

## IN THE FAIR WORK COMMISSION

Matter No: 2018/18 and 2018/20

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

### **SUBMISSION OF UNITED VOICE –FACTUAL FINDINGS**

1. This submission is made pursuant to the directions of the President made on 9 May 2019 requiring ‘*interested parties*’ to file a submission setting out the findings they seek to have made based on the evidence before the Full Bench in the 4 yearly review of the *Children’s Services Award 2010* (‘the Children’s Services Award’) and the *Educational Services (Teachers) Award 2010* (‘the Teachers’ Award’).
2. There was substantial evidence presented by the union and employer participants in the review of the Awards. United Voice called 5 witnesses: Ms Bronwen Hennessy, Ms Pixie Bea, Dr Marianne Fenech, Ms Alicia Wade and Ms Preston Warner. Dr Fenech is an expert witness qualified as an academic in early childhood education and the only expert that gave evidence in these proceedings. The remaining witnesses of United Voice were all predominately award reliant educators except Pixie Bea who is an experienced worker in the sector currently engaged under an agreement. All United Voice’s witnesses were cross examined.
3. The Australian Childcare Alliance (‘the ACA’) is a peak body for childcare providers and an employer group and was represented by Australian Business Lawyers. The ACA presented a substantial evidentiary case in support of its own claims and in opposition to the union claims. The ACA filed and relied on evidence of 11 witnesses who were either owners or managers of early childhood educational services. These witnesses represented a diverse sample of providers in terms of size and location although community providers, not-for-profit providers and larger providers were not represented in the sample. There was also among the ACA witnesses a franchisee. All the ACA witnesses were cross examined.
4. None of the ACA witnesses formally presented themselves as experts although their statement evidence was replete with unqualified opinions and submissions. The Commission is a specialist industrial tribunal not bound to apply the rules of evidence. The participants noted that there would not be formal objections made to statement evidence when it was tendered in light of the significant witness evidence to be heard and limited time available. The principal foreshadowed objections are that the witnesses in their statement provided unqualified opinions, submissions or the material is irrelevant.

5. We attach a schedule containing objections to the ACA witness statements tendered.
6. Generally, where an objection is made and accepted, the Commission should attribute no weight or little weight to the material.
7. The evidence presented was more than an anecdotal snap shot of providers, employers and employees within the sectors covered by the Awards. As will be noted there are a number of matters that were not contested or an identified consensus emerged.

### **The National Quality Framework**

8. The claims of United Voice for allowances concerning the requirement that providers within a service designate a person as a Responsible Person and an Educational Leader and the claim concerning an increase in non-contact time are claims that concern changes to the sector occasioned by the introduction of the National Quality Framework ('NQF') in 2012. The NQF was introduced after the Awards were made and did not feature in the making of the Awards.
9. The NQF is a regulatory framework and not a funding model. The funding of the sector is quite distinct from the NQF.
10. A general threshold finding which the Commission is entitled to make is that the NQF has occasioned industrially significant change in the nature of the work within the sector and the current system of regulation is not reflected in any sense within the Awards.
11. The fact that the NQF was introduced after the making of the Awards is a fact established by the brief award histories detailed in submissions lodged. The continued existence of the NQF is a legislative and policy fact. There was no evidence or suggestion that the NQF was likely to change or that there was any proposal for its substantial revision.
12. The evidence provided some useful context to the significance of the introduction NQF to the sector covered by the Awards and the interaction (or lack of interaction) between the current provisions of the Awards and the regulatory burden now imposed on the sector by the NQF.
13. There was a clear consensus that emerged from the evidence that the introduction of the NQF represented a significant regulatory change, with ongoing and significant obligations concerning how work under the Awards is conducted and that the Awards do not in any meaningful sense reflect the regulatory regime that now and into the future governs the sector.
14. A number of ACA's witnesses noted that the NQF occasioned a major shift in the regulation of the sector.<sup>1</sup>
15. Ms Karthika Viknarasah<sup>2</sup>, a director of a company that operates 2 childcare centres, post graduate qualifications in education and had over 10 years' experience as an Educational

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<sup>1</sup> Transcript, Monday, 6 May 2019, Viknarasah PN1191 (hereafter PN), Fraser PN1892 to 1899, MacleanPN2533 to 2536, Chemello PN2763; Mahoney PN4001 to 4002; McPhail and Llewellyn's experience did not traverse previous regulatory schemes and the introduction of the NQF.

Leader and centre director, stated that the introduction of the NQF was a ‘big change’ for the sector.<sup>3</sup> Ms Viknarasah described the NQF as less prescriptive than previous regulation and that the NQF requires ‘continuous improvement’<sup>4</sup>:

*The problem is that they (the NQF standards) were less prescriptive and that's why they're so difficult to adhere to. The previous system that we had was very prescriptive so we either knew we were following or not following. Because the National Quality Framework is so open to interpretation it's very difficult to know exactly how we're going.*<sup>5</sup>

16. A number of other employer witnesses observed that the NQF demand for continuous improvement was a feature of its rigor.<sup>6</sup>

17. [REDACTED]  
[REDACTED] The witnesses who were questioned about the assessment process consistently indicated that the process was rigorous<sup>8</sup>, demanding, required thoughtful consideration of the quality standards imposed by the NQF and the results of the assessments were significant to a provider as among other things the results informed choices about the placement of children in care.<sup>9</sup>

18. Ms Pamela Maclean, an operator of 2 long day-care services in Queensland, with over 30 years’ experience in the sector and prior to the introduction of the NQF had worked as an assessor for the National Childcare Accreditation Council noted:

**Bull:** *I'd be interested to hear your view about the National Quality Framework. It was a significant change wasn't it?*

**Maclean:** *Yes, it was quite an empirical shift for many of our educators. It was basically a shift from what activities and experiences do you provide to a system where it wanted to know what were the outcomes achieved for children. So it was quite a different way of looking at what we did each day in our practise. .... In*

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<sup>2</sup> Statement - Exhibit 13.

<sup>3</sup> PN1191.

<sup>4</sup> PN1202.

<sup>5</sup> PN1201.

<sup>6</sup> See: Fraser, PN1892 to 1898 and PN1929 to 1930; Paton PN2356 to 2360; Maclean, PN2534 to 2535.

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<sup>8</sup> A centre would have an assessor attend their premises for between 2 or 3 days.

<sup>9</sup> Fenech NP673 on informed choice; Katy Paton PN 2363 to 2370; MacLean PN2574 to 2577; Chemello PN2770. McPhail PN3083 to 3087; and Tullberg PN3720 to 3725.

2012 when it was launched it was a bit of a tsunami of change for those of us in the sector.<sup>10</sup>

19. There was significant evidence and dispute as to whether classifications within the Children’s Services Award incorporated duties and responsibilities imposed on the sector by the NQF in the context of United Voice’s allowance claims. This issue is addressed further below. Ms Llewellyn, an operator of a centre in Mill Park, South Australia, had operated her centre for approximately 3 years. Ms Llewellyn had an extensive background in human resource management and industrial relations and a degree in area.<sup>11</sup> Ms Llewellyn observed in her statement that the Awards ‘fail to recognise the intricacies between the different state regulations and therefore the different operational requirements that we need to be able to run a profitable and successful business.’<sup>12</sup> When asked to elaborate on what she meant by this statement, Ms Llewellyn noted:

**Bull:** *The National Quality Framework is principally a uniform national law that applies to all states and territories in Australia. You'd agree with that proposition?*

**Llewellyn:** *Yes.*

**Bull:** *By making that statement, are you also indicating that the award should reflect the related regulation of the sector it covers?*

**Llewellyn:** *Yes, definitely.*

**Bull:** *So, it's desirable that the industrial instrument reflects what are critical regulations governing the sector which the industrial instrument covers. You'd agree with that proposition?*

**Llewellyn:** *Yes.*<sup>13</sup>

20. A number of other employer witnesses also noted the disconnect between the Awards and the NQF. Ms Paton, an operator of 2 long day care centres in Queensland observed in her statement that she does not think the Awards ‘work together or consider all the other legislation that applies to the ECEC sector.’<sup>14</sup> Ms McPhail, an operator of 2 centres and an experienced business person, noted in her statement that ‘aspects of the

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<sup>10</sup> PN2534 to 2535.

<sup>11</sup> Statement, 9 April 2019, Exhibit 39 at [3] and [4]. Ms Llewellyn’s oral evidence commences at PN4081.

<sup>12</sup> As above at [82].

<sup>13</sup> PN4261 to 4263.

<sup>14</sup> Exhibit 21, at [79].

*Awards are out of sync with the industry and the legislative requirements.*<sup>15</sup> Ms Tullberg stated that the Awards needed to be ‘*updated*’ to reflect the NQF.<sup>16</sup>

**S1 –Allowances - Responsible Person –‘*that mantle of leadership*’<sup>17</sup>**

21. The evidence clearly demonstrated that the requirement imposed by the National Law that providers designated a person on the premises of a centre while it is operating as a Responsible Person is observed and considered an important element of the current scheme of regulation.
22. A number of providers in an attempt to down play the critical nature of the imposition on them of the requirement to designate a person as a Responsible Person<sup>18</sup>, argued with some minor variation that ‘*someone has always been responsible*’<sup>19</sup> and that having a Responsible Person was a content less ‘*label*’.<sup>20</sup> A number of witnesses indicated that the role of Responsible Person is one that has always existed in the sector and the practise was supported by earlier regulations requiring a person to be in charge of a service or a designated supervisor.<sup>21</sup> Mr Fraser noted ‘*there was always someone in charge of the centre which was usually the director*’.<sup>22</sup> Ms McPhail similarly describes the requirement to have a Responsible Person as a ‘*legislative requirement that can be complied with by allocating the title to qualified employees who already have the responsibility as listed as a duty of their position under the Award*’.<sup>23</sup>
23. There was no dispute that the requirement to designate a person as the Responsible Person is a novel explicit requirement introduced by the NQF. Ms Brannelly clearly indicates that prior to the NQF ‘*there was no legislated requirement for a responsible person to be placed in charge*’.<sup>24</sup>
24. The actual practise of providers clearly conflicted with the characterisation of a Responsible Person as a content less label subsumed within existing classifications or a superfluous

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<sup>15</sup> Exhibit 28 at [30].

<sup>16</sup> Exhibit 35 at [87].

<sup>17</sup> MacLean PN2617.

<sup>18</sup> Regulation 150 of the National Law requires that staff records include the name of the responsible person at the centre based service for each time that children are being educated and cared for by the service. Regulation 173(2) (c) requires that the name of the responsible person at any time is displayed.

<sup>19</sup> Exhibit 38, Mahony at [89].

<sup>20</sup> Exhibit 39, Llewellyn at [86] described the role as a ‘*label*’ and that the approved provider is legally liable. Fraser in her statement, Exhibit 18, described the designation of a responsible person as a ‘*legislative title we are required to give an employee*’ at [119], see also [93].

<sup>21</sup> Exhibit 13, Viknarasah [115] to [116]; Exhibit 18, Fraser at [114]; Exhibit 25, Maclean at [102]; Exhibit 34, Brannelly at [41]; Exhibit 35, Tullberg at [89] to [94].

<sup>22</sup> Exhibit 18, Fraser at [114].

<sup>23</sup> Exhibit 28, McPhail at [93].

<sup>24</sup> PN3458.

adjunct to the legal responsibility of the approved provider. The evidence clearly indicated that the general practise of providers was that the designation of a Responsible Person is viewed as a fundamental and important obligation. This was reflected in the practise of providers to designate the approved provider<sup>25</sup>, the centre director<sup>26</sup> or another senior employee<sup>27</sup> as the responsible person. Pamela MacLean carefully selects 8 of her employees to be the responsible person if required:

*... the employees we select to perform that duty (responsible person) are also likely to be those we pay above award rates (or at higher levels under the awards) because they have demonstrated they are responsible, good team members who have shown they are capable and trustworthy and able to take on responsibility with grace.*<sup>28</sup>

25. Generally, the evidence indicated that great care was taken to ensure that the Responsible Person was a senior experienced employee and frequently paid a salary in excess of the award minimum.<sup>29</sup> The decision to allocate the role to an employee was considered and often incorporated into the roster. Mr Mahony, an operator of 2 centres in the suburbs of Adelaide readily agreed that he sought to ensure that the directors at each of his centres were the Responsible Person: *'I certainly do.'*<sup>30</sup> Ms Maclean similarly observed that it was her practise to ensure the director or assistant director were the Responsible Person and that she did not assume the role herself so as *'not to undermine the role of the director.'*<sup>31</sup> In recognition of the significance of the role, a number of witnesses indicated that they ensure that the employee who is commonly the Responsible Person was paid well above the award.<sup>32</sup> [REDACTED]

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<sup>25</sup> Llewellyn at PN4271; Hands at PN4815.

<sup>26</sup> At PN2586 Ms Maclean noted *'Our directors and assistant directors are there to cover that role'*; Brannelly at Exhibit 34 in her statement notes the responsible person in her centres are always the assistant director, coordinator or director at [38].

<sup>27</sup> Fraser at PN1905; Chemello at PN2804 to 2808; Tullberg at PN3637 to PN3688.

<sup>28</sup> Exhibit 25 Statement of Maclean, 15 April 2019, at [107].

<sup>29</sup> See, for example, Maclean at PN2588 to 2593: Ms Maclean's preferred practise was for a director to be the responsible person and all the directors she engaged were paid above award wages. McPhail notes in her statement that her centre director is the responsible person and because of the *'valued roles'* she performs is *'on a salary and bonus structure significantly above her applicable award'* at Exhibit 28 at [85].

<sup>30</sup> PN3979.

<sup>31</sup> PN2586 to 2591.

<sup>32</sup> Fraser at PN1908; Maclean PN2592; Chemello notes *'all my staff are on above award wages'* at PN2819; McPhail PN3097; Tullberg PN3637.

[REDACTED]

*The role is not reflected in current award classifications*

26. A number of witnesses noted that the role of Responsible Person was already incorporated into the classifications under the Award. Typically, the indicative duties of a level 6 director which required responsibility for the ‘*overall management and administration of the service*’ or the requirement that a level 5 assistant director ‘*assume responsibility for the day-to day management of the centre in the absence of the director*’ were cited as an indication that the Children’s Services Award classifications incorporated the duties imposed on a responsible person.
27. A defining characteristic of the Responsible Person under the National Law is that the person must be present at a centre based service at all times that the service is educating and caring for children.<sup>34</sup> A number of witnesses readily conceded that while a director and an assistant director had management responsibilities these duties did not necessarily require the person to be on the premises to fulfil these duties.<sup>35</sup>
28. The NQF is not prescriptive concerning who can perform the role of the Responsible Person and the role can be performed by different employees at varying levels of classification throughout the day. Providers have a choice as to who is the Responsible Person.
29. A cook or a level 3 employee can be a Responsible Person. All employees up to Level 4 have indicative responsibilities that are predicated on being supervised by the director or assistant director. When questioned about a level 4 employee under the Children’s Service Award being the Responsible Person, Ms Llewellyn conceded that a person at this level always worked under the supervision of the director or an assistant director and that when they were asked to take on the role of Responsible Person they were being asked to assume responsibility on their own shoulders quite independently.<sup>36</sup>
30. The contention that the role of Responsible Person is subsumed within general management duties or for that matter any of the classifications of employment within the Awards is nonsensical in light of the role not being appurtenant to any classification and that no classification within the Awards require responsibility or management to be connected to being present on the premises at all times. The fact that a person other than the director or an assistant director can and will be the Responsible Person indicates the independence of this role from the current classifications of the Awards.

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[REDACTED]

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Exhibit 3 at page 1.

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Viknarasah PN1223 to 1232; Brannelly PN3450; Tullberg PN3709 to 3714.

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PN4292 to 4298.

*The role is not subsumed within the responsibilities of the approved provider or nominated supervisor*

31. A number of witnesses also sought to equate the Responsible Person with the approved provider or nominated supervisor.<sup>37</sup> Some attempt was made to conflate the legal responsibility that an approved provider has for their centre with the responsibility that the Responsible Person takes on.<sup>38</sup> Dr Fenech when cross examined on the matter observed that the approved provider and the nominated supervisor are often the Responsible Person but there is no requirement that they must be the Responsible Person and sometimes other employees will be the Responsible Person for relatively lengthy periods in their absence.<sup>39</sup> The assumption that the approved provider and nominated supervisor will usually be the Responsible Person reinforces the significance of the role but the positions are in no sense coextensive.
32. Certified supervisors and supervisor certificates have been removed from the National Law *'to reduce red tape for approved providers.'*<sup>40</sup> The role of Responsible Person is now explicitly intended to apply to persons other than the approved provider and this feature of the National Law's treatment of the role is about affording approved providers *'more autonomy to decide who can be the responsible person in each service.'*
33. The role of Responsible Person is distinct from the status given to the approved provider as the person principally legally liable for compliance with the National Law. An approved provider would not be a person that would be an employee and paid an award based allowance. Further, an approved provider can be a body corporate. A Responsible Person must be a natural person.<sup>41</sup> Many approved providers are corporations and can never be the Responsible Person.<sup>42</sup> The evidence broadly reflected that provider practise concerning who is designated the Responsible Person reflected the intended significance of the role: the preference is to have a person in the role with experience and seniority.

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<sup>37</sup> At PN4811 to 4827, Alexandra Hands notes that as the approved provider when she was on the premises she was the responsible person but that when she left the director took over the role. Ms Fraser notes that the approved provider has *'liability of the centre, never the Responsible Person'*, exhibit 18 at [115]. See also Tullberg at PN3672 who notes that the responsible person has *'no liability'*.

<sup>38</sup> PN621 to 638.

<sup>39</sup> PN621 to 633.

<sup>40</sup> Exhibit 3, National Quality Framework, Information Sheet, Responsible Person Requirements for Approved Providers from 1 October 2017 at page 1.

<sup>41</sup> Section 162(1) of the National Law is the source of the obligation to have a responsible person on the premises of a centre when it is operating. The section notes that an approved provider (if an individual), nominated supervisor or a person in day to day charge of the service *'must be present at all time'*. The role can only be performed by a natural person.

<sup>42</sup> s162 (1) (a).



34. A number of the witnesses noted that it was their practise to differentiate the role of approved provider and Responsible Person. Mr Mahony is the approved provider for his centres but deliberately does not perform the role of the Responsible Person when he is on the premises as he prefers to *'have the responsible person, someone who's there in the normal working time as, you know, as an obligation to the staff and to the proper running of the place.'*<sup>43</sup> Ms McPhail operates two childcare services through a corporation and the approved provider is a corporation.<sup>44</sup>

*A broad range of employees can be a responsible person and are in practise*

35. Who can be a Responsible Person is very broad<sup>45</sup> and evidence indicated that despite the clear acknowledgement that the role should be performed by a senior staff member relatively junior and ostensibly unqualified staff performed the role often at the beginning and end of the day. Ms Viknarasah admitted that *'Lena'*, the cook at her centre could and did perform the role of Responsible Person.<sup>46</sup> There was no suggestion that Lena was not an appropriate Responsible Person but Lena performed this role for no reward as a conscientious member of staff.

36. Ms Viknarasah readily admitted that Lena was engaged and paid as a cook and was paid no allowance for being the Responsible Person.<sup>47</sup> When questioned about this state of affairs, Ms Viknarasah observed:

**Bull:** *You've said earlier in your evidence that it's a desirable state of affairs that centres should be staffed with the senior and the best qualified people most of the time?*

**Viknarasah:** *Yes.*

**Bull:** *Do you think having some allowance or some money associated with being the responsible person would encourage that state of affairs?*

**Viknarasah:** *Well, Lena's already agreed to be the person and she's paid as the cook.*

**Bull:** *No, but as part of the award if you had to pay an allowance to the responsible person do you think that would alter some of the decisions you make as an owner operator of services as to who became the responsible person?*

**Viknarasah:** *Yes, I would probably not put Lena as the responsible person. It would - I would probably step in much more often so that I wouldn't have to pay that allowance.*

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<sup>43</sup> PN7980.

<sup>44</sup> Exhibit 28 Statement of McPhail at [8].

<sup>45</sup> As above, the criteria are that the person is over 18, has adequate knowledge and understanding of the provision of education and care to children and an ability to effectively supervise and manage an educational care service. There are no educational standards or a level of experience associated with being a responsible person.

<sup>46</sup> PN1231.

<sup>47</sup> PN1231 to 1241.

**Bull:** But you're also a far more qualified and better experienced educator than Lena is?

**Viknarasah:** Yes.

**Bull:** So currently under the award there's no incentive particularly for you to assume that responsibility?

**Viknarasah:** I mean there's a legal requirement for somebody to do it so if nobody's going to do it, it would have to be me.

**Bull:** But you'd agree that effectively there's no - nothing is paid to the responsible person when they have to assume that position?

**Viknarasah:** Yes, apart from their normal ordinary hours.<sup>48</sup>

37. Ms Maclean also conceded that it was possible for quite junior staff to be the Responsible Person<sup>49</sup> but that it was not good practise to have junior persons opening and closing centres. As a conscientious manager, Ms Maclean recognised the importance of role and took care in selecting a Responsible Person:

*I tend to look at our staff and work with our directors and assess who is coming along well. Who is ready to take on that mantle of leadership to a small degree for a small part of the day to - and who manages well with families and who is able to be a decision maker. So, you know, there are lots of attributes that we may look for. It doesn't necessarily mean it's the oldest or the most qualified or whatever. We also look at this question with regard to those team members personal commitments who may or may not be able to be available early and late and so on. So, again, as I said earlier, it's a collaborative approach ....<sup>50</sup>*

38. Ms Hands, an approved provider of a 2 long day care services in Adelaide with almost 45 years of experience 'in the childcare industry'<sup>51</sup> and an executive member of the South Australian Childcare Alliance, readily conceded that by designating someone as a Responsible Person brought 'responsibilities and duties'.<sup>52</sup>

#### *Administrative burden*

39. An argument put against the creation of a Responsible Person allowance (and an allowance for Educational Leader) was that the administration of such allowance would be onerous. The argument has its most relevance to a Responsible Person allowance as this allowance would need to be paid for increments of an hour or more and could apply to more than one employee each day. The role of the Educational Leader is intended to be compensated by a weekly allowance.

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<sup>48</sup> PN1237 to 1241.

<sup>49</sup> PN2615.

<sup>50</sup> PN2617.

<sup>51</sup> Exhibit 42- Statement of Alexandra Hands, 12 March 2019, at [3].

<sup>52</sup> PN4823.

40. The evidence indicated that the contention that the allowance would be administratively oppressive has little or no substance.
41. First, the allowance would not impose an additional record keeping requirement on providers. The National Law already requires that the approved provider must maintain a record of who is the Responsible Person at all times that the service is operating.<sup>53</sup> Many providers incorporated designation of a responsible person into their roster process.
42. Further, the employer witnesses conceded that their payroll and human resource system were capable of accommodating *ad hoc* unanticipated changes occasioned by illness and other absences, one off payments and other allowance payments which necessitated frequent adjustments to the payroll. For example, Ms Fraser volunteered that it was her practise to pay *ad hoc* amounts of \$50 to \$60 to her employees to compensate for the disutility of remaining on the premises when parents were late to pick up their children.<sup>54</sup> All employer witnesses when questioned admitted to possessing electronic pay roll and human resource systems that could accommodate frequent changes in entitlements and wages due to their staff.
43. Lastly, the evidence broadly indicated that the allocation of the role of Responsible Person was planned and generally incorporated into the roster.<sup>55</sup>

*The role is frequently performed by persons who would be ineligible for an award based allowance*

44. The allowance sought is one that will be paid by employers to employees that are award reliant. The allowance will not be payable to the employer, corporations, agreement covered employees or to employees paid a significant increment above the Awards. A great deal of the evidence given by the ACA witnesses about the proposed Responsible Person allowance was irrelevant as these witness pay employee that is usually the Responsible Person well above the award.<sup>56</sup> Maclean and McPhail both indicated that a reason for paying an employee a premium above the award was because the employee performed the 'role' of the responsible person within their service.<sup>57</sup> Ms Chemello notes '*all my staff are on above award wages.*'<sup>58</sup>
45. Four ACA witnesses directly addressed the cost of the Responsible Person allowance in the evidence: Fraser, Maclean, Tullberg and Mahony<sup>59</sup>. All these witness with the exception of

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<sup>53</sup> Regulation 150 of the National Law.

<sup>54</sup> PN1852 to 1864.

<sup>55</sup> Fraser notes in her statement that she always ensures at the opening of her centre diploma qualified educators at a minimum are rostered to be the responsible person, exhibit 18 at [17]. 'Lena' was rostered as the responsible person in rosters Viknarah was cross examined on as above.  
<sup>56</sup> See note 27.

<sup>57</sup> Maclean, exhibit 25 at [107]; McPhail, exhibit 28 at [85].

<sup>58</sup> PN2819.

<sup>59</sup> Mr Mahoney's costing includes 20% for on cost.

Mr Mahony paid the employee who was usually the Responsible Person an above award salary.<sup>60</sup>

46. The attempts by the ACA witnesses to model the fiscal impact of the allowance should be generally disregarded. For example, Ms Fraser owns 7 centres in Queensland and modelled the impact of the allowance as a cost of \$330 per week per centre.<sup>61</sup> Ms Fraser did not indicate that her business would be unable to pay the allowance but that: *'I would need to directly pass the cost of this allowance onto the parents.'*<sup>62</sup> When questioned concerning how the cost was calculated it was apparent the true cost would be significantly less and potentially very small as most of the imputed cost could be absorbed in over award payments. Ms Fraser's costing were done on the basis that every moment there is a Responsible Person on one of her premises (namely all hours of operation) this would incur a cost.<sup>63</sup> Many of the centre directors who are also the Responsible Person most of the time at Ms Fraser's centres are paid well above the award.<sup>64</sup>
47. Ms MacLean notes incongruously: *'we already pay our Directors above the award rate to be the responsible person in charge of our centres. Why would we pay them more to be what they already are?'*<sup>65</sup> When questioned, Ms Maclean states that her directors are paid \$15,000.00 per year above the award minimum<sup>66</sup> and the directors are paid this increment above the award, for among other reasons, to be the Responsible Person. Ms Maclean's costing are also premised on the allowance being payable for all operating hours without any reference to whether there would be an industrial obligation to pay the allowance.<sup>67</sup>
48. The methodologically suspect manner in which these costings have been conducted does not provide the Commission with any basis to find that the cost impact of the allowance is likely onerous. The totality of the evidence indicates that there a number of beneficial ways that employers can absorb the cost of the allowance by ensuring that experienced and well paid staff perform the role. There is some efficacious symmetry concerning cost and benefit to employers and employees that can be deduced from the practise of employers in allocating the role of Responsible Person. More experienced and non-award reliant employees appear from the evidence to be frequently and for longer durations appointed the Responsible Person. Where there would be an entitlement for the allowance to be paid, in practice, it appears from

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<sup>60</sup> Fraser PN2612; MacLean PN2592 to 2600; Tullberg PN2634 to 3638; see also McPhail PN3096 to 3097.

<sup>61</sup> Exhibit 18 at [116].

<sup>62</sup> As above at [117].

<sup>63</sup> PN1918.

<sup>64</sup> PN1918 to 1824,

<sup>65</sup> Exhibit 25 at [109].

<sup>66</sup> PN2597.

<sup>67</sup> PN2609.

the evidence will often be in relation to more junior award reliant staff performing the function for shorter periods.

49. The Commission is entitled to make the following findings:

- a) a Responsible Person under the NQF can be and is in practise an employee in a wide variety of classifications under the Award;
- b) a Responsible Person is often a more senior employee;
- c) Responsible Persons are often the proprietor, approved provider (if the approved provider is a natural person) or a senior employee in receipt of above award payments who would be ineligible for an allowances paid to an award reliant employee;
- d) the legal liability of approved providers under the National Law is distinct from the role of the Responsible Person;
- e) the Awards classifications do not recognise the role of the Responsible Person;
- f) the role Responsible Person entails significant responsibility and additional duties in addition to any duties required of an employees by virtue of their classification under the Awards;
- g) payment of the Responsible Person allowance would not create an exceptional or oppressive administrative burden on employers;
- h) the cost of such an allowance is exaggerated as the role of Responsible Person is often performed by the employer, approved provider or an employer paid significantly above the award;
- i) providers would have significant capacity to reduce or absorb the cost of the allowance by reinforcing the existing practise of designating themselves or a person paid above the award the Responsible Person; and
- j) The imposition of an allowance would reinforce good practise in ensuring that the person who performed the role was more senior and well qualified.

### **S1 –Allowances - Educational Leader**

50. United Voice claims an allowance for employees who take on the role of Educational Leader in the Children’s Services Award and the Teachers’ Award.

51. It was uncontested in the evidence that the National Regulations require that ‘*the approved provider of an education and care service must designate, in writing, a suitably qualified and experienced educator, co-ordinator or other individual as educational leader at the service to lead the development and implementation of educational programs in the service*’.<sup>68</sup>

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<sup>68</sup>

Regulation 118.

52. Witness Mr Jae Dean Fraser, who was questioned on this, agreed that it was a ‘*fixed requirement*’.<sup>69</sup> Ms Karthika Viknarasah also acknowledged that the regulations require an approved provider to appoint an Educational Leader and that the failure to appoint an Educational Leader was an offence.<sup>70</sup>
53. Dr Marianne Fenech, an early childhood education academic with expertise in early childhood policy, quality early childhood education and regulation and of early childhood education and care (ECEC) services, was the only expert witness who gave evidence in the proceedings. Dr Fenech noted that the Educational Leader role arose from the requirements of the National Quality Framework (NQF). The employer proposition that the Educational Leader role existed prior to the NQF was not supported by the evidence. In Dr Fenech’s report to the Commission, titled ‘*Report for the Fair Work Commission for the Four Yearly Review of Modern Awards AM2018/18 Children’s Services Award 2010 & AM2014/266 Educational Services (Teachers) Award 2010*’ it is stated that:

*1.1. In 2012 the Australian Government introduced the National Quality Framework, a system of regulation, quality assurance and quality improvement designed to improve the standard of quality provided in early childhood education and care (ECEC) services across Australia (ACECQA, 2018). Regulation 118 of the Framework’s Education and Care Services National Regulations (NSW Government, 2016) requires the approved provider of an ECEC service to “designate, in writing, a suitably qualified and experienced educator, co-ordinator or other individual as educational leader at the service to lead the development and implementation of educational programs in the service”. The Framework does not stipulate requisite minimum qualifications or experience for an educator to be eligible to undertake this role. The responsibilities of an Educational Leader are elaborated on in Quality Area 7 of the Framework’s National Quality Standards (NQS), Governance and Leadership.*

*1.2. Standard 7.2 requires that “effective leadership promotes a positive organisational culture and builds a professional learning community” (ACECQA, 2018, p. 91). The educational leader is critical to such leadership, with Element 7.2.2 requiring that “The educational leader is supported and leads the development and implementation of the educational program and assessment and planning cycle” (ACECQA, 2018, p. 91). The Guide to the NQS (ACECQA, 2017a, p. 173) states that “the role of the educational leader is to work with educators to provide curriculum direction and to ensure children achieve the outcomes of the approved learning*

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<sup>69</sup> Transcript, PN 1931-1932. See also oral evidence of Mahony, PN4016.

<sup>70</sup> PN1263-1264.

*framework". The NQF Guide (ACECQA, 2018) further stipulates that the educational leader (in addition to the approved provider and nominated supervisor) must ensure that "programs for all children are based on an approved learning framework and delivered in accordance with that framework" (ACECQA, 2018, p. 93).<sup>71</sup>*

54. There was general consensus between the union and employer witnesses on what the role of Educational Leader entailed on a practical basis within services.

55. In her witness statement, United Voice witness Preston Tori Warner, who is the Educational Leader at St. Cecilia's Child Care and Kindergarten in Queensland, stated that:

*19. As Educational Leader I have a number of responsibilities. These include:*

*a) Programming and planning for the centre. This includes leading the development of educational programs for the children in the centre and ensuring that evidence of what each child has learnt across a year is documented in observations and photos. Each child has a portfolio and each child's individual needs must be considered in creating programs.*

*b) Support for other educators. On a day to day level, I will have purposeful conversations with other educators to check in on how they are doing during the day, and respond to questions that arise. During non-contact time, I will make time to talk individually with all other educators. I will discuss any issues they are facing in educating children, and assist in problem solving or addressing these issues.*

*c) Critical reflection. This includes assisting educators with reflection on their educational practice, and ensuring that each team is carrying out education and care as they should in accordance with the NQF.*

*a) Physical environment. This includes ensuring that the environment is enriching learning, creating age and ability appropriate learning experiences for the children and using resources (toys, art, and the natural environment) to assist in learning.*

*b) Policies/procedures. This includes involvement in the review of the centre's policies on Educational leadership and supporting the Centre Director in reviewing other policies and procedures.*

*20. In undertaking my role as Educational Leader I am guided by the National Quality Framework (NQF).*

*21. Inclusion of children with different needs is a part of the early learning framework. Inclusion of children who are Indigenous and Torres Strait Islander*

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<sup>71</sup> Exhibit 10, Statement of Dr. Marianne Fenech dated 14 March 2019 (Annexure C), paragraphs 1.1-1.2.

*children and children from culturally and linguistically diverse (CALD) backgrounds is part of the early learning framework. Inclusion of children with different abilities is also part of the early learning framework.*

22. *As part of my educational leader role, I am responsible for guiding the programming to ensure that it is inclusive.*

23. *This can mean creating programs that explore different how different children have different religious beliefs, or creating a celebration for special events – such as having a Canada Day celebration if there is a Canadian child in the centre.*

24. *In this term, one child will be attending the centre with high needs and a support worker. I will be guiding the educational development of the child, and tailoring my programming to ensure that she is included with the other children. The support worker will attend to her medical needs.<sup>72</sup>*

56. In her oral evidence, Ms Warner identified that she oversees programming and planning for the centre and that the National Quality Standards require her as Educational Leader to research and ‘*be up-to-date with recent early childhood findings.*’<sup>73</sup>

57. Another United Voice witness, Ms Bronwen Hennessy, who is Educational Leader at Community Kids Greenacres Early Childhood Centre in South Australia, provided evidence that her Educational Leader role includes the following:

20. *Our centre uses an online portal and smart phone application called Kindy Hub that allows us to communicate with parents and provide updates on the children’s days. Through this portal, we provide daily observations, updates on activities through the day and photos. As Educational Leader I am heavily involved in the mentoring of other junior educators to support them in working to the standards that are required under the NQF. This involves proof reading communications that are published on the Kindy Hub and providing them with useful feedback on their written reports and their interactions with the children.*

21. *Part of my role as the educational leader is to lead critical reflections of the staff and develop plans to ensure that the reflections are acted upon and put into practice. This involves consultations with staff to develop these reflections and then further meetings with the other members of the management team to discuss how we can implement the changes that need to occur.<sup>74</sup>*

58. Ms Hennessy also identified that she was required to undertake research and gave an example of research she was required to undertake:

***Arndt:*** *Has anyone asked you to undertake research?*

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<sup>72</sup> Exhibit 17, Statement of Preston Tori Warner dated 8 March 2019, paragraphs 19-24.

<sup>73</sup> PN1477-1478 and PN1515-1516.

<sup>74</sup> Exhibit 6, Statement of Bronwen Hennessy dated 11 March 2019, paragraphs 20-21.



**Hennessy:** *In some cases, yes.*

**Arndt:** *Can you explain what those cases were?*

**Hennessy:** *One example would be the critical reflection that we have been trained to improve and develop in our Centre. I was asked to look into some various methods for doing critical reflection and what makes it useful and functional and so forth. To use that to sort of help develop our plan of how we were going to implement critical reflection amongst our staff.<sup>75</sup>*

59. Numerous employer witnesses also acknowledged that the employee in the Educational Leader role undertakes duties including leading programming, mentoring other employees, leading critical reflection and undertaking research to assist in providing a quality service. Ms Paton gave evidence that *'...it's a very multi-faceted role - the educational leader. It might be mentoring the staff. It could be working directly with a teacher or a child who may have a particular set of needs. It could be working directly with me on the development of a separate philosophy or theory. It's quite diverse.'*<sup>76</sup>

60. In an exchange regarding the role of centre directors, Ms Maclean stated:

**Saunders:** *You have two directors, at the moment, that's right?*

**Maclean:** *Yes, we do.*

**Saunders:** *They have teaching qualifications?*

**Maclean:** *Yes, they do.*

**Saunders:** *They're not registered as teachers?*

**Maclean:** *No.*

**Saunders:** *You do not need to be registered as teachers as a teacher in Queensland, do you, to work in early childhood?*

**Maclean:** *No. Not to be a director, no.*

**Saunders:** *Okay. Part of their responsibility is overseeing the implementation of the educational program?*

**Maclean:** *A small part of it, yes.*

**Saunders:** *It is part of it?*

**Maclean:** *I beg your pardon?*

**Saunders:** *It is part of it?*

**Maclean:** *Yes, a small part though. It's not a priority for them because they have an educational leader. In this case that's me.<sup>77</sup>*

61. Ms Llewellyn noted that that the Educational Leader at her centre did the following: *'She supports the educators to do their program planning. She is a mentor. She does room*

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<sup>75</sup> PN328-329.

<sup>76</sup> PN2340.

<sup>77</sup> PN2501-2507.

*inspections. She ensures that the program plans are up to date, that the observations and learning stories are educational and of a high level, and any training that may need - she may need to do with the staff to ensure that their observations are - to name a few things.*<sup>78</sup> Ms Viknarasah conceded that part of the Educational Leader role was to raise issues in the workplace as matters of critical reflection, and that could include discussing an idea or undertaking research.<sup>79</sup> Mr Fraser observed that centre managers reviewed and assessed the program *'along with the educational leader'*.<sup>80</sup>

62. Mr Mahony stated that *'I value the Educational Leader's role and the - you know - the leaderships that that person can offer and I would expect that person to have a role in working with the room leaders and helping us develop a uniform educational standard throughout the centre.'*<sup>81</sup> Mr Mahony also agreed that there was real work that the Educational Leader brought to the process of developing the educational program.<sup>82</sup>
63. Overall, there was clear consensus in the evidence that the Educational Leader is a role that carries real responsibility, including for leading programming and planning within a service, mentoring other educators, leading critical reflection and undertaking research.
64. The evidence confirmed that the Educational Leader provides leadership in programming across the *whole service*, whereas a Lead Educator (or Room Leader) is responsible for leading programming within the one *room*. Ms Hennessy noted that as Assistant Educator of the Nursery Room she reported to the Lead Educator of the Nursery Room whereas as Educational Leader she reported to the Director.<sup>83</sup> She observed that *'as educational leader I sort of oversee the programming for the centre, whereas in the room I report to her, if that makes sense.'*<sup>84</sup> This evidence supports our submission that the classification of Level 4 under the Children's Services Award is intended to compensate for the level of responsibility in leading the programming for children within a room, and not across the whole service, as undertaken by the Educational Leader.<sup>85</sup>
65. It was recognised by both union and employer witnesses that the Educational Leader role is a significant and valued role within a service. Dr Fenech provided evidence in her report to this effect:

*2.1. The introduction of the role of educational leader in the NQF signified an acceptance in legislation of the connection between educational leadership and*

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78 PN4379.

79 PN1342-1347.

80 PN1656.

81 PN4029.

82 PN4030-4031.

83 PN212-216 and PN350-351.

84 PN216.

85 See United Voice Further submission in reply dated 29 April 2019, paragraphs 26-27.

*ECEC quality and quality improvement (Thomas & Nuttall, 2013). That educational leadership drives quality ECEC and learning and development outcomes for children was well established over a decade ago through the internationally renowned Effective Leadership in the Early Years Sector UK study (Siraj-Blatchford & Manni, 2006).*

*2.2 The need for educational leaders as a strategy to boost quality in ECEC services was identified in the five-year longitudinal Australian E4Kids study (Tayler, 2016). The study was led by Professor Emeritus Collette Tayler and investigated the impact of participation in ECEC services on children's learning and development outcomes. The study collected data between 2010 – 2013 from 2,494 Australian E4Kids children and 157 control children, aged 3-4 years through to 8 years, from Victoria and Queensland. Findings showed that the quality of educator-child engagements had the most significant impact on children's development outcomes. These engagements comprised of three domains: emotional support for children, the organisation of activities that facilitate children's learning and engagement, and the level of instructional support provided by the educators during the play-based program (instructional support being most closely associated with cognitive development and academic success). An educational leader would be seeking to improve practice in each of these domains, and particularly in instructional support, which Tayler (p.6) explains includes "promoting an understanding of everyday concepts through analysing, creating, and integrating previous knowledge; connecting to the child's real world; having back and forth exchanges with children where scaffolding, giving encouragement and affirmation feature; probing children's thinking and providing information; and modelling language through frequent conversations, open-ended questions, the use of advanced vocabulary and language, repetitions and extensions, and self and parallel talk". Of the three domains the study found high and moderately high levels of emotional support, moderate levels of room organisation that facilitates children learning and participation in a range of stimulating activities, but low levels of instructional support. Tayler concluded from this finding:*

*"The everyday ECEC programs observed within long-day care, family day care and preschool/kindergarten settings provided most children with low levels of the interactions that are known to promote young children's thinking (conceptual understanding), challenge their ideas and understandings and enrich their language capability. These findings suggest that there is an opportunity to make a substantial difference to children's cognitive development well before school by having early childhood educators further develop skills in promoting children's learning. This finding is especially*

*significant to the children living with a range of risk factors, and who are known to benefit most from high-quality early childhood programs. Effort to focus professional learning investments more directly on interactions that promote learning is likely to pay off. The NQF reform activity included the requirement for ECEC services to nominate a Lead Educator for the service. This role offers potential for engaging at service level on optimal techniques to promote young children's learning. Now, when the ECEC field is developing professionally and is motivated to make a difference to children's learning, the role of 'educator' and 'lead educator' is salient (my emphases)" (p. 7).*

2.3. *Today, the educational leader is pivotal to the provision of quality education and care in ECEC settings, contributing to the meeting of standards in all quality areas of the NQS (Australian Children's Education and Care Quality Authority (ACECQA), 2017b). Scholars (Fleet, Soper, Semann, & Madden, 2015) have noted that expectations on educational leaders to meet these standards and facilitate quality and quality improvement are "high" (p. 29).*

2.4. *ACECQA (n.d.-b, p. 1) asserts that the role "can significantly (my emphasis) impact on the important work educators do with children and families". This impact is achieved through the educational leader:*

- *Leading the development and implementation of educational programs that support children's learning and development*
- *Building the professional practice and capacity of all educators in the service, by providing curriculum direction and leading critical reflective discussions about practice, the planning cycle (observation, planning, evaluation and follow up), and implementation of the approved learning framework*
- *Establishing and maintaining a culture of learning and ongoing improvement*
- *Mentoring staff with varying qualifications (certificate III, diploma, early childhood teaching degree) and experience*
- *Discussing the educational program with parents*
- *Ensuring authentic links between practice and the local community*
- *Developing systems to ensure smooth transitions for children (e.g., to another room, or to school)*

*(ACECQA, 2017a, n.d.-a, n.d.-b):<sup>86</sup>*

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<sup>86</sup> Exhibit 10 Statement of Dr. Marianne Fenech dated 14 March 2019 (Annexure C) paragraphs 2.1-2.4.

66. Numerous employer witnesses also accepted that the Educational Leader role was a significant and valued role. Witness Ms Maclean gave evidence that she took on the role herself because *'whilst people may present themselves extremely well at an interview, it isn't until you see them in action on the floor with the children and families that you really get a gauge on how well they understand their role. How well they could explain it to others and so on. And those are attributes that a very good educational leader needs. So we discussed it and she asked if I would prefer or if I could for her become the educational leader until we had ascertained who would be appropriate to take those roles.'*<sup>87</sup> Ms Brannelly agreed that the reason some larger OSHC providers had several people doing the role of Educational Leader was because the work was *'of value'*<sup>88</sup> and Ms Sarah Elizabeth Tullberg in her evidence agreed that the model she had chosen for her service was based on acknowledgement that the work of Educational Leaders was important, and that there was sophistication and complexity to the work.<sup>89</sup> Ms Nicole Louise Llewellyn stated that the role of Educational Leader was *'...important to an organise - important to a centre and to ensure its success, yes.'*<sup>90</sup> Ms Alexandra Hands agreed that Educational Leaders were important for the maintenance of ratings and the general quality of the service provided.<sup>91</sup>

67. Dr Fenech gave oral evidence that the Educational Leader role is an important leadership position:

**Bull:** *Thank you. You were asked some questions about the quality standards which deal with effective leadership. This is effective leadership in relation to the educational leader role?*

**Fenech:** *Mm hm.*

**Bull:** *Can you perhaps elaborate on, in the context of - this is the Standard 7.2 - what is meant by "effective leadership" when the document addresses that matter?*

**Fenech:** *Are you talking about how the resource talks about the role?*

**Bull:** *What are they getting at when they talk about effective leadership?*

**Fenech:** *It's a role of influence and a role that is empowering for other staff. It's a role that's critical for all educators in the service to actually collectively be working towards quality education and care for children and outcomes for children. So in terms of - it's a leadership role because it requires or it involves bringing educators on board and changing their practises sometimes, so again doing that professional development and looking at how they can be improving their service, because that's*

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87 PN2583.

88 PN3486-3487.

89 PN3716-3719.

90 PN4381.

91 PN4824-4828.

*one of the tenets of the National Quality Framework. It's not just even if you're doing things okay; it's about how can you keep improving. And with the staff turnover that we have in the sector, I think that is often an issue for educational leaders in terms of trying to build quality as a whole team within a service. As I mentioned before, the educational leader is responsible for mentoring staff, modelling practice, enabling high quality practice, so it's not a role that can be done on the run. It's a role that requires intentionality I think.*<sup>92</sup>

68. Dr Fenech also gave evidence that the Educational Leader Resource, produced by ACECQA in March 2019, and marked as Exhibit 5 in the proceedings, clarifies practice for educators and assessors, and affirms the claims and comments made in her report.<sup>93</sup> The Educational Leader Resource provides in-depth information about the role of the Educational Leader, the types of activities the Educational Leader is expected to undertake within the workplace.

69. It was conceded by several employer witnesses that the Educational Leader role is not remunerated within the current classification structure. Ms Llewellyn agreed that the role the Educational Leader was a different job to simply being an educator and that the role was different to simply designing and implementing an educational program.<sup>94</sup> Ms Viknarasah conceded that there was no recognition of the Educational Leader role within the classifications except '*maybe in the classification description of a director*'.<sup>95</sup> Ms Viknarasah accepted that the Educational Leader would not necessarily or frequently be the Director.<sup>96</sup>

70. It was not generally contested that an employee at any classification of the Awards could be Educational Leader. Ms Brannelly agreed that the Award does not require payment at any specific level for the role of Educational Leader:

**Bull:** *But what I was putting to you principally was, that you don't - there's no requirement under the award - well, the award doesn't recognise the role of the educational leader. You'd agree with that?*

**Brannelly:** *The award does not use the title of the educational leader in its definitions.*

**Bull:** *And the award doesn't tell you what level and above can be the educational leader. You agree with that?*

**Brannelly:** *No. No, it doesn't. I agree with that.*

**Bull:** *And your group - you say - attributes this responsibility to level four and above, generally?*

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<sup>92</sup> PN678 -680.

<sup>93</sup> PN669 and PN507.

<sup>94</sup> PN4383, PN4380.

<sup>95</sup> PN1263-1268.

<sup>96</sup> PN1268.

**Brannelly:** So this is - yes, the sector tell me that the way in which they apply the Educational Leader role in terms of the award is at Level 4, because that recognises, has always recognised responsibilities in relation to the program design, development, and implementation and guidance.

**Bull:** But that's a self-identified practise which in part is a recognition of the level of responsibility implicit in the role of Educational Leader. Do you agree with that proposition?

**Brannelly:** Yes.<sup>97</sup>

71. An IEU witness, Ms Ana Mravunac, who is a Director at San Marino World of Learning in NSW, confirmed that being an effective Educational Leader involved work in addition to the duties that an employee would do according to their award classification.<sup>98</sup>

72. Finally, the evidence indicated that there would be little genuine administrative difficulty in paying an Educational Leader allowance as the role is generally a longer term designation.

The following exchange with witness Ms Sarah Elizabeth Tullberg demonstrates this:

**Bull:** But educational leaders, you don't appoint them for a fortnight do you?

**Tullberg:** No.

**Bull:** They're quite long term-ish designations. You'd agree with that?

**Tullberg:** Correct.

**Bull:** An educational leader is designated as the education leader for a significant period, not just for a fortnight or a month?

**Tullberg:** Correct.

**Bull:** So in effect if you had to pay an additional amount it's like paying an above award payment, it's just changing the numbers within your system for that employee. You'd agree with that proposition?

**Tullberg:** Yes.<sup>99</sup>

73. On the basis of the above evidence, the Commission is entitled to make the following findings:

- a) the Educational Leader role arose from the implementation of the NQF, which placed an obligation on approved providers to designate an appropriate person as the Educational Leader for a service;
- b) the person designated as Educational Leader has a number of responsibilities including leading the programming for the service, mentoring other employees, leading critical reflection and undertaking research;

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<sup>97</sup> PN3469-3472, see also PN3488-3489.

<sup>98</sup> PN4527-4528.

<sup>99</sup> PN3633-3636.

- c) the Educational Leader performs an important leadership role, which is significant in terms of service quality;
- d) the Educational Leader role is not remunerated within the current classification structure; and
- e) it is appropriate that employees who are designated as Educational Leader should receive compensation in the form of an allowance for the work performed in this role.

**Allowance claims –OSHC**

74. In our further submission in reply (dated 29 April 2019) United Voice accepted that outside of school hour’s care (OSHC) providers had different ratio requirements and stated that it may be appropriate to structure the allowances on a different size scale within OSHC.<sup>100</sup> We withdraw that paragraph.

75. During the hearing, an issue was raised regarding the relative sizes of long day care and out of school hours care (OSHC) and United Voice agreed to provide the data we relied upon.<sup>101</sup> United Voice provided this data in excel format to interested parties on 24 May 2019.

76. Data from the national registers on the ACECQA website indicates that the percentage of services that fit into each size category is broadly equivalent across long day care and OSHC. This table demonstrates this:

<b>ACECQA National Register Data at 8 May 2019</b>			
<b>Places category</b>	<b>Number of LDC services</b>	<b>Percentage of total LDC services</b>	
No more than 39	1634	21.25%	
40-59	1834	23.85%	
60+	4223	54.91%	
<b>Grand Total</b>	<b>7691</b>	<b>100.00%</b>	
<b>Places category</b>	<b>Number of OSHC services</b>	<b>Percentage of total OSHC services</b>	
No more than 39	932	20.43%	
40-59	1127	24.71%	
60+	2502	54.86%	
<b>Grand Total</b>	<b>4561</b>	<b>100.00%</b>	

77. As such, we maintain our original claim that the Educational Leader allowance should apply in the same manner in OSHC services.

<sup>100</sup> United Voice Further submission in reply dated 29 April 2019, paragraph 35.

<sup>101</sup> PN3429 – 3445.



## **S29 - Non-contact time for Educational Leaders**

78. United Voice makes a claim for additional non-contact time for Educational Leaders (2 hours per week in centres licensed for no more than 39 places, 3 hours per week for centres licensed for 40-59 places and 4 hours per week for centres licensed for 60 and above places). Both Awards specify that an employee responsible for programming will have a minimum of 2 hours non-contact time per week, but there is no specific allocation of non-contact time for Educational Leaders.
79. The evidence in the above section on the Educational Leader allowance demonstrates that Educational Leaders have specific responsibilities, and that the role Educational Leaders perform is significant for the maintenance of quality within a service. Educational Leaders require adequate time to perform this work.
80. In the examination in chief, Dr Fenech observed the following:

**Bull:** *Just one brief matter. Dr Fenech, since you provided your report or authored your report, there's been a document released by ACECQA called the Educational Leader Resource that was released in March 2019?*

**Fenech:** *Correct. That was after 14 March.*

**Bull:** *Okay. Is there anything in relation to that document which alters any conclusions or which you consider appropriate to bring to the attention of the Commission?*

**Fenech:** *I think there are sections in that manual that affirms claims or comments that I have made in the report, particularly regarding the educational leader and their role. Did you want me to outline those now?*

**Bull:** *If you could?*

**Fenech:** *Yes, okay.*

**Deputy President Clancy:** *Sorry, just for our benefit, which exhibit are we - - -?*

**Bull:** *That's exhibit number 5.*

**Deputy President Clancy:** *Thank you.*

**Fenech:** *So I think overall what that document does is emphasise that the role is a significant one, and it's a significant role of leadership, not a management or - it's above and beyond an educational role, and one of the points that it makes time and time again is the time that's required to do that role effectively. I'll just see if I can find a quote for you that I think is quite pertinent - for example, on page 96, the resource states that - I'm sorry, bear with me for a minute while I find my - so the report says:*

*To be effective, the role of an educational leader requires time allocation in addition to and quarantined from other responsibilities.*

*And later:*

*The providers are advised to allocate set hours for the role.*

*And I think because the document - it's a 148 page resource that has come out to guide the practise of educational leaders, and it talks about all the, I guess, in depth, in detail, the work that the educational leader undertakes, so the amount of meetings, for example, that the educational leader is advised to have with educators, the influencing role, the building of collaborations, the building of a learning community, mentoring staff - these are things that require an investment of time I guess and don't happen on the run.<sup>102</sup>*

81. United Voice witness Ms Hennessy, who works at a centre licensed for 75 children, provided evidence in her statement that she received 2 hours of non-contact time per week for Educational Leader work, but that it was difficult to complete the work within this time:

*27. I am provided 2 hours per week non-contact time to complete my work as an educational leader. This role requires a significant amount of research into current methods of programming and curriculum models that I then work to implement at Greenacres. I do much of this work in my own time, usually on weekends or during the evenings. Last year, I began the application process to Gowrie to secure extra funding for three children in the Kindergarten room that had special needs. The application process took over 12 months and eventually reached a point where I was not able to continue with it because I did not have enough non-contact time to complete it. The Director had to take over the application and see it through because I did not have the time to do it.*

*28. The work that I produce now is of a high quality, but my practice would be improved by having enough time to research new ideas on programming and curriculums. The two hours allocated provides me with barely enough time to complete the basic work required of an educational leader, but it is rare that I am able to read into new curriculum research or write the programs in extensive detail during work hours.<sup>103</sup>*

82. Certain employer witnesses also recognised that the Educational Leader role required specific time allocation and indicated that some employers already provide specific non-contact time for this role. Ms Brannelly acknowledged that it was not uncommon for employers to negotiate to provide more than 2 hours non-contact for the Educational Leader role and conceded that larger services may require more non-contact time than mandated by the

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<sup>102</sup> PN506-516.

<sup>103</sup> Exhibit 6 Statement of Bronwen Hennessy dated 11 March 2019, paragraphs 27-28.

award.<sup>104</sup> Ms Llewellyn, who runs a centre with 130 places, gave evidence that she employed an Educational Leader who had a full-time non-contact role:

**Bull:** *So you choose to designate in your service directors, Level 6s, as educational leaders?*

**Llewellyn:** *No, I have a separate educational leader who's paid as a Level 5 full time off the floor.*

**Bull:** *I apologise about that. So you choose to have your educational leader devoted entirely to being the educational leader?*

**Llewellyn:** *Absolutely.*

**Bull:** *And that's an acknowledgement of the importance and complexity of the role?*

**Llewellyn:** *And also the size of my service and the service that the educators and the families require.*

**Bull:** *So it takes - there's a significant amount of time and work involved in adequately performing the function of an educational leader within your service such that you have a Level 5 doing it as a full time position?*

**Llewellyn:** *Yes.*

**Bull:** *And that's in a sense a role that you've invented because you've assessed the requirements of an educational leader and you think it's in your interest for a variety of reasons to have a dedicated person doing it full time?*

**Llewellyn:** *Absolutely.*<sup>105</sup>

83. On the basis of the above evidence, the Commission is entitled to make the following findings:

- a) the person designated as Educational Leader has a number of responsibilities including leading the programming for the service, mentoring other employees, leading critical reflection and undertaking research;
- b) the Educational Leader performs an important leadership role, which is significant in terms of service quality and compliance with the NQF;
- c) an employee who is an Educational Leader requires specific non-contact time in which to undertake their duties;
- d) the amount of non-contact time required will increase with the relative size of the Centre; and
- e) the non-contact time sought by United Voice for Educational Leaders (2 hours per week in centres licensed for no more than 39 places, 3 hours per week for centres

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<sup>104</sup> PN3495-3499.

<sup>105</sup> PN4300 -4304.

licensed for 40-59 places and 4 hours per week for centres licensed for 60 and above places) is an appropriate minimum standard under the Awards.

## **S29 - Non-contact time**

84. United Voice makes a claim to increase non-contact from 2 hours to 4 hours in both Awards for employees responsible for the preparation, implementation and/or evaluation of a developmental program.

85. United Voice member Ms Pixie Bea provided evidence in her witness statement about the significant number of tasks that must be completed during non-contact time. In her witness statement, Ms Pixie Bea stated that:

*50. The activities that are commonly required to be completed in non-contact time as Room Leader are:*

- a) Tracking each child's development against development goals, and tracking the individualised support that is being provided to the child.*
- b) Writing up observations of each child.*
- c) Informing parents of developmental progress.*
- d) Preparing developmental summaries for each child every 3 months.*
- e) Assessing the developmental needs of new children coming into the centre.*
- f) Providing information on the developmental needs of children moving from one room to the next.*
- g) Drawing up a program for the next week of activities.*
- h) Reflecting on last week's program.*
- i) Research on resources to fit the next program.*
- j) Preparing a roster for managing team responsibilities within the room.*
- k) Preparing behaviour plans for children who are showing challenging behaviours.*
- l) Tailoring programs for children with special needs, including children from culturally and linguistically diverse backgrounds and children with disabilities.*
- m) Mentoring and providing guidance to other staff members in the Room.*
- n) When undertaking this work, we need to reference the Early Years Learning Framework (EYLF), the National Quality Framework (NQF), the National Quality Standards (NQS) as well developmental theorists and current research in early childhood and child development. As an example, this includes theories about infant brain development, different learning styles, the importance of learning through play and typical and atypical developmental stages.*

*51. Additional activities that are required to take place during non-contact time include:*

- a) If planning an excursion, a risk/benefit analysis needs to take place.*

*b) Checking children's permissions for different activities such as whether they have permission to use nappy cream, what are their food requirements, do they have any allergies or religious food requirements.*<sup>106</sup>

86. Dr Fenech, in her report, gave evidence that quality programming is critical in meeting the NQS:

*5.1. Section 51 (1b) of the National Law (Education and Care Services National Law Act 2010, Cth) stipulates that approved services must meet "the educational and developmental needs" of the children in attendance. Further, the Law (Section 168) states that a centre's programs must be "based on an approved learning framework; and (b) is delivered in a manner that accords with the approved learning framework; and (c) is based on the developmental needs, interests and experiences of each child; and (d) is designed to take into account the individual differences of each child".*

*5.2. Part 4.1 of the National Regulations (New South Wales Government, 2016) outlines more detailed program requirements. Regulation 73 refers to the provision of an educational program that has specific outcomes: "(a) the child will have a strong sense of identity; (b) the child will be connected with and contribute to his or her world; (c) the child will have a strong sense of wellbeing; (d) the child will be a confident and involved learner; and (e) the child will be an effective communicator". These outcomes replicate those in approved national learning frameworks, such as the Early Years Learning Framework (Department of Education Employment and Workplace Relations (DEEWR), 2009). Regulation 74 stipulates documentation requirements for the assessment of children's outcomes and of the educational program. For example, for a child of prior-to-school age the approved provider needs to ensure that there is documentary evidence of assessments of each child's developmental needs, interests, experiences and participation in the educational program; and of each child's progress against the outcomes of the educational program. The amount of documentation is dependent on the frequency and length of time a child attends a service. Under Regulation 75 the approved provider is required to ensure that information pertaining to the educational program is displayed and accessible to parents, and that a copy of the educational program is available upon request. Regulation 76 requires that information about the educational program specific to each child (e.g., information about a child's participation in the program) be provided to their respective parents. While Regulations 74-76 are directed to the*

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<sup>106</sup>

Exhibit 8 Statement of Pixie Bea dated 4 March 2019, paragraphs 50-51.

*approved provider, it is common practice for these responsibilities to be delegated to the nominated supervisor, educational leader, and educators.*

*5.3. Following these regulatory requirements educators are required to program in ways that meet the standards and elements of Quality Area 1 of the NQS, Educational Program and Practice (ACECQA, 2018). This quality area comprises three standards: The educational program enhances each child's learning and development; Educators facilitate and extend each child's learning and development; and Educators and co-ordinators take a planned and reflective approach to implementing the program for each child (See Appendix 1 for associated elements for each standard).*

*5.4. While there is no prescriptive way programming is to be undertaken, it must meet the requirements of the NQS, and be founded and delivered according to the principles, practices and intended learning outcomes of an approved learning framework. To this end educators' programming must:*

- Be child-centred, building on each child's individual interests, knowledge, abilities, culture, strengths and ideas. Educators are to actively seek information about each child from his/her family.*
- Maximise opportunities (interactions, experiences, routines and events) to stimulate and enhance children's learning and development*
- Use play-based learning*
- Make intentional, pedagogically-informed practice decisions that draw on: the NQS and approved learning framework; educators' professional knowledge and skills base; their knowledge of each individual child and their families and local community; and the service philosophy*
- Utilise available and appropriate resources to facilitate and extend children's play*
- Be inclusive, ensuring every child's participation*
- Incorporate routines (e.g., nappy changing, meal times, transitioning from outside to indoors) as opportunities for learning*
- Incorporate all curriculum areas (literacy, creative arts, numeracy, science & technology) when providing experiences for children that actively support or initiate the investigation of ideas, complex concepts and thinking, reasoning and hypothesising*
- Address developmental domains (language, cognitive, social, emotional, physical)*

- *Be communicated to families*
- *Be subject to ongoing critical reflection*
- *Strive for ongoing improvement*

(ACECQA, 2018; DEEWR, 2010).

5.5. *What is evident from this list of requirements is that programming is more complex than a mere technical implementation of a prescribed curriculum. When programming effectively, educators in ECEC services exercise professional knowledge and judgement, implementing play-based learning experiences while reflecting on practice and engaging in continuous curriculum decision-making informed by an approved learning framework (DEEWR, 2010). As recent research has noted, however, “the knowledge and deliberations brought to play-based curricula are often overlooked, as play is regarded as naturally occurring for children. Those who know and do this work, however, recognise it as complex, challenging and highly demanding” (Wong et al., 2015, p. 79).*<sup>107</sup>

87. The evidence indicated that reducing or decreasing programming requirements was not a solution to the problem, given the quality standards required in the sector. In response to a question about adjusting programming methods, Ms Alicia Wade, who is a Centre Manager at Aussie Kindies –Torquay in Qld, answered she had not considered adjusting the method because ‘*that's the standard requirement and we are - to ensure that we're providing a quality program for families and for children, we've got to produce this quality education for children.*’<sup>108</sup> Dr Fenech also provided evidence that programming documentation has an impact on the assessment and rating of a service:

5.7. *All stages of the planning cycle require documentation. Notwithstanding Regulation 94, ACECQA is not prescriptive about documentation requirements but rather allows educators to exercise professional judgement in this area.*

5.8. *In practice, however, during an assessment and rating visit assessors may request to see programming documentation (ACECQA, 2018) that includes:*

- *A variety of documentation that demonstrate children’s progress towards learning outcomes; programs’ responsiveness to children’s strengths, cultures, ideas,*

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<sup>107</sup> Exhibit 10, Statement of Dr. Marianne Fenech dated 14 March 2019 (Annexure C), paragraphs 5.1-5.5.

<sup>108</sup> PN859.

*abilities, knowledge and interests; analysis of each child's learning and development; planning for further learning goals*

- *Written programs that include "planned experiences and/or strategies to support individual children's goals" (p. 102)*
- *Documented programs that demonstrate "that an assessment of the learning outcomes has led to goals ... that are designed to intentionally support aspects of learning" (p. 102)*
- *Information about each child and monitoring of their learning, wellbeing and engagement*
- *Evidence of strategies utilised to garner information from families about their child*
- *Documented evidence of reflective practice*<sup>109</sup>

88. The evidence from United Voice members demonstrated that the non-contact time currently provided for by the Awards is insufficient and leads to educators performing work unpaid after hours. Ms Wade stated that lead educators failed to complete programming in the allocated time '*probably about 80 per cent of the time*'.<sup>110</sup> Ms Wade also gave evidence that employees at her centre were taking work home, and despite encouraging them to stop, there was pressure on them to finish the programming.<sup>111</sup> Ms Wade stated the pressure arose from: '*Well, you've got a National Quality Framework that we have to meet and then we have the Department of Education that come in and do spot checks. And if they are not meeting that and the programming is not acceptable to families at all times, it's a breach and a compliance letter from the Department of Education.*'<sup>112</sup>

89. Ms Hennessy gave evidence in her statement that '*when I worked in the Kindergarten room, we had 54 children on the roll which made programming within the allocated two hours very difficult. I calculated at one point that with 54 children on the roll, that meant that I was only able to allocate 27 minutes of programming per child per quarter. This is not an adequate amount of time to program effectively and I would frequently not complete the programming in the allocated non-contact time.*'<sup>113</sup> While Ms Hennessy's Centre Manager agreed to provide her with additional non-contact time in that situation<sup>114</sup>; there is no Award requirement to do so. Ms Hennessy also provided evidence that '*on the many occasions that I*

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<sup>109</sup> Exhibit 10, Statement of Dr. Marianne Fenech dated 14 March 2019 (Annexure C), paragraphs 5.7-5.8.

<sup>110</sup> PN848.

<sup>111</sup> PN866-868.

<sup>112</sup> PN868.

<sup>113</sup> Exhibit 6, Statement of Bronwen Hennessy dated 11 March 2019, paragraph 25.

<sup>114</sup> Exhibit 6, Statement of Bronwen Hennessy dated 11 March 2019, paragraph 25.



*have not been able to complete the programming within the allocated two hours, I have completed the work at home outside of working hours on my own time. On other occasions I have completed the programming while on the floor, in between activities with the children.*<sup>115</sup>

90. Ms Warner also indicated that it was difficult to complete programming within the allocated 2 hours, stating: *'I try to effectively manage my time and do as much as possible; however I am generally not able to complete all my programming work within the 2 hours of non-contact time.'*<sup>116</sup>

91. Employer witness Ms Llewellyn also recognised the importance of non-contact time. Ms Llewellyn gave evidence that she aimed to give employees responsible for preparing programs at her centre 4 hours of non-contact time per week (in addition to having a full-time off the floor Educational Leader) and acknowledged that more than 2 hours per week of non-contact was desirable and appropriate.<sup>117</sup>

92. On the basis of the above evidence, the Commission is entitled to make the following findings:

- a) the 2 hours of non-contact time currently provided under the Awards for employees responsible for the preparation, implementation and/or evaluation of a developmental program is insufficient; and
- b) the Awards should be varied to provide 4 hours of non-contact time for employees responsible for the preparation, implementation and/or evaluation of a developmental program.

#### **S 14 - Training clause**

93. United Voice seeks the insertion of a new clause to ensure that where an employer directs an employee to attend training, that course fees will be paid by the employer and any time spent in training by the employee will be recognised as time worked.

94. There was general consensus in the evidence that where the employer requires an employee to undertake training, that training should be paid for by the employer. Ms Viknarasah stated that *'if I say 'You have to do it' then I would have to - I would pay for it.'*<sup>118</sup> Mr Fraser and Ms Brannelly agreed that it was the employer's responsibility to pay for training that they want

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<sup>115</sup> Exhibit 6 Statement of Bronwen Hennessy dated 11 March 2019, paragraph 26.

<sup>116</sup> Exhibit 17, Statement of Preston Warner dated 8 March 2019 [Exhibit 17], paragraph 50.

<sup>117</sup> PN4342-4350.

<sup>118</sup> PN1351.

the employee to do for their benefit<sup>119</sup> and Ms Chemello and Ms Tullberg indicated that they already paid for staff training.<sup>120</sup>

95. Several employer witnesses conceded that where an employer requires an employee to undertake training, time spent in training is time worked. Ms Brannelly agreed that training should count as work time *'if the training is, as you say, directed by the employer and required by the employer then that meets that definition. I agree.'*<sup>121</sup> Ms Tullberg agreed training should be work time *'if the employer is directing the staff'*.<sup>122</sup>

96. The following exchange occurred with Mr Fraser:

**Bull:** *So you believe it's the employer's responsibility to pay for training that they want the employee to do for their benefit?*

**Fraser:** *Yes.*

**Bull:** *And the time in training should be work time?*

**Fraser:** *If we can, sure. But a lot of the time that's very difficult because we're a ratio based business.*

**Bull:** *But the course will be a professional course. It is work essentially isn't it?*

**Fraser:** *Yes.*<sup>123</sup>

97. United Voice witnesses provided evidence that they are regularly required to pay for training themselves, and that time spent in training is often not regarded as time worked. Ms Warner, who is required to have a First Aid Certificate and CPR Certificate, indicated that her current employer can assist in getting a discounted rate, but does not pay for any of the course fees or for the time spent in training.<sup>124</sup> Whilst her current first aid certificate was paid for by her former employer, she gives evidence that *'the First Aid Certificate lasts for a period of 3 years. My certificate will expire in April 2019. I will have to pay for the course fee myself, and I will have to undertake the training in my own time.'*<sup>125</sup>

98. Ms Wade gives evidence that *'employees who take on the role of Responsible Person at my centre are required to have a first aid certificate and cardiopulmonary resuscitation training (CPR)...*'<sup>126</sup> and that employees have to pay for training and undertake the training in their own time. She states the following in her witness statement:

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<sup>119</sup> PN1959 and PN3500.

<sup>120</sup> PN2822 and PN3735-3736.

<sup>121</sup> PN3503.

<sup>122</sup> PN3737.

<sup>123</sup> PN1959-1961.

<sup>124</sup> Exhibit 17 Statement of Preston Warner dated 8 March 2019, paragraphs 57-58.

<sup>125</sup> Exhibit 17, Statement of Preston Warner dated 8 March 2019, paragraph 60.

<sup>126</sup> Exhibit 11, Statement of Alicia Wade dated 8 March 2019, paragraph 39.

43. *My most recent first aid refresher course was in 2017. I undertook the course in my own time on the weekend and paid for the course myself. The course cost \$180. Attached and marked Annexure C is a copy of the payment receipt.*

44. *My most recent CPR course was in August 2018. I undertook the course in my own time and paid for the course myself. The course cost \$70. Attached and marked Annexure D is a copy of the payment receipt.*

45. *I was not reimbursed for first aid training or the CPR training by my employer and nor are the other employees at my centre.*

46. *I am not paid for the time spent in first aid training or the CPR training by my employer and nor are the other employees at my centre.*

47. *Employees at my centre either undertake the training on the weekend or take a day off as annual leave.<sup>127</sup>*

99. The evidence indicated that training costs are not insubstantial and these costs were not contested. As Ms Wade states above, the cost of a first aid refresher course was \$180 and the cost of a CPR course was \$70. These are qualifications that require ongoing maintenance with the ACECQA Guide to the NQF (Exhibit 1) stating that:

*Renewal of first aid qualifications*

*The Safe Work Australia First Aid in the Workplace Code of Practice recommends that persons required to maintain first aid qualifications should attend training on a regular basis to refresh their first aid knowledge and skills, and to confirm their competence to provide first aid. The Code of Practice also recommends that refresher training in CPR should be undertaken annually and first aid qualifications should be renewed every three years.<sup>128</sup>*

100. This ongoing cost can be difficult for low paid employees to cover, and Ms Wade provided evidence that *‘through conversations with other staff members, I am aware that some employees at my centre struggle to pay for the cost of the training. There are several employees who are single mothers at my centre who have to use money set aside for rent or groceries to pay for the training.’<sup>129</sup>*

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<sup>127</sup> Exhibit 11, Statement of Alicia Wade dated 8 March 2019, paragraphs 43-47.

<sup>128</sup> Exhibit 1, Guide to the NQF, page 438.

<sup>129</sup> Exhibit 11, Statement of Alicia Wade dated 8 March 2019, paragraph 48.

101. On the basis of the above evidence, the Commission is entitled to make the following findings:

- a) there are employees in this sector that are being required by employers to undertake training without reimbursement of course fees or recognition of the time spent in training as time worked;
- b) there are employees in this sector who have to pay for required training themselves and undertake that training on weekends or by taking annual leave; and
- c) that it is appropriate and fair that where an employer requires an employee to undertake training, that training should be paid for by the employer and that time spent in training should be regarded as time worked.

## **S20 –Allowances –Clothing and equipment allowance –Laundry allowance**

102. United Voice’s claim concerning the laundry allowance is discrete. The claim seeks to insert a definition to clarify that the existence of on-site laundry facilities does not preclude the allowance being payable. The claim does not alter the entitlement to the laundry allowance which is based on the employer requiring the employee to wear a uniform which is also required to be laundered.

103. Ms Bea gave evidence in support of this claim and her evidence was unimpeached by cross examination.<sup>130</sup>

104. The proposition that ECEC employees need a freshly laundered uniform for each day of work was largely uncontroversial.<sup>131</sup>

105. A number of employers did not pay the allowance as a uniform was optional.<sup>132</sup>

106. Ms Llewellyn’s evidence was consistent with the justification for our claim. Ms Llewellyn does not pay the laundry allowance to her staff, requires her staff to wear a polo shirt but only issues 2 shirts to an employee, agreed that a freshly laundered shirt was required for each day of work and that a full time employee would potentially have to launder the uniform at home 3 times a week. The justification for not paying the laundry allowance was that staff could use the washing machines on site which get busy ‘*most afternoon*’.<sup>133</sup> Washing and drying an item in the centre’s machine takes an hour and quarter and if a full time employee is availing herself of the facilities at the centre, the employee is washing a uniform on Tuesday, Wednesday, Thursday and Friday.

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<sup>130</sup> PN426 to PN446.

<sup>131</sup> Chemello pays the laundry allowance as part of above award payments and readily agreed that uniforms need to be neat and tidy each day at PN3833. Tullberg agrees that a fresh uniform is required ‘*most days*’ at PN3678.

<sup>132</sup> Fraser PN1964; McPhail PN2833.

<sup>133</sup> PN4307 to 4327.

107. Mr Mahony has washing facilities on his premises but pays the laundry allowance as he recognises the utility of the allowance:

*I choose to do that. I do have two laundries and two sets of facilities and if, I suppose, employees decided to use those for what they require then I would not be paying them the allowance but they choose not to at this stage so I pay them the allowance and I'm very keen to have them appear in their uniform. So I am happy to pay the - in my case I'm happy to pay the allowance, although it is a significant sum of money on our costs each year.<sup>134</sup>*

108. Ms Hands also paid the laundry allowance and gave her employees a choice to use a free work laundry service and was a proponent of the utility the laundry allowance and freshly laundered uniforms for staff.<sup>135</sup>

109. The evidence indicates that the problem sought to be cured by the insertion of the definition as proposed is real, that there is utility in the variation in light of working conditions in the sector and that the variation should be made.

## **S20 –Allowances –Clothing and equipment allowance –Sun hats and sunscreen**

110. United Voice makes a claim that hats and sunscreen should be considered ‘*protective clothing*’ and employees should either provided with hats and sunscreen or be reimbursed the cost of purchase.

111. United Voice witness Ms Hennessy provided evidence that educators spend a significant amount of time outdoors during working hours, and that modelling good behaviour for children was an important feature of her role as educator in her witness statement:

38. *We teach the children that it is important to always wear sun protection, including hats and sunscreen, when they go outside. It is important that we role model this for the children, so we always make sure we wear hats and sunscreen when we are outside with the children. It's also important for my own health that I am adequately protected from the sun when I am outside with the children. The amount of time we spend outside with the children can vary depending on the weather and the staff that are working. On a sunny day we can spend around 4-5 hours outside with the children.<sup>136</sup>*

112. There was no real contest in the evidence that sun hats and sunscreen should be provided and/or paid for by an employer. The employer witnesses who were asked about sun hats and

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<sup>134</sup> PN4025.

<sup>135</sup> PN4799-4808.

<sup>136</sup> Exhibit 6, Statement of Bronwen Hennessy dated 11 March 2019, paragraph 38.

sunscreen indicated that they already provided hats and sun screen. Ms Llewellyn agreed that she already provided sunscreen and hats and that introducing an award requirement to do so would not affect the operation of her business.<sup>137</sup> Mr Mahony stated the following:

**Bull:** ....You say in relation to hats and sunscreen that you already provide it. You do what we're asking to be inserted into the award. You provide hats and sunscreen?

**Mahony:** We do indeed, yes. I do that for a number of reasons. One of them of course is that I need to provide adequate protection for my employees while they're out in the sun. And the second one is I need them to demonstrate clearly to the children that we all do this when we're out in that sort of condition.

**Bull:** So if there was a clarification of a requirement to provide hats and sunscreen that wouldn't affect the way you operate your centres?

**Mahony:** It would make no difference in our particular case.

113. On the basis of the above evidence, the Commission is entitled to make the following findings:

- a) employees in this sector spend a reasonable amount of time outdoors in the course of their duties;
- b) sun hats and sunscreen are essential protective equipment in this context; and
- c) it is appropriate that employer pay for sun hats and sunscreen or reimburse the cost of purchase.

### **S30 – Annual leave/Close downs**

114. The United Voice claim would have the effect of limiting close downs to a maximum of 4 weeks over the Christmas/New Year period and require the employee to be paid their ordinary rate if the employee had no annual leave.<sup>138</sup> Our claim would take away the ability provided by the Children's Service Award to employers to in effect stand down and stand down employees over the over the Christmas/New Year period for extended periods without pay if they have exhausted their annual leave entitlement.

115. No witness gave any evidence that the current latitude given by the Children's Service Award to employer concerning shut downs is used or in any sense necessary.

116. We summarise the evidence of the employer witnesses below and over the page.

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<sup>137</sup> PN4333-4334.

<sup>138</sup> United Voice amended draft determination Children's Services Award, filed 15 March 2019.

Viknarasah	Both her centres operate 50 weeks of the year. <sup>139</sup>
Fraser	A large operator: owns 7 centres and manages 5 centres. All centres are open all year and no shut down is applied to the workforce. Ms Fraser admitted the removal of the current shut down provisions would have no impact of the way manages her business. <sup>140</sup>
Paton	The Centre has a 2 week close down over Christmas: <i>'the week of Christmas and the week of New Year.'</i> <sup>141</sup> <i>'You don't need that facility to direct people to take leave other than at the Christmas/New Year period?---Other than Christmas? Correct.'</i> <sup>142</sup>
Maclean	The 2 centres operate all year. <sup>143</sup>
Chemello	The 3 centres are open all year: <i>'we only shut down for public holidays.'</i> <sup>144</sup>
McPhail	The 2 centres open all year and never shut down. <sup>145</sup>
Brannelly	A spokesperson and operator of Outside of School Hours Care ('OSHC') services: <i>'[F]or the majority a lot of services do close over the two weeks during the Christmas holidays - but usually services are open for between 48 and 50 weeks of the year.'</i> <sup>146</sup> A limitation on only a 2 week shut down over the Christmas/New year period would not impede the operation of most services. <sup>147</sup>
Tullberg	The 3 centres open 52 weeks a year. <sup>148</sup>
Mahony	One service open 52 weeks a year, the other service operates 50 weeks a year and shuts down for 2 weeks over the Christmas/New year period. <sup>149</sup>

<sup>139</sup> Exhibit 13 at [23] and [27].

<sup>140</sup> PN1877 to 1881.

<sup>141</sup> PN2377.

<sup>142</sup> PN2386.

<sup>143</sup> PN2550.

<sup>144</sup> PN2741.

<sup>145</sup> PN3120 to 3121.

<sup>146</sup> PN3504.

<sup>147</sup> PN3506.

<sup>148</sup> PN3733.

<sup>149</sup> PN3982 to 3986.

Llewellyn	The 1 franchise centres operate all year and having only a 2 week shut down would not affect the operation of her business. <sup>150</sup> In relation to directing an employee to take leave without pay or inadequate annual leave: ‘ <i>these issue have not arisen at my centres.</i> ’ <sup>151</sup>
Hands	The 2 services operate all year. <sup>152</sup>

117. The evidence reflects the evolving ‘*for profit nature*’ of the sector. Providers appear to manage leave like most businesses where there are foreseeable reductions in demand over the Christmas/New Year period which coincide with when most employees’ preference for leave occurs. Ms Llewellyn notes that she attempts to accommodate staff preferences for leave but there is responsibility on managers to manage leave and if an employee takes all their annual leave in June then the expectation is that they will be working for most of January.<sup>153</sup> Ms Paton who does observe a 2 week shut done at her centre readily agrees that she does not need the facility to direct staff to take leave without pay or leave for more than 2 weeks to manage the Christmas/New year shut down.<sup>154</sup>
118. The Commission is entitled to find that the current provisions of the Children’s Services Award at clauses 24.4(a), (b) and (c) which allow for lengthy unspecified close downs over the Christmas/New Year period where an employee can be directed to take leave without pay and an open ended capacity to direct an employee to take annual leave or be paid at the ordinary rate at other ‘*vacation periods*’ are anachronistic. There was no evidence from an employer that the problem which the current clause 24.4(b) is directed towards is real. The evidence indicates that employers responsibly manage the leave entitlements of their employees to accommodate foreseeable seasonal changes in the need for labour. The variation proposed will reinforce the current practise.
119. It is not necessary for the Commission to engage in any consideration of legal issues associated with these provisions raised in our submission as there is clear merit case that the provisions are obsolete and unnecessary. Our variations as proposed should be made.

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<sup>150</sup> PN4335 to 4336.  
<sup>151</sup> Exhibit 39 at [104].  
<sup>152</sup> PN4795 to 4797.  
<sup>153</sup> PN 4336 to 4340.  
<sup>154</sup> As above.



## **ACA and others' claims**

### **The rostering claim**

120. ACA and others seek to vary the Awards to exempt an employer from having to provide 7 days' notice in circumstances where another employee has provided less than 7 days' notice of their inability to perform a rostered shift and there are issues with meeting staff to child ratios.
121. The evidence established that the variation ACA seeks to make to the rostering clause is unnecessary. Both Awards contain provision for varying rosters by agreement<sup>155</sup> and there was a clear consensus that employees covered by the Awards are generally willing to agree to roster changes (except where it may conflict with their own caring or other responsibilities).
122. United Voice member Ms Bea gave evidence in her statement that in her experience '*people are understanding of why these shift changes need to occur when a colleague is sick or has a family emergency and are normally willing to swap or change shifts if it does not create difficulties for their own caring responsibilities.*'<sup>156</sup> Ms Wade stated in her statement that '*if someone has an urgent appointment or some other unusual circumstance that needs to be accommodated, I try and find another staff member who is willing to cover the shift or change shifts. Most staff are flexible and cooperative with these amendments to rosters because they understand that their co-workers have unexpected illnesses or appointments.*'<sup>157</sup>
123. The evidence of employer witnesses including Mr Fraser, Ms Chemello and Ms Hands, overwhelmingly indicated that employees were accommodating with late roster changes.<sup>158</sup> Ms Paton gave the following evidence:
- Saunders:** ... *When you call your staff, you do from time to time call staff to try and fill gaps in the roster don't you?*
- Paton:** *Yes.*
- Saunders:** *And they do their best to help out?*
- Paton:** *Absolutely.*
- Saunders:** *They usually only refuse if they've got a decent reason like an appointment or family responsibilities?*
- Paton:** *Yes.*<sup>159</sup>
124. The evidence also indicated that overwhelmingly, the employer witnesses were *not* seeking the ability to make late roster changes without employee agreement.<sup>160</sup> Several employer

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<sup>155</sup> Children's Services Award, clause 21.7(b)(i) and the Teachers' Award, for part-time employees, clause 10.4(d)(i).

<sup>156</sup> Exhibit 9, supplementary statement of Pixie Bea dated 10 April 2019, paragraph 15.

<sup>157</sup> Exhibit 12, supplementary statement of Alicia Wade dated 12 April 2019, paragraph 11.

<sup>158</sup> PN1793-1796, PN2718-2719, PN4698.

<sup>159</sup> PN2294-2296.

witnesses, including Ms Viknarasah and Ms Chemello, also indicated that they perceived such a practice as unfair<sup>161</sup> or as not ‘good for our team’.<sup>162</sup> The evidence of Mr Mahony is indicative:

**Saunders:** *If you can't find a casual you might ask one of the other staff to come in?*

**Mahony:** *Well, it'll be one of two things. Either the director will make some arrangement for themselves to come in, or they will contact another staff member and see if we can organise something that works for them, as well.*

**Saunders:** *You wouldn't force someone who wasn't rostered to come in?*

**Mahony:** *Oh, gosh, no. There's no coercion. We're a very teamly(sic) group of people and we work together closely and respect each other's needs.*

**Saunders:** *And you don't need the power to that, do you?*

**Mahony:** *I'm not aware of having any such power, but I wouldn't use it if I did.<sup>163</sup>*

125. It was uncontested that if the rostering claim was granted, it would create difficulties for employees in respect of caring responsibilities and attending to medical matters. United Voice member Ms Bea, who currently works as a casual (as she has not been able to obtain permanent employment), states that ‘*the unpredictable nature of my hours is a significant stress factor*’.<sup>164</sup> She gives evidence in her statement that ‘*changing my hours with little notice can cause significant disruption to my life outside of work, especially in relation to managing my children’s school drop offs and pick-ups. As a parent, I require stability to provide care for my own children. If educators who are parents rely on out of school hours care or support from families then shift changes with little notice places extreme stress on all of these relationships.*’<sup>165</sup> Ms Hennessy gave evidence in her statement that ‘*currently, if we have any rostering requests, we are required to provide them to the director two weeks in advance. I am able to plan my life outside of work around my roster being available more than one week in advance. This means I can plan shifts in my second job, doctors appointments, and the running of other errands. If my roster was changed at short notice without my consent, it would make planning my life very difficult. For example, if I have a doctors appointment booked one afternoon after my shift but my shift is changed at the last minute without my*

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<sup>160</sup> Oral evidence of Maclean PN2482-2486; Chemello, PN2720-2727; McPhail, PN2974-2986; Tullberg, PN3563-3565; Mahony, PN3962-3964; Llewellyn PN4224-4229.

<sup>161</sup> PN1154-1176.

<sup>162</sup> PN2721 -2727.

<sup>163</sup> PN3972-PN3974.

<sup>164</sup> Exhibit 9 Supplementary statement of Pixie Bea dated 10 April 2019, paragraph 11.

<sup>165</sup> Exhibit 9 Supplementary statement of Pixie Bea dated 10 April 2019, paragraphs 12-13.

*consent, then I have to make the choice between potentially getting a non-attendance fee from my doctor or not attending part of my rostered shift.*<sup>166</sup>

126. On the basis of the above evidence, the Commission is entitled to make the following findings:

- a) the majority of employees in the sector are willing to agree to roster changes unless it conflicts with caring responsibilities or other appointments;
- b) the current Awards already provide employers with sufficient flexibility to address rostering issues;
- c) the rostering variation sought by ACA and others is unnecessary;
- d) the rostering variation sought by ACA and others would have a detrimental impact on the ability of employees' to plan for outside of work responsibilities; and
- e) the rostering variation sought by ACA and others should be rejected.

### **The ordinary hours claim**

127. ACA and others make a claim to extend the span of ordinary hours from 6.30pm to 7.30pm in the Children's Services Award and in Schedule B of the Teachers' Award.

128. The evidence indicates that this variation is not necessary and would be significantly disruptive to employees who have caring responsibilities.

129. One of the reasons advanced for this variation was that late pick up of children by parents provide a rationale for extending the span of ordinary hours to 7.30pm.<sup>167</sup> However, the evidence indicated that late pick up of children is not frequent. United Voice member Ms Hennessy provided uncontested evidence that: *'in my experience, most children have been picked up by their parents before 6.15pm. We occasionally have parents who run late when there is an emergency or some other unusual circumstance, though this doesn't happen often'*.<sup>168</sup> Ms Bea and Ms Wade also provided evidence that late pick up was infrequent.<sup>169</sup>

130. Employer witness Ms McPhail provided evidence that late pick up occurred *'very rarely'* at her centre<sup>170</sup> and Mr Mahony conceded that *'late pickups at the moment is not a serious problem for us'*.<sup>171</sup> Late pick-up is not restricted to pick up after closing hours (or after the ordinary span of hours in the Awards):

*Saunders: So about once a week a parent is late picking up their child?*

*Paton: Correct.*

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<sup>166</sup> Exhibit 7 Supplementary statement of Bronwen Hennessy dated 10 April 2019, paragraphs 11-12.

<sup>167</sup> ACA and others, submission filed 15 March 2019, page 19.

<sup>168</sup> Exhibit 7 Supplementary statement of Bronwen Hennessy dated 10 April 2019, paragraph 5.

<sup>169</sup> Exhibit 9 Supplementary statement of Pixie Bea dated 10 April 2019, paragraph 9; Exhibit 12 Supplementary statement of Alicia Wade dated 12 April 2019, paragraph 5.

<sup>170</sup> PN2918-2920.

<sup>171</sup> PN3958.

**Saunders:** *That's not concentrated in the 12 hour session. That can be one of the kids that finishes at 5.30?*

**Paton:** *Yes. We have the same late pick-up rules for outside of session as we do for late collection.*

**Saunders:** *Of course. But it doesn't always push you past the centre's closing time, does it?*

**Paton:** *No, but it does cause staff who would normally be rostered to finish at 5.30 to stay and that's causing overtime on theirs.*

**Saunders:** *Sure, but that could be fixed by rostering someone by changing their roster to six?*

**Paton:** *Except that I don't know that that parent is going to be late.*

**Saunders:** *Of course. So you wouldn't really roster someone regularly just in case someone was late, would you?*

**Paton:** *No.*

131. Numerous employer witnesses indicated they charged parents late fees for late pick up of children.<sup>172</sup>
132. There is a level of inherent uncertainty in parents picking up children late, and it was acknowledged that regardless of the opening hours, there is always a risk of late pick up.<sup>173</sup> There was no evidence that an employer would roster an employee after closing time just in case of a late pick-up<sup>174</sup> and no evidence that extending the ordinary span of hours in the Awards would genuinely address any issues that arise from late pick up.
133. Many employer witnesses had not undertaken any costings or any business assessment of the case for increased opening hours<sup>175</sup>, and no clear evidence emerged to suggest any genuine need across the sector for an increased ordinary span of hours under the Awards.
134. There was a consensus that employees covered by the Awards are predominantly female, and that many of them worked part-time and had young families and caring responsibilities and it was accepted by several employer witnesses that extending the ordinary span of hours within the Awards would impact on employees' caring responsibilities.<sup>176</sup>
135. Ms Hennessy, who has a second job as a disability support worker, also gave evidence about the impact of extending the ordinary span of hours on her secondary employment prospects,

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<sup>172</sup> Fraser, PN1717-1719; Paton PN2189-2196; Chemello PN2689-2690; Llewellyn PN4210-4213.  
<sup>173</sup> Llewellyn PN4210.

<sup>174</sup> See oral evidence of Tullberg PN3595, Mahony PN3961 and Paton, PN2185.

<sup>175</sup> Oral evidence of Viknarah, PN1088; Fraser, PN1699 and Mahony, PN3943.

<sup>176</sup> Oral evidence of Wade, PN882-885; Viknarah, PN1097-1103; Paton PN2203-2206; Chemello, PN2677-PN2680; Mahony PN3912-3916; Llewellyn PN4157-4166.

stating that working routinely until 7.30pm ‘*would make it pretty much impossible for a week night job because it just would not be worth it for the families that I work for to hire me.*’<sup>177</sup>

136. On the basis of the above evidence, the Commission is entitled to make the following findings:

- a) late pick up of children is infrequent and extending the span of ordinary hours within the Awards would not genuinely address this issue;
- b) there is no genuine need across the sector for an increased ordinary span of hours under the Awards;
- c) the ordinary hours variation sought by ACA and others is unnecessary;
- d) the ordinary hours variation sought by ACA and others would have a detrimental impact on the ability of employees’ to meet their caring responsibilities;
- e) the ordinary hours variation sought by ACA and others would have a detrimental impact on the ability of employees’ to undertake secondary employment; and
- f) the ordinary hours variation sought by ACA and others should be rejected.

**United Voice  
29 May 2019**

## Annexure A

### Objections to statement evidence of the ACA

Statement	paragraph	objection
<b>Viknarasah</b> 11 April 2019 Exhibit 13	14	Seeks to qualify as an expert
	33	Relevance, the last sentence is an opinion
	39	Last sentence an opinion
	40	Opinion
	42	Middle sentence – opinion
	43	Relevance/opinion
	47 and 48	Hearsay
	50	Hearsay
	61 to 63	Relevance
	65 to 68 and 70	Submission
	74	Submission
	78 to 83 (except	Submission
	82 to 107 to 109	Submission
	110	Relevance/opinion
	114	Opinion
	119 to 122	Submission
124	Submission	
133	Opinion	
141 to 163	Submission	
<b>Fraser</b> 15 April 2019 Exhibit 18	12 to 17	Submission
	31 to 37	Submission
	38 to 40	Submission/opinion
	41 and 42	Submission
	56 to 66	Submission
	86	Submission
	89	Opinion
	90 and 92	Opinion
	96 and 98	Submission/opinion
	99 to 109	Submission/opinion
	114	Submission
135 to 152	Submission	

<p><b>Paton</b> 14 March 2019 Exhibit 21</p>	<p>5 to 8 32 to 34 45 to 51 (except 49) 53 56 to 59 79</p>	<p>Submission Submission Submission /opinion  Submission Submission Opinion</p>
<p><b>Maclean</b> 15 April 2019 Exhibit 25</p>	<p>{5} to {7}  10 to 17 36 to 39 53 and 54 58 to 64 82 98</p>	<p>Seeks to qualify as an expert – this witness has some claim to expertise in relation to assessment and regulation in ECEC in light of her academic qualifications and work experience.  Relevance Submission Submission Submission Submission Submission</p>
<p><b>Chemello</b> 1 March 2019 Exhibit 27</p>	<p>27  45 47</p>	<p>“ ... all my permanent staff, I pay above award rates, I do only pay award rates for casual and trainee employees.” This diminishes the general weight and relevance of this witness’ evidence in the review of safety net instruments.  Hearsay Submission</p>
<p><b>McPhail</b> 12 April 2019 Exhibit 28</p>	<p>44 to 47</p>	<p>Submission</p>
<p><b>Brannelly</b> 15 April 2019 Exhibit 34</p>	<p>17 to 32 55 to 37 46 51 to 51</p>	<p>Submission Submission Opinion Submission</p>

	56 to 62 64 to 68	Submission/opinion Submission/opinion
<b>Tullberg</b> 9 April 2019 Exhibit 35	7 to 13 28 37 to 40 45 51 to 57 84 to 87 90 to 98 99 to 100	Relevance Submission Opinion Opinion Submission submission Submission Opinion
<b>Mahony</b> 11 April 2019 Exhibit 38	6 to 12 33 to 34 38 to 40 46 47 49 to 56 and 58 93	Relevance Submission Submission Opinion Submission Submission Submission
<b>Llewellyn</b> 9 April 2019 Exhibit 39	38 to 59 96 to 98	Relevance/submission Submission
<b>Hands</b> 12 March 2019 Exhibit 42	41 and 42 47 to 57	The observations concerning the motivating factors of parents are an opinion. Submission