of rates for classifications for similarly qualified employees

PN128

and then there's a reference to the Metals Award and by footnote, in particular, to classification CA1(a) and (b) which would see rates that ought to be, on that basis, some, at the top end, 210 per cent above a C10. I will come - before I sit down I'm going to come to external relativities and the recent statement of the President dealing with the issue of professional awards but I just pause to note that at that point, the rates were ones which were said to sit happily within the external relativities.

PN129

There has, of course, been - there was compression both before and after that point which has affected the actual rates but the bottom line is there's nothing in that decision - - -

PN130

VICE PRESIDENT HATCHER: Sorry, just to clear this up, did the Metals Award at that time have rates as distinct from percentage relativities for C1?

PN131

MR TAYLOR: We'd need to check that. Ms Saunders who had an intimate working knowledge of the award up until a few years ago on a daily basis recalls that the rate did come out but possibly not by that date so currently that award has, as your Honour's no doubt aware, a comparison to C10 percentage but not actual rates for the professional level, but the one thing that's clear from this decision is that there is no attempt by the parties and no attempt by the Commission to come to grips with work value change simply as there was in 2010, six years later, a straight pick up of the VISTA award rates without any analysis and so we say that doesn't affect that simply applying rates against a background in which these are employees whose rates of pay are almost inevitably going to be covered by enterprise agreements where there's no real analysis - there's no analysis at all, we say of work value change and doesn't and couldn't affect the datum point.

PN132

The other case, or cases, that are relied upon by the ACA I haven't included in the folder but can I just do my best on my feet to identify that they are decisions of a Full Bench headed by Watson VP in 2016, one of which is (2016) FWCFB 3800 which was considering the question of making a state reference public sector modern award to replace a state transitional award and the Bench simply took the rates in the transitional award and applied them into the state reference public sector modern award.

PN133

That award is not the award in question before you. It is a different award and in any event, again what you don't find in those decisions and there were also rates being set in respect of some local government employers. What you see is simply an acceptance that conditions that were in the previous award should continue. No party putting any submissions about work value change or seeking analysis of work value change.

PN134

Just to come back to your Honour, the Vice President's question, Ms Saunders is able to identify that at the time the minister's request was made to the Commission to start creating modern awards, the Metals Award at that point did have rates of pay for the professional level so it would appear that they would have been in effect in 2004 but they came out at some point through the modernisation process. Can I - - -

PN135

VICE PRESIDENT HATCHER: When there were rates in the award, and I can see they were certainly there in 2005, were they consistent with the percentage relativities?

PN136

MR TAYLOR: No. A compression had already occurred by that stage.

PN137

VICE PRESIDENT HATCHER: No, leaving aside compression, take into account the compression, were they ever consistent with the relativities, intended relativities?

PN138

MR TAYLOR: I understand if we're talking about the rate in the Metals Award, then my understanding is that at the point the rates were originally there with a top level of 210 per cent, that was 210 per cent of the C10 rate and it was - and by 2004 it was really as a result of dollar, flat dollar, increases causing compression that that percentage was no longer there. I'm going to come to this but we say if you're dealing with external relativities and proper external relativities then to the extent to which there are proper external relativities they are percentages of the C10 rate but let me come to that because I need to do so in the context of the President's statement and also the submissions we put in response to the pharmacists decision that came down in late 2018.

PN139

But can I just come back to our 157 case and just say a couple of things about, firstly, the statutory criteria that the Commission will need to consider. We've addressed this in our written submissions but what we had overlooked but the Commission, I know, won't overlooked(sic) is that in addition to the modern award objective criteria the Commission will also need to have regard to the minimum wages objective in section 284 so that's an omission in our submission and I just wanted to address that on my feet.

PN140

The matters that we put in respect of the minimum award objective are matters which, or submissions which, go directly to those criteria and the minimum wages objective for which there is, as far as we can see, are functionally identical and so, in particular, we identify the, as a broad question of the broad objective, that is to set a fair safety net of wages, we say it's, of course, fundamentally unfair to have minimum wages that don't reflect the proper work value and quality of the work performed.

PN141

When one then comes down to the particular sub-criteria, we say that it will have a positive net affect on workplace participation and a positive effect on the national economy and as for evidence to suggest it will cause harm to business viability, that's something that I'm going to address before I sit down. We say that the evidence that's been led against us doesn't suggest it would, or wouldn't lead to a conclusion that it would, and we say it is consistent with the principle of equal remuneration that a group of highly feminised workforce that the award be increased consistent with a reflection of the fact that it would have the effect of properly reflecting the value of work done by early childhood teachers in particular and lift them to an appropriate rate of pay.

PN142

I mentioned a couple of times the New South Wales decisions. I've dealt with that, or we've dealt with that, in detail in our written closing submissions exactly what they were and so forth but can I just deal with apparent misconception by the employers as to how we rely on them. We don't rely on them to set particular percentages or particular rates of pay. We accept that there's different statutory language although for our part we don't place much significance in a difference between an expression of a safety of fair minimum wages and a statutory obligation to create fair and reasonable terms and conditions.

PN143

Both of them require fair terms and conditions but what the reliance we place on these decisions is because here are cases which fall within the datum period in question. Schmidt J's decision in 2001 is considering, on her finding, a datum period that starts before 1995 but the case run by the union, and we made this clear in our written submission, was that the change that they relied on started after an increase that had occurred in December 1994 so effectively the case that she upheld was a case of work value change from 1995 onwards, which is the same case that you're looking at, and it was specifically analysing the work of early childhood teachers and so the findings that were there made, we say, are of assistance and are instructive in a number of respects and I've identified one already, that is the public interest in addressing questions of shortage.

PN144

There was also useful information about the claimed effect that employers had of how disastrous it would be compared to how it actually worked out but there is also analysis of a series of factual propositions that were put by employers and rejected which we say, we accept of course that this case to be determined on the evidence and facts before it, but nevertheless is of some use to see historically how a group of workers who are the same workers in New South Wales, who make up a large proportion of the workers who are covered by this claim, in respect of work value change over the same period, how that Tribunal considered the extent of and the nature of change and found from 1995 to 2009 very substantial work value change and that, we say, will give this Commission assistance in confirming the views that you would find on the basis of the evidence presented in this case that have, in fact, been that substantial change.

PN145

Turning then to that part of our case which does examine the nature of the work value change, I've already made the first point that I wanted to make under this heading and that is that our case, of course, necessarily had to, or sought to, demonstrate substantial work value change for teachers, not for early childhood teachers alone but teachers, all teachers, and so there was extensive evidence from primary school teachers and from secondary school teachers and from experts that analysed and talked about the work of primary school and secondary school teachers as well as early childhood teachers.

PN146

It's perhaps easy in a case so dominated by, where the cross-examination's entirely focussing on early childhood, to forget that 90 per cent of the teachers that are going to be covered by this claim were not - there was no opposition, no employer of such teachers came to this Commission and rejected the proposition that there has been the work value change that this union has said has applied to the vast majority of teachers.

PN147

The ACA submissions, as I said, at paragraphs 120 and 121 of the document that we've been given appear to accept or concede there has been that change. Their complaint is that the same change hasn't occurred for early childhood teachers. Inevitably whenever the Commission is doing a work value exercise for a occupational group comprising people doing many different types of jobs,

necessarily there is going to have to be some weighing up of change that might not apply entirely equally across those groups.

PN148

For our part, we say the Commission would be well satisfied that the very substantial change in early childhood mirrors at the very least the changes to primary and secondary school teachers but even if we're wrong about that, even if the ACA has been able to chip away at the case and say well there might have been substantial work value change but it hasn't been as great for early childhood teachers, that would only, we say, affect the total weighing exercise to a degree. It wouldn't mean that you wouldn't grant a work value change satisfied that there has been substantial change in respect to the vast bulk of workers covered by this classification, particularly given what we say is the almost inevitable finding that a teacher is a teacher.

PN149

That there is not, contrary to the ACA's case, a capacity to differentiate the work value of an early childhood teacher from a primary school teacher. The specific work value changes that we've addressed, we've set out in written submission from paragraph 140, our closing submission from paragraph 140 onwards, I'm not now going to go through those in any detail. They address a wide variety of matters including, of some real importance, the increase in the relevant period of the educational requirement from a three year degree to a four year degree but also the masters that those who have a degree already and are converting to teaching, that has increased from a one year to a two year masters degree to be able to be a teacher.

PN150

ACA says well you don't need to be concerned about that because all year teachers at a higher step but that somewhat glib response doesn't, we say, properly reflect that what is inherent in a substantial increase in the amount of professional education that nascent teachers get at a tertiary level is reflective of a substantial increase in the knowledge that they should have as teachers which they, it is accepted, apply when they are teachers and that is not a knowledge which only affects them in the first year.

PN151

It's knowledge which affects them in their second - when they're at level five and level six and level seven. They are working, they are applying skill and knowledge which is a higher skill and knowledge. Sure, they start one step higher but thereafter they are still working at a much higher level. We identify the new professional standards particularly - have a particular new affect on early childhood teachers, but generally having national standards show, we say, a national professionalism which replaces what was there before.

PN152

These things are always incremental. Like we went from nothing to new national standards but it shows a new professionalism and it's directly linked to an accountability that these people are now being held to standards. They didn't have to previously qualify to be proficient. Now they do and they have to demonstrate that. ACA says well it's no more than an exercise of just filling out forms to show

that what you do is, in fact, reflective of standards but if you're talking about lifting the profession up, there'll be some that don't reach those standards and others who, in order to reach that standard, recognise that they have to work at a higher and different level than they did before.

PN153

National registration requirements similarly enhance professional status and lead to a view that these are now professionals being formally recognised as professionals in a way which for each older teachers were not occurring in the past. Then we get to the national quality standards. There are some matters of detail about the ACA submissions that we need to put in writing about this but some things to understand at a very high level nature. Firstly, of course, as I said before, nothing comes out of a complete vacuum.

PN154

There were previously quality standards that applied at a state level and then at a Commonwealth level, at least for long day-care centres, but the change in 2009 to the national quality standards that apply across the board was, we say, on the evidence will be accepted by this Commission to be a very substantial change not just because EYLF came in and there was no curriculum before which meant that teachers now were all teaching to achieve particular curriculum outcomes, not just for that reason, because you replaced what was previously, with great respect, to sort of tick a box exercise with something that was much more nuanced and much - and required much higher levels of quality to be judged to be meeting the standards and it is also very important to remember that the NQIAS, which the ACA introduced into, a substantial feature of this case, only at the very end of the case notwithstanding that we had referred to it in our expert evidence, notwithstanding that of course it was well known to the ACA's clients at all relevant times, it only applied to long day-care centre.

PN155

It didn't apply to the preschool sector, so the National Quality Framework is, and its mandated requirements is, actually entirely brand new for a large proportion of those early childhood teachers. Part of the ACA's position before this Bench, just as it was before Schmidt J in 2001, is that educators and teachers do the same job, teachers are worth no more than educators notwithstanding their higher professional qualifications, but that submission doesn't sit happily with the evidence, not even with the evidence that was led by some of the ACA's own witnesses.

PN156

You'll recall Ms Kearney, for example, moaning that when asked questions about reports and observations, how difficult it was to get some of the lower qualified staff to do them at all never mind do them properly and the teachers were the ones who could be relied on to do them and Ms Viknarasah, in cross-examination, accepting the proposition that teachers were, because of their qualifications, going to be bringing to the task of educating something that was going to lead to a better result than educators despite her statement saying something to the contrary effect.

PN157

But this notion that the ACA led about what teachers do and that is no different to educators, might have been assisted if they had put into evidence position descriptions that conveyed that notion. They didn't. We sought position descriptions from witnesses and I want the Bench to look at two of those. One that's - first one's behind tab 7 of the folder and I'll hand the Commission the other one that didn't go into the folder that's part of exhibit 82.

PN158

The first position description you're looking at is a position description marked exhibit 92, this is behind tab 7, of an early childhood teacher. This is G8. This is their position description that applies across, was it, about 500 centres that they operate across the country. Just pausing for a moment. You'll recall that when Mr Fraser came into the witness box, who owned and operated I think four maybe five centres, he also had a position description which was almost identical to this one and he, when asked about that, said well he accepted that this position description described fairly much what most early childhood teachers do and so the position description that he uses and G8 use would appear to be relied upon as indicating the nature of early childhood teaching work.

PN159

If you look at position objective just immediately before the first line, you'll see that it's to co-ordinate the learning activities of the allocated group of children including the supervision of all assistants, ensure the care and development of each child in the group and monitor the achievement of education objectives. This is a position which clearly, on its face, has job responsibilities which are higher than that of educators and the nature of the responsibilities are then set out specifically under the line, just looking at the first four, ensure that a developmentally and educationally appropriate program is planned and implemented for each child which takes into consideration the school curriculum, assess the needs of each child, monitor their progress and ensure school readiness, supervise assistance in the group, maintain effective communication with parents of each child in the group, and it goes on.

PN160

That, we say, which comes directly from the employers, is a more reliable guide to what childhood teachers do than some of the material which has been summarised from statements filed by the witnesses for ACA who seek to downplay the importance and level of the work in question. I handed separately to the Bench exhibit 82 which is a bundle of position descriptions that were used by Ms Kearney's business. The final one which, just find the page number, starts at page 23 as numbered at the bottom of the bundle, is for the position of kindergarten teacher, so this particular workplace, as is common, at the final year group in Victoria called the kindergarten year, so this is the oldest children, there is a teacher who is engaged and you'll recall the evidence that it is not invariably the case but it is commonly the case that the person who is the room leader of the final year before school is a qualified teacher.

PN161

That is certainly a feature of Queensland and Victoria and there was evidence of witnesses that we led who had not only done that, like Ms Vane-Tempest, but had, amongst other things, done that role. It's a common role and it's in part linked,

from an employer perspective, to the fact that government funding for kindergarten programs requires that it be conducted and led by a teacher. It doesn't actually require the same contact hours that the NQF separately requires of educators, whether they're teachers or not.

PN162

Those requirements are based around ensuring safety and the like. These are government programs which recognise how important it is to have professionally qualified teacher teaching but you'll see that this workplace, far from suggesting that the teacher is some person no better or different to any other educator, has constructed a position description which, firstly, is directly related to the National Quality Framework. You'll see the headings on the first page.

PN163

Sorry, not on the first page, on the second page of the document, page 24 of the bundle, first heading Educational Program and Practice QA1 and thereafter the headings all refer to quality standard grades and there you see what it is that the teacher does and, as I said, this, we say, can be relied on somewhat more happily than the sort of shorthand downplaying evidence that some of the ACA witnesses sought to lead directly contrary to the evidence of the IEU witnesses saying what they actually do.

PN164

What they say they do correlates quite happily with what the position descriptions say they are supposed to do and you'll see that the type of activities they must do under the heading Educational Program and Practice, things like, I'm now looking at the second dot point on page 25, 'You're required to research new and innovative ideas which may be incorporated into the program'. Next dot point, 'Through discussions, observations and documentation you will plan, implement and evaluate the program', so these are teachers who are directly leading the educational program as a primary school teacher would, I might just add.

PN165

It goes on, personally observe and complete individual observations, deliver regular updates and the like, so these are, we say, the documents which are particularly useful. I'm not minded to otherwise deal in detail with the reply to some of the material which we've been given so can I now move to a broad heading of affordability.

PN166

VICE PRESIDENT HATCHER: Well just hold on a sec, Mr Taylor. We might take a short morning tea break at this occasion, Mr Taylor.

PN167

MR TAYLOR: Thank you.

SHORT ADJOURNMENT

[10.49 AM]

RESUMED

[11.09 AM]

PN168

VICE PRESIDENT HATCHER: Mr Taylor, before we resume perhaps we should have acknowledged earlier that today is apparently National Childhood Educators Day in which we recognise and celebrate the value of their work.

PN169

MR TAYLOR: Well it's a serendipitous day to be on my feet. Can I turn to the question of affordability.

PN170

VICE PRESIDENT HATCHER: Well before you do that, so you've addressed the work value changes but what you haven't specifically addressed is how they are recognised in terms of remuneration. That is, the appropriate methodology of each, if we were to accept that those work value changes had occurred in part or whole as you say, how that's appropriately to be reflected in remuneration having regard to the fact that we're setting a minimum rates award, we're not setting a bargained outcome or a paid rates award. Do you want to say something about that?

PN171

MR TAYLOR: Well what we've put in our submissions and what we maintain is that there has been substantial work value change which would lead this Commission to a view that the rates are - no longer properly reflect the value of the work. Our submission as to what the quantum of the change would be has not changed from our opening case. We put it on two bases. The primary claim is one that reflects what we say is currently a set of rates that no longer properly separate out the higher value of the work done by more experienced teachers.

PN172

The internal relativities are such that the - mean that the difference in pay at the bottom end to the top end is not as great as it ought to be. The fact that there has been recognition of the higher value of work done by teachers with more experience is something that, as we do in our written submission, can be traced back to - I mean, there's various earlier authorities and we cite, I think, a 1970 New South Wales case to that effect and has been cited favourably since then that there is improvements in the value of the work as teachers get more senior.

PN173

As a matter of fact, although we accept that the amount of weight that's placed on this is limited, you will see that in the bargained outcomes, as against the award outcome, you do see that there's been maintained a much greater disparate - much greater range of rates than the modern award and the reason, bluntly, why the modern award's internal relativities have become, in our submission, no longer appropriate can be put down to the inevitable compression that it's affected all professional awards as a result of flat dollar increases, so you'll see that the higher grades don't receive the same percentage increase when translated to a percentage as the lower ones and slowly the rates have come closer together.

PN174

Hence our primary position is that what would be appropriate is not to increase as substantially as would otherwise be thought appropriate the starting rates but rather change the internal relativities so that the more significant

changes/increases in pay are ones that cut in at the higher levels so that's where the primary position comes in. We say, look change the internal relativities and then having done so, then grant in recognition of the change of work value a 17 and a half per cent increase that would then apply to that new set of relativities.

PN175

VICE PRESIDENT HATCHER: All right, so what's that based on? Leaving aside the relativity issue, the 17 and a half per cent, what sort of - what's that hanging off?

PN176

MR TAYLOR: It's hanging off some 24 years of work value change. We accept this is not - there's no mathematical formula that one can directly apply but the level of work value change, we say, is substantial. I hear what the ACA says about how useful the particular percentage is that New South Wales Commission consider over a much shorter period of time but it's nevertheless of some guidance that the effect, the amounts in question, were some 45 per cent increase before compounding over a shorter period of time.

PN177

We also say that the New South Wales Commission in 2001 and 2009 in the arbitrated outcomes was not wrong, was not wrong, to pay regard to the actual rates being paid to public sector teachers through enterprise bargaining. Governments are not renowned for paying more than they need to pay. One can readily infer that in those bargained outcomes there is an intention by the parties to have regard to work value change to reflect the value of the work.

PN178

We accept that this Commission, setting minimum rates, doesn't just go out and find a bargained outcome and say well that looks good enough for us, but here we're not talking about an outlier enterprise agreement that might affect a small number of people and the like. We're talking about the bargained outcome of public sector teachers across this country applying - so these are rates that apply to, within some small percentage differences, some 90 per cent of all teachers in the country.

PN179

That means that this Commission can have regard to that, those rates. You can't, we accept, put aside the notion that perhaps those bargained rates have some other aspects to them beyond recognition of work value but they clearly, given the massive gap between the award rate and the actual rates, quite apart from the need for rates to be relevant, relevant rates, it does, we say, provide some guidance. Why should the figure be 17.5 per cent and not 18 or 17? No, we don't have any specific submission as to that, I accept that. I don't think we are unique in that front.

PN180

I'm not sure I'm aware of any work value exercise that someone has drawn some mathematical equation that comes to a particular figure but we say the 17.5 per cent, after you adjust the internal relativities or our other claim which is just a flat 25 per cent, is modest given the value of the work value change.

PN181

VICE PRESIDENT HATCHER: Well the difficulty, perhaps not difficulty, the issue to be taken account is that you're trying to achieve a practical outcome for early childhood teachers but by lifting all the rates in the Teachers Award that may, depending upon the size, if any, of the increase have indirect impacts, for example, on the way bargaining occurs in the private school sector. That is, for example, theoretically if we were to whack up teachers rates to match bargained outcomes as they currently are, it might have consequences for incentives to bargain in that sector.

PN182

MR TAYLOR: Well I accept that if the outcome that was being sought was to match bargained outcomes. I think our table behind the third tab is public sector teachers but bargained outcome in the independent sector, it's not higher. It's about the same and the claim that we are seeking is lower than, lower than, current bargained outcomes. If it was, in fact - we think that something can be inferred from the lack of any opposition by any public sector employer or independent school employer to the claim, that they are not concerned that this would have some detrimental effect on bargaining or some effect on the outcomes, if that, in fact, was the nature of this claim, then you would hear inevitably from such employers but this claim sits below bargained outcomes.

PN183

It doesn't - and as I said, that's why I said we're unashamedly, you're right, looking to try and address the conditions of early childhood teachers and that's because they are, and it's really only those in long day-care centres for the profit, they are the ones who are not getting what our client thinks are rates that other teachers get and they should but it's a - the claim has two features. The ERO claim would match but that's because that's what the Act requires. You can't do anything less than that.

PN184

VICE PRESIDENT HATCHER: No, I'm doing - we're talking about the work - -
-

PN185

MR TAYLOR: When it comes to the work value claim, it is pitched below it and that's perhaps not surprising in a statutory environment where it would be, we accept, a very difficult ask to convince this Tribunal with its statutory obligations to increase award rates above bargaining rates at least so long as there is the sort of current differences exists but no, so we don't think that that is a concern, with respect, your Honour. We don't read in submissions that have been filed that is a concern.

PN186

We haven't seen any submission to the effect that it would be a concern and Ms Saunders tells me, on instructions, that at least in New South Wales independent schools tend to pay - well their agreements tend to be higher than the public sector rates which are set out by way of comparison in the document behind tab 3 so it's even less of a concern.

PN187

DEPUTY PRESIDENT DEAN: Mr Taylor, I think you said there's a ballpark around 90 per cent of teachers were public sector teachers. What percentage are Catholic?

PN188

MR TAYLOR: No, what I - I might have mis-spoke. What I said was about 90 per cent of teachers are primary/secondary school teachers and the other 10 percent are early childhood. I haven't got to hand percentages of public sector versus private but no doubt we could - whether there is ABS data on that - - -

PN189

DEPUTY PRESIDENT DEAN: I thought you said something in the context of table - - -

PN190

MR TAYLOR: There is. Mr Wright says there is - ABS does have data on that so - - -

PN191

DEPUTY PRESIDENT DEAN: I thought you said something in the context of the document behind tab 3 that - - -

PN192

MR TAYLOR: Yes, I did. I did and I might have mis-spoke. The document behind tab 3 is just public sector rates but I was using admittedly a shorthand to - because independent schools, as a matter of fact, enter into enterprise agreements which usually, within a relatively small margin, mirror the public sector rates, while we haven't got a separate schedule for those, if we did produce one it would have an outcome that was much the same as this schedule and the Catholic system similarly tends to, again, mirror.

PN193

There's the bargaining moves usually in close proximity to each other and there is obvious pressure from the union for that matter in the interests of the employers that there isn't a substantial disparity in award outcomes between public sector and independent sector.

PN194

DEPUTY PRESIDENT DEAN: I'm just having a very quick look at the New South Wales and ACT Catholic Systemic Schools Enterprise Agreement 2017, still has I think as the current rates of pay operates from - last one from January 2019 and step 12 in that, well that seems to have 13 steps, step 12 in that is 93,793 which is below obviously the IEU claim for step 12.

PN195

MR TAYLOR: I just - - -

PN196

DEPUTY PRESIDENT DEAN: Coming back to - - -

PN197

MR TAYLOR: Yes, I'd need to get instructions on that. I just, on the top of my feet, I can't quite recall how step 13 and step 12 correlate with each other but certainly - and it may be that what the Bench would be assisted by is if we produced a schedule like the one behind the third tab in respect of independent and secondly Catholic agreements across the country so that the same - so the figures, just the actual figures, can be put down. I'm just in a position now, because I hadn't sought those instructions before today, to be able to deal with it as usefully as perhaps I should but I would think that document would tell its story and I think you can take from what submission I've put already that there is an acceptance, not without some grudgingness(sic), but some acceptance that this Commission is not going to increase award rates above agreement rates, we accept that, and we didn't understand that our claim was doing so or would so and so it might be that we've made a mistake but it may well be that there's some explanation for that point that your Honour has just raised that it means that we're not doing so.

PN198

VICE PRESIDENT HATCHER: Mr Taylor, while we're in the business of distracting you, can I take you back to tab 6.

PN199

MR TAYLOR: Tab 6, yes.

PN200

VICE PRESIDENT HATCHER: The decision there.

PN201

MR TAYLOR: This is the decision of Watson SDP?

PN202

VICE PRESIDENT HATCHER: Yes, so the sentence you took us to about the minimum rates aligning with the metals rates for C1, I'm a bit puzzled by this because as I understand, reading this decision, that the award was made aligned with the VISTA award which was then said to align with the C1 rate in the Metals Award. It doesn't seem to be that that alignment exists now. That is, if C1 still existed teachers rates are lower than C1 rate if it still existed. How did they fall out of alignment between the date of this decision and the current position?

PN203

MR TAYLOR: I think that question assumes, and I don't want to suggest anything to the contrary, but assumes that Watson SDP had, in fact, correctly stated that the particular rates before him at that time correlated with the actual rates C1(a) and (b). Inevitably, I think, we'll find that the range of rates in the Teachers Award, at least at the bottom, the bottom rate so it's level one, two, three, four, was lower than the C1(a) and (b) rate wherever, in any award you found at the time because that's still the case now.

PN204

I read that sentence as perhaps reflecting a submission that had been made but without necessarily thinking the Senior Deputy President had done a high level

analysis of the rates but was rather working on the basis that they fell within a range that was a professional range in a broad sense. I'm inferring that, that's all we can do from the relatively limited reference but I do want to, and this is an important issue, I do want to come to this issue of C10 reference and professional rates.

PN205

It's been raised in the pharmacists decision which, of course, your Honour's well aware of having been on that Bench, and it comes - it's been raised now by the most recent statement of the President and I just wanted to - - -

PN206

VICE PRESIDENT HATCHER: Well just before we move on, I'm just wondering if your client would be able to provide us with a copy of the actual award that was made arising from this decision so we can work out what that sentence actually means.

PN207

MR TAYLOR: Yes, we can - yes, we'll endeavour to do so although I think actually this would have been an AEU award rather than ours. No, it was ours, sorry.

PN208

VICE PRESIDENT HATCHER: It says IEU.

PN209

MR TAYLOR: It was ours, my apologies. Yes, says so in the first paragraph. Yes, we will certainly endeavour to do so. Dean DP, returning to the question, Ms Saunders thinks she's turned up the same schedule to the New South Wales and ACT Catholic Systemic Schools Enterprise Agreement 2017 that bears rates of pay and it may be that your Honour was referring to the rates in the first column for the rates effective 1 January 2017.

PN210

DEPUTY PRESIDENT DEAN: Sorry, what page? Because I'm looking at, I just Googled it, Mr Taylor, so I might have picked up something incorrectly but it looks to be the New South Wales and ACT Catholic Systemic Schools Enterprise Agreement 2017, some 286 pages. Does that look right?

PN211

MR TAYLOR: Ms Saunders says yes. I'm looking at page 125.

PN212

DEPUTY PRESIDENT DEAN: Hang on. That's what I was looking at and I'm looking at the second last column which is annual salary from the first full pay period on or after 1 January 2019 and I'm looking at step 12.

PN213

MR TAYLOR: Yes, I think that - I see now. I think there was a confusion here at the bar table because we were looking at a very similar figure that was step 13 in January 2017 but step 13, that is the highest level, the point where you - the

highest level you can reach under that enterprise agreement is a figure of 102,806 and that is a figure which you will see reflects exactly the public sector rate for New South Wales at what we've said is steps - levels 11 and 12 of the Public Sector Award in our document behind tab 3.

PN214

What I need to do, because I just can't do it on my feet because I'm not aware of it, is work out this translation of steps 12 and 13 in the Catholic systemic and how that correlates across to the award, et cetera.

PN215

DEPUTY PRESIDENT DEAN: Mr Taylor, while you're looking at that document, a couple of pages down, so page 129, it seems to be that - well that's ACT, sorry. It seems to be, on page 131, that for teachers employed on or after I think it's some date in 2014 the scale's moved from a 12 step to something more closely aligned with the teaching standards.

PN216

MR TAYLOR: Yes, there was a banding exercise for people who started after a certain date. That's true in the New South Wales system, I understand, and I think this is right that the agreements, both public sector and Catholic systemic, have provisions which translate people from the 13 step to the new agreed banded approach.

PN217

DEPUTY PRESIDENT DEAN: I also have a vague recollection that something similar is in the New South Wales - - -

PN218

MR TAYLOR: Crown employees. I think that, again - - -

PN219

DEPUTY PRESIDENT DEAN: Is that correct?

PN220

MR TAYLOR: Yes, I think that's my understanding too, that there is a high degree of similarity in that respect in the way in which the two awards - in both two enterprise agreements work, yes, and Ms Saunders says in that particular agreement, the transitional provisions that transition teachers from one pay scale to the banded pay scale is clause 16.

PN221

VICE PRESIDENT HATCHER: Just to save you some work, Mr Taylor, I've found that award.

PN222

MR TAYLOR: You found?

PN223

VICE PRESIDENT HATCHER: The award.

PN224

MR TAYLOR: Well that - see there you go. The wonders of the Commission database or maybe just Mr Google.

PN225

VICE PRESIDENT HATCHER: Yes, and having glanced at it I can't possibly understand how that finding about the relativity could have been made.

PN226

MR TAYLOR: Yes, yes. It's not a decision which appears to have had the benefit of contested submissions on rates and what rates ought to be set but presumably it was a - one can only assume that a submission was put to that effect to the Senior Deputy President. There were two things left that I wanted to deal with, one of them shorter and the other one longer. The longer one is going to - is this issue of external relativities. The shorter one is just to make some submissions on the question of affordability and what's put by the employers in this regard.

PN227

We understand that the argument's put in two ways. It's said that it will increase costs - increased costs will cause increased fees for parents and make early childhood education less affordable. Separately or in addition it's put that the increased costs are simply unsustainable in the for profit sector and cause operators to suffer an existential crisis causing them to close and in turn then causing problems with supply of early childhood education.

PN228

These are very significant submissions to put and one would think that if the Commission was asked to make evidentiary findings as to either of those, there would be some substantial evidence put on by the person who is seeking to cause that conclusion to be reached. Indeed, the written submission that we understand you're to be provided by ACA identifies that this might be an area for expert evidence before findings would be made, although there's an attempt to say that that's something we should have done, put it on, rather than falling, as we say, on the party who's seeking to make good these findings.

PN229

The true position on this is something that really only emerged through cross-examination. The various witnesses made broad statements about affordability but were apparently unwilling, when they filed their material, to back that up with any evidence that went to the precise financial position of their business and there was generally very little evidence filed by ACA. To the extent to which the evidence emerged beyond broad assertions, it really emerged from documents being produced and then put to witnesses in cross-examination.

PN230

But some things do, we think, clearly emerge from the evidence. The first is that this is an industry which, as a broad generalisation, is very profitable and growing. Both Mr Fraser and Mr Carroll did put on evidence, the same evidence, a report by an industry analyst company, IBISWorld, I-B-I-S World, which analysed the industry. Both Mr Fraser was cross-examined as to the document but the Commission might recall that IBISWorld described this industry as one that is

a growth industry, it was in that sort of best position within the chart where it's of economic growth, and IBISWorld identified that on material it had wages over revenue was set to decrease between 2017-18 and 2022-23 from a little under 62 per cent to a little under 58 per cent.

PN231

This is an industry where it's forecast to grow and where the increased, in effect, profitability as against wages is also forecast to grow. The - - -

PN232

VICE PRESIDENT HATCHER: The focus of the evidence concerning affordability seemed to be on the four profit small operator sector of the industry.

PN233

MR TAYLOR: Yes.

PN234

VICE PRESIDENT HATCHER: How does general industry growth ameliorate the position for that type of operator? That is, they've got limited access to capital to expand, they've got a mature centre, they operate at with a mature clientele. How do they address that issue? I mean, obviously the G8s of the world are going to open new centres and get new revenue and get bigger and bigger but the operator who owns one centre or two centres in an established area, what relevance is industry growth to them.

PN235

MR TAYLOR: Well it's relevant in two ways. One, they, as operators, can grow and more than one of the ACA witnesses came along and said that over the two or three years since they first filed their statement they've now created a new centre. Some of them had, in the years leading up to giving evidence, found investors and opened new centres, so they have the capacity to grow in that sense but it also indicates, we say, an industry which, combined with the evidence about government subsidy, has the capacity to increase the amounts that are charged by the small amounts that would be necessary to fund the claim and, in cross-examination, we think we've established that none of the centres would need to increase the amount they charge per child per day by more than \$5 and in some cases it was around one or \$1 or thereabouts.

PN236

In circumstances where all of them had increased their rates per child per day by more than \$5, or sorry by \$5 or thereabouts over the last one to two years, and in circumstances where the government subsidies have come in which mean that at least for those parents who might be most directly price affected, that is the low paid, low income parents, are subsidised up to 80 cents in the dollar for services which are charging less than, I could be corrected as to the figure, but I think it was \$120 a day and hence as was put to the witnesses in cross-examination with no response that was credible denying it, but that they have the capacity to increase rates readily to meet the quite modest increase in costs if they wished to maintain their current profitability and what we saw is that in respect of most of these services, there's already very substantial profitability.

PN237

We put in our written submission, I think, the position in respect of Mr Fraser quite how much money he would continue to make by way of profit if the claim was granted in full but it clearly would have a very, very modest effect on a very substantial profit that he is generating from his business. We do say, your Honour, that this being a growth industry is relevant to capacity to pay but we also make the additional submissions that I've really moved ahead beyond the question your Honour asked to say these things are, indeed, affordable.

PN238

Ms Kearney, in ACA's written submission, we understand, is going to - is quoted as saying that her business is not profitable. That citing her original statement as filed, which makes it difficult for her to increase pay for teachers, and yet when she got into the witness box she told us she had, in fact, done that. She'd increased the rates for the teachers, had in fact - she was now paying them the rates that we would be seeking in this claim.

PN239

The thing that - I know what might be said about G8 being a different category but we nevertheless say that the evidence of Mr Carroll, who is running 500, or his company is running 500, early childhood centres across the country, is powerful evidence as to why an increase is good, is a good idea. Can we ask if the Bench would just be reminded of that evidence by turning to tabs 8 of the folder. This is Mr Carroll's further evidence filed in the work value proceedings. It was marked exhibit 95 in the proceedings and you will recall that prior to filing that statement, G8 had determined, and this is noted in paragraph 11, decided to increase all ECT remuneration to be 10 per cent above the minimum wages set by the award.

PN240

That is in the context where in the previous paragraph, he says it's not feasible for G8 to implement an increase of 11 to 33 per cent but it could increase by 10 per cent and had done so. Why had it done so? He makes that clear. This was expanded in cross-examination but for the purposes of this submission I can rely just on the statement. He makes that clear from paragraphs 14 and onwards. It's to do with attraction and retention.

PN241

For the notion that difficulties of attraction and retention are unrelated to increases - unrelated to remuneration seem to be belied by someone who we would say would be in a very good position to understand the market for ECTs, being certainly the largest employer to come before this Commission by way of evidence and so the increase was specifically done to improve retention and attraction.

PN242

Then paragraph 17 we read what the impact of that is. He says:

PN243

Paying the award rate was resulting in attraction and retention challenges for G8. Increasing ECT wage rates is added to G8s value proposition for ECTs - -

PN244

That's management speak for ECTs are ahead, they're better off.

PN245

- - - and has a (indistinct) attraction and retention. This in turn reduces turnover in ECTs and allows each G8 centre to provide a more consistent quality education offering to our children and families which will drive increased occupancy and improve financial performance over time.

PN246

It's a win. It's a win for the ECTs, it's a win for the business.

PN247

VICE PRESIDENT HATCHER: But that's at 10 per cent though. He says more than 10 per cent is unsustainable.

PN248

MR TAYLOR: Yes.

PN249

DEPUTY PRESIDENT DEAN: And he has economies of scale that the smaller providers won't have.

PN250

MR TAYLOR: When you say economies of scale this is not like manufacturing where you have a large plant and you're producing a hundred thousand widgets against another plant only producing 50. Each one is a separate centre. Sure there are some management above that which is consolidated, but - - -

PN251

VICE PRESIDENT HATCHER: He says there are economies of scale in paragraph 13.

PN252

MR TAYLOR: Yes, he does acknowledge this, but we say that those things don't detract from the notion that the proposition that this is a good thing not only for the ECTs to have an increase, but also for the businesses concerned. It goes directly to addressing problems of supply and demand of teachers and has a positive benefit. The fact that he says, well we can do 10 per cent but we can't do 11 has to be taken we say with a grain of salt.

PN253

VICE PRESIDENT HATCHER: But you're the one relying on this evidence. I mean do we take that evidence with a grain of salt or not?

PN254

MR TAYLOR: That bit you do.

PN255

VICE PRESIDENT HATCHER: He gets us you put it the bang for his buck out of 10 per cent. He doesn't need 17 per cent to deal with the issues he addressed, he got the positive result with 10 per cent.

PN256

MR TAYLOR: What I'm dealing with here is I am dealing with two discretionary considerations which are in contest. One is that there's no need - increasing rates of pay is irrelevant to attraction and retention. We say Mr Carroll's evidence gives us one powerful reason to say that's wrong, and secondly that it's unaffordable and would be detrimental to businesses. I accept that Mr Carroll can only give evidence about his own business, but I don't think this evidence does anything other than confirm that this is not unaffordable, and it's consistent then with the evidence that we got from each of the other witnesses when we cross-examined them about affordability, that they too could readily afford these changes.

PN257

The highest point it got was - I can't think if it was Ms Kearney, but I do remember one of the ACO witnesses saying, well, look - when it was put to them, you know, in your particular case an increase in the order of a dollar or a dollar fifty would be sufficient to cover the entire value of the claim without affecting in any way your profitability, and it was said, well, yes, but that would put us at a competitive disadvantage to someone down the road who isn't increasing their rate by a dollar or a dollar fifty. That may be the case if they're making an individual business decision.

PN258

It doesn't seem to affect G8, but if we are talking about an award move all business have to increase rates, then they are all going to be faced - so the same competitive pressure. Inevitably any business has to decide rates against desired profitability and the like and each one will come up with a different figure and it might be affected by the particular costs of doing business in that particular location and no doubt doing business in the centre of the CBD of Sydney is a different cost base than one doing so in a small country town in South Australia. There will be differences that will affect the rates or a charge, but if everyone is required to pay a higher rate to teachers then all can take that into account and setting and that evidence that somehow this is all terribly unaffordable we say just never got close to stacking up. It was not even within cooee of a substantial case that our claim is some way unaffordable.

PN259

VICE PRESIDENT HATCHER: If the answer is putting up rates that of course has knock on consequences to the take home incomes of other people.

PN260

MR TAYLOR: Yes, it does have knock on consequences, and depending on the amount that those are increased and the extent to which the government subsidy applies, which at its highest level will fund 80 cents in the dollar of any increase, the impact of that is one that - well, it will vary, we accept that, but what we say you don't find in this case is evidence showing that there's a major issue.

PN261

DEPUTY PRESIDENT DEAN: Sorry, Mr Taylor, what did you just say about funding, 80 cents in the dollar, what was that?

PN262

MR TAYLOR: It was that effective 1 July 2018 the Commonwealth changed the way funds childcare, and evidence was led, I am working from memory rather than a document in front of me, but the effect of which was that how much subsidy would be paid now directly to the childcare service rather than to the parent to then pay the childcare service will vary on a range of criteria, and that criteria includes the income level of the family, but also the amount of hours that the parents are working. At its highest level, so those who are working sufficient hours and have lower income, the Commonwealth subsidy is 80 cents in the dollar. So for every dollar that is being - - -

PN263

DEPUTY PRESIDENT DEAN: So the funding is related to the number of kids in the centre, the number of hours and their family income, not about a teacher's salary?

PN264

MR TAYLOR: No, it's nothing to do with the centre, it's only to do with the parents and their situation.

PN265

DEPUTY PRESIDENT DEAN: And the number of hours the children - - -

PN266

MR TAYLOR: So it's how many hours - it's nothing to do with teachers. When I said hours working I didn't mean hours worked by anyone in the centre, it's the parents and it's - - -

PN267

DEPUTY PRESIDENT DEAN: Yes.

PN268

MR TAYLOR: - - - I can't remember the expression, it's just gone out of my head - an activity test. So there's an activity test for the parents so that the parents have to demonstrate that they are working a certain number of hours themselves, and they have to demonstrate an income level, and then there's a method which then calculates how much subsidy is paid for that child to the childcare centre. It's paid in effect on behalf of the child, but now under the new system the parent only has to pay the difference as against paying the whole amount, but receiving money from the Commonwealth to be able to do so.

PN269

VICE PRESIDENT HATCHER: Can you just remind us where we find all that.

PN270

MR TAYLOR: Yes. I recall that - I know that Mr Fraser gave some limited evidence about it and I cross-examined him about it, and Ms James gave evidence

about it too. There might need to be also perhaps a reference to the Commonwealth publication on it, but we can perhaps if it's helpful add that to our note that I would like leave to be able to file in reply to Mr Fagir's submission, written submission, some reference to that material.

PN271

VICE PRESIDENT HATCHER: Mr Taylor, the problem with the affordability debate of course is receiving submissions based upon a range of conceivable outcomes rather than a known outcome. Is an alternative for the Full Bench to give a provisional in principle view as to what adjustment, if any, should be made to wages and then see further submissions from the parties, particularly looking at you, Ms Eastman, as to how that might play out in reality?

PN272

MR TAYLOR: Yes. I think from our side we would be less enthusiastic if that also extended to going back into evidence and extending the case, but I did anticipate that in respect of the 158 case that it was likely that the Commission would seek some further assistance, because again the parties haven't for example dealt with the question of whether there's any reason why the entire sum shouldn't - the entire increase shouldn't occur immediately or should be phased in over time. So I did anticipate something along those lines, but I would be somewhat more resistant if the Bench had in mind further evidence, but of course ultimately we're in the Bench's hands as to what information it thinks it needs in order to make a decision and we will assist in that regard.

PN273

I am sorry to keep jumping around, but, Deputy President Dean, coming back to the questions about Catholic systemic New South Wales and ACT agreement I said I wasn't in a position then to give you the assistance perhaps I should have been able to do, but Ms Saunders tells me that there is a clause in that agreement, clause 14.3, the effect of which is to translate the steps as follows, that step 5 of the enterprise agreement would equate to level 3 of the Federal Award and step 13 would equate to level 11 of the Federal Award. So as a result the amounts that are being sought in this case are considerably below the top level of that agreement, but it might be that you would prefer us to put some of this in writing or produce a chart of the sort that I suggested we could do like the one behind tab 3.

PN274

Can I now tread without some level of trepidation into the murky waters of external relativities as the last subject matter in this oral submission. The employer case in this respect is fairly simple. It points to existing rates in other professional awards; nurses, professional engineers, and says that the outcome of our claim would be to lift rates above those rates and that would contravene a long standing principle that rates ought to be set by reference to external relativities and in particular that award rates for one award shouldn't move in a way that would disrupt external relativities.

PN275

When that submission was first raised in circumstances where this case has already expanded to include a work value case, and now apparently needs to expand to a case that involved moving every professional rate, with some little

concern on my part, but we say a number of things about this. The starting point is this, that there is no wage fixing principles in the Act. There are statutory obligations that this Commission has that are in the Act which require it to satisfy itself that the wage rates are appropriate, and it does so by considering cases that come before it, and to come to a view, as we would urge you to, that there's been substantial work value change that the rates currently for teachers don't properly reflect the value of that work, and then to say but we can't do anything about it because there are other awards which apply to professionals which have rates that are lower, we say would not be to engage properly with the statutory duty.

PN276

It shouldn't be the case that you need to firstly, or any applicant should firstly move some other award before it can move the award that's actually before the Commission. We don't in this case, we don't in this case seek to advance our case on the basis that what should happen is a removal of the compression which is the reason why professional rates in a variety of awards are as low as they are. We're not putting the case forward on the basis that compression should be removed, but we do say that the substantial work value change, and we do say that you can award a substantial increase without affecting external relativities as traditionally understood. When I say as traditionally understood, because as the Vice President raised even back in 2004 and certainly now the rates that you find in the teachers award but also in the other professional awards have lost all contact with the proper external relativities. Because of compression - because of compression, the flat dollar increases, the professional rate now in the manufacturing award, 210 per cent, is not a rate that you find in any professional award actually being paid, but that is the external relativity. If you were - - -

PN277

VICE PRESIDENT HATCHER: I thought the point of the pharmacist award was slightly different. It was that it had never been set in accordance with that relativity. That is even putting aside a compression it had not been set according to that relativity.

PN278

MR TAYLOR: Yes. And we don't find in our case that the rates here have been set based on specific professional rates. There's nothing in the history that we have discovered which says that the rates are ones which are set referable to C10, but what we're faced with is a submission that you can't increase the rates because that would disturb external relativities, and what I want to now do is put a submission which says you can increase those rates without being concerned about those external relativities, and without being concerned that you're getting ahead of any further analysis of professional rates that the president has indicated on a provisional basis that this Commission may well now consider over what presumably will be some years if it's going to review all 29 awards on that basis.

PN279

Now, the statement in question, what I have just referred to, is found in this folder behind tab 10, and one tab earlier are submissions that we filed in these proceedings arising from the pharmacists case, but can I just turn firstly to the statement. No doubt this is familiar to the Bench, but it arises of course out of the pharmacists decision and in particular out of the aspect of that decision which

deals with the question of alignment of rates and relativities between pharmacists with a particular qualification, four year undergraduate degree, and the manufacturing award. In that case of course the Full Bench headed by the vice president presiding today considered that that might itself potentially constitute a work value consideration, and invited submissions as to that and foreshadowed that it might have to be referred to the president.

PN280

That having occurred the president issued this statement, which includes at paragraph 12 a reference to these proceedings; that is that the teachers award is currently the subject of proceedings and identifies one of the bases upon which the application is being advanced is that the pay rates for undergraduate degree qualified teachers in early childhood and school education are not properly or fairly aligned with classifications requiring equivalent qualifications in the manufacturing award or with the AQF.

PN281

I am not sure we have put the case in quite that way, but it's certainly the case that the employers are putting a case against us that these rates should not change because they are aligned with the amounts being paid to classifications in other professional awards, and by aligned I don't think they mean that there has ever been any history of alignment that one can find, but just they happen coincidentally to be in or around the same level and it would be wrong to change them.

PN282

As I said the reason why - and the upshot as the Bench is aware is that the president indicated in paragraph 13 a provisional view about the 29 awards, which would include this award, being referred to a Full Bench for review starting, his provisional view is, with the four awards identified in paragraph 10 does not include this - but that it's a review which would occur after the determination of the application in this proceeding, which rightly or wrongly we read as a reference to the fact that the president doesn't believe that any such review in any way is an impediment to this Bench determining the work value claim and awarding an increase.

PN283

We have prepared - before I hand that up can I just take you back to the previous tab in the submissions we put arising out of the pharmacists decision and just identify some particular aspects of those submissions. When that decision came down we put on a submission which provided some history of the C10 classification structure, and I am looking particularly now if the Bench could follow with me paragraphs 10 and following how the C10 classification structure came into being. It was born it would appear in April 1990 following the 1989 national wage case, and at that time professional engineers and professional scientists were covered by parts of that award, and you will see in paragraph 12 that at that time professional engineers were given certain - professional engineer classifications were given certain relativities to C10. I am not suggesting that we now can explain why those relativities were given, in particular why it is that a degree qualified engineer would be at the C5 rate which corresponds with a much lower educational requirement, but that's how it worked at.

PN284

At that time you will see that level 3, level 4 were set 175 and 195 per cent of the C10. It subsequently moved, those percentages moved such that the amounts became 180 and 210. That's what you will find now at the C1 level within the metals award, 180 and 210, without there being wage rates for the reasons that the vice president raised with me earlier.

PN285

Our submission is that the graduate teacher within a very short period of time is doing the full job in a way that a graduate engineer under certainly now the professionals award is said to step through a series of steps, and I think if I read the ACA submissions correctly they too assert that teachers are doing pretty much the full job from day one. Our submission is that the appropriate - if there was going to be a relativity exercise engaged in, which hasn't happened before, then the starting level for a teacher would be in the order of the C2B rate of 160 per cent of a C10 rate.

PN286

Ms Saunders has prepared some figures which derive from the award which I thought may assist to remove concern about our claim and external relativities. So this is a table which starts with manufacturing award classification, and you will see there the references to the internal relativity reference points; first C5 for which one needs a Certificate III and 80 per cent towards a diploma. That's at 130 per cent of C10. The next level is C2B which I have indicated would be we say equivalent to the four year degree level teacher. Then there's C1A at 180 per cent and C1B at 210 per cent.

PN287

The current manufacturing award rates are set out in the third column, and the current teachers award rates corresponding with the levels 3 and 12 are set out in the next column. Then the penultimate column headed 'Current manufacturing award rate with correct relativities', that heading is to indicate what the amounts in the metals award would be or the corresponding classification levels would be if you applied the 1990 determined internal relativities, which are said to be used as a basis for external relativity comparison, and what that indicates amongst other things is the compression that's occurred over time.

PN288

What we say this demonstrates by reference to the last column, our claim, is that the rates that we are seeking are not greater than proper external relativities. So this Commission actually thinks that the only way it can determine this claim is the employers assert - we reject this proposition by the way, but just embracing it for the purposes of the debate - is to be satisfied that it won't affect external relativities, then presumably the proper way of doing that if it's to be understood in its historical context is by reference to the comparable reference points in the metals award, and as you will see the claims at the top level, our claim is just a fraction higher, but the claims we say fall within such external relativity rates. So we don't there is any impediment to an increase.

PN289

VICE PRESIDENT HATCHER: So this table is premised upon a teacher's university degree level 3 being aligned with an advanced diploma. Why is that a starting premise? That's the whole point raised in the pharmacist award. I mean no one talks in the manufacturing award about whether you're doing the job on day one once you get your advanced diploma.

PN290

MR TAYLOR: Correct. We debated frankly where to put that level 3 and we took a view that at the most generous level it would be there, influenced in part by the fact that rightly or wrongly, and we're not here to debate the rights and wrongs of the professionals award, but professional engineer at least back when rates were being set in 1990 was pegged at 160 per cent as an experienced engineer. Now they too had a degree. Why back in 1990 they were pegged there is unclear, certainly unclear on what I have before me, and so that's where we - to the extent to which we have got those four levels on the left-hand side they correspond in a broad way to the levels that were set for professional engineers back in 1990. Of course the actual rates have compressed over that time, but there was a good argument that - there's no doubt an argument that can be had before a Full Bench arising from this statement that there was a whole series of professional rates that should be increased by even more.

PN291

What we are trying to do here is say this, that you do not as a Full Bench need to be concerned about granting the claim because of a concern that there is some further proceedings that it might get ahead of. What we're saying is that granting our claim falls within and below the outcome of those proceedings and is not going to affect what is said to be properly fixed external relativities.

PN292

The only other thing I was - there's two other things I was going to say about this. I think the Bench may be aware of this, but not only did the president refer to our proceeding in paragraph 12, but Commission staff at page - we're just looking at the annexures now - page 11 of 18 of the print sets out firstly the manufacturing award classifications and rates of pay and compares that to rates of pay under the teachers award and identifies the actual relativity to C10, and so you see on page 11 that the current actual relativity to C10 of a level 12 teacher is 158 per cent.

PN293

If we take the approach that the employers take in this proceeding that these rates should be properly set to external relativities, then on any view that should be 210 per cent, not 158 per cent. So hence we say there really isn't a concern here, but the rest of that document may well be of assistance. It shows for example the amount actually being paid to a level 3 teacher, someone who has completed a four year degree or a two year masters having had a previous degree, is less than - sorry, is it at 120 per cent of the C10 rate. So again well below an actual amount if you were dealing with external relativity. So there isn't we say a concern, but we nevertheless in our submission on the pharmacist case put some submissions in respect of compression and the effect of compression, and you may recall those submissions, they're behind the previous tab, particularly at paragraph 23.

PN294

VICE PRESIDENT HATCHER: The problem is if you set rates on the basis that you're unwinding compression that creates a principle that's applicable to every single award classification above C10.

PN295

MR TAYLOR: And that may well be an issue that is emerging out of that Full Bench case, but we are not putting forward our case on the basis that you unwind compression. What we're putting forward is a case of work value increase, what we're adding to that is if there's a concern about external relativities on a traditional way the amounts that we are seeking are well below any such external relativities. It is true as a matter of fact that the reason why professional rates - sorry, professional rates in the awards for which there was actually fixed against C10 are as a matter of fact so below the actual relativity that was set for them is because of compression. We have read what the pharmacists Full Bench said about that, that the applicant in that case had to accept that there was some level of that is the natural outcome of the submissions that were put in annual wage reviews, and you have read what we have put in response to that in paragraph 23, which is three parted.

PN296

The first is at a fundamental level no party coming before this Bench having proven, assuming this is the case, that the work is undervalued should in some way be denied the right rate of pay because of some submissions that were put by some people at some earlier point in time. That shouldn't be the case, but in any event the actual submissions that were put were summarised in that paragraph, but were submissions that were to the effect that in a number of those annual wage reviews there should be a dollar increase for some employees and a percentage increase for others. The Commission didn't accept that, but it's not as if the union movement can somehow be bound by positions that it did in fact put, and particularly professional unions were always, or invariably putting submissions that there shouldn't be flat dollar increases because of the compression effect.

PN297

Fundamentally we are not as I said here saying that these things should be changed because this Bench is going to unwind compression. We're here saying there should be work value increases, but you don't need to be concerned about external relativities and you don't need to be concerned with getting ahead of whatever Full Bench proceedings are going to occur over what would appear to be some further number of years by awarding the increases that we're seeking.

PN298

Your Honour the Vice President asked some questions about when the actual rate of pay for - the actual C1A and B rate of pay went out of the manufacturing award. Maybe what we can do is provide you with a note about this, but Ms Saunders in her very efficient way has provided me with this handwritten note that in the 2008 Full Bench decision 717 in December 2008 rates were provisionally included in the manufacturing award, but to be reviewed after the professionals award was settled. The professionals award was made in September 2009 and it contained rates that were not identical to the rates that were then in the manufacturing award also applying to professional engineers and scientists, although there wasn't a substantial difference between them, and then in a

decision that's 2009 AIRC Full Bench 996, a decision handed down in a very efficient way on 30 December 2009, a very short decision I am told, an application made by the AiG with apparently no opposition removed the C1 rates from the manufacturing award and added the note that you now find there against C1 referring to the professionals award.

PN299

VICE PRESIDENT HATCHER: Can I ask your client to do this exercise, to take the C1A and B rates as they last appeared in the manufacturing or metals award as then - - -

PN300

MR TAYLOR: When you say they last appeared can I just understand what you mean by that.

PN301

VICE PRESIDENT HATCHER: I can see that in the last version of the award before WorkChoices came in and the new system came in that the rates were in the metals award, and then extrapolate what they would be today if they had remained in and been the subject of annual wage review decisions in the normal course of events.

PN302

MR TAYLOR: So what they would be if they had remained in the manufacturing award - - -

PN303

VICE PRESIDENT HATCHER: As they were at that time and been adjusted like all the other award rates.

PN304

MR TAYLOR: Taking into account nothing more or less than national wage reviews?

PN305

VICE PRESIDENT HATCHER: Yes.

PN306

MR TAYLOR: Yes. Of course we can do that. So the last thing I wanted to do is seek leave - you haven't seen Mr Fagir's submission - I don't wish to add any adjective about it beyond the fact that it is unsurprisingly quite detailed, going to a series of matters of facts. There are a number of matters of detail as to evidence and I would like leave to be able to file a written document. To the extent to which we have dealt with issues orally we won't deal with that again in writing of course, it's just going to those matters which are more matters of detail. If we could have an opportunity to put that on in reply.

PN307

VICE PRESIDENT HATCHER: Perhaps we should be able to see that submission before we make that direction.

PN308

MR TAYLOR: Yes, of course.

PN309

VICE PRESIDENT HATCHER: Is that going to be filed sometime soon, Mr Fagir?

PN310

MR FAGIR: I can provide hard copies now and it can be filed.

PN311

VICE PRESIDENT HATCHER: You can file it in court then.

PN312

MR TAYLOR: Subject to the desire to respond to that material in an efficient way that concludes what we wanted to say orally in closing the two cases.

PN313

VICE PRESIDENT HATCHER: All right. So if we resume at 9 am tomorrow will that allow us to finish all the submissions that we need to hear, noting Mr Taylor's application for a written response as to certain matters?

PN314

MR FAGIR: Assuming the Full Bench promises to very carefully read every word that appears in my written submission my objective would be to be no more than two hours, perhaps two and a half.

PN315

VICE PRESIDENT HATCHER: And if that promise is not forthcoming?

PN316

MR FAGIR: Perhaps two and a half to three at the outset.

PN317

VICE PRESIDENT HATCHER: All right. So you will finish by lunch?

PN318

MR FAGIR: Yes.

PN319

VICE PRESIDENT HATCHER: How long will you need, Mr Warren?

PN320

MR WARREN: I will be a short period of time.

PN321

VICE PRESIDENT HATCHER: All right. Will the Commonwealth be making any submissions of substance at this stage?

PN322

MS EASTMAN: Your Honour, not at this stage, but in light of the matters raised today I will need to take some instructions and it may well be that we could

provide a short note dealing with the Commonwealth's position in relation to the subsidies, and there are a few other matters just raised orally this morning that we may also wish to deal with. I will get those instructions this afternoon.

PN323

VICE PRESIDENT HATCHER: All right. We will now adjourn and resume at 9 am tomorrow.

ADJOURNED UNTIL THURSDAY, 05 SEPTEMBER 2019 [12.25 PM]