[2020] FWCFB 3011

DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Award stage – Group 4 awards – *Children's Services Award 2010* and *Educational Services (Teachers) Award 2010* – Final Claims – Substantive Issues

(AM2018/18 and AM2018/20)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, 10 JUNE 2020

4 yearly review of modern awards – Award stage – Group 4 awards – Children's Services Award 2010 and Educational Services (Teachers) Award 2010 – Final Claims – Substantive Issues.

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Abbreviations

2018 Amendment Act	*Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth)
ABS	Australian Bureau of Statistics
FW Act	*Fair Work Act 2009* (Cth)
ACECQA	Australian Children's Education and Care Quality Authority
AFEI	Australian Federation of Employers and Industries
AIS	Associations of Independent Schools
ANZSIC	Australian and New Zealand Standard Industrial Classification
Awards	*Children's Services Award 2010* and *Educational Services (Teachers) Award 2010*
Census	Census of Population and Housing
Children's Services Award	*Children's Services Award 2010*
CoE	Characteristics of Employment
ECEC	Early Childhood Education and Care
ECEC Employers	Australian Business Industrial, the Australian Childcare Alliance Inc, the New South Wales Business Chamber Ltd, the National Outside School Hours Care Association and Junior Adventures Group
EEH	Survey of Employee Earnings and Hours
I and E Arrabalde	Isabelle Arrabalde and Elizabeth Arrabalde (or the Individuals)
IEU	Independent Education Union of Australia
June 2018 Report	Early Childhood and Childcare in Summary June Quarter 2018 Report
NQF	National Quality Framework
National Law	Education and Care Services National Law
National Regulations	Education and Care Services National Regulations
NQS	National Quality Standard
Productivity Commission Report	Childcare and Early Childhood Learning – Productivity Commission Inquiry Report 31 October 2014
Review	The Fair Work Commission's 4-yearly Review of Modern Awards
Teachers Award	*Educational Services (Teachers) Award 2010*
The Unions	Independent Education Union of Australia and the United Workers' Union (formerly United Voice)
UWU	United Workers' Union (formerly United Voice)

1. Background

[1] A number of substantive claims have been made to vary the *Children's Services Award 2010* (the Children's Services Award) and the *Educational Services (Teachers) Award 2010* (the Teachers Award) as part of the 4 yearly review of modern awards (the Review).

[2] A Mention was held on 22 October 2018 to deal with the programming of a number of substantive claims to vary the Children's Services Award. A Report was issued following that Mention and a further programming Mention took place on 9 November 2018.[1] At the 9 November Mention, the parties confirmed that there was an overlap between a number of the claims in the Children's Services Award and the substantive claims in the Teachers Award. A Statement[2] issued on 13 November 2018 invited parties to file short written submissions dealing with the issues and how the overlapping claims should be dealt with. Programming mentions were held on 28 November 2018 and 5 December 2018. Transcripts of these Mentions are available on the Fair Work Commission's (the Commission) website.

[3] At the 28 November 2018 Mention, it was again agreed that there was an overlap between the substantive claims in the Children's Services Award and the Teachers Award and a further Mention was held on 5 December 2018 to deal with that issue. Prior to the 5 December 2018 Mention, interested parties filed a joint report setting out their position that all the substantive claims in the Children's Services Award and in the Teachers Award (apart from the Independent Education Union of Australia's (IEU) claims) be heard together. The IEU's claims were omitted from the joint report as the IEU had filed a separate submission indicating they did not agree to the proposal that the claims be heard together. After the 5 December 2018 Mention, the IEU filed a further submission agreeing to have two of their claims, one relating to the definition of teachers and one relating to 'quarter days' heard in conjunction with the claims relating to the Children's Services Award.

[4] As agreed by the interested parties, the substantive claims relating to the Children's Services Award (AM2018/18) and the Teachers Award (AM2018/20) were heard together by the same Full Bench, with the exception of the IEU's claim regarding teachers in distance education. That claim was to be heard and determined by a separate Full Bench. The IEU subsequently wrote to Vice President Hatcher (the presiding Member of that Full Bench) withdrawing its claim relating to distance education.[3] We also note that Business SA had initially made a claim relating to casual employees in the Children's Services Award but this claim was also withdrawn.[4]

[5] The claims advanced by the United Workers' Union (UWU; formerly United Voice)[5] in both the Children's Services Award and the Teachers Award are as follows:

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[1] Transcript, 9 November 2018.

[2] [2018] FWC 6953.

[3] IEU correspondence, 26 April 2019.

[4] Business SA correspondence, 7 May 2019.

[5] United Voice was amalgamated with the National Union of Workers to become the United Workers' Union, effective 11 November 2019.

(i) a claim to introduce a new allowance for employees assigned to be the Educational Leader at a service (**Educational Leader Allowance**);

(ii) a claim to introduce a new allowance for employees assigned to be the Responsible Person at a service (Responsible Person Allowance); and

(iii) a claim to increase the time off the floor away from children (non-contact time) for Room Leaders and Educational Leaders (Non-contact Time Claim).

[6] The claims advanced by I. and E. Arrabalde (the Individuals) are in similar terms to those advanced by the UWU for a Responsible Person Allowance and an Educational Leader Allowance.

[7] The other claims advanced by the UWU in relation to the Children's Services Award are:

(i) a claim seeking the payment of training courses and time worked at those courses (Training Allowance);

(ii) a claim seeking the laundry allowance be paid in circumstances where employees wash their clothes using the on-site facilities at the workplace (Laundry Allowance);

(iii) a claim to include 'hats and sun protection (including sunscreen)' in the definition of protective clothing and to require the employer to either provide these items or reimburse the employee (Clothing Allowance);

(iv) a claim to vary the exemption in the higher duties clause so that an employee who is required to perform higher duties (to replace a colleague who is attending paid training) is paid higher duties (Higher Duties Claim); and

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

[8] Australian Business Industrial, the Australian Childcare Alliance Inc, the National Outside School Hours Care Association (NOSHCA), Junior Adventures Group and the New South Wales Business Chamber Ltd (the ECEC Employers) advanced two claims in respect of both Awards:

(i) A variation such that ordinary hours may be worked between 6:00 am and 7:30 pm (as opposed to the current spread of hours of 6:00 am to 6:30 pm) (Ordinary Hours Claim); and

(ii) A variation to the rostering arrangements in the Children's Services Award and the Teachers Award (the Awards) so that an employer is exempt from having to provide employees with seven days' notice of a roster change in circumstances where:

(a) another employee has provided less than seven days' notice of their inability to perform a rostered shift; and

(b) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee's rostered hours so as to replace the absent employee (Rostering Claim).

[9] The Claims advanced by the IEU in relation to the Teachers Award are:

(i) a claim to amend award coverage for Directors of childcare centres with teaching degrees, to be covered by the Teachers Award (and not the Children's Services Award) (Coverage Claim); and

(ii) a claim to confirm the minimum payments of a 'quarter day' and 'half day' to casual teachers (Minimum Engagement Claim).

[10] The following submissions were filed in response to a Statement and Directions published on 11 December 2018:[6]

- Australian Children's Education and Care Quality Authority (ACECQA);[7]
- I and E Arrabalde;[8]
- IEU;[9]
- The ECEC Employers;[10] and
- UWU.[11]

[11] Submissions in reply were filed by the following parties:

- Australian Federation of Employers and Industries (AFEI);[12]
- I and E Arrabalde;[13]
- IEU;[14]
- The ECEC Employers;[15] and
- UWU.[16]

[12] Witness evidence was heard on 6, 7 and 8 May 2019 after which the parties were directed to file written submissions setting out the findings they sought based on the evidence. The following parties filed submissions in response to those Directions:

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[6] See [2018] FWC 7505. The Directions were subsequently amended on 7 March 2019.

[7] ACECQA submission, 15 March 2019.

[8] I and E Arrabalde submission, 14 March 2019.

[9] IEU submission, 15 March 2019.

[10] ECEC Employers submission, 15 March 2019.

[11] UWU submission, 15 March 2019.

[12] AFEI submission, 17 April 2019.

[13] I and E Arrabalde submission, 26 April 2019.

[14] IEU submission, 15 April 2019; and IEU submission, 29 April 2019.

[15] ECEC Employers submission, 16 April 2019; and ECEC Employers submission, 29 April 2019.

[16] UWU submission, 12 April 2019; and UWU submission, 29 April 2019.

- AFEI;[17]
- I and E Arrabalde;[18]
- IEU;[19]
- The ECEC Employers;[20] and
- UWU.[21]

[13] To facilitate the hearing of the respective claims, the Commission published two Background Documents (Background Paper 1 dated 13 June 2019, and Background Paper 2 dated 5 July 2019) containing a number of questions directed at particular parties.[22] Parties were asked to respond to these questions and the following submissions were filed in response to Background Paper 1:

- AFEI;[23]
- I & E Arrabalde;[24]
- IEU;[25]
- The ECEC Employers;[26] and
- UWU.[27]

[14] The following submissions were filed in response to Background Paper 2:

- AFEI;[28]
- I & E Arrabalde;[29]
- IEU;[30] and
- The ECEC Employers;[31] and
- UWU.[32]

[15] A final hearing was conducted on 9 August 2019 and the following material was filed after the 9 August 2019 hearing:

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[17] AFEI submission, 17 April 2019.

[18] I and E Arrabalde submission, 26 April 2019.

[19] IEU submission, 15 April 2019; and IEU submission, 29 April 2019.

[20] ECEC Employers submission, 16 April 2019; and ECEC Employers submission, 29 April 2019.

[21] UWU submission, 12 April 2019; and UWU submission, 29 April 2019.

[22] This decision incorporates more recent data released since the background documents were published.

[23] AFEI submission, 10 July 2019.

[24] I and E Arrabalde submission, 5 July 2019.

[25] IEU submission, 10 July 2019.

[26] ECEC Employers submission, 10 July 2019.

[27] UWU submission, 9 July 2019.

[28] AFEI submission, 17 July 2019.

[29] I and E Arrabalde submission, 19 July 2019.

[30] IEU submission, 19 July 2019.

[31] ECEC Employers submission, 19 July 2019.

[32] UWU submission, 19 July 2019.

- I & E Arrabalde;[33]
- IEU;[34] and
- The ECEC Employers.[35]

[16] A list of the submissions filed is set out at **Attachment 1**, a list of the witness evidence is set out at **Attachment 2** and a list of Exhibits is set out at **Attachment 3**.

[17] During the course of the proceedings we invited the parties to comment on whether the **Educational Leader Allowance** claim overlapped with the proceedings in C2013/6333 and AM2018/9. Those proceedings are before a differently constituted Full Bench. We note that the parties have expressed a preference that we determine those matters before the other Full Bench. We note that the other Full Bench has reserved its decision.

[18] We do not propose to determine two of the claims before us, at this time. These claims are the claims in respect of an **Educational Leader Allowance** and a **Responsible Person Allowance**. These claims will be listed for Mention after the Full Bench in C2013/6333 and AM2018/9 has handed down its decision.

[19] This decision deals with the remaining claims as advanced by the parties in the proceedings. Before turning to the various claims, it is necessary to say something about the Commission's task in the Review. It is also appropriate to put those claims in context by addressing the relevant framework regulating the early childhood education and care (ECEC) sector, and to describe the various sectors covered by the Children's Services Award and the Teachers Award.

2. The Review

[20] Section 156 of the *Fair Work Act 2009 (Cth)* (the FW Act) deals with the conduct of the Review and s.156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context 'review' has its ordinary and natural meaning of 'survey, inspect, re-examine or look back upon'.[36] The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

[21] If a power to decide is conferred by a statute and the context (including the subject matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the subject matter, scope and purposes of the legislation will ordinarily be implied.[37] However, a number of provisions of the FW Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). In particular, the Review function in Part 2-3 of the FW Act involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review.

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[33] I and E Arrabalde submission, 20 August 2019.

[34] IEU correspondence, 13 September 2019.

[35] ECEC Employers submission, 16 August 2019.

[36] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38].

[37] *O'Sullivan v Farrer* (1989) 168 CLR 210 at [216] per Mason CJ, Brennan, Dawson and Gaudron JJ.

[22] Section 138 (achieving the modern awards objective) and a range of other provisions of the FW Act are also relevant to the Review: s.3 (object of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.135 (special provisions relating to modern award minimum wages); Division 3 (terms of modern awards) and Division 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions etc by the Commission); s.578 (matters the Commission must take into account in performing functions etc); and Division 3 of Part 5-1 (conduct of matters before the Commission).

[23] The modern awards objective is in s.134 of the FW Act:

> ‘**134 The modern awards objective**
>
> What is the modern awards objective?
>
> **(1)** The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> **(a)** relative living standards and the needs of the low paid; and
>
> **(b)** the need to encourage collective bargaining; and
>
> **(c)** the need to promote social inclusion through increased workforce participation; and
>
> **(d)** the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> **(da)** the need to provide additional remuneration for:
>
> **(i)** employees working overtime; or
>
> **(ii)** employees working unsocial, irregular or unpredictable hours; or
>
> **(iii)** employees working on weekends or public holidays; or
>
> **(iv)** employees working shifts; and
>
> **(e)** the principle of equal remuneration for work of equal or comparable value; and
>
> **(f)** the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> **(g)** the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> **(h)** the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

> This is the ***modern awards objective***.
>
> When does the modern awards objective apply?
>
> **(2)** The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:
>
> **(a)** the FWC's functions or powers under this Part; and
>
> **(b)** the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.
>
> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[24] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) of the FW Act (the s.134 considerations).

[25] The modern awards objective is very broadly expressed.[38] It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account s.134 considerations.[39] 'Fairness' in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[40]

[26] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[41] No particular primacy is attached to any of the s.134 considerations[42] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[27] It is not necessary to make a finding that the modern award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[43] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[44] In giving effect to the modern awards objective the Commission is performing an evaluative

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

[39] (2017) 256 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]-[44].

[40] [2018] FWCFB 3500 at [21]-[24].

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

[42] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

[43] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

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

function taking into account the matters in ss.134(1)(a)–(h) of the FW Act and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[28] Further, the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*[45] (the *Penalty Rates Review*):

> 'What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).'[46]

[29] Section 138 of the FW Act emphasises the importance of the modern awards objective:

> **'138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[30] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[47]

[31] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*[48] Tracey J considered what it meant for the Commission to be satisfied that making a determination varying a modern award (outside a 4 yearly review) was 'necessary to achieve the modern awards objective' for the purposes of s.157(1). His Honour held:

> 'The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.

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[45] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [161].

[46] Ibid at [48].

[47] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[48] (2012) 205 FCR 227.

> …
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.
> …
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.'[49]

[32] The above observation – in particular the distinction between that which is 'necessary' and that which is merely 'desirable' – is apposite to s.138, including the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary, as opposed to merely desirable. What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[50]

[33] In the *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) Decision* (the *Penalty Rates Case*)[51] the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:

> '1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
>
> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
>
> 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
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> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

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[49] Ibid at [35]–[37] and [46].

[50] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[51] (2017) 256 IR 1.

- the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'[52]

[34] Where an interested party applies for a variation to a modern award as part of the Review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)*: as follows:[53]

> '[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.
>
> [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'

[35] In the same decision the Full Court also said: '...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.'[54]

[36] We will apply the above principles in this decision.

[37] The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act* 2018 (the *2018 Amendment Act*) was assented to on 11 December 2018. The *2018 Amendment Act* repealed the parts of the FW Act providing for the conduct of 4 yearly reviews of modern awards. However, Schedule 4, Application and transitional provisions, of the *2018 Amendment Act* preserved the operation of the relevant provisions in the FW Act in respect of reviews of modern awards conducted as part of 4 yearly reviews of modern awards, if such review was commenced, but not completed, prior to 1 January 2018.

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[52] Ibid at [269].

[53] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123.

[54] Ibid at [46].

[38] The review of the Children's Services Award and the Teachers Award commenced prior to 1 January 2018. Accordingly, these reviews may continue pursuant to the provisions of the FW Act despite their repeal.

3 The National Quality Framework

[39] The ACECQA is the independent national authority established under the Education and Care Services National Law (the National Law) to guide the implementation and administration of the National Quality Framework (the NQF). The submission filed by the ACECQA does not respond to the specific claims in the proceedings but does provide some background information to the NQF.

[40] The NQF provides for a comprehensive legislative and policy framework which recognises the importance of ECEC and the professional nature of the work performed by employees in the sector.

[41] There are several different types of services within the ECEC sector including long day care, kindergartens, pre-schools, out-of-school hours' care and vacation care. The National Law and the Education and Care Services National Regulations (National Regulations) apply to most long day care, family day care, kindergarten, pre-school and outside school hours services in Australia. Some parts of the National Law and Regulations are specific to particular services.

[42] The NQF was introduced in 2012, with the aim of improving education and care across the sector, in long day care, family day care, preschool/kindergarten and outside of school hours care services.[55] The introduction of the NQF has created broad and significant changes in the sector. The NQF has imposed mandatory prescriptive national regulation on the sectors covered by the Awards.

[43] There are several elements to the NQF including:

- the National Law and National Regulations;
- the National Quality Standard;
- an assessment and quality rating process;
- national approved learning frameworks;
- a regulatory authority in each state and territory responsible for the approval, monitoring; and quality assessment of services in their state or territory; and
- a national body – (the ACECQA) which guides the implementation of the NQF and works with regulatory authorities.[56]

[44] The legislative framework for the NQF is the National Law and Regulations, which apply to most long day care, family day care, kindergarten/preschool and outside school hours care services in Australia.[57]

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[55] 'Guide to National Quality Framework', ACECQA, first published February 2018, last updated October 2018, p. 8.

[56] 'Guide to National Quality Framework', ACECQA, first published February 2018, last updated October 2018, p. 8.

[57] 'Guide to National Quality Framework', ACECQA, first published February 2018, last updated October 2018, p. 8.

[45] Victoria was the first state to pass the *Education and Care Service National Law Act 2010*.[58] The *Education and Care Services National Regulations* were made in Victoria on 9 December 2011 and came into effect on 1 January 2012.

[46] The National Law was then adopted by other states and territories, either through the passage of an application act or by the passage of corresponding legislation.[59] The National Law broadly harmonises the regulation of ECEC across Australia, though there are some variations across states. These variations are not significant for the purpose of the claims before us.

[47] In all states and territories, aside from Western Australia, the National Law and Regulations broadly came into effect on 1 January 2012. In Western Australia, the National Law came into effect on 20 June 2012 and the National Regulations on 25 July 2012 (regulations 1 and 3) and 1 August 2012 (the remaining regulations).

[48] Breaches of the National Law and Regulations attract civil penalties. Depending on the type of breach, the approved provider, the nominated supervisor and/or the educator are liable.

[49] The National Law introduced the National Quality Standard (the NQS), which is found in Schedule 1 of the National Regulations. The NQS is used to assess ECEC services to determine rating levels.

[50] There are seven quality areas within the NQS:

(1) Educational program and practice;
(2) Children's health and safety;
(3) Physical environment;
(4) Staffing arrangements;
(5) Relationships with children;
(6) Collaborative partnerships with families and communities; and
(7) Governance and leadership.

[51] Services are rated against each area of the NQS and given a rating (from highest to lowest) of '*Excellent'*, '*Exceeding National Quality Standard*', '*Meeting National Quality Standard*', '*Working towards National Quality Standard*' or '*Significant Improvement required*'.

[52] The quality rating is significant. Services that are rated as '*Significant Improvement required*' may have immediate action taken against them by the regulatory authority. This

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[58] All references within this submission to the National Law refer to the *Education and Care Service National Law Act 2010* (Vic) and all references to the National Regulations are to the *Education and Care Services National Regulations* (NSW).

[59] *Children (Education and Care Services National Law Application) Act 2010* (NSW); *Education and Care Services National Law (ACT) Act 2011* (ACT); *Education and Care Services (National Uniform Legislation) Act 2011* (NT); *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA); *Education and Care Services National Law (Application) Act 2011* (Tas); *Education and Care Services National Law (Queensland) Act 2011* (Qld); and *Education and Care Services National Law (WA) Act 2012* (WA).

action could include suspension of the service approval and withdrawal of access to the Child Care Subsidy.

[53] Further, the quality rating is public. Each service is required to display the rating at all times and the quality ratings are published on national registers, and the '*Starting Blocks'* and '*MyChild*' websites. Quality ratings are likely to have a significant impact on occupancy rates and the economic viability of a service.

[54] Relevantly for present purposes, an 'Educational Leader' is a defined role under the NQF. Regulation 118 of the National Regulations requires the approved provider to designate an 'Educational Leader':

> '**118 Educational leader**
>
> 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.
>
> Note: A compliance direction may be issued for failure to comply with this regulation.'[60]

[55] The ACECQA Information sheet on 'the role of the Educational Leader' notes that the role of the Educational Leader is primarily to:[61]

- collaborate with educators and provide curriculum direction and guidance;
- support educators to effectively implement the cycle of planning to enhance programs and practices;
- lead the development and implementation of an effective educational program in the service; and
- ensure that children's learning and development are guided by the learning outcomes of the approved learning frameworks.

[56] The ACECQA Information sheet also states that the Educational Leader has a significant role in:[62]

- guiding and developing educators and families' understanding about play and leisure-based learning, and the significance of the early years in the education continuum for children;
- building the knowledge, skills and professionalism of educators; and
- building a culture of professional inquiry with educators, coordinators and staff members to develop professional knowledge, reflect on practice and generate new ideas.

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[60] *Education and Care Services National Regulations* (2011), at reg. 118.

[61] 'National Quality Standard Information sheet: The Role of the Educational Leader', ACECQA, last updated April 2018, p. 2.

[62] 'National Quality Standard Information sheet: The Role of the Educational Leader', ACECQA, last updated April 2018, p. 2.

[57] The ACECQA Information sheet also states that:[63]

> 'The educational leader has an influential role in promoting positive outcomes for children and families. Effective educational leadership builds the capacity of educators by inspiring, motivating, affirming, challenging and extending their practice and pedagogy. This joint endeavour involves inquiry and reflection and supports ongoing learning and professional development.'

[58] Further, under the National Law, each centre is required to have a Responsible Person present at all times that the service is educating and caring for children. In each service, the approved provider is required to nominate an individual as the Nominated Supervisor. It is an offence to operate a service without a Nominated Supervisor.[64] Section 162(1) of the National Law states:

> '**162 Offence to operate education and care service unless responsible person is present**
>
> **(1)** The approved provider of an education and care service must ensure that one of the following persons is present at all times that the service is educating and caring for children—
>
> **(a)** the approved provider, if the approved provider is an individual or, in any other case, a person with management or control of an education and care service operated by the approved provider;
>
> **(b)** a nominated supervisor of the service;
>
> **(c)** a person in day-to-day charge of the service.
>
> Penalty: $5000, in the case of an individual. $25 000, in any other case.'[65]

[59] At centre-based services, the staff record must include the name of the Responsible Person at the service for each time that children are being educated and cared for by the service.[66] In addition, the centre must display the name and position of the Responsible Person in charge of the education and care service at any time.[67]

[60] There are minimum requirements that a Nominated Supervisor must meet, which are stated in Regulation 117C(1):

> '**(1)** For the purposes of *section 161A* of the Law, the prescribed minimum requirements for nomination of a person as a nominated supervisor of an education and care service are that the person must—
>
> **(a)** have attained the age of 18 years; and

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[63] 'National Quality Standard Information sheet: The Role of the Educational Leader', ACECQA, last updated April 2018, p. 1.

[64] *Education and Care Services National Law* (2010) at s. 161.

[65] *Education and Care Services National Regulations* (2011), at reg. 162(1).

[66] *Education and Care Services National Regulations* (2011), at reg. 150.

[67] *Education and Care Services National Regulations* (2011), at reg. 173(2)(c).

> **(b)** have adequate knowledge and understanding of the provision of education and care to children; and
>
> **(c)** have the ability to effectively supervise and manage an education and care service.'[68]

[61] There are also minimum requirements that a person in day-to-day charge of a service must meet which are set out in Regulation 117B(1):

> '**(1)** An approved provider or a nominated supervisor of an education and care service must not place a person in day-to-day charge unless—
>
> **(a)** the person has attained the age of 18 years; and
>
> **(b)** the approved provider or nominated supervisor (as the case requires)—
>
> **(i)** has had regard to the matters set out in subregulation (2); and
>
> **(ii)** has taken reasonable steps to ensure that the person has adequate knowledge and understanding of the provision of education and care to children and an ability to effectively supervise and manage an education and care service.'[69]

[62] In each case, consideration is also given to the person's history of compliance and any previous decisions under the law.[70]

[63] A Nominated Supervisor and each person in day-to-day charge of the service must also have successfully completed any child protection training required by state or territory law.[71]

[64] The Responsible Person is responsible for ensuring that the centre is operating, at all opening hours, in accordance with the National Law and Regulations. This means that the Responsible Person must ensure the health and safety of the children on site; that staff to children ratios are being met; that the physical environment is set out appropriately; and that programming and planning is carried out in accordance with the NQF. The Responsible Person must also maintain relationships with parents and families.

[65] As the Director (who is generally the Nominated Supervisor) cannot be on site at all opening hours, another employee will be designated the Responsible Person for those hours that the Nominated Supervisor is not on site.

[66] An employee who is designated as a Responsible Person could be an Assistant Director, an Early Childhood Teacher, a diploma qualified educator or a certificate III qualified educator.

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[68] *Education and Care Services National Regulations* (2011), at reg. 117C(1).

[69] *Education and Care Services National Regulations* (2011), at regs. 117B(1).

[70] *Education and Care Services National Regulations* (2011), at regs. 117B(2), 117B(3), 117C(2) and 117C(3).

[71] *Education and Care Services National Law Act* (2010) at s.162A.

[67] This employee will be the '*person in day to day charge*' for the purposes of s.162(1)(c) of the National Law.

4. The Children's Services Award 2010

Employee characteristics

[68] Using a framework developed by Commission staff[72] the Children's Services Award is 'mapped' to the following industry classes:

- 8010 Preschool education; and
- 8710 Child Care Services.

[69] The following information presents an employee profile of the Children's services industry from the Census of Population and Housing (Census). The most recent Census data is from August 2016. The Census is the only data source with information on employment for this industry. The August 2016 Census data show that there were around 139,000 employees in the Children's services industry. Table 1 compares characteristics of employees in this industry with employees in 'all industries'.[73]

Table 1: Employee characteristics of Children's services industry, 2016

	Children's services industry		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	7027	5.0	4 438 604	50.0
Female	132 306	95.0	4 443 125	50.0
Total	139 333	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	63 861	48.2	5 543 862	65.8
Part-time	68 661	51.8	2 875 457	34.2
Total	132 522	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	100 750	73.0	5 985 652	68.1
Year 11 or equivalent	12 626	9.1	856 042	9.7
Year 10 or equivalent	20 315	14.7	1 533 302	17.4
Year 9 or equivalent	2751	2.0	273 180	3.1
Year 8 or below	1131	0.8	112 429	1.3
Did not go to school	473	0.3	26 356	0.3
Total	138 046	100.0	8 786 961	100.0
Student status				
Full-time student	11 929	8.6	715 436	8.1
Part-time student	19 044	13.8	491 098	5.6
Not attending	107 326	77.6	7 618 177	86.3
Total	138 299	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	7685	5.5	518 263	5.8
20–24 years	23 661	17.0	952 161	10.7
25–29 years	20 706	14.9	1 096 276	12.3

[72] Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006*: *Phase 1 report*', Research Report 2/2012, Fair Work Australia.
[73] ABS, *Census of Population and Housing,* 2016.

	Children's services industry		All industries	
	(No.)	(%)	(No.)	(%)
30–34 years	18 143	13.0	1 096 878	12.3
35–39 years	15 290	11.0	972 092	10.9
40–44 years	15 170	10.9	968 068	10.9
45–49 years	13 104	9.4	947 187	10.7
50–54 years	10 682	7.7	872 485	9.8
55–59 years	8355	6.0	740 822	8.3
60–64 years	4627	3.3	469 867	5.3
65 years and over	1912	1.4	247 628	2.8
Total	139 335	100.0	8 881 727	100.0
Average age	36.3		39.3	
Hours worked				
1–15 hours	19 204	14.5	977 997	11.6
16–24 hours	22 977	17.3	911 318	10.8
25–34 hours	26 480	20.0	986 138	11.7
35–39 hours	39 713	30.0	1 881 259	22.3
40 hours	15 474	11.7	1 683 903	20.0
41–48 hours	42 49	3.2	858 120	10.2
49 hours and over	44 25	3.3	1 120 577	13.3
Total	132 522	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[70] Table 1 shows that the profile of Children's services industry employees differs from the profile of employees in 'All industries' in five aspects:

- Children's services industry employees are predominately female (95.0 per cent, compared with 50.0 per cent of all employees);
- slightly more than half (51.8 per cent) of Children's services industry employees are employed on a part-time basis (i.e. less than 35 hours per week), compared with around one in three (34.2 per cent) of all employees;
- three in 10 (30.0 per cent) of Children's services industry employees work 35–39 hours per week, compared with 22.3 per cent of all employees;
- around half (50.4 per cent) of Children's services industry employees are aged under 34 years, compared with 41.1 per cent of all employees; and
- over one in five (22.4 per cent) Children's services industry employees are students, compared with 13.7 per cent of all employees.

Forms and conditions of employment

[71] Data from the Australian Bureau of Statistics (ABS) provides information on employee characteristics, forms and conditions of employment and a comparison of classifications with low-paid employment.

[72] There are four levels within the Australian and New Zealand Standard Industrial Classification (ANZSIC) structure: division, subdivision, group and class. The relevant divisions of ANZSIC for the Children's Services Award are Division P: Education and training[74] and Division Q: Health care and social assistance.[75] The following presents all of the subdivisions, groups and classes within each industry:

Education and Training:

- Subdivision 80 Preschool and School Education
    - Group 801 Preschool education
        - Class 8010 Preschool Education
    - Group 802 School Education
        - Class 8021 Primary Education
        - Class 8022 Secondary Education
        - Class 8023 Combined Primary and Secondary Education
        - Class 8024 Special School Education
- Subdivision 81 Tertiary Education
    - Group 810 Tertiary Education
        - Class 8101 Technical and Vocational Education and Training
        - Class 8102 Higher Education
- Subdivision 82 Adult, Community and Other Education
    - Group 821 Adult, Community and Other Education
        - Class 8211 Sports and Physical Recreation Instruction
        - Class 8212 Arts Education
        - Class 8219 Adult, Community and Other Education n.e.c.
    - Group 822 Educational Support Services

[74] 'Division P: Education and Training', Australian Bureau of Statistics 2013, Australian and New Zealand Standard Industrial Classification 2006 (Revision 2.0), Cat. no. 1292.0, last released 26 June 2013.

[75] 'Division Q: Health Care and Social Assistance', Australian Bureau of Statistics 2013, Australian and New Zealand Standard Industrial Classification 2006 (Revision 2.0), Cat. no. 1292.0, last release 26 June 2013.

- Class 8220 Educational Support Services

Health care and social assistance:

- Subdivision 84 Hospitals
  - Group 840 Hospitals
    - Class 8401 Hospitals (except psychiatric hospitals)
    - Class 8402 Psychiatric hospitals
- Subdivision 85 Medical and other health care services
  - Group 851 Medical services
    - Class 8511 General practice medical services
    - Class 8512 Specialist medical services
  - Group 852 Pathology and diagnostic imaging services
    - Class 8520 Pathology and diagnostic imaging services
  - Group 853 Allied Health Services
    - Class 8531 Dental services
    - Class 8532 Optometry and optical dispensing
    - Class 8533 Physiotherapy services
    - Class 8534 Chiropractic and osteopathic services
    - Class 8539 Other allied health services
  - Group 859 Other Health Care Services
    - Class 8591 Ambulance services
    - Class 8599 Other health care services n.e.c.
- Subdivision 86 Residential care services
  - Group 860 Residential care services
    - Class 8601 Aged care residential services

- Class 8609 Other residential care services

- Subdivision 87 Social assistance services
  - Group 871 Child care services
    - Class 8710 Child care services
  - Group 879 Other social assistance services
    - Class 8790 Other social assistance services

[73] Data on forms and conditions of employment are not available for the Children's services industry. The most readily available data are at the division level (or 1-digit level) and hence, data on the forms of employment are presented by the relevant ANZSIC divisions—Division P: Education and training and Division Q: Health care and social assistance.

[74] The ABS defines casual employees as employees without paid leave entitlements.[76] Around three-quarters of workers in Health care and social assistance and Education and training were employees with paid leave entitlements in November 2019, compared with 63.0 per cent in all industries (Table 2).[77]

Table 2: Employed persons by status of employment in main job, November 2019

	Education and training		**Health care and social assistance**		**All industries**
	No. ('000s)	**Percentage of employment**	**No. ('000s)**	**Percentage of employment**	**Percentage of employment**
Employee	1021.1	93.8	1613.8	90.8	83.2
With paid leave entitlements	842.9	77.4	1284.5	72.3	63.0
Without paid leave entitlements	178.2	16.4	329.2	18.5	20.3
Owner manager of enterprise with employees	15.4	1.4	56.5	3.2	5.9
Owner manager of enterprise without employees	52.4	4.8	105.8	6.0	10.6

[76] ABS, *Characteristics of Employment, Aug 2019*, Catalogue No. 6333.0, Explanatory notes.

[77] ABS, *Labour Force, Australia, Detailed, Quarterly, Nov 2019*, Cat. No. 6291.0.55.003.

	Education and training		Health care and social assistance		All industries
	No. ('000s)	Percentage of employment	No. ('000s)	Percentage of employment	Percentage of employment
Contributing family worker	0.0	0.0	0.4	0.0	0.2
Total	**1088.9**	**100.0**	**1776.5**	**100.0**	**100.0**

Note: All data are expressed in original terms.

[75] Around 20 per cent of employees in Health care and social assistance and around 17 per cent of employees in Education and training were casual employees, lower than the all industries average (24.3 per cent). Both full-time and part-time employees in Health care and social assistance and Education and training were more likely to be employed with paid leave entitlements. In contrast, part-time employees across all industries were more likely to be casual employees (Table 3).[78]

Table 3: Employees with and without paid leave, November 2019

	Full-time		Part-time		All employees	
	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)
Education and training	94.4	5.6	62.7	37.3	82.6	17.4
Health care and social assistance	91.3	8.7	65.8	34.2	79.6	20.4
All industries	**88.4**	**11.6**	**47.8**	**52.2**	**75.7**	**24.3**

Low-paid employees in the Children's Services Award

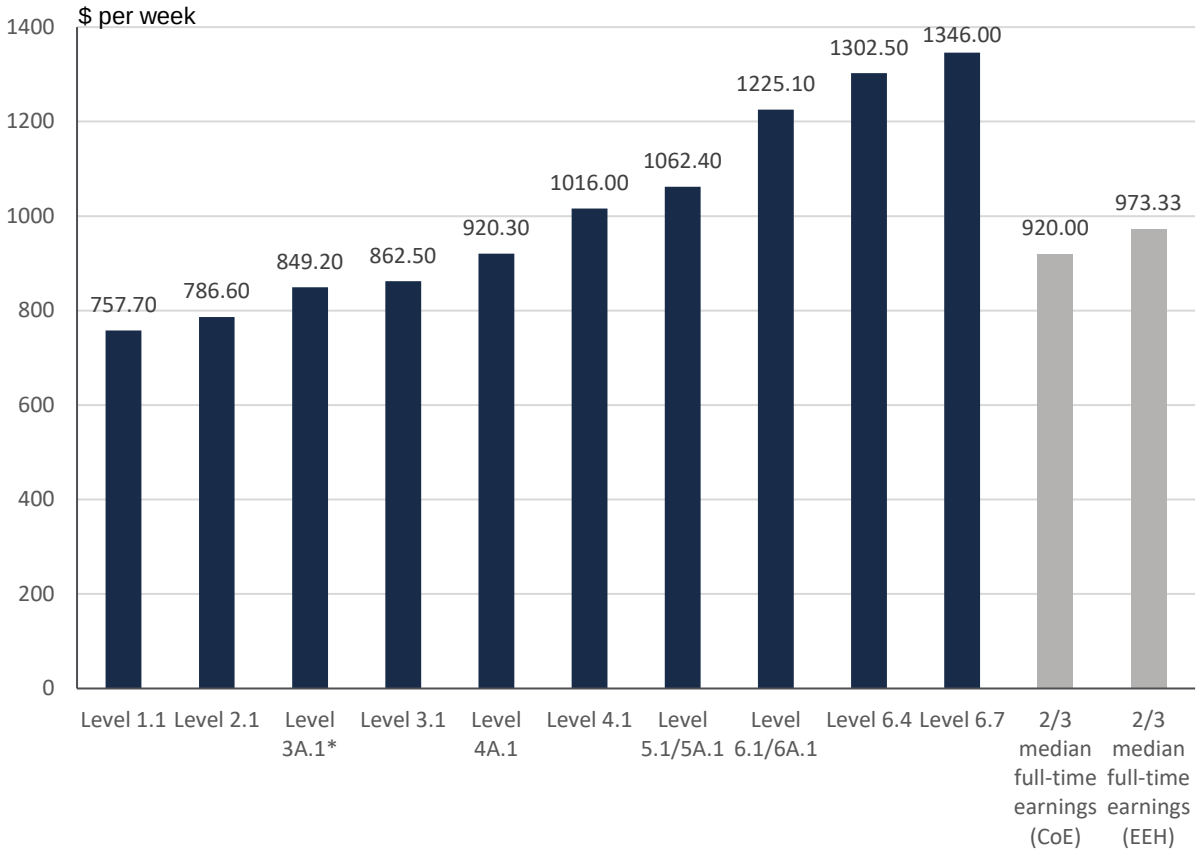
[76] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid',[79] within the meaning of s.134(1)(a) of the FW Act.

[77] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. These are compared to the minimum weekly wages in the Children's Services Award as determined in the *Annual Wage Review 2018–19*, effective 1 July 2019 (Chart 1).

[78] ABS, *Labour Force, Australia, Detailed, Quarterly, Nov 2019*, Catalogue No. 6291.0.55.003.

[79] [2017] FWCFB 1001 at [166].

Chart 1: Comparison of minimum full-time weekly wages in the *Children's Services Award 2010* and two-thirds of median full-time earnings [updated]



Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time non-managerial employees paid at the adult rate. Only the classifications on commencement are shown.
* Former Western Australian 'E' worker classification

[78] Chart 1 shows that the full-time weekly wage for Level 4A.1 in the Children's Services Award was around the CoE measure of two-thirds of median full-time earnings, with all classifications below this rate below two-thirds of median full-time earnings. In addition, all classifications below Level 4.1 were below the EEH measure of two-thirds of median full-time earnings.[80]

[79] Background Paper 1, published on 13 June 2019, posed the following question in relation to the above data:[81]

> '***Q.2*** *Is it generally agreed that most award reliant employees covered by the Children's Services Award are 'low paid' within the meaning of s.134(1)(a)?*'

[80] The UWU agreed with the proposition put, submitting that:

[80] ABS, *Characteristics of Employment, Australia, August 2019*, Catalogue No. 6333.0; ABS, *Employee Earnings and Hours, Australia, May 2018*, Cat. No. 6306.0.

[81] Background Paper 1, 13 June 2019 at page 12.

> 'Most employees in the sector would be classified lower than Level 4. Only the Director, Assistant Director (if a service had such a role, some smaller services do not have an Assistant Director) and Room Leaders would be classified at Level 4.1 and above. In addition, the Director position, as the most senior position, is most likely to be paid above award wages.
>
> The characterisation of award reliant employees covered by the Children's Services Award as 'low paid' within the meaning of paragraph 134(1)(a) is appropriate.'[82]

[81] In response to the question posed, the ECEC Employers did not concede that 'most award reliant employees covered by the Children's Services Award are low paid', submitting that:

> 'The data available does not clearly identify the numbers of employees in each relevant classification and so notwithstanding that an assessment can be made as to which classifications are 'low paid' (applying the metrics identified in the Discussion Paper), a determination as to the proportion of employees who are 'low paid' is not possible.'[83]

[82] The AFEI submitted that it was not in a position to accept the proposition that most award-reliant employees covered by the Children's Services Award are low paid because:

> 'none of the data represented in Chart 1[84] is directed at the incidence (i.e. frequency) of employment at any of the classification levels in the award and therefore the Chart does not show (or even purport to show) the classification level(s) at which 'most' employees are employed.
>
> To the extent that the Chart represents award derived data, that data is confined to the minimum weekly wages in the award effective 1 July 2018 – it does not represent actual amounts that are paid. As one example, it does not include pay point progression within classification levels based on service within the industry,[85] noting that a Level 3 employee will progress after two years, to Level 3.3, the same wage rate as applicable to Level 4A.1.
>
> Consequently, even if it were the case that full time weekly wages for classifications below Level 4A.1, and Level 3.3 were below the CoE and the EEH measures,[86] that comparison is incapable of providing any reasonable platform to support the proposition that 'most' award reliant employees are 'low paid'. [87]

[83] We accept that the proposition put in Q2 above is too broadly stated as the data does not identify the numbers of employees at each classification. However, we are satisfied that award-reliant employees classified at levels below 4A.1 are low paid within the meaning of s.134(1)(a).

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[82] UWU submission, 9 July 2019 at paras 13-14.

[83] ECEC Employers submission, 10 July 2019 at para 5.

[84] See Background Paper 1, 13 June 2019 at page 12, Chart 1: Comparison of minimum full-time weekly wages in the Children's Services Award 2010 and two-thirds of median full–time earnings.

[85] Clause 14.1.

[86] See Background Paper 1, 13 June 2019 at para 26.

[87] AFEI submission, 10 July 2019 at paras 7–9.

5. Educational Services (Teachers) Award 2010

Employee characteristics

[84] Using a framework developed by Commission staff 88 the Teachers Award is 'mapped' to the following industry classes:

- 8010 Preschool education;
- 8021 Primary education;
- 8022 Secondary education; and
- 8023 Combined primary and secondary education.

[85] The following information presents an employee profile of the Educational services (Teachers) industry from the Census. The most recent Census data is from August 2016. The Census is the only data source with information on employment for this industry. The August 2016 Census data show that there were around 560 000 employees in the Educational services (Teachers) industry. Table 4 compares characteristics of employees in this industry with employees in 'all industries'.[89]

Table 4: Employee characteristics of Educational services (Teachers) industry, 2016

	Educational services (Teachers) industry		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	126 824	22.5	4 438 604	50.0
Female	435 627	77.5	4 443 125	50.0
Total	562 451	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	312 077	58.2	5 543 862	65.8
Part-time	224 317	41.8	2 875 457	34.2
Total	536 394	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	464 070	83.1	5 985 652	68.1
Year 11 or equivalent	29 911	5.4	856 042	9.7
Year 10 or equivalent	55 520	9.9	1 533 302	17.4
Year 9 or equivalent	6072	1.1	273 180	3.1
Year 8 or below	2322	0.4	112 429	1.3
Did not go to school	349	0.1	26 356	0.3
Total	558 244	100.0	8 786 961	100.0
Student status				
Full-time student	17 853	3.2	715 436	8.1
Part-time student	32 556	5.8	491 098	5.6
Not attending	508 910	91.0	7 618 177	86.3

[88] Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006*: *Phase 1 report*', Research Report 2/2012, Fair Work Australia.

[89] ABS, *Census of Population and Housing,* 2016.

	Educational services (Teachers) industry		All industries	
	(No.)	(%)	(No.)	(%)
Total	559 319	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	7 704	1.4	518 263	5.8
20–24 years	31 325	5.6	952 161	10.7
25–29 years	55 940	9.9	1 096 276	12.3
30–34 years	57 960	10.3	1 096 878	12.3
35–39 years	60 862	10.8	972 092	10.9
40–44 years	70 707	12.6	968 068	10.9
45–49 years	75 343	13.4	947 187	10.7
50–54 years	69 911	12.4	872 485	9.8
55–59 years	67 882	12.1	740 822	8.3
60–64 years	44 126	7.8	469 867	5.3
65 years and over	20 677	3.7	247 628	2.8
Total	562 437	100.0	8 881 727	100.0
Average age	43.8		39.3	
Hours worked				
1–15 hours	60 932	11.4	977 997	11.6
16–24 hours	73 425	13.7	911 318	10.8
25–34 hours	89 959	16.8	986 138	11.7
35–39 hours	87 324	16.3	1 881 259	22.3
40 hours	81 792	15.2	1 683 903	20.0
41–48 hours	54 189	10.1	858 120	10.2
49 hours and over	88 775	16.6	1 120 577	13.3
Total	536 396	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[86] Table 4 shows that the profile of Educational services (Teachers) industry employees differs from the profile of employees in 'All industries' in five aspects:

- Educational services (Teachers) industry employees are predominately female (77.5 per cent, compared with 50.0 per cent of all employees);
- around four in 10 (41.8 per cent) Educational services (Teachers) industry employees are employed on a part-time basis (i.e. less than 35 hours per week), compared with around one in three (34.2 per cent) of all employees;
- around three in 10 (30.5 per cent) Educational services (Teachers) industry employees work 16–34 hours per week, compared with only 22.5 per cent of all employees;
- over six in 10 (62.0 per cent) Educational services (Teachers) industry employees are aged 40 years and over, compared with less than half (47.8 per cent) of all employees; and
- over eight in 10 (83.1 per cent) Educational services (Teachers) industry employees completed Year 12 or equivalent, compared with 68.1 per cent of all employees.

Forms and conditions of employment

[87] Data from the ABS provide information on employee characteristics, forms and conditions of employment and a comparison of classifications with low-paid employment.

[88] There are four levels within the ANZSIC structure: division, subdivision, group and class. The relevant division of ANZSIC for the Teachers Award is Division P: Education and training. The following presents all of the subdivisions, groups and classes within the Education and training industry:

- Subdivision 80 Preschool and School Education
    - Group 801 Preschool education
        - Class 8010 Preschool Education
    - Group 802 School Education
        - Class 8021 Primary Education
        - Class 8022 Secondary Education
        - Class 8023 Combined Primary and Secondary Education
        - Class 8024 Special School Education
- Subdivision 81 Tertiary Education
    - Group 810 Tertiary Education
        - Class 8101 Technical and Vocational Education and Training
        - Class 8102 Higher Education
- Subdivision 82 Adult, Community and Other Education
    - Group 821 Adult, Community and Other Education
        - Class 8211 Sports and Physical Recreation Instruction
        - Class 8212 Arts Education
        - Class 8219 Adult, Community and Other Education n.e.c.
    - Group 822 Educational Support Services
        - 8220 Class Educational Support Services

[89] Data on forms and conditions of employment are not available for the Educational services (Teachers) industry. The most readily available data are at the division level (or 1-digit level) and hence, data on the forms of employment are presented for the Education and training division.

[90] The ABS defines casual employees as employees without paid leave entitlements.[90] Just over three-quarters of workers in Education and training were employees with paid leave entitlements in November 2019, compared with 63.0 per cent in all industries (Table 5).[91]

Table 5: Employed persons by status of employment in main job, November 2019

	Education and training		**All industries**
	No. ('000s)	**Percentage of employment**	**Percentage of employment**
Employee	1021.1	93.8	83.2
With paid leave entitlements	842.9	77.4	63.0
Without paid leave entitlements	178.2	16.4	20.3
Owner manager of enterprise with employees	15.4	1.4	5.9
Owner manager of enterprise without employees	52.4	4.8	10.6
Contributing family worker	0.0	0.0	0.2
Total	**1088.9**	**100.0**	**100.0**

Note: All data are expressed in original terms.

[91] Around 17 per cent of employees in Education and training were casual employees, lower than the all industries average (24.3 per cent). Both full-time and part-time employees in Education and training were more likely to be employed with paid leave entitlements. In contrast, part-time employees across all industries were more likely to be casual employees (Table 6).[92]

Table 6: Employees with and without paid leave, November 2019

	Full-time		**Part-time**		**All employees**	
	With paid leave (%)	**Without paid leave (%)**	**With paid leave (%)**	**Without paid leave (%)**	**With paid leave (%)**	**Without paid leave (%)**
Education and training	94.4	5.6	62.7	37.3	82.6	17.4
All industries	**88.4**	**11.6**	**47.8**	**52.2**	**75.7**	**24.3**

[90] ABS, *Characteristics of Employment, Aug 2019*, Catalogue No. 6333.0, Explanatory notes.

[91] ABS, *Labour Force, Australia, Detailed, Quarterly, Nov 2019,* Catalogue No. 6291.0.55.003

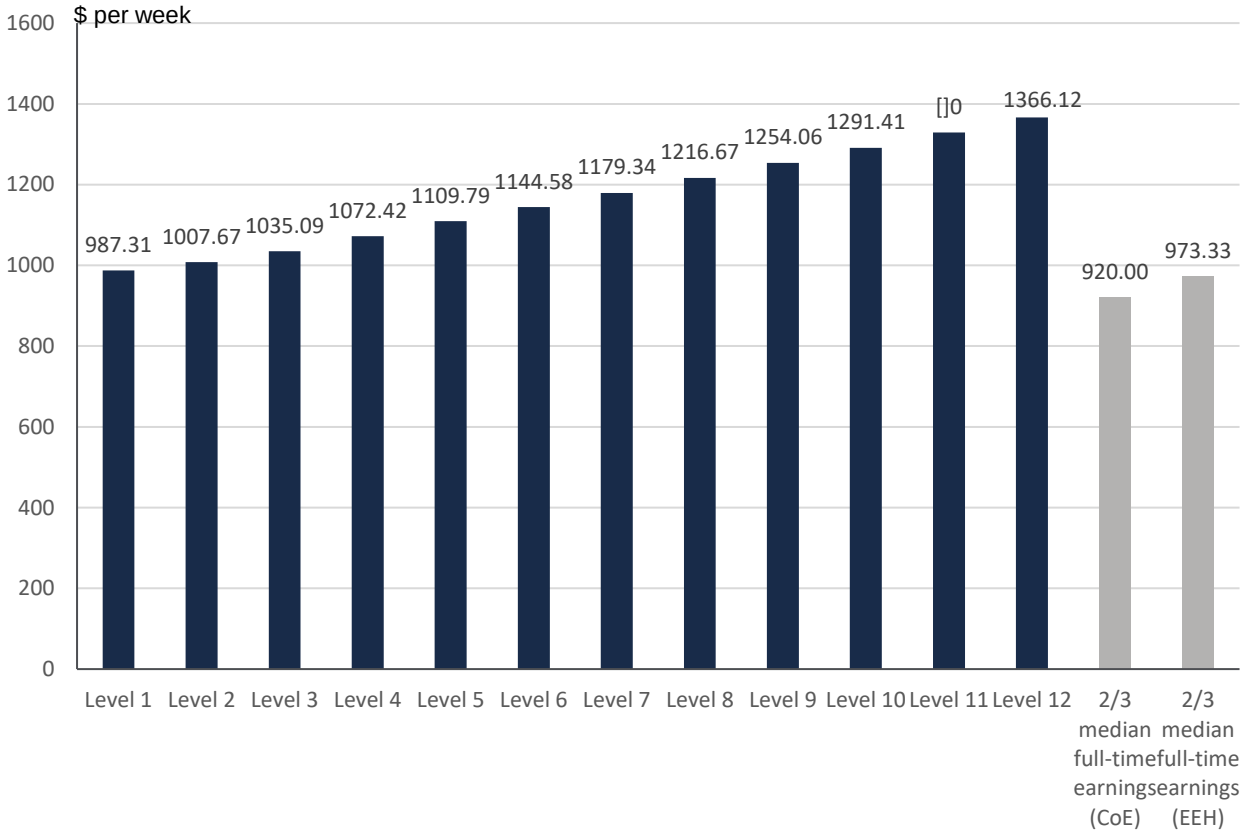
[92] ABS, *Labour Force, Australia, Detailed, Quarterly, Nov 2019*, Catalogue No. 6291.0.55.003.

Low-paid employees in the Teachers Award

[92] As mentioned earlier, a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid',[93] within the meaning of s.134(1)(a).

[93] The most recent data for median earnings is for August 2019 from the CoE survey. Data on median earnings are also available from the Survey of EEH for May 2018. These are compared to the minimum weekly wages in the Teachers Award as determined in the *Annual Wage Review 2018–19*, effective 1 July 2019 (Chart 2).[94]

Chart 2: Comparison of minimum full-time weekly wages in the *Educational Services (Teachers) Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time non-managerial employees paid at the adult rate. Weekly rate of pay for employees in the *Educational Services (Teachers) Award* is calculated by dividing the annual rate by 52.18.

[94] The data show that all classifications were above both the CoE and EEH measures of two-thirds of median full-time earnings.

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[93] [2017] FWCFB 1001 at [166].

[94] MA000077; ABS, *Characteristics of Employment, Australia, August 2019*, Catalogue No. 6333.0; ABS, *Employee Earnings and Hours, Australia, May 2018*, Catalogue No. 6306.0.

6. Common Claims

6.1 Ordinary Hours Claim

[95] The ECEC Employers (in this section, the Applicants) seek to vary the spread of ordinary hours clause under the Children's Services Award and the Teachers Award from between 6.00 am and 6.30 pm, to 6.00 am and 7.30 pm.

[96] The Applicants contend that the extension of the span of hours represents an appropriate and contemporary standard having regard to the conditions of the ECEC sector and the modern awards objective, and that this pattern does not represent 'unsocial' hours or hours which are out of step with contemporary standards or the purposes of the ECEC sector. It is contended that an additional payment for work performed between 6.30pm and 7.30pm does not achieve the modern awards objective because it overcompensates employees for work performed between those times.

[97] In summary, the Applicants submit that the claim should be granted on the basis of:

- the role and characteristics of the ECEC sector;
- the experience of parents within the ECEC sector;
- the effect of current ordinary hours award conditions; and
- the likely effect of granting the claim.

[98] As to the role and characteristics of the ECEC sector the Applicants submit that:

> (a) The primary purpose of childcare is to provide a place for young children to be when their parents are unable to care for them in the home because they are at work.
>
> (b) The ECEC sector supports all Australian families and has the power to facilitate workforce participation leading to better outcomes for the economy and employment growth.
>
> (c) Current government programs, (including the current subsidy arrangements) encourage both parents (and particularly mothers) to work because it is good for the economy.
>
> (d) Childcare is an extremely competitive industry in which affordability, opening hours and compliance with an increasingly complex regulatory regime determine the viability of a business.

[99] The above propositions are expanded upon in Sections 12 and 13 of the Applicants' submission dated 15 March 2019.

[100] It is convenient to observe here that these submissions amount to little more than assertions that lack any probative evidentiary foundation. Further, the contention that the 'primary purpose of childcare is to provide a place for young children to be' while their parents are working, is strongly contested and, in our view, inaccurate. The focus of the ECEC sector and the regulatory framework is on the provision of quality education and care for children. As the IEU submits:

> 'This is why services are required to engage qualified teachers and educators: to dismiss the work as merely looking after children dramatically downplays the importance of the work and fundamentally misunderstands the nature and purpose of the sector.'[95]

[101] It is convenient to observe here that these submissions amount to little more than generalised assertions that lack any probative evidentiary foundation. Further, the contention that the 'primary purpose of childcare is to provide a place for young children to be' while their parents are working, is strongly contested and, in our view, inaccurate. The focus of the ECEC sector and the regulatory framework is on the provision of quality education and care for children. As the IEU submits:

> 'This is why services are required to engage qualified teachers and educators: to dismiss the work as merely looking after children dramatically downplays the importance of the work and fundamentally misunderstands the nature and purpose of the sector.'[96]

[102] Further, the evidence supports a finding that quality ECEC makes a difference. Sylva et al[97] found a significant relationship between high quality pre-schooling and better intellectual and social/behavioural development for children. Similarly, Taggart et al[98] found that quality pre-schooling continued to positively influence outcomes throughout primary school.

[103] We accept that the predominant reason why parents have their children attend ECEC is to enable parents to engage in paid employment, followed by providing developmental or social opportunities for children. We note here that the reasons given by parents as to why their children attend ECEC is to be distinguished from the broader public policy purpose of ECEC (as discussed at [100] – [101] above). Of children aged under 6 years in some formal ECEC other than preschool:

(a) 66% attend because of parents' employment;

(b) 11% attend due to other parent-related/other reasons (the most common being "give parents a break"); and

(c) 23% attend for child-related reasons.[99]

[104] As to the experience of parents within the ECEC sector the Applicants submit that:

(a) Affordability and accessibility of childcare for Australian families are current issues facing the ECEC sector generally.

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[95] IEU submission, 10 July 2019, at para 10.

[96] IEU submission, 10 July 2019, at para 10.

[97] Sylva, K., Melhuish, E., Sammons, P., Siraj-Blatchford, I., & Taggart, B. (2004). *The Effective Provision of Pre-School Education (EPPE) Project: Findings from Pre-school to end of Key Stage*. Cited at Annexure C to Exhibit 10 – Witness Statement of Dr Marianne Fenech, 14 March 2019 at para 6.4.

[98] Taggart, B., Sylva, K., Melhuish, E., Sammons, P., & Siraj, I. (2015). *Effective preschool, primary and secondary education project (EPPSE 3-16+): How preschool influences children and young people's attainment and developmental outcomes over time. Research Brief (June 2015)*. UK: Department for Education. Cited at Annexure C to Exhibit 10 – Witness Statement of Dr Marianne Fenech, 14 March 2019 at para 6.4.

[99] Baxter, Jennifer, *Child care and early childhood education in Australia*, Australian Government Australian Institute of Family Studies accessed on 26 April 2019 at https://aifs.gov.au/sites/default/files/publication-documents/fs2015.pdf at p 3.

(b) Childcare needs to accommodate parent (customer) demand at an affordable price or parents will go elsewhere.

(c) Accessibility and affordability of childcare are extremely important factors that, if not provided, can discourage parents, particularly women, from working.

(d) Limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women).

(e) Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable childcare.

(f) Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.

(g) The nature of childcare is that working parents must drop off their children before commencing work and pick-up their children following the completion of their work. This pattern suggests that the ordinary hours of the childcare industry should commence earlier and conclude later than other industries.

(h) Parents who utilise childcare services work in all industries.

(i) Parents routinely choose childcare providers close to their homes so that they can drop off children before travelling to work, and pick-up children on the way home from work. This means that parents must finish work with enough time to travel to the childcare centre to pick-up their child 'on time'.

(j) Many parents face increasingly long commuting times due to the distance of their home from work, reliability of public transport and an increase in traffic around major cities.

[105] The above propositions are expanded upon in Section 14 of the ECEC Employers' submission dated 15 March 2019.

[106] The IEU and UWU contest many of the propositions advanced by the Applicants and the IEU submits:

- none of the statements are supported by expert or useful lay evidence – at its highest the Applicants rely on broad assertion by its unqualified witnesses, none of whom have performed any market testing or provided any financial information; and

- the propositions reiterate the foundational error of describing ECEC services as being merely 'childcare', which appears to be an attempt to downplay its important economic and social role in favour of a focus on user convenience.

[107] While it was not contested that some parents have long commuting times; the unions observe that there was no evidence about this and whether it impacts on the utilisation of ECEC services in any way. We deal later with the lack of an evidentiary foundation in respect of the propositions advanced.

[108] As to the effect of the current span of hours in the Awards the Applicants submit that:

(a) The span of ordinary hours in the Children's Services Award and Teachers Award currently finish at 6:30pm.

(b) The cessation of ordinary hours at 6:30 in the childcare industry is identical to or earlier than 46% of modern awards. This means that, at least in respect of modern awards, 'overtime has begun' in the childcare industry at a point where many working parents are still completing 'ordinary hours' in other industries (or travelling to pick-up their children).

(c) There is a demand from parents for childcare centres to stay open past 6:30pm due to their own work commitments.

(d) In order to avoid the payment of overtime, some childcare providers require parents to pick-up their children at 6:30 pm (i.e. the end of ordinary hours).

(e) Unlike employers in other industries, childcare employers do not have unilateral control on when centres can close. If parents do not attend 'on time' to collect children, childcare centres are required to stay open, incurring unplanned overtime liability.

(f) It is a common experience of childcare centres that, notwithstanding a clearly defined closure time of 6:30pm, parents are often late necessitating the payment of overtime.

(g) Commuting to and from work and work commitments are the main reasons parents cite to centre operators for why they cannot pick-up their children by 6:30pm.

(h) Some centres charge late fees as a deterrent to late parents, further exacerbating unaffordability issues within the industry.

(i) Some centres do not charge late fees, which means, given parents commonly pay a 'day rate', those centres are incurring overtime liability without the generation of any additional income to offset this.

(j) Unplanned overtime caused by parents collecting their children after 6:30pm causes some disability for childcare employees who are unable to identify, with certainty, their finishing time.

[109] The above propositions are expanded upon in Section 16 of the ECEC Employers' submission dated 15 March 2019.

[110] The propositions above at [106] (b), (c), (d), (f), (g), (h), (i), and (j) are contested.

[111] We deal later with the proposition that there is a demand from parents for ECEC centres to stay open after 6:30pm. We note here that there was evidence that some centres charge late fees as a deterrent to late pick-ups by parents.[100]

[112] The proposition that 'parents are often late necessitating the payment of overtime' was advanced in support of extending the span of ordinary hours to 7.30pm.[101] The evidence indicated that late pick up of children is infrequent. UWU witness 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'.[102]

[113] Similarly, Ms Wade, the manager of Aussie Kindies in Torquay which operates between 6.30am and 6.30pm, said 'We haven't had a late family in about a year and a half'.[103] Ms McPhail, the director of a company that operates two ECEC services which operate from 6.30am to 6.30pm, also gave similar evidence. During the course of cross-examination, it was put to Ms McPhail that at her centres sometimes parents are late picking up their children; she responded 'very rarely'.[104]

[114] We accept that some witnesses described a greater incidence of late pick up, but, viewed as a whole, the evidence supports a finding that parents are occasionally late in picking up children. Further, and contrary to proposition (g), there was little evidence as to why some parents were late. Ms Tullberg provided an example of a parent who was late because of work finishing times[105] but the evidence did not suggest this was a widespread phenomena.

[115] We also note that the Applicants accept that regardless of the span of hours under the Awards, unexpected occurrences and emergencies will mean that is impossible to eliminate the possibility of late pick-ups. In their reply submission the Applicants state that the claim is not made on the basis that it will eliminate late pickups, but rather that 'it will calibrate the ordinary hours span under the Awards to a period which better accommodates working parents who, given the work finish time and the time taken to travel to a centre, are more likely to 'miss' a 6:30pm pick-up'.[106] Further, contrary to the submission of the UWU, the Applicants submit that the evidence in these proceedings supports the proposition that 'late pick-up' policies would change if the span of ordinary hours was extended.

[116] As to the likely effect of granting the claim the Applicants submit that:

> (a) Extending ordinary hours until 7:30pm will increase the hours of operation of centres and make childcare more accessible for Australian families.

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[100] See oral evidence of Jae Fraser – Transcript, 7 May 2019 at PN1717-PN1719; katy Paton – Transcript, 7 May 2019 at PN2189-PN2196; Ann Marie Chemello – Transcript, 7 May 2019 at PN2689-PN2690; Nicole Llewellyn – Transcript, 9 May 2019 at PN4210-PN4213.

[101] ECEC Employers submission, 15 March 2019 at page 19.

[102] Exhibit 7, Supplementary statement of Bronwen Hennessy dated 10 April 2019 at para 5.

[103] Transcript, 6 May 2019 at PN875.

[104] Transcript, 7 May 2019 at PN2919 – PN2920.

[105] Transcript, 8 May 2019 at PN3601.

[106] ECEC Employers submission 29 April 2019 at para 2.42

(b) Extending ordinary hours until 7:30pm will make childcare more sustainable for ECEC operators who are currently deterred from staying open past 6:30pm due to the significant costs associated with 2 employees being paid at overtime rates, despite demand from parents.

(aa) Extending the ordinary hours until 7:30pm will increase workforce participation to benefit Australian families and the Australian economy in that it will allow parents to work longer hours.

(bb) Extending ordinary hours until 7:30pm will make childcare more affordable for parents by pushing back or removing the "late fees" charged to parents when they arrive after 6:30pm.

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

[117] The above propositions are expanded upon in Section 17 of the ECEC Employers' submission dated 15 March 2019.

[118] All of these propositions are contested. In short, the IEU submits:

- no witness has given evidence that they would in fact extend their opening hours if the span of hours has changed, and none are in fact using the full span at present;
- there is no evidence that the claim will make childcare 'more sustainable', noting the failure of any ACA witness to bring actual financial information in respect of current business costs and the obvious marginality of current overtime costs;
- there is no evidence to support the proposition that the claim will increase workforce participation; as a matter of common sense this would not seem to flow from permitting childcare centres to remain open longer at slightly less expense; and
- extending the opening hours does not mean parents will never be late; given that no witness has said they would roster staff past closing time to cover for unexpected late pickups; both the 'unpredictability' for staff and the late fee cost for parents would remain.[107]

[119] There is considerable force in the arguments advanced by the IEU and we return to the lack of probative evidence shortly.

[120] We note here that it is unclear to us whether any of the employer witnesses would change operating hours even if there was a change to the span of opening hours, as most had not done

[107] IEU submission, 10 July 2019 at para [13].

any costing on the financial viability of a change and there was little probative evidence that there was significant parental demand for such a change.[108]

[121] As to proposition (b), employer witnesses Mr Mahony and Ms Hands conceded that they had not done the calculations on the cost of opening until 7.30pm.[109] Ms Chemello gave evidence that her centre's late fees were to offset the time in lieu costs (not direct overtime costs, as she offered time in lieu rather than overtime).[110]

[122] We would also note that there is no probative evidence to support the broad assertion advanced in proposition (aa). As to (bb), we note that the evidence does not support a finding that expanding the span of ordinary hours will necessarily result in businesses reducing or eliminating late fees and, a difficulty with proposition (cc) is that a number of the Applicants' witnesses acknowledged that they would *not* roster employees on after closing time just in case of a late pick-up.[111]

[123] The Applicants address the modern awards objective and the various s.134 considerations in Part F of the ECEC Employers' submission of 15 March 2019. The Applicants contend that the Awards will provide a fair and relevant minimum safety net once varied in accordance with their claims. It is convenient to deal with the Applicants' submissions about the s.134 considerations now, before turning to the UWU and IEU submissions in reply.

[124] As to 'relative living standards and the needs of the low paid' (s.134(1)(a)), the Applicants acknowledge that it is 'an obvious consequence' of their claim that the penalties paid to particular employees after 6.30pm may decrease on those days but submit that a decrease in the wages payable after 6.30pm does not mean that low paid employees will be worse off on an overall basis. In particular, the Applicants submit that the proposed changes will:

(a) allow employees working on the closing shift to have set, pre-determined hours (and no longer be inconveniently asked to work overtime for an undetermined period of time when parents are running late);

(b) create structured employment between 6.30pm and 7.30pm where none presently exists; and

(c) enable employees to (still) be paid overtime after working 8 hours in a day or after 7.30pm.

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[108] See oral evidence of Karthika Viknarasah – Transcript, 6 May 2019 at PN1088-PN1089; Jae Fraser – Transcript, 7 May 2019 at PN1699; Katy Paton - Transcript, 7 May 2019 at PN2237-PN2238; Pamela Maclean - Transcript, 7 May 2019 at PN2489, Ann Marie Chemello - Transcript, 7 May 2019 at PN2696-PN2698; Kerry Mahony - Transcript, 8 May 2019 PN3943 and PN3954.

[109] Kerry Mahony – Transcript, 8 May 2019 at PN3947-3948; Alexandra Hands – Transcript, 9 May 2019 at PN4635.

[110] Transcript, 7 May 2019 at PN2690.

[111] See oral evidence of Tullberg – Transcript, 8 May 2019 at PN3595; Mahony – Transcript, 8 May 2019 at PN3961; Paton – Transcript, 7 May 2019 at PN2185.

[125] The Applicants also submit[112] that it is important to look at the relative living standards and the needs of all low paid Australians, and that extending the ordinary hours until 7.30pm will:

- increase the access and availability of childcare services to Australian families;
- increase workforce participation of both parents; and
- decrease the cost of childcare for low paid parents who struggle to arrive by 6.30pm due to long commutes and transport issues getting to and from work.'

[126] In their reply submission the Applicants clarify that they do not submit that the claim '*will increase the living standards and the needs of all low paid Australians*'[113] but do submit that in assessing s.134(1)(a) (or alternatively ss.134(1)(f) and (g)), the effect of any proposed variation needs to be assessed not only against the needs and desires of a particular workforce covered by a reviewed award/s, but also more broadly.

[127] There is little, if any, probative evidence in support of the proposition that the variation sought will have the effect posited by the Applicants. A point to which we shall return shortly.

[128] The question of whether s.134(1)(a) only applies to low paid employees covered by the award sought to be varied, or to low paid workers generally, does not arise due to the paucity of evidence in support of the contention that there is an unmet demand for childcare services after 6:30pm. Further, it is clear that the variation will not assist the low paid employees covered by the Children's Services Award to meet their needs.

[129] The UWU submits that the Applicants have ignored the fact that many early childhood educators are also working parents and, in particular, working mothers:

> 'Many educators have caring responsibilities themselves and extending the ordinary span of hours will create difficulties for these educators to pick up their own children and provide appropriate care to them…
>
> It is apparent from the evidence of our members that educators would experience difficulties managing caring responsibilities if ordinary hours of work within the Awards were extended. Hours after 6.30pm within the context of ECEC are 'unsocial' hours, which are currently paid at the overtime rate in recognition of the disutility associated with work in the evening.'[114]

[130] The evidence before us shows that there are some employees covered by the Awards who themselves have caring responsibilities and extending the spread of ordinary hours would make it difficult for them to meet those responsibilities. In other words, it would make it difficult for low paid employees covered by the Children's Services Award to meet their needs. Ms Bea gave evidence regarding the difficulties she faces in balancing her work and family responsibilities:

> 'In my own family, if I am working until 6.30pm I am reliant on my partner being able to pick my children up from school, getting their dinner ready and taking them to any extracurricular

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[112] ECEC Employers submission, 15 March 2019.

[113] ECEC Employers submission in reply, 29 April 2019 at para 2.62.

[114] Ibid, at paras [38]-[41].

> activities they have. My partner has a disability and so sometimes struggles managing these afternoons when he needs to pick up the kids…… If I were to finish at 7.30pm, by the time I got home my children would be in the process of getting ready for bed. This time of the evening for children is already high stress, so if I am arriving home at that time tired from my day at work I would not feel like I was able to spend quality time with them. On the afternoons I am able to arrive home not long after my children have finished school, we are able to do activities together such as hand sewing. If I were to work until 7.30pm then I would miss out on these meaningful interactions.'[115]

[131] Ms Wade, the manager of Aussie Kindies in Torquay, gave evidence of the difficulties of obtaining staff to work after 6:30pm,:

> 'If the opening hours of our centre were to extend until 7.30pm, then this means the educators would have less time with their families. I already have difficulties trying to find educators who are able to work the shift that ends at 6:30pm. A number of the educators at my centre are single mothers who do not have strong support networks. They have their own children in after school hours care which closes at 6:00pm and we stay open until 6:30pm. A number of the educators at my centre are mums who take children to sporting activities in the afternoon. Extending the opening hours of the centre would impact their caring duties in this respect. I live with my mother and my father, who are able to care for my daughter when she finishes school if I am still at work. However, if I was required to work until 7.30pm I would miss out on spending valuable time with her. She normally sleeps at around 7:00pm so the time from when I get home from work and she goes to bed is crucial in maintaining our relationship.'[116]

[132] As to the proposition that the claim would create difficulties for educators under the Awards to manage their own caring responsibilities the Applicants submit that a balance needs to be struck between the needs and preferences of employees and the needs and preferences of industry, customers/clients and the wider economy.

[133] In our view this consideration weighs against varying the Awards in the manner proposed.

[134] In relation to 'the need to encourage enterprise bargaining' (s.134(1)(b)), the Applicants submit that 'the changes proposed have the potential to increase the prospect of collective bargaining based on a particular centre's needs (e.g. 5pm close or 7pm close) and how a centre may arrange operating hours to reflect relevant government finding subsidies, the type of centre they operate and parent demands'.[117]

[135] This submission is put on the basis that the broader the span of hours, the greater scope there may be for employees to seek to bargain for their own specific needs, particularly in relation to centres which may have different parental demand.

[136] The submission put is entirely speculative and unsupported by any evidence. We are not persuaded that the variations sought would encourage enterprise bargaining. This consideration weighs against varying the Awards in the manner proposed.

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[115] Exhibit 9 - Supplementary statement of Pixie Bea, 10 April 2019 at paras 5 and 7.

[116] Exhibit 12 - Supplementary statement of Alicia Wade, 12 April 2019 at paras 6 and 7.

[117] ECEC Employers submission, 15 March 2019 at para 27.1.

[137] As to the need to 'promote social inclusion through increase workforce participation' (s.134(1)(c)), the Applicants contend that the claim:

> 'will generate workforce participation for parents who can utilise childcare services in accordance with their own family and working needs.'[118]

[138] We accept that the predominant reason why children attend ECEC is to enable parents to engage in paid employment, followed by providing developmental or social opportunities for children. Of children aged under 6 years in some formal ECEC other than preschool:

(a) 66% attend because of parents' employment;

(b) 11% attend due to other parent-related/other reasons (the most common being "give parents a break"); and

(c) 23% attend for child-related reasons.119

[139] However, we are not persuaded that granting the claim will lead to any measurable increase in workforce participation. As we mention later, there is a paucity of evidence in support of the proposition that the claim addresses an unmet demand.

[140] We regard this consideration as neutral.

[141] As to the need to 'promote flexible modern work practices and the efficient and productive performance of work' (s.134(1)(d)), the Applicants submit that (at 29.1 – 29.5 of their 15 March 2019 submission):

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

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[118] ECEC Employers submission, 15 March 2019 at para 28.1.
[119] Baxter, Jennifer, *Child care and early childhood education in Australia*, Australian Government Australian Institute of Family Studies accessed on 26 April 2019 at https://aifs.gov.au/sites/default/files/publication-documents/fs2015.pdf at p 3.

> It is the submission of the Applicants, that restrictive ordinary hours are hindering employer opening hours (and in turn workforce participation of Australian families) by operating according to historical and no longer relevant principles.'[120]

[142] We accept that this consideration weighs in favour of varying the Awards as proposed by the Applicants.

[143] As to the need to 'provide additional remuneration for employees working overtime and/or unsociable irregular or unpredictable hours' (s.134(1)(da)), the Applicants concede that as the claim seeks to vary the definition of 'overtime' (at least in respect of the span of hours) and accept that this consideration is 'obviously relevant',[121] but submit that 6.30pm-7.30pm should not be considered unsociable hours warranting the payment of overtime.[122]

[144] We disagree. The current terms in the Awards provide for the payment of overtime for work after 6:30pm, as compensation for the working of unsociable hours. This consideration weighs against granting the variation sought.

[145] As to the likely impact on 'business, including on productivity, employment costs and regulatory burden' (s.134(1)(f)), we accept that a decision to grant the claim will benefit business by reducing employment costs and the regulatory burden on business. This consideration weighs in favour of granting the claim.

[146] As to the need 'to ensure a simple, easy to understand, stable and sustainable modern award system' (s.134(1)(g)), the Applicants submit:

> 'a simple, easy to understand, stable and sustainable modern award system would include working conditions (and the working of ordinary hours) in the childcare industry which contemplated the fact that working parents need to collect their children following the cessation of their own ordinary hours. Currently, the span of ordinary hours in the Awards does not sufficiently contemplate this.
>
> Further, the business and societal benefits associated with the ACA Claims (which have been addressed in the other limbs of the Modern Awards Objective) will indirectly lead to a sustainable modern award system in the longer term.
>
> The Witness Statements outline that the current modern award system is not easy to understand and does not consider or accommodate the other Childcare Regulations that businesses must comply with. This is in part due to the current ordinary hours span and rostering conditions.'123

[147] We reject the proposition that the current ordinary hours span is not easy to understand. We note that the Applicants accepted that the current ordinary hours span of 6.00am to 6.30pm is not difficult to understand but submit that the interrelationship between modern awards and the NQF is difficult to understand, making rostering within ordinary hours difficult to apply. We accept that rostering in the ECEC sector has a degree of complexity; primarily due to the

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[120] ECEC Employers submission, 15 March 2019 at paras 29.1 – 29.5.

[121] Ibid, at para 30.1.

[122] Ibid, at paras 30.2 – 30.3.

[123] Ibid, at paras 33.1 – 33.3.

NQF. But the submission put is unpersuasive, because here we are dealing with the modern awards, not the NQF. Nor are we persuaded by the submission that varying the awards in the manner proposed would make the award more sustainable.

[148] In our view this consideration is neutral.

[149] As to the likely impact on 'employment growth, inflation and the sustainability performance and competitiveness of the national economy' (s.134(1)(h)), the Applicants contend that the ECEC sector is 'a vital part of Australia's services industry [and that it] … supports every industry that has working parents wanting to put their children in care and has the power to get more women into work if they have access to childcare'.[124] It is submitted that:

- the nature of the Australian economy has transformed from a 9am – 5pm week day economy to one in which Australians are expected to work longer hours and more irregular hours;
- Australia's economic performance is substantively influenced by a healthy, appropriately regulated childcare industry to support all Australian families; and
- by amending the ordinary hours clause centres will increase their operating hours, which in turn will generate greater workforce participation and longer working hours, thus 'boosting Australian employment and Australia's performance, competitiveness and long term economic sustainability'.[125]

[150] The matters mentioned in s.134(1)(h) focus on the aggregate (as opposed to the sectoral) impact of an exercise of modern award powers.

[151] We are not persuaded that varying the Awards in the manner proposed will have any measurable impact on the national economy; for two reasons. First, there is a paucity of evidence about the extent of parent demand for the extended hours and, second, there is little evidence directed at the likely utilisation of any extension to the span of hours by ECEC centres. In our view this consideration is neutral.

[152] We now turn to reply submissions of the UWU and IEU.

[153] The UWU and IEU oppose the claim. The UWU submits that 'it is unnecessary, will have a disruptive impact on the employees covered by the Awards and does not meet the modern awards objective'.[126]

[154] The UWU submits that:

- where a specific service seeks to open for longer hours, and wishes to pay employees at ordinary hours for those hours, it is open for such a service to engage in collective bargaining with employees with a view to achieving that outcome through an enterprise agreement;

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[124] Ibid, at para 34.1.

[125] Ibid, at paras 34.2 – 34.5.

[126] UWU submission in Reply, 12 April 2019 at 26.

- the fact that some employers within the sector wish to open later is not a cogent basis for extending the ordinary hours of work for all employees covered by the Awards across this sector, especially given employers can already open for longer hours under the current Awards; and
- the overtime rate is time and a half for the first two hours and double time thereafter under the Children's Services Award (clause 23.2(a)) and time and a half for the first three hours and double time thereafter under the Teachers Award (clause B.4.1(a)) and these rates are not excessive and are consistent with industrial norms within the modern award system. It is appropriate that employees working hours after 6.30pm be paid overtime.

[155] As to the proposition that delays in parent pick up provide a rationale for extending the spread of hours, the UWU submits that:

> 'Delays in parent pick up would vary across centres, however there is no evidence that it is widespread or that it cannot be managed effectively through the use of appropriate policies.'[127]

[156] Further, the UWU submits:

> 'The most appropriate response is not to vary the ordinary span of hours for all employees within this sector but to appropriately manage late pickups through centre policies and procedures. As noted a significant number of centres have policies by which parents must pay a late fee if they fail to pick up their children by a particular time. It is unrealistic to assume that these policies would change should the span of ordinary hours be extended.
>
> Employees within this sector, who are largely low paid, should not have to bear the cost of late pickups.'[128]

[157] The IEU also opposes the claim, characterising it as 'a naked attempt to further reduce the take-home pay of workers in a notoriously low-paid, female dominated industry, in circumstances where there is no evidence that this is necessary or justified'.[129]

[158] The IEU submits that the Applicants have put forward no evidence or submissions:

- demonstrating that these adjustments are necessary;
- beyond broad assertion, showing that the current regime in fact imposes significant – let alone excessive – costs on operators or parents; and
- explaining why the costs of increasing inconvenience for parents and profitability of operators should be borne entirely by low paid early childhood teachers and educators, without any corresponding benefit to them.[130]

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[127] Ibid, at para 49.

[128] Ibid, at paras 54 – 55.

[129] IEU Submission in Reply, 15 April 2019.

[130] Ibid, at para 11.

[159] The IEU submits that the Applicants have not made any serious attempt to explain why the Teachers Award should be similarly varied (particularly in circumstances where teachers are more usually engaged during 'core hours').

[160] In their reply submission of 29 April 2019 the Applicants submit the claim has the 'relatively modest aim' of aligning the span of ordinary hours in the Awards to a range which accommodates the specific needs of the ECEC sector and its role within the wider economy and society.

[161] The Applicants submit it would be a mistake for parties to simply dismiss or disregard the reality that many parents utilise ECEC while they are at work, and the closing time of a ECEC centre will have a direct impact on the working hours of the parent and/or the ability to collect their child. Further, the Applicants submit that it should not be understated that many parents use ECEC services to facilitate (and in effect to make possible) their continued engagement in the workforce, which coexists with the importance of the ECEC sector of providing quality education.

6.1.1 Consideration

[162] At the heart of the merits case advanced in support of the claim is the proposition that there is an unmet demand for ECEC services after 6.30pm and extending the span of hours until 7.30pm will result in centres extending their operating hours to meet that demand.

[163] As we have noted above, one of the propositions advanced by the Applicants is that 'there is a demand from parents for childcare centres to stay open past 6.30pm due to their own work commitments'. This proposition is foundational to other arguments advanced in support of the claim, in particular:

- limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women);
- some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable childcare; and
- greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.

[164] The difficulty for the Applicants is that there is a paucity of probative evidence in support of the asserted unmet demand. Only two of the Applicants' witnesses gave evidence of any 'survey' of parents' preferences regarding opening hours. In the course of her oral evidence Ms McPhail said that she had conducted a 'Facebook poll' in the 24 hours prior to giving her evidence and that:

> 'in the last 24 hours, we had 60 people respond. And of those, 22 percent said that, yes, there is a demand for childcare to be open after 6:30pm'.[131]

[131] Transcript, 7 May 2019 at PN2910.

[165] The poll data was 'on Facebook' and not otherwise recorded in a document. We have no idea of the context or the question asked of the respondents to the poll. No material was filed in relation to these issues and the Applicants did not refer to this aspect of Ms McPhail's evidence in their submission setting out the findings they sought based on the evidence. This evidence is of very limited probative value.

[166] The other witness who gave evidence of a survey of parents was Ms Tullberg. Ms Tullberg owns the Knox Childcare and Kindergarten (Knox Centre) and is the operations manager of three other centres operated by Wallaby Childcare Group (Wallaby Centres). The hours of operation of these centres are:

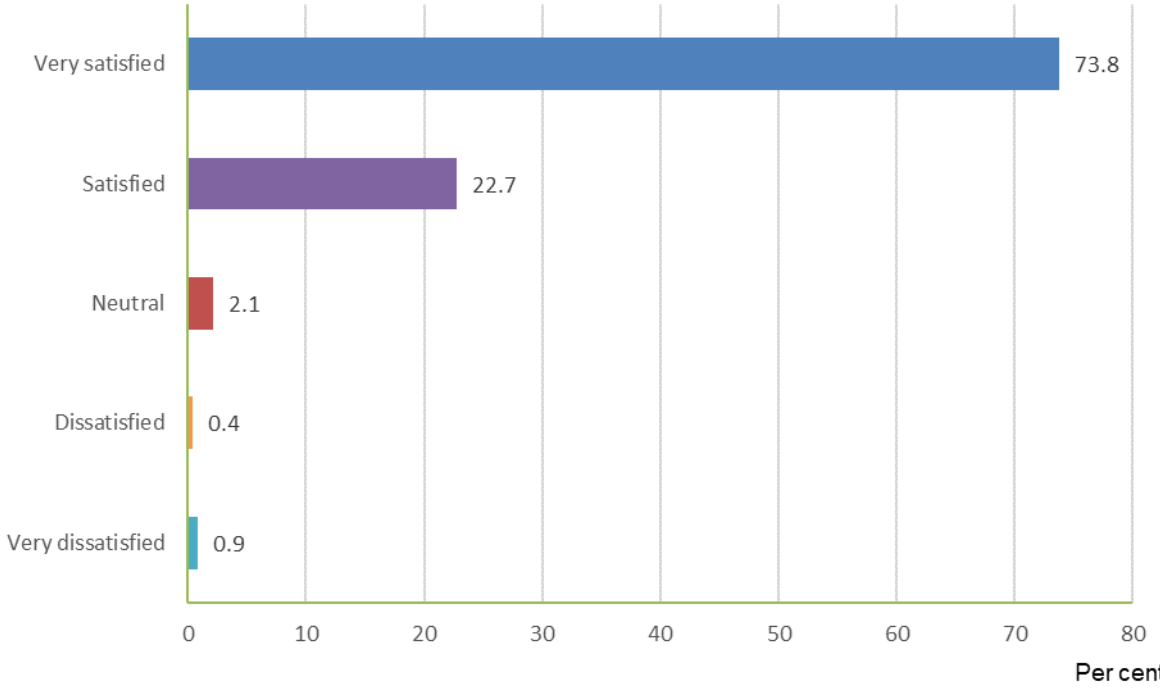
	Open	**Close**
Wallaby Centres	6.30am	6.30pm
Knox Centre	7.00am	6.30pm

[167] Ms Tullberg conducted a survey of parents attending the four centres at the end of 2016. The survey included a question: 'Parents, are the operating hours convenient?'. In cross examination, Ms Tullberg agreed that the survey was 'their opportunity to tell you if they want anything about the centre to change'.[132] The survey results are set out in Exhibit IEU 36.

[168] Chart 3 below presents the combined results from the *Knox Childcare and Kindergarten Survey* and *2016 Wallaby Childcare Group Annual Parent Satisfaction Survey* relating to convenient operating hours. Over 96 per cent of respondents were either 'Very satisfied' or 'Satisfied' with the convenience of the current operating hours. Only 1.3 per cent of respondents were 'Very dissatisfied' or 'Dissatisfied'.

[132] Transcript, 8 May 2019 at PN3589.

Chart 3: Convenience of current operating hours[133]



Note: Data presented are the combined results from the *Knox Childcare and Kindergarten Survey* (53 responses) and *2016 Annual Parent Satisfaction Survey* (180 responses). Combined responses total 233.

[169] There is no sound evidentiary basis for finding that there is an unmet demand from parents for childcare services after 6.30pm.

[170] The second limb of the argument advanced by the Applicants is that extending the spread of hours to 7.30pm will result in centres extending their operating hours. There is reason to doubt that this would be so, or at least to doubt that there would be any significant extension of operating hours across the ECEC sector. The considerations below lead us to this view.

[171] In support of its contention that the variation proposed is 'unnecessary', the UWU relies on the observation that the majority of services in the ECEC sector operate within the current span of hours as prescribed in the Awards. In support of this proposition the UWU relies on the table below.[134]

Table 7: Closing time of ECEC services, as at 2 April 2019

Closing time	Before 6pm	At 6pm	Between 6.01pm and 6.29pm	At 6.30pm	After 6.30pm	Total
	2123	4230	225	2186	197	8,961
Percentage of total	23.7	47.2	2.5	24.4	2.2	

[133] See *Knox Childcare and Kindergarten Survey*; *2016 Annual Parent Satisfaction Survey*; Exhibit 36.

[134] UWU submission in reply, 12 April 2019 at para 27.

[172] Table 7 has been created using data from the Australian Children's Education and Care Quality Authority ('ACECQA') national registers, with specific parameters used to give an indication of closing times across the sector.[135]

[173] The table shows that 70.9% of services close before or at 6pm, 73.4% close before 6.30pm and 97.8 per cent close by 6.30pm. Only 2.2% of services close after 6.30pm. The UWU submits that there may be *some* services within these that would close later if the Awards were varied but it cannot be presumed that a significant number would. The UWU notes that a significant number of services close much earlier than the current Award span of hours limits.

[174] The Applicants submit that the data in Table 7 'plainly has a number of significant limitations', many of which are acknowledged by the UWU. The Applicants note that while the original data set apparently compromises of 15,091 services, only 8,961 services have been included in the UWU's analysis (an 'exclusion rate' of approximately 41%). The UWU's calculations appear to exclude 5817 'services' (approximately 39%) on the basis that no closing time is listed. The Applicants submit that this 'is an extraordinarily high proportion of the data set which means that the percentage figures relied upon should be viewed with great caution'.[136]

[175] We accept that there are limitations in the data relied on by the UWU. But it seems that it is the best evidence available in respect of this issue. We note that the Applicants were unaware of any data more reliable than that identified by the Unions.[137]

[176] A survey conducted by Early Childhood Australia (ECA) found that only 0.8% of long day care centres opened past 6.30pm - extracts from the ECA website article, *Seven tips on flexible hours you may not know*, is annexed and marked as 'LJ-3' to Ms Lisa James' Statement in Reply.[138] The article includes the following observation:

> 'For evening care, parents' (sic) may also preference 'home environments', either in informal care arrangements, family day care or in-home care. This may mean that demand for extended hours can be a challenge. If there are only a small number of families using the service, or variable demand, extended hours can often be difficult to sustain in the long term.' (emphasis added)

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[135] The CSV dataset for approved services in the region '*Australia*' was accessed on 2 April 2019 from https://www.acecqa.gov.au/resources/national-registers. The closing time in the table is based on closing time of a service on Mondays. The vast majority of services have the same closing time across the week, but there may be some that vary. There were a total of 15,901 services listed in the datasheet. Certain services were excluded. All services that did not have a closing time listed were excluded, and this comprised a significant number of services. 31 services were excluded for having an unclear finish time such as '0.00'. 89 services were excluded for having a close time of '23:59', as spot checks of these services indicated this appeared to be a data error. Most services used 24 hour time however a portion of services used 12 hour time. The services using 12 hour time were manually sorted into an appropriate category. Percentages are rounded to 1 decimal point. Data sets on the ACECQA national registers are updated daily; this table reflects the information as of 2 April 2019.

[136] ABI submission, 29 April 2019 at para 2.16

[137] ABI Response to FWC Background Document 1, 10 July 2019 at para 102.

[138] Exhibit 33.

[177] This proposition was also supported by a study of a trial of extended hours care by the Australian Institute of Family Studies, titled *Flexible Child Care Key findings from the AIFS Evaluation of the Child Care Flexibility Trials,* by Jennifer Baxter and Kelly Hand.[139]

[178] Part of the study aimed to provide participating families with access to extended hours of operation at the start and/or at the end of the weekday at six centres across Australia. Participating centres offered extended early morning sessions (commencing at 5 am at the earliest) and/or extended evening sessions (until 8 pm at the latest). A separate fee was payable for the extended session of care, and parents were required to book this session in advance.

[179] While some centres reported that families showed significant interest in the extended sessions, only one centre had sufficient permanent enrolments to continue an extended session beyond the trial period. At the end of 2013, three of the centres had no enrolments in the extended hours service, and as a result the trials at these centres were discontinued early. In total, 18 families were reported to have enrolled in the extended hours sessions over the trial period.

[180] The Summary of the Trials (at page 16) included the following comments:

> 'In summary, this evaluation highlighted that parents sought various dimensions of "flexibility" in child care. For some, this meant greater availability of existing care arrangements, while others wanted access to options they did not currently see as being available to them, including more occasional or in-home care, or care at different hours. Some parents expressed a wish for the types or features of care that were explored in the trials (such as weekend care).
>
> Clearly an important question taking this forward is in regard to the likely take- up of those forms of [extended] care. Provision of flexibility "just in case" it is needed is not likely to be financially sustainable, as seen in the trials from those services that experienced low take-up of trialled "flexible" approaches.
>
> Learning from both parent and service provider perspectives in this evaluation, we can see that there are complexities in identifying the demand for care, especially given the diversity of families' needs and wishes for care solutions. Further there are significant challenges in being able to deliver care that does meet parents' needs for flexible care.
>
> While this evaluation has provided valuable insights about the supply of and demand for flexible child care, we do not have perspectives on this from a representative sample of Australian parents, and this would be needed in order to better understand the needs for different flexible care solutions across the Australian population.'[140]

[181] The evaluation, through information provided by parents, service providers and other stakeholders, allowed the authors to consider broad issues regarding the supply and demand for flexible child care. The stated main learnings from the trials were that:

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[139] Exhibit 33, Annexure LJ-4.

[140] Exhibit 33, Annexure LJ-4 at page 58.

- parents' child care needs and preferences are diverse, so parents need a range of easily accessed child care options;
- identification of demand for flexible care is not straightforward;
- 'flexibility' is just one of the characteristics of care that parents look for;
- delivery of a flexible child care solution is dependent on service provider commitment and educator availability; and
- when introducing a new child care option, timing and continuity matters.

[182] One of the evidentiary gaps in these proceedings relates to the fourth dot point – there is little evidence about service provider commitment and educator availability to support the proposition that if the spread of hours was extended to 7.30pm, then centres would extend their operating hours.

[183] In relation to service provider commitment, the witness evidence before us often falls short of a commitment to extend operating hours to the extent of the extension in the spread of hours proposed in the claim. For example, Ms McPhail says:

> 'I have read the ACA claim to extend ordinary hours from 6.30pm until 7.30pm. This extension of ordinary hours would assist services when parents are running late and cannot pick their children up by 6.30pm. It would also help centres hold staff meetings during normal work hours to which mandatory staff attendance is required because the meetings could be held once the last child leaves the centre. It would also help us to provide the community more regularly with much valued additional care opportunities such as occasional 'date nights' for our parents that are currently financially out of the question.'[141] (emphasis added)

[184] Ms Tullberg is more definitive:

> 'If the ordinary hours in the modern award were to be extended, I would open the Knox Centre from 7.00am – 7.30pm to:
>
> (a) fit in with my parent's lifestyle and working needs; and
>
> (b) push the late collection fee back until after 7.30pm.
>
> In the event of this scenario, I would survey all my parents to see if they would like the Centres to remain open until 7.30 or 7.00pm. In my experience, parents will take any services they can utilise. We might even attract new families join us based on the extended hours.'[142] (emphasis added)

[185] We note Ms Tullberg's evidence that she would survey the parents that utilised her centres. As mentioned earlier, such a survey was conducted and it establishes very little support for an extension in operating hours.

[186] Ms Chemello's evidence was:

> 'If the hours were extended to 7.30pm, I would consider changing my rosters to suit the demands of the parents. In the immediate future I would probably still open at 6/6.30am but I would close at 7.00pm.

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[141] Exhibit 28 – Witness Statement of Kristen McPhail, 12 April 2019 at para 41.

[142] Exhibit 35 – Witness Statement of Sarah Tullberg, 9 April 2019 at paras 36 – 37.

> Changing the ordinary hours to 7.00pm would also help me stay open later for the hosting of staff meetings.'[143] (emphasis added).

[187] Ms Chemello accepted that a decision to extend operating hours had a degree of complexity:

> 'Yes, sure. You understand the ACA claim is to expand the span of hours to end at 7.30?---Correct.
>
> Whether you keep your centres open later depends on demand in the area?---There are a few things that you would have to look into; parent demands, parents' occupations, their different rostering, their demographics of where they live in comparison to where the service is. It's not just a clear-cut of - there are a few things that you would need to consider.
>
> Before you could say whether it was worth it for you as a business you would need to do quite a complicated analysis. Is that fair?---Yes.
>
> You haven't done that analysis up to 7.30, have you?---At the moment, no.
>
> Okay?---It hasn't - I've been restricted with the award, so that hasn't even been an option in my head.'[144] (emphasis added)

[188] It is also relevant to note that most of the ECEC employer witnesses had not undertaken a business study of the demand for, or the viability of, longer opening hours.[145] The following exchange is illustrative:

> Saunders: One of the other reasons you support the claim - you've done no business case modelling on the actual demand for longer hours, have you?
>
> Viknarasah: No.
>
> Saunders: You haven't surveyed your parents?
>
> Viknarasah: No[146]

[189] In sum, the evidentiary foundation for the central propositions advanced in support of the claim has not been established. There is no sound evidentiary basis for finding that there is an unmet demand from parents for childcare services after 6.30pm. Further, even if the spread of hours was extended to 7.30pm, there is reason to doubt that there would be any significant extension of operating hours across the ECEC sector.

[190] In our view the claim lacks the requisite merit. If the Awards were varied in the manner proposed they would *not* provide a 'fair and relevant minimum safety net of terms and

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[143] Exhibit 27 – Witness Statement of Ann Marie Chemello, 1 March 2019 at paras 45 – 46.

[144] Transcript, 7 May 2019 at PN2695 – PN2699.

[145] See oral evidence of Karthika Viknarasah PN1088-1089, Jae Fraser PN1699, Katy Paton PN2237-PN2238, Pamela Maclean PN2489, Ann Marie Chemello PN2696-2698, Kerry Mahony PN3943 and PN3954.

[146] Transcript, 6 May 2019 at PN1088-PN1089.

conditions'. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. We accept that the variations proposed would benefit the employers covered by the Awards and that the considerations in ss.134(1)(d) and (f), weigh in favour of the claim. But the other s.134 considerations are either neutral or, in the case of ss.134(1)(a), (b) and (da), weigh against the variation proposed.

[191] We have taken into account the s.134(1) considerations, insofar as they are relevant, and have concluded that it is not necessary to vary the Awards in the manner proposed to ensure that they achieve the modern awards objective. Accordingly, we dismiss the claim.

6.2 Rostering Claim

[192] The Applicants seek to vary the rostering clauses in the Children's Services Award and the Teachers Award so that an employer would be exempt from having to provide employees with 7 days' notice of a roster change in circumstances where:

(a) another employee has provided less than 7 days' notice of their inability to perform a rostered shift; and

(b) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee's rostered hours so as to replace the absent employee.147

[193] The Applicants submit that the particular conditions in the ECEC sector require flexibility for employers to vary rosters of permanent staff to address unplanned leave where 7 days' notice is not provided or when consent to waive notice is not provided.[148]

[194] It is contended that the ECEC sector is heavily regulated and constantly assessed on its 'consistent quality of care' provided to children[149] and that childcare centres are subject to complex regulations governing staff-child ratios, teacher-child ratios and qualification requirements.[150] Accordingly, these regulations mean that the replacement of an absent employee in a roster is mandatory (as opposed to being optional in many other industries).[151]

[195] The Children's Services Award currently provides that, absent agreement, an employee's rostered hours of work may only be changed by giving 7 days' notice – unless it is an emergency outside of the employer's control. The Applicants contend that the present provisions are 'not sustainable' and must be updated to ensure that the award is consistent with employee requests for flexibility, ECEC regulations and the practical application of the terms.[152]

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[147] ECEC Employers Submission dated 15 March 2019 at para 3.1; ECEC Employers Submission dated 29 April 2019 at para 1.5(b).

[148] ECEC Employers Submission dated 15 March 2019 at paras 20.2(h) - 20.2(k).

[149] Ibid, at para at 22.1.

[150] Ibid, at para 20.2(b).

[151] Ibid, at paras 20.2(c) - 20.2(d).

[152] Ibid, at para 18.12.

[196] Specifically, the Applicants seek to vary clauses 10.4(d) and 21.7(b) of the Children's Services Award, to provide employers with greater flexibility to change rosters other than with 7 days' notice. Clause 10.4(d) deals with part time employment. The amendment sought is the insertion of a new clause 10.4(d)(iii), as follows:

> **10.4 Part-time employment**
>
> (d) (i) Changes in the agreed regular pattern of work may only be made by agreement in writing between the employer and employee. Changes in the days to be worked or in starting and/or finishing times (whether on-going or ad hoc) may also be made by agreement in writing.
>
> (ii) Where agreement cannot be reached, the employer may change the days the employee is to work by giving seven days' notice in advance of the change in accordance with clause 21—Ordinary hours of work and rostering.
>
> (iii)The employer is not required to provide the full seven days' notice in circumstances where:
>
> (a) another employee has provided less than seven days' notice of his/her inability to perform a rostered shift; and
>
> (b) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee's rostered hours so as to replace the absent employee.
>
> (iv~~iii~~) The employer is relieved of the obligation to provide the full seven days' notice of change of the days an employee is to work where an emergency outside of the employer's control causes the employer to make the change. In this clause, emergency means any situation or event that poses an imminent or severe risk to the persons at an education and care service premises, or a situation that requires the education and care service premises to be locked-down.

[197] Clause 21.7(b) deals with rostering and the amendment sought is the insertion of a new clause 21.7(b)(ii) as follows:

> **21.7 Rostering**
>
> **(a)** An employer will post a legible roster at a place readily accessible to employees indicating the rostered hours of work.
>
> **(b) (i)** An employer may change an employee's rostered hours, but only by giving the employee seven days' notice. In the absence of such notice overtime will be paid until seven days have elapsed from the date the notice was given. However, an employee and employer may agree to waive or shorten this notice period in a particular case. Such agreement must be recorded in writing and form part of the time and wages records.
>
> (ii) The employer is not required to provide the full seven days' notice in circumstances where:
>
> (a) another employee has provided less than seven days' notice of his/her inability to perform a rostered shift; and
>
> (b) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee's rostered hours so as to replace the absent employee.

(iii) The employer is also relieved of the obligation to provide the full seven days' notice where an emergency outside of the employer's control causes the employer to make the change. In this clause, emergency means any situation or event that poses an imminent or severe risk to the persons at an education and care service premises, or a situation that requires the education and care service premises to be locked-down.

(iv~~ii~~) However, where an employee is required to stay beyond their rostered hours because a parent fails to arrive on time to collect a child, this will not be regarded as an emergency. In this circumstance, the employer must pay the employee at overtime rates for the additional time the employee remains at the workplace.

[198] In the Teachers Award, rostering is provided for under clause 10.4(d) in relation to part-time employment, as follows:

10.4 Part-time employment

(d) An employer cannot vary a part-time employee's teaching load or days of attendance unless:

(i) the employee consents; or

(ii) where such a variation is required as a result of a change in funding, enrolment or curriculum, the employer provides seven weeks' notice in writing in the case of a school teacher or four weeks' notice in the case of an early childhood teacher, or where the change would result in a reduction in salary, the salary of the teacher is maintained for a period of seven weeks in the case of a school teacher or four weeks in the case of an early childhood teacher.

[199] The Applicants submit that the Teachers Award is 'completely different to and inconsistent with the rostering clause in the Children's Services Award'.[153] The 'rostering' clause in the Teachers Award appears under the heading part-time employment (clause 10.4(d)(ii)) and requires an employer to set the teaching load and days of attendance, and that this can only be departed from in situations relating to 'funding, enrolment or curriculum changes'.[154] In such circumstances, 4 weeks' notice of the teaching load or days of attendance must be provided.[155] It is submitted that this clause is 'impractical and unsuitable in long day care and outside school hours care settings' engaging teachers on a part-time basis.[156]

[200] In summary, the Applicants submit that the claim should be granted on the basis of:

- the unique rostering requirements which arise in Childcare;
- the unique rostering limitations which arise in Childcare; and
- the operation of the current award conditions and proposed variation.

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[153] Ibid, at para 19.1.

[154] Ibid, at paras 19.2 - 19.5.

[155] Ibid, at para 19.1.

[156] Ibid, at paras 19.2 - 19.5.

[201] As to the unique rostering requirements in Childcare, the Applicants submit that:

(a) Employees in the childcare industry are routinely unavailable at the last minute due to health and other personal reasons.

(b) Childcare employers are subject to complex regulations that impact their ability to roster employees including:

(i) staff:child ratios - depending on the age and number of children who attend the centre each day;

(ii) qualified teacher:child ratios - depending on the number of children who attend the centre each day;

(iii) qualification requirements - to ensure at least 50% of the employees in the Centre on any given day are Diploma Qualified (the remaining employees must be at least Certificate III qualified), (collectively the Childcare Regulations).

(c) Childcare employers are routinely required to replace employees in rosters in situations outside their control and which do not constitute an "emergency". For example, unwell employees, unavailability, absenteeism and other personal reasons.

(d) The Childcare Regulations mean that the replacement of an absent employee in a roster is required (as opposed to being optional in many other industries). Further, a replacement employee must have certain qualifications in order to comply with the Childcare Regulations.

(e) The alternatives to replacing an absent employee in a childcare roster are to:

(i) act in breach of the Childcare Regulations with risks of incurring fines, losing a centre's licence or accreditation status; or

(ii) call parents and ask them to pick-up their children from the centre (so the number of children in the centre decreases and as a result the centre returns to being compliant with the Childcare Regulations).

[202] The above propositions are expanded upon in Section 21 of the ECEC Employers' submission dated 15 March 2019.

[203] It is generally accepted that there is a comprehensive scheme of regulation for ECEC services and the UWU acknowledged that services must comply with the National Law and Regulations, as well as any relevant State based regulations. The UWU also observe that attendance at ECEC services is not highly variable, and that, generally, parents are required to book a place in advance, and may have to pay a fee if their child is unable to attend at late notice.[157]

[204] But many of the other propositions advanced were contested; or unsupported by the evidence. In particular, there is no evidence that employees in ECEC are particularly prone to

[157] See oral evidence of Kylie Brannelly – Transcript, 8 May 2019 at PN3423-PN3424; Kerry Mahony – Transcript, 8 May 2019 at PN3991-PN3993; Nicole Llewellyn – Transcript, 9 May 2019 at PN4250-PN4253; and Alexandra Hands – Transcript, 9 May 2019 at PN4758-PN4767.

unanticipated absences. The IEU rejects the Applicants' assertion that ECEC centres are uniquely vulnerable to staff absences, submitting that most if not all businesses require a minimum level of staff to be operational.

[205] The IEU also address the submission that ECEC workers are 'routinely' absent from work due to illness or other personal issues:

> 'All national system employees are entitled to personal leave and bereavement leave. This is leave which is almost always taken at little to no notice: that is the nature of illness. The risk of an employee being absent at short notice for these reasons is universal; employers must take this into account when determining appropriate staffing levels. In other words, staffing at above-minimum levels is not 'overstaffing', as described by some ACA witnesses: it is appropriate staffing to manage these risks.
>
> What in fact emerges from the ACA evidence is that the alleged difficulties these operators face is not through anything particularly unique to the early childhood industry, but instead as a result of them choosing to staff at levels which preserve minimum compliance with staffing ratios but do not or do not sufficiently take into account normal incidents of employment such as personal leave.'158

[206] There was no evidence that any of the employer witnesses had been non-compliant with the minimum staffing requirements in the National Law or Regulations under the operation of the current Awards.[159]

[207] As to the unique rostering limitations in the ECEC sector, the Applicants submit that:

(a) Generally speaking, using casual employees (or labour hire) to replace absent permanent employees in a roster is to be avoided as:

  (i) casual employees do not provide 'consistency of care' as they are not familiar with the children which is not good for families, the children and the childcare employer's quality standards;

  (ii) the likelihood of having an available pool of casuals at short (or immediate) notice is rare;

  (iii) due to lack of training and familiarity with the centre, casual employees are generally less capable.

(b) It is preferable that permanent employees replace other employees when absent to ensure:

  (i) 'consistency of care' is provided in accordance with quality standards outlined in the National laws; and

  (ii) qualification requirements are met so that an employee with a Diploma replaces an employee with a Diploma

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[158] IEU Submission in Reply, 15 April 2019 at paras 26-27.

[159] See oral evidence of Nicole Llewellyn – Transcript, 9 May 2019 at PN4221-PN4229; and Alexandra Hands – Transcript, 9 May 2019 at PN4703.

[208] The above propositions are expanded upon in Sections 22 of the ECEC Employers' submission dated 15 March 2019.

[209] These propositions are all contested.

[210] We note that Ms McPhail gave evidence that continuity of care is important for the ECEC sector and that casual employment and the use of agencies is therefore not desirable. In her statement she said that 'in order for children to part with their parents easily and have a sense of belonging to their environment, they need the continuity.'[160] Similarly, Mr Fraser stated that agency staff create 'a huge issue around continuity and consistency of care because we are likely to be engaging people who are not familiar with the centre and not familiar with the children.'[161]

[211] However, we also note that the evidence indicated that some services roster above the minimum required to deal with absences and ensure compliance with mandated educator to children ratios.[162] Further, all but one of the employer witnesses who operate services indicated that, in practice, they employ appropriately qualified casual employees.[163]

[212] The Applicants do not contest that employers can and do maintain staffing ratios in various ways but submit that the costs, difficulties and outcomes arising from these current practices warrant a change to the existing rostering provisions.

[213] As to the operation of the current award conditions and the proposed variation, the Applicants submit that:

(a) Currently, the Children's Services Award requires the provision of 7 days' notice for a change of roster. If notice is not provided or consent to waive notice is not given in writing, overtime is payable.
(b) It is impractical for centres to provide 7 days' notice of a change in roster in circumstances where another employee has provided less than 7 days' notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).
(c) While there is an ability for permanent employees to waive the 7 day notice requirement in writing and there is some evidence this occurs, the circumstances of this 'consent' appears to be informal (eg; a phone call).
(d) The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to

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[160] Exhibit 28 – Witness Statement of Kristen McPhail, 12 April 2019 at para 74.

[161] Exhibit 18 – Witness Statement of Jae Fraser, 15 April 2019 at para 93.

[162] See oral evidence of Alexandra Hands – Transcript, 9 May 2019 at PN4681-PN4684; Kerry Mahony – Transcript, 8 May 2019 at PN3965-PN3966; Jae Fraser – Transcript, 7 May 2019 at PN1677-PN1680; and Katy Paton – Transcript, 7 May 2019 at PN2269-PN2279.

[163] See Exhibit 27 - Witness Statement of Ann Marie Chemello, 1 March 2019 at para 23; Exhibit 43 - Witness Statement of Hands, 12 March 2019 at para 19; Exhibit 21 - Witness Statement of Katy Paton, 14 March 2019 at para 20; Exhibit 13 - Witness Statement of Karthika Viknarasah, 11 April 2019 at para 31; Exhibit 35 - Witness Statement of Tullberg, 9 April 2019 at para 19; Exhibit 28 - Witness Statement of Kristen McPhail, 12 April 2019 at para 21; Exhibit 18 - Witness Statement of Jae Fraser, 15 April 2019 at paras 24-25; Exhibit 25 - Witness statement of Pamela Maclean, 15 April 2019 at para 30; Exhibit 38 - Witness Statement of Kerry Mahony, 11 April 2019 at para 21.

> accommodate unplanned absences and comply with ratio requirements without incurring overtime costs.

[214] The above propositions are expanded upon in Section 23 of the ECEC Employers' submission dated 15 March 2019.

[215] Propositions (b), (c) and (d) are contested.

[216] The Applicants address the modern awards objective and the various s.134 considerations in Part F of their submission of 15 March 2019. The Applicants contend that the Awards will provide a fair and relevant minimum safety net once varied in accordance with their claims. No submission is advanced in respect of ss.134(1)(b), (c), (da) and (e). It is convenient to deal with the Applicants' submissions about the s.134 considerations now, before turning to the UWU and IEU submissions.

[217] As to 'relative living standards and the needs of the low paid' (s.134(1)(a)), the Applicants contend that 'the particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences and comply with ratio requirements without incurring overtime costs'.[164]

[218] The UWU submits that roster changes without adequate notice can be disruptive and can have 'a significant impact on the ability of employees to attend to their family and caring responsibilities'.[165] We accept the submission put.

[219] The evidence suggests that if the claim were granted, and employees were required to change their roster at short notice it would create difficulties for those employees. 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'.[166] It is her evidence 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.'[167]

[220] Ms Hennessy gave evidence 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

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[164] ECEC Employers submission, 15 March 2019 at para 20.2(k).

[165] UWU submission in Reply, 12 April 2019 at para 78.

[166] Exhibit 9 - Supplementary statement of Pixie Bea, 10 April 2019 at para 11.

[167] Ibid, at paras 12-13.

> shift but my shift is changed at the last minute without my 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.'[168]

[221] In our view this consideration weighs against varying the Awards in the manner proposed.

[222] As to the need to 'promote flexible modern work practices and the efficient and productive performance of work' (s.134(1)(d)), the Applicants submit that:

- Childcare employers are routinely required to replace employees in rosters in situations outside of their control and which do not constitute an 'emergency'.
- It is impractical for centres to provide 7 days notice of a change of roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).[169]

[223] We accept that this consideration weighs in favour of varying the Awards in the manner proposed.

[224] As to the likely impact on 'business, including on productivity, employment costs and regulatory burden' (s.134(1)(f)), the Applicants submit that if the claim is granted childcare centres will 'be able to practically accommodate absences from staff in a way consistent with a complex regulatory arrangements'.[170]

[225] We accept that this consideration weighs in favour of varying the Awards in the manner proposed.

[226] As to the need 'to ensure a simple, easy to understand, stable and sustainable modern award system' (s.134(1)(g)), the Applicants submit:

> 'Given the primary purpose of the childcare industry is to provide a place for children to go while their parents are at work, a simple, easy to understand, stable and sustainable modern award system would include working conditions (and the working of ordinary hours) in the childcare industry which contemplated the fact that working parents need to collect their children following the cessation of their own ordinary hours. Currently, the span of ordinary hours in the Awards does not sufficiently contemplate this.
>
> Further, the business and societal benefits associated with the ACA Claims (which have been addressed in the other limbs of the Modern Awards Objective) will indirectly lead to a sustainable modern award system in the longer term.

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[168] Exhibit 7 - Supplementary statement of Bronwen Hennessy, 10 April 2019 at paras 11-12.

[169] ECEC Employers submission, 15 March 2019 at para 29.

[170] Ibid, at para 32.3.

> The Witness Statements outline that the current modern award system is not easy to understand and does not consider or accommodate the other Childcare Regulations that businesses must comply with. This is in part due to the current ordinary hours span and rostering conditions.'[171]

[227] We accept that there is a degree of complexity in the current rostering terms. We deal with this issue later and simply note here that this consideration would weigh in favour of varying the Awards in the manner proposed.

[228] As noted earlier, the Applicants advance no submission in relation to 'the need to encourage enterprise bargaining' (s.134(1)(b)). For our part, we do not consider that the variations sought would encourage enterprise bargaining. Accordingly this consideration weighs against granting the claims.

[229] The UWU and IEU oppose the claim on the basis that it is unnecessary and does not meet the modern awards objective. It is submitted that the existing exceptions to the provision of 7 days' notice (see cl 21.7(b)(i) and (ii)) are sufficient for employers to manage rostering issues and further exceptions are not required.

[230] The UWU submits that employees in the ECEC sector generally try and accommodate roster changes where possible and that there is no evidence that employees routinely refuse roster changes for no reason. It is submitted that:

- the variations will create difficulties for employees with caring responsibilities;
- the variations will reduce social inclusion and potentially reduce workforce participation in the sector;
- the effect of the variations will be to remove overtime penalties for hours worked between 6.30pm and 7.30pm and for late roster changes, which is inconsistent with s.134(1)(da);
- the claims would reduce the 'family friendliness' of these Awards and 'could potentially result in increased employment costs if this results in employees leaving the sector, with employers required to rehire and retrain new employees'.[172]
- the Awards already contain sufficient flexibility and the consideration in s.134(1)(g) does not support granting the Claims; and
- no evidence has been filed to support the Applicants' contention that granting the Claims will boost employment, Australian performance and long term economic sustainability. The consideration in s.134(1)(h) does not support granting the Claims.

[231] The IEU submits that what is sought, properly understood, is:

> 'the right to require its workforce – without any compensation – to be subject to having their ordinary hours of work mandatorily changed with no notice. Although this would only be in limited circumstances, on the ACA's case these are matters which regularly and unpredictably

[171] Ibid, at paras 33.2 – 33.3.

[172] Ibid, at para 105.

> arise. The proposed variation would in practice require these workers to be permanently on-call.'[173]

[232] The IEU contends that if granted the claim would give permanent employees less control over their hours of work than casuals (who can be offered work at short or no notice, but are under no obligation to accept), who are compensated in part for the unpredictability of work. The IEU submits that the lack of merit in the claim is even clearer in respect of the Teachers Award:

> 'The lack of merit in this claim is even clearer in respect of the Teachers Award, which requires significantly longer notice periods including at least four weeks notice for part-time employees (again, waivable by agreement). This reflects the different role played by teachers as opposed to educators, and in particular the need to plan a long-term educational program for each child rather than varying matters on a day to day basis.'[174]

[233] The IEU submits that the Applicants do not deal with these issues at all, but simply seek a general variation if its claim in respect of the Children's Services Award is granted:

> 'It is not sufficient for ACA to justify a major change to the conditions of teachers by simply saying it is justified for educators. No case at all has been made out in respect of the particular circumstances of early childhood teachers.
>
> Accordingly, even if its claim in respect of the Children's Services Award succeeds – which, for the reasons set out above, it should not – the Teachers Award cannot and should not be so varied.'[175]

[234] Finally, the IEU submits (in respect of both the Ordinary Hours of Work Claim and the Rostering Claim) that the claims would cause serious detriment to already low paid employees and, at its highest, the case is one of cost-saving for operators at the expense of their employees, and:

> 'Tellingly, no financial information has been provided in support of the repeated claim that the current minimum award costs are 'unsustainable'.'[176]

6.2.1 Consideration

[235] In our view, the evidence does not support the Applicants' contention that the variations proposed are *necessary* to ensure that the awards achieve the modern awards objective. Tellingly, the following findings (proposed by the IEU)[177] are *uncontested*:

1. Employers can, and do, maintain adequate staffing ratios in the face of unexpected absence by:

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[173] IEU submission in Reply, 15 April 2019.

[174] Ibid, at para 30.

[175] Ibid, at paras 33-34.

[176] Ibid, at para 36.

[177] IEU submissions in reply, 26 May 2019 at paras 27-34.

(a) employing, and rostering, sufficient staff to manage the risk of an employee requiring personal or other short-notice leave;

(b) directly engaging a pool of casual employees;

(c) utilizing agency casuals;

(d) requesting that staff change their start and finish times;

(e) offering part-time staff additional shifts, up to eight hours of which under the Award may be paid at ordinary time rates;

(f) offering part-time and full-time staff overtime; and

(g) using managerial staff to cover absences.

2. There is no evidence that any ECEC Centre has, as a result of short notice staff absences or for any other reason, fallen under the minimum staffing ratios. One centre came 'close' on one occasion due to a gastro outbreak, but was still able to operate.178

3. Stable rostering patterns such that the same employees are present at the service at the same times on the same day:

(a) enable ECEC services to provide better continuity of care for children;

(b) are particularly important in respect of teachers, to enable them to best deliver the educational program;

(c) provide improved educational outcomes for children;

(d) are preferred by parents and correspondingly provide a benefit to the business; and

(e) provide greater stability and certainty for ECEC workers.

4. It is impossible to predict when an employee will require personal leave.

5. When an employee takes personal leave, it is usually at very short notice.

[236] Importantly, the Applicants do not contest that many ECEC employees are accommodating in assisting ECEC operators comply with the relevant regulations by voluntarily agreeing to vary their rosters within 7 days (or 4 weeks, depending on the Award). Indeed, there is no evidence of ECEC employees unreasonably withholding their consent to a roster change. Despite this concession, the Applicants submit that '*absent this accommodation*, the conditions of the Awards in respect of rostering *would be* unworkable'.[179]

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[178] Transcript, 7 May 2019 at PN2880-PN2882.

[179] ECEC Employers submission in reply, 29 April 2019 at para 2.57.

[237] The difficulty with this submission is that it is entirely speculative. The evidence before us is that ECEC employees *are in fact accommodating* and *do agree* to voluntarily change their rostered hours on short notice. In circumstances where there is no evidence before us suggesting that employees are not accommodating and do not agree to voluntarily change their rosters on short notice, we are not persuaded that the change proposed is necessary.

[238] Further, the evidence revealed a general reluctance from employers to 'force' employees to undertake work without their agreement.

[239] Of the ten witnesses called by the Applicants who gave evidence in respect of this claim, seven – Ms Viknarasah, Ms Maclean, Ms Chemello, Ms McPhail, Ms Tullberg, Mr Mahoney and Ms Llewellyn – did not agree that they should be able to unilaterally change their employee's hours and days of work at no, or short, notice.[180] For example:

- Ms Chemello;[181]

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

- Ms Tullberg;[182]

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

- Ms Paton's evidence was that she would 'always seek to request something of someone before demand it, as a human';[183] and

- Mr Mahony;[184]

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

[240] In respect of this evidence, the Applicants submit that:

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[180] Transcript, 6 May 2019 at PNP1113 - PN1115, P1172 – P1176 (Karthika Viknarasah); Transcript, 7 May 2019 at PN2482 - PN2486 (Pamela Avril Maclean); Transcript, 7 May 2019 at PN2708 - PN2709 (Ann Marie Chemello), Transcript, 7 May 2019 at PN2980 - PN2986 (Kristen Carol McPhail); Transcript, 8 May 2019 at PN3557 - PN3558, PN3568 - PN3569 (Sarah Tullberg); Transcript, 8 May 2019 at PN3973 - PN3974 (Kerry Mahony); Transcript, 9 May 2019 at PN4217 - PN4219, P4228 - P4229 (Nicole Llewellyn).

[181] Transcript, 7 May 2019 at PN2727.

[182] Transcript, 8 May 2019 at PN3564.

[183] Transcript, 7 May 2019 at PN2305.

[184] Transcript, 8 May 2019 at PN3973.

> 'this evidence should not necessarily be determinative of ACA/ABI's rostering claim. While such evidence does not necessarily assist ACA/ABI's claim, as was put in opening, the rostering claim seeks to amend the awards to address one particular scenario, where an employee does not provide sufficient notice to an employer that they will be absent and the employer is required to replace the employee in a roster to satisfy their statutory obligations as to staff ratios.'[185] (emphasis added)

[241] We agree with the proposition that the evidence referred to does not assist the Applicant's claim. Indeed, it calls into question the utility of granting the claim.

[242] The variation would allow an employer to change an employee's rostered hours with little or no notice where the employee was required to replace an absent employee in order to ensure that the service met its obligations in respect of staff to child ratios. The justification for such a provision has not been made out, as a matter of merit.

[243] If the Awards were varied in the manner proposed they would *not* provide a 'fair and relevant minimum safety net of terms and conditions'. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. We accept that the variations proposed would benefit the employers covered by the Awards and that the considerations in ss.134(1)(d), (f), and (g) weigh in favour of the claim. But the other s.134 considerations are either neutral or, in the case of ss.134(1)(a) and (b), weigh against the variation proposed.

[244] It may be accepted that, at least from the Applicants' perspective, the variations sought are desirable. But, as we have mentioned earlier, the Act requires more than that; it requires that a modern award include terms 'only to the extent necessary to achieve the modern awards objective' (s.138). We have taken into account the s.134(1) considerations, insofar as they are relevant, and have concluded that the requisite necessity has not been established in respect of this claim. Accordingly, we dismiss the claim.

[245] Before leaving this issue we wish to deal with two further matters, relating to the rostering provisions in the Children's Services Award.

[246] We note at the outset that we acknowledge that rostering in the ECEC sector is 'not a simple task and last minute changes can cause significant stress to a business and the person in charge of rostering.'[186]

[247] Ms Alexandra Hands' evidence is that that planning a roster with fluctuating variables (i.e., absences etc) is one of the most difficult aspects of operating centres because of compliance with ratio requirements.[187] Ms Nicole Llewellyn's evidence also deals with the difficulty of rostering employees in a way that keeps costs down for families, gives employees seven days' notice and fits in with all the legislative requirements.[188] Similarly, Ms McPhail's

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[185] ECEC Employers submission – background document 2, 19 July 2019 at para 33.

[186] ECEC Employers Submission, 15 March 2019 at para 21.3.

[187] Exhibit 43 – Statement of Alexandra Hands, 12 March 2019 at paras 62 - 67.

[188] Exhibit 39 – Amended Statement of Nicole Louise Llewellyn, 39 April 2019 at para 78.

evidence is that rostering employees to suitable shifts is never smooth in practice due to circumstances beyond a centre's control.[189]

[248] The first matter we wish to raise concerns the Applicants' submission that there is an administrative burden associated with providing the agreement to waive the 7 day notice period in writing. They submit that 'this additional requirement … is so out of touch with the way the childcare industry operates that employers are generally ignoring this requirement simply making sure they get consent from employees anyway they can to change a roster last minute.'[190]

[249] A number of the witnesses suggest that this 'consent' occurs informally (e.g.; a phone call or text message); largely because last minute changes to the roster generally occur early in the morning (before 7.00am) or on the weekend.[191]

[250] We note that clause 10.4(a) – Part time employment, requires that ad hoc agreed changes in the days to be worked or in starting and/or finishing times must be made in writing. Similarly, clause 21.7(b) – Rostering, provides that any agreement to waive or shorten the 7 day notice period required to change an employee's rostered hours 'must be recorded in writing and form part of the time and wages records'. What is meant by 'made in writing' or 'recorded in writing' may give rise to practical problems and may not be reflected in current practice in the ECEC sector.

[251] As to this issue we note that the Part time/Casuals Full Bench varied clause 25.5(c) of the *Social, Community, Home Care and Disability Services Industry Award 2010* in order to clarify that:

> '"rostering arrangement and changes to rosters" may be communicated by any electronic means of communication (for example, by text message) and that an equivalent provision to clause 25.5(c), as varied, be included in clause 22.6 of the Aged Care Award.'[192]

[252] Clause 22.6(f) of the *Aged Care Award 2010* (as varied) states:

> '**(f)** Rostering arrangements and changes to rosters may be communicated by telephone, direct contact, mail, email, facsimile or any electronic means of communication.'

[253] It is our *provisional* view that the variation of clauses 10.4(a) and 21.7(b) of the Children's Services Award in similar terms is necessary to ensure that the award achieves the modern awards objective. A conference of interested parties will be convened shortly to discuss this issue.

[254] We are also not persuaded that it is necessary to vary the relevant provision in the Teacher's Award. The Applicants' case, and evidence, was overwhelmingly directed at the 7

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[189] Exhibit 28 – Amended Statement of Kristen Carol McPhail, 12 April 2019.

[190] ECEC Employers submission, 15 March 2019 at para 23.4.

[191] Ibid, at para 23.3.

[192] [2017] FWCFB 3541 at [645].

day notice requirement in the Children's Services Award. We agree with the IEU's observation that no case at all has been made out in respect of the particular circumstances of early childhood teachers.

[255] The final matter we wish to raise concerns the Applicants' submission that the current rostering clause is difficult to understand.[193]

[256] Clauses 10.4(d)(iii), 21.7(b)(ii) and 21.7(b)(iii) deal with the exceptions to the requirement (absent agreement) to provide 7 days' notice of a changes in hours or roster. These provisions provide as follows:

> **'10.4(d)**
>
> …
>
> **(iii)** The employer is relieved of the obligation to provide the full seven days' notice of change of the days an employee is to work where an emergency outside of the employer's control causes the employer to make the change. In this clause, emergency means any situation or event that poses an imminent or severe risk to the persons at an education and care service premises, or a situation that requires the education and care service premises to be locked-down.'
>
> …
>
> **21.7(b)**
>
> …
>
> **(ii)** The employer is also relieved of the obligation to provide the full seven days' notice where an emergency outside of the employer's control causes the employer to make the change. In this clause, emergency means any situation or event that poses an imminent or severe risk to the persons at an education and care service premises, or a situation that requires the education and care service premises to be locked-down.
>
> **(iii)** However, where an employee is required to stay beyond their rostered hours because a parent fails to arrive on time to collect a child, this will not be regarded as an emergency. In this circumstance, the employer must pay the employee at overtime rates for the additional time the employee remains at the workplace.'

[257] It seems to us that these provisions should be redrafted in plain language and that the provision of examples may assist those who are required to implement the provisions in practice. A conference will be convened shortly to provide interested parties with an opportunity to comment on this issue. The two clauses should also be consistent. We note that there is no equivalent to clause 21.7(b)(iii) in clause 10.4.

6.3 Non-contact time Claim

[258] The UWU seek to increase the non-contact time (time off the floor away from responsibilities with children) currently provided for under the Children's Services Award and the Teachers Award; and to provide extra non-contact time for Educational Leaders.[194]

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[193] ECEC Employers Submission – Background document, 10 July 2019 at para 103.

[194] The UWU submission - Factual Findings, 29 May 2019 at para 83.

[259] The UWU witnesses who gave evidence relevant to these claims were:

- Pixie Bea;[195]
- Dr Marianne Fenech;[196]
- Bronwen Hennessy;[197]
- Alicia Wade;[198] and
- Preston Warner.[199]

[260] The ECEC Employer witnesses who gave evidence relevant to these claims were:

- Kylie Brannelly;[200]
- Jae Fraser;[201]
- Nicole Llewellyn;[202]
- Kerry Mahony;[203] and
- Kristen McPhail.[204]

[261] We discuss the evidence in the course of our consideration of each element of the claim.

[262] We propose to deal with each element of the claim separately.

6.3.1 General increase in non-contact time

[263] The UWU seek to vary clause 21.5(a) of the Children's Services Award as follows:

21.5 Non-contact time

(a) Non-contact time will be provided for the purpose of planning, preparing, evaluating and programming activities. During non-contact time, an employee will not be required to supervise children or perform other duties as directed by the employer. ~~An employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children will be entitled to a minimum of two hours per week, during which~~

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[195] Exhibit 8 - Witness Statement of Pixie Bea, 4 March 2019; Exhbiit 9 - Supplementary Statement of Pixie Bea, 10 April 2019.

[196] Exhibit 10 - Witness Statement of Dr Marianne Fenech, 14 March 2019.

[197] Exhibit 6 - Witness Statement of Bronwen Hennessy, 11 March, Exhibit 7 - Supplementary Statement of Bronwen Hennessy, 10 April 2019.

[198] Exhibit 11 - Witness Statement of Alicia Wade, 8 March 2019; Exhibit 12 - Supplementary Statement of Alicia Wade, 12 April 2019.

[199] Exhibit 17 - Witness Statement of Preston Warner, 8 March 2019.

[200] Exhibit 34 - Witness Statement of Kylie Brannelly, 15 April 2019.

[201] Exhibit 18 - Witness Statement of Jae Fraser, 15 April 2019.

[202] Exhibit 39 - Witness Statement of Nicole Llewellyn, 9 April 2019.

[203] Exhibit 38 - Witness Statement of Kerry Mahony, 11 April 2019.

[204] Exhibit 28 - Witness Statement of Kristen McPhail, 12 April 2019.

~~the employee is not required to supervise children or perform other duties directed by the employer, for the purpose of planning, preparing, evaluating and programming activities.~~

(i) An employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children will be entitled to a minimum of ~~two~~ four hours non-contact time per week.

[264] We note here that the UWU's submissions and evidence focussed on the claim to increase non-contact time from two to four hours per week. No submission was advanced in support of the proposed rewording of the balance of clause 21.5.

[265] The UWU contend that there is a significant amount of 'preparation, implementation and/or evaluation of a developmental program for an individual child or group of children' that educators are required to complete within non-contact time, and that the introduction of the NQF has significantly increased the scope and duration of this work.

[266] At [130] – [131] of their submission of 15 March 2019 the UWU submit:

> 'The expectation under the NQS is that the educational program is developed based on the needs of each child. It is not sufficient for an educator to simply use the same programs repeatedly without thought for the individual needs of children in the centre. Educators are expected to be responsive to children, flexible in their programming and able to integrate children's emerging ideas. This is particularly so with children who are from different cultural backgrounds or have disabilities.
>
> Completion of these tasks is critical to ensuring that the centre is complying with obligations under the NQS, and assessors may sight programming and planning documentation when determining whether the centre is meeting the obligations of the NQS.' (footnotes omitted)

[267] The propositions in the above extract from the UWU's submission were generally not contested, however the ECEC Employers submit that no inference should be drawn that the requirement to develop an educational program based on the needs of each child was created by the NQS and, further, any characterisation of educational programming in ECEC which suggests that entirely 'bespoke' programs are developed for each and every child in every centre is not correct (or likely realistic).[205] We accept the submission put.

[268] The evidence disclosed that centres use different forms of template programs to cater to the needs of a majority of children;[206] but it is not contested that these programs are adapted to varying extents in certain circumstances and in certain centres, depending on the needs of the relevant children.

[269] The UWU submit that within the allocated non-contact time educators are expected to complete a wide variety of tasks including:

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[205] Exhibit 11 - Witness Statement of Alicia Wade, 8 March 2019 at para 55.

[206] Ibid.

- preparing programs for educational learning and development; writing up observations of individual children;
- communicating with parents on their children's development;
- undertaking critical reflection on their own programming and practice;
- researching appropriate resources for programs;
- assessing the effectiveness of programs;
- planning inclusive programming for children with diverse needs;
- making applications for additional inclusion support resources; and
- liaising with relevant organisations and professionals where necessary (i.e. inclusion support agencies, speech pathologists, psychologist).

[270] In short, it is argued that these tasks must be undertaken within the framework of the NQF and that completion of these tasks is critical to ensuring that the centre is complying with obligations under the NQS. UWU detail particular quality areas in their submission.[207] It is argued that two hours of non-contact time per week is not sufficient for educators to complete the required tasks[208] and that the inadequacy of the current provision for non-contact time forces employees to complete the required tasks in their own time or as unpaid overtime.[209]

[271] The UWU contends that the evidence supports the following findings:

1. 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 in insufficient.

2. 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.

[272] The Employers oppose the claim and the ECEC Employers submit that the evidence supports the following findings:

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

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

[273] Plainly, the central issue in contention is whether the current provision of 2 hours non-contact time per week is sufficient or whether it is necessary to increase the time provided in order to ensure that the Awards achieve the modern awards objective.

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[207] Ibid, at paras 132 – 150.

[208] Ibid, at para 151.

[209] Ibid, at para 152.

[274] We begin our consideration by accepting Dr Fenech's evidence as to the importance of quality programming in meeting the NQS and that 'programming is more complex than a mere technical implementation of a prescribed curriculum'. As Dr Fenech observed:

> '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).[210]

[275] It was also Dr Fenech's evidence that programming '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,':[211]

> 'These programming requirements are critical to the provision of quality ECEC. They are the mechanisms through which educators identify children's learning and development needs, make informed decisions about how to further support this learning and development, and plan accordingly. They enable rigorous assessment of all children, and lead to targeted support for those with additional needs. They facilitate reflection on practice and support ongoing improvement. They also provide a solid basis for engagement with families and communication about their child's learning and wellbeing (ACECQA, 2016).'[212]

[276] We accept that quality programming is an integral part of quality ECEC and that those educators 'responsible for the planning, implementation and/or evaluation of a developmental program' should be given adequate non-contact time to undertake these tasks.

[277] As to the adequacy of the current award provision of 2 hours non-contact time per week, the UWU primarily relied on the evidence of 4 lay witnesses: Ms Bea; Ms Hennessy, Ms Wade and Ms Warner.

[278] Ms Bea gave evidence that she received the minimum 2 hours non-contact time for the first two months in a role. When asked if she was able to complete her necessary duties in that period she responded 'yes'.'[213] Further, Ms Bea's evidence concerning insufficient non-contact time appeared to be because she was not receiving the amount of non-contact time *currently* prescribed by clause 21.5. This is evident from [46] – [49] of her statement:

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[210] Exhibit 10 - Statement of Dr.Marianne Fenech, 14 March 2019 (Annexure C) at paras 5.1-5.5.

[211] The UWU submission, 15 March 2019, page 29 at para 149, citing Dr Fenech report, para 5.4.

[212] Exhibit 10 – Witness Statement of Dr Marianne Fenech, 14 March 2019 (Annexure C) at para 6.1.

[213] Transcript, 6 May 2019 at PN481.

> 'In July 2018, I was officially employed in position of Room Leader for one of the toddler rooms (aged 2-2 ½ years old) at Mornington Street. I was responsible for programming for the children in the room.
>
> There could be 15 toddlers per day in the room. In the month of July 2018 the total number of children in my group across the week went from 10 to 18.
>
> In July 2018 I received a total of 2 hours of non-contact time in the whole month, and this was split across two different days on very short notice.
>
> This time was not enough to complete the programming. The non-contact time was generally provided ad-hoc, and often not provided at all, as I was required to cover other employee breaks on the floor in time that could have been non-contact time. I often had to complete programming work at home, after work.'[214] (emphasis added)

[279] In our view, Ms Bea's evidence does not support the UWU's contention that the variation proposed is necessary to ensure that the Awards achieve the modern awards objective.

[280] Ms Hennessy deals with this issue at [25] – [26] of her Statement:

> '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. At this time I spoke to the Director of our centre about my concerns that two hours per week to complete programming for 54 children was not enough. She agreed to increase the programming time for the Kindergarten room to 3 hours per week. This extra hour helped but it was still not enough to ensure all of the programming was completed. Now that I am no longer working in that room, my allocated non-contact time has dropped back to two hours again.
>
> On the many occasions that I 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 occasion I have completed the programming while on the floor, in between activities with the children.' (emphasis added)

[281] Ms Hennessy's evidence suggests that, depending on the context, 2 hours of non-contact time is insufficient and, further, some ECEC employers address this issue by providing additional non-contact time.

[282] Ms Wade stated that lead educators failed to complete programming in the allocated time 'probably about 80 per cent of the time'[215] and that employees at her centre were taking work home, and despite encouraging them to stop, there was pressure on them to finish the programming.[216] Ms Wade also observed that the pressure referred to arose from 'a National

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[214] Exhibit 8 - Witness Statement of Pixie Bea, 4 March 2019 at paras 46 – 49.

[215] Transcript, 6 May 2019 at PN848.

[216] Transcript, 6 May 2019 at PN866-PN868.

Quality Framework that we have to meet and then we have the Department of Education that come in and do spot checks.'[217]

[283] The ECEC Employers submit that Ms Wade's evidence in respect of the non-contact time issue 'should be treated with caution'. In response to questioning Ms Wade made the repeated claim that '2 hours was not enough time';[218] yet aspects of Ms Wade's evidence on this point were unclear. Ms Wade claimed lead educators in her centre always received 2 hours non-contact time,[219] while identifying that whether lead educators were able to complete programming in their allocated time was dependent on child behaviour and whether non-contact time was interrupted due to a requirement to be on the floor (which was apparently 80% of the time).[220] Her evidence was that she would 'try to' make up the two hours of non-contact time later.[221] As the ECEC Employers observe, this evidence, and how it is consistent with a centre which 'always' provides 2 hours contact time, was not explained.[222]

[284] We accept that there are some inconsistencies in Ms Wade's evidence and that this diminishes the weight to be afforded to her evidence.

[285] Ms Warner stated that it was difficult to complete programming within the allocated 2 hours: '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.'[223]

[286] Some of the ECEC Employer witnesses 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). During the course of cross examination, Ms Llewellyn agreed with the proposition that 'more than 2 hours per week of non-contact was desirable and appropriate'.[224] We note that Ms Llewellyn did *not* suggest more than 2 hours non-contact time should be mandated for all ECEC services, especially small centres. Ms Llewellyn also acknowledged that her centre is 'quite large by the standards of long day care'[225] and said that 'I would like to retain the flexibility to schedule 4 hours when it suits my centre but not have this as a mandated minimum.'[226]

[287] The ECEC Employers submit that the Awards provide an appropriate minimum that can be increased by individual centres on a case by case basis for operational reasons[227] and that the employer evidence suggests that when ratio requirements or children attendance allow, they

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[217] Transcript, 6 May 2019 at PN868.

[218] Transcript, 6 May 2019 at PN861, PN863 and PN865.

[219] Transcript, 6 May 2019 at PN855

[220] Transcript, 6 May 2019 at PN848

[221] Transcript, 6 May 2019 at PN851.

[222] ECEC Employers submission, 29 May 2019 at para 8.1.

[223] Exhibit 17 - Witness Statement of Preston Warner, 8 March 2019 at para 50.

[224] Transcript, 9 May 2019 at PN4342-PN4350.

[225] Transcript, 9 May 2019 at PN4249.

[226] Exhibit 39 - Witness Statement of Nicole Llewellyn, 9 April 2019 at para 103.

[227] ECEC Employers submission, 16 April 2019 at para 6.11.

often do provide additional time to employees.'[228] AFEI advanced a similar argument. We accept that the evidence led by the ECEC Employers generally supports those contentions.

[288] Ms Viknarasah's evidence was that 'mandating this additional time is unnecessary', and she has a staff policy not to take work home. She also states that employees could complete programming collaboratively with the children during work time:[229]

> 'From my experience in the ECEC sector, technology is actually making non-contact time less important than it was before as programming can be done much more efficiently and this extra non-contact time is unnecessary for the operational requirements of the ECEC sector.
>
> I currently provide 2 hours of non-contact time to all permanent and part time employees. However, generally my staff do not take this as they say that they prefer to do their programming collaboratively with children as this is considered best practice. Employees do not take work home or work outside their rostered hours to complete programming or other tasks related to implementing or delivering an educational program. In fact our policy states that employees are not to take work home.'[230]

[289] Similarly, Mr Mahony states:

> 'In my experience, 2 hours in a quiet environment away from interruptions is adequate. Increasing the non-contact time to 4 hours would add nothing to the quality of programming and runs the risk of being a further additional expense for parents because thus require additional staffing to cover our ratio requirements and to comply with legislative obligations.[231]

[290] Importantly, the evidence of Ms Viknarasah and Mr Mahony regarding the adequacy of the current 2 hours non-contact time was unchallenged in cross examination.

[291] Two other witnesses called by the ECEC Employers raised concerns about the cost and other consequences of granting the claim.

[292] Mr Fraser (who owns 7 ECEC centres and manages a further 5 centres) expressed concern about the heightened costs of increasing non-contact time:

> 'I would have a great deal of difficulty in determining which employees would be entitled to 4 hours of non-contact time and this change would require me to recruit many more qualified employees to cover this non-contact time. As previously discussed, due to the 50% diploma qualified regulation, this would significantly increase my costs as I would have to ensure appropriate staff numbers to give other employees mandated additional time off the floor. I have done some maths and in just one of my centres, this would equate to a further 32 hours per week to cover that employee and it would need to be covered by a Diploma qualified employee which would cost each centre $816/week or over $42,000 per year.'[232]

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[228] Ibid, at para 6.9.

[229] Exhibit 13 – Witness Statement of Karthika Viknarasah, 11 April 2019 at paras 133-134.

[230] Ibid, at para 134.

[231] Exhibit 38 – Witness Statement of Kerry Mahony, 11 April 2019 at para 110.

[232] Exhibit 18 – Witness Statement of Jae Fraser, 15 April 2019 at para 131.

[293] Ms McPhail indicates that she would eliminate the non-contact time for all other employees who were not Educational Leaders if the UWU's claim were granted:

> 'If … we were required to give 4 hours non-contact time to Room Leaders and Educational Leaders, Pachamama would simply cut off the non-contact time for everyone else who is not a Room Leader/Educational Leader in order to increase the Room Leader's non-contact time. … [T]here is only so much expense for non-contact time that we have budgeted for (and therefore built into the fees) and only so much time we can have staff off the floor in order to comply with ratio requirements.'[233]

[294] Neither Mr Fraser nor Ms McPhail were cross examined on this aspect of their evidence.

[295] We are not persuaded that the variation proposed by the UWU is necessary to ensure that the Awards achieve the modern awards objective. The UWU's evidence in support of the proposition that the current prescribed non-contact time was insufficient boiled down to the evidence of Ms Hennessy, Ms Wade and Ms Warner. As we have mentioned, there were some inconsistencies in Ms Wade's evidence, which diminished the weight we attach to it. In contrast, the evidence of the witnesses called by the ECEC Employers was unchallenged in cross-examination.

[296] The weight of the evidence suggests that the current provision of 2 hours non-contact time is sufficient in most circumstances and that some ECEC centres provide additional time where required.

[297] We dismiss the UWU's claim.

6.3.2 Non-contact time for Educational Leaders

[298] There is no specific additional non-contact time for Educational Leaders in the Children's Services Award or the Teachers Award.

[299] The UWU submits that an employee who is an Educational Leader requires specific non-contact time in which to undertake their duties[234] and that the 2 hours of non-contact time currently provided under the Awards to employees responsible for the preparation, implementation and/or evaluation of a developmental program, is insufficient.

[300] The UWU propose to insert a new clause 21.5(a)(ii) in the Children's Services Award:

> (ii) The educational leader will be entitled to additional non-contact time per week, according to the size of the centre, as follows:

Centres with:	**Additional non-contact time:**
No more than 39 places	2 hours
40-59 places	3 hours
60 and above places	4 hours

[233] Exhibit 28 – Statement of Kristen McPhail, 12 April 2019 at para 113.

[234] The UWU submission - Factual Findings, 29 May 2019 at para 83.

[301] The UWU contends that the person designated as Educational Leader at an ECEC centre performs an important leadership role, which is significant in terms of service quality and compliance with the NQF. [235]

[302] The UWU seeks the following findings:

> 1. 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.
>
> 2. The Educational Leader performs an important leadership role, which is significant in terms of service quality and compliance with the NQF.
>
> 3. An employee who is an Educational Leader requires specific non-contact time in which to undertake their duties.
>
> 4. 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,
>
> 5. The 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) is an appropriate minimum standard under the Awards.

[303] We note that the ECEC Employers and AFEI did not seek any specific findings in respect of the non-contact time claim for Educational Leaders.

[304] The ECEC Employers contest findings 1, 2, 4 and 5 sought by the UWU. Finding 3 is partially contested, with the ECEC Employers submitting that an Educational Leader may require specific non-contact time in which to undertake their duties.

[305] We begin our consideration by accepting Dr Fenech's evidence that regarding the importance of educational leadership and the need to provide time to effectively undertake the role,:

> 'Findings from national and international research consistently show that leadership of educational programming and planning is a hallmark of high-quality ECEC services.
>
> Consistent with Element 7.2.2 of the NQS (ACECQA, 2018) educational leaders will most impact the provision of quality ECEC at their service when they are supported and resourced to enact the responsibilities of the role (ACECQA, 2017b). Identified supports include leadership training; time to effectively undertake the role; networking opportunities; time for collaborative in-house professional learning; and funding and access to quality professional development for

[235] The UWU submission, 15 March 2019, p. 32 at para 162; The UWU submission Factual Findings, 29 May 2019 at para 83.

> all educators (ACECQA, n.d.-a; Colmer, Waniganayake, & Field, 2014; Fenech, 2013; Grarock & Morrissey, 2013; Rouse & Spradbury, 2016).'[236]

[306] Dr Fenech's evidence is consistent with the ACEQA Information sheet on 'the role of the Educational leader' (see [54] – [57] above). Further, Element 7.2.2 of the National Quality Standard requires Educational Leaders to be supported in their role and the ACEQA Information sheet notes that this support could include:

> **Capacity building opportunities** – e.g. the opportunity to develop and build their knowledge, skills and competencies
>
> **Empowerment** – e.g. autonomy and professional influence to effectively undertake their role
>
> **Resourcing** – this could include:
>
> - clearly defined role description, expectations and outcomes
> - time
> - professional learning materials and opportunities
> - networking and collegial support opportunities.[237] (emphasis added)

[307] In the course of her oral evidence, Dr Fenech was asked about the ACEQA Information Sheet and said:

> 'what that document does is emphasise that the role is a significant one, and it's a significant role of leadership … - 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.
>
> The providers are advised to allocate set hours for the role. … 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.'[238]

[308] The UWU witness Ms Hennessy, who works at Community Kids Greenacres Early Childhood Centre (a centre licensed for 75 children), gave evidence 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

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[236] Exhibit 10 – Witness Statement of Dr Marianne Fenech, 14 March 2019 at paras 2.5 – 2.6.

[237] See Exhibit 5 – ACECQA Educational Leader Resource.

[238] Transcript, 7 May 2019 at PN506 - PN516.

> 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.[239]

[309] The ECEC Employers concede that an Educational Leader may require specific non-contact time to undertake their duties.[240]

[310] A number of the witnesses called by the ECEC Employers recognised that the Educational Leader role requires specific time allocation and the evidence indicated that some employers already provided specific non-contact time for this role.

[311] As mentioned earlier, Ms Llewellyn, the owner/approved provider of the Mill Park Centre, employs a full-time Educational Leader with a non-contact role. [241] In the course of her evidence, Ms Llewellyn agreed that, to do their role well in a large centre, the Educational Leader 'needs significant preparation time, quiet time, to prepare materials and so forth to fulfil the role of educational leader'.[242]

[312] During cross examination, Ms Llewellyn agreed with the proposition that her decision to appoint an Educational Leader who does not work 'on the floor' was an acknowledgement of the importance and complexity of the role, the size of the centre and the service that the educators and families require.[243]

[313] Similarly, Mr Fraser typically appointed his assistant centre managers as the educational leader in the service in recognition that 'it's a significant, an important function within a service'.[244] And, Mr Mahony (the owner/operator of 2 long day care centres) tends to designate assistant directors as the Educational Leader in 'recognition of the fact that the role involves some complexity and specialisation'.[245]

[314] Ms Brannelly (the CEO of the Queensland Children's Activities Network) accepted that 'Educational Leaders need to do some program preparation work to support effective implementation for each session of case' but went on to say that:

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[239] Exhibit 6 - Witness Statement of Bronwen Hennessy, 11 March 2019.

[240] ECEC Employers response to Background Paper, 17 July 2019 at para 72.

[241] Transcript, 9 May 2019 at PN4300-PN4304 (Llewellyn).

[242] Transcript, 9 May 2019 at PN4343.

[243] Transcript, 9 May 2019 at PN4301 – PN4302.

[244] Transcript, 7 May 2019 at PN1943.

[245] Transcript, 8 May 2019 at PN4019.

> 'The guaranteed minimum 2 hours (as per the award) meets this basic needs (sic) with anything extra negotiated in a contract informed by the operating context of the service'.[246]

[315] But Ms Brannelly's evidence needs to be contextualised. It is clear that she was giving evidence as to the impact of the UWU's claims on the Outside of School Hours Care (OSHC) sector[247] and that at [56] and [62] of her statement she says:

> In OSHC services there is a lot of opportunity to complete non-contact time activities given the service operates around a school day and there are 6 hours typically available each day for non-contact duties between sessions of care.
>
> Not all non-contact duties are related to the service's educational program. The Director, Coordinator or Assistant Coordinator must have the discretion to apply their non-contact hours according to the priorities in their workload.[248]

[316] We are satisfied that employees designated as Educational Leaders require additional non-contact time in order to undertake their role. In our view the provision of an additional 2 hours non-contact time per week is appropriate and we propose to vary the Children's Services Award to so provide. We acknowledge that the role of an Educational Leader in a large ECEC centre may require more than an additional 2 hours non-contact time. But, at present, we propose to leave the provision of such additional non-contact time to individual negotiation. As this will be a new entitlement we think a cautious approach is appropriate.

[317] In relation to the s.134 considerations, the variation we propose will assist those low paid employees designated as Educational Leaders to better meet their needs, as they will be provided with paid non-contact time in order to undertake their role; rather than undertaking tasks in unpaid time, after work (s.134(1)(a)). We accept that the variation proposed will not encourage collective bargaining (s.134(1)(c)) and will increase employment costs and regulatory burden upon some ECEC businesses (s.134(1)(f)).

[318] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the considerations in s.134(1)(a)-(h). We have taken those considerations into account, insofar as they are relevant, and we are satisfied that it is necessary to vary the Children's Services Award in the manner proposed in order to achieve the modern awards objective.

7. Claims in relation to the Children's Services Award

7.1 Training Allowance

[319] The Children's Services Award only requires employers to pay for first aid training and only in certain circumstances. Clause 15.4 provides as follows:

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[246] Exhibit 34 – Witness Statement of Kylie Brannelly, 15 April 2019 at para 55.

[247] Ibid, at para 1.

[248] Ibid, at paras 56 and 62.

'**15.4 First aid allowance**

(a) Where an employee classified below Level 3 is required by the employer to administer first aid to children within the employee's care and the employee holds a current recognised first aid qualification such as a certificate from the St John Ambulance, the Australian Red Cross or a similar body they will be paid an allowance of 1.13% of the standard rate per day. Where the employee is employed in out-of-school hours care, the allowance will be 0.15% of the standard rate per hour.

(b) Provided that a first aid officer need not be appointed where a qualified nurse is on the premises at all times.

(c) Where an employee is required by an employer to act as a first aid officer and they do not have current qualifications, the employer must pay the costs of any required training.'

(Emphasis added)

[320] Aside from the terms of clause 15.4(c), the Children's Services Award does not currently require an employer to reimburse an employee for the cost of training.[249]

[321] The first aid allowance in clause 15.4(a) is only payable to employees classified below level 3 who are required to administer first aid to children within their care. During the course of the proceedings we invited the UWU to respond to the proposition that the restriction of the allowances to employees *below* level 3 suggested that the responsibility to administer first aid forms part of the classification wage rate for higher level employees.

[322] In response to this proposition the UWU replied that clause 15.4(a) is, in part, based on the structure of the first aid allowances in two pre-modern awards: the *Children's Services (Victoria) Award 2005* and the *Children's Services (Australian Capital Territory) Award 2005*. Both awards provided a first aid allowance for employees appointed to act as a first aid person and a per day allowance for employees at below level 3 who were required to administer first aid (see clause 19.5 in the former, and clause 5.5.2 in the latter).

[323] The UWU noted that the current clause 15.4 does not contain an allowance for employees appointed to act as the first aid officer, but does retain an allowance for employees below Level 3 who are required to administer first aid, and submits:

'In our research, we have been unable to find a Decision within the award modernisation period on this matter. It is unclear whether the removal of the allowance for the 'first aid person' was an oversight or intentional.

On that basis, we say it is not possible to conclude that the responsibility to administer first aid forms part of the base wage rate for higher positions.

[249] UWU submission, 15 March 2019, p. 37, at para. 199.

> In any case, the lack of such an allowance should not act as a factor against the granting of a claim for a training clause.'[250]

[324] We disagree with the UWU. It seems to us that it may be inferred from the limited scope of the allowance in clause 15.4(a) that for employees above level 3 the responsibility to administer first aid is already remunerated as part of their classification wage rate. One of the indicative duties of a level 4 employee is the responsibility for 'ensuring a safe environment is maintained for children'.[251] Further, employees at level 3 and above are required to have completed a Diploma in Children's Services (or an equivalent qualification) and the completion of first aid training as a component of that qualification.[252]

[325] The UWU seeks to vary the Children's Services Award by introducing a new clause 15.9, titled 'Training expenses', as follows:

> **'15.9 Training expenses**
>
> Where an employee is directed to participate in training, any expenses associated with training incurred by the employee (including course fees) shall be reimbursed by the employer to the employee. The time spent in training will count as time worked.'[253]

[326] The new clause is said to be necessary because 'UWU members have reported difficulties with getting reimbursed for course fees and time spent in training'.[254] It is argued that the costs associated with first aid and cardiopulmonary resuscitation (CPR) training are a significant issue in the sector.

[327] The UWU submits that since the implementation of the NQF there has been an increased expectation that educators have specialist first aid qualifications, including anaphylaxis and asthma management and that in order to meet the NQF requirements:

> 'some employers will require that all staff have first aid qualifications, whilst others will require that employees in certain positions maintain first aid qualifications.'[255]

[328] It is also contended that the NQF and 'the evolving standards expected of educators',[256] lend support to the claim. In this regard UWU refers to Regulation 136—First Aid qualifications:

> '**(1)** The approved provider of a centre-based service must ensure that each of the following persons are in attendance at any place where children are being educated and cared for by the service, and immediately available in an emergency, at all times that children are being educated and cared for by the service—

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[250] UWU submission, 9 July 2019 at paras 60–62.

[251] *Children's Services Award 2010* at cl B.1.6.

[252] See schedule B of *Children's Services Award 2010*.

[253] UWU submission, 15 March 2019 at para 9.

[254] Ibid, at para 191.

[255] Ibid, at para 195.

[256] Ibid.

(a) at least one staff member or one nominated supervisor of the service who holds a current approved first aid qualification;

(b) at least one staff member or one nominated supervisor of the service who has undertaken current approved anaphylaxis management training;

(c) at least one staff member or one nominated supervisor of the service who has undertaken current approved emergency asthma management training.'[257]

[329] An explanation of Regulation 136 is provided at page 437 of the Guide to the NQF[258] (Exhibit 1):

'**Centre-based services**

At all times and at any place that children are being educated and cared for by the service, the following person(s) must be in attendance and immediately available in an emergency:

- at least one staff member or one nominated supervisor of the service who holds a current approved first aid qualification, and
- at least one staff member or one nominated supervisor of the service who has undertaken current approved anaphylaxis management training, and
- at least one staff member or one nominated supervisor of the service who has undertaken current approved emergency asthma management training.

The same person may hold one or more of these qualifications.

If the approved service is operating on a school site (for example, a government kindergarten or preschool), the requirements for regulation 136(2) can be met if one or more staff members of the school holding the relevant qualifications are in attendance at the school site and immediately available during the emergency.

The approved provider should consider how it will meet this requirement during all parts of the day, including breaks, and have contingency plans in place for an educator on leave.'

[330] The UWU submits that the practical effect of Regulation 136 is that:

'…at the very least, a number of employees within a centre based service must have the relevant qualifications. In smaller services, in practice, it is likely to be that all employees will need to have the relevant qualifications in order to ensure compliance with the Regulation.'[259]

[331] The UWU acknowledges that it is not 'a formal requirement' that all employees have first aid qualifications but asserts that 'it has become a widely expected standard within the ECEC sector that employees will have and maintain first aid qualifications'.[260]

[332] The UWU's witnesses who gave evidence relevant to this claim are:

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[257] Ibid, at para 193; *Education and Care Services National Regulations* (2011), at reg. 136(1).

[258] 'Guide to National Quality Framework', ACECQA, first published February 2018, last updated October 2018, page 8.

[259] UWU Submission, 9 July 2019 at para 54.

[260] Ibid, at para. 196.

- Pixie Bea;[261]
- Alicia Ann Wade;[262] and
- Preston Tori Warner.[263]

[333] The UWU seeks the following findings:

1. 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.[264]
2. 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. 265
3. 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. 266
4. 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. 267

[334] We note that 'finding' 4 is really a submission as to the conclusion we should reach, rather than a finding of fact we should draw from the evidence.

[335] In relation to the modern awards objective, the UWU submits that their claim is 'fair' because 'employers are provided with a benefit by having a qualified and trained workforce and employees should be supported and reimbursed appropriately to undergo this training.'[268] The UWU submits that the variation they seek is in line with the modern awards objective relating to the relative living standards and the needs of the low paid[269]:

> '… the costs associated with first aid and CPR training for educators is relatively high compared to their average wages under the Award. It is onerous to place the burden of these costs on the employees. The time that is taken to undertake this training is related directly to their work and so should be considered time worked and remunerated as such.'[270]

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[261] Exhibit 8 – Witness statement of Pixie Bea dated 4 March 2019 at para 36; Transcript, 6 May 2019 at PN365-PN495.

[262] Exhibit 11 – Witness statement of Alicia Ann Wade dated 8 March 2019 at paras 39, 43-47, 48; Transcript, 6 May 2019 at PN705-PN961.

[263] Exhibit 17 – Witness statement of Preston Tori Warner dated 8 March 2019 at paras 57-58, 59; Transcript, 7 May 2019 at PN1455-PN1542.

[264] UWU submission, 29 May 2019 at para 94.

[265] Ibid, at para 101(a).

[266] Ibid, at para 101(b).

[267] Ibid, at para 101(c).

[268] UWU submission, 15 March 2019 at para 207.

[269] *Fair Work Act 2009 2009* (Cth), s.134(1)(a).

[270] UWU submission, 15 March 2019 at para 206.

[336] The UWU also relies on the fact that two modern awards currently contain clauses which are similar to the clause they propose (clause 32.5 of the *Manufacturing and Associated Industries Award 2010* and clause 26.5 of the *Food, Beverage and Tobacco Manufacturing Award 2010*). The UWU submits that:

> 'Many awards do not contain a training clause because *as a general principle*, if an employer requires an employee to undertake particular training then the employer must cover the cost or reimburse the employee appropriately. Similarly, time spent in training at the direction of the employer is understood to be time worked.'[271]

[337] The ECEC Employers and the AFEI oppose the claim.

[338] The ECEC Employers' witnesses who gave evidence relevant to this claim are:

- Kylie Ann Brannelly;[272]
- Ann Marie Chemello;[273]
- Jae Dean Fraser;[274]
- Kerry Joseph Mahony;[275]
- Kristen Carol McPhail;[276]
- Sarah Elizabeth Tullberg;[277] and
- Karthika Viknarasah.[278]

[339] The ECEC Employers submit that the claim is 'too wide' in circumstances where the evidence filed is narrowly directed at first aid and CPR courses being paid for and time spent at the courses being counted as time worked. They note that first aid is included in Certificate III and Diploma courses which are qualifications required to be held by employees working in childcare centres and that at present the modern award only requires employers to pay first aid training courses where an employee is required by an employer to act as a first aid officer. The ECEC Employers contend that many employers pay for all employees to obtain first aid and CPR qualifications.

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[271] Ibid, at para 200.

[272] Exhibit 34 – Witness statement of Kylie Ann Brannelly, 15 April 2019; Transcript, 8 May 2019 at PN3401-PN3522 (in particular, PN3500; PN3503).

[273] Exhibit 27 – Witness statement of Ann Marie Chemello, 1 March 2019; Transcript, 7 May 2019 at PN2641-PN2849 (in particular, PN2822).

[274] Exhibit 18 – Witness statement of Jae Dean Fraser, 15 April 2019; Transcript, 7 May 2019 at PN1553-PN2028 (in particular, PN1959-PN1961).

[275] Exhibit 38 – Witness statement of Kerry Joseph Mahony, 11 April 2019 at paras 101, 102; Transcript, 8 May 2019 at PN3893-PN4042.

[276] Exhibit 28 – Witness statement of Kristen Carol McPhail, 12 April 2019 at paras 101-103; Transcript, 7 May 2019 at PN2863-PN3135.

[277] Exhibit 3 – Witness statement of Sarah Elizabeth Tullberg, 9 April 2019 at paras 106, 108; Transcript, 8 May 2019 at PN3527-PN3750 (in particular, PN3735-PN3736; PN3737).

[278] Exhibit 13 – Witness statement of Karthika Viknarasah, 11 April 2019; Transcript, 6 May 2019 at PN971-PN1381 (in particular, PN1351).

[340] In its reply submission of 16 April 2019 the ECEC Employers submit (at 7.3):[279]

- The legislative requirement is that at least one staff member or nominated supervisor have a first aid qualification, though many employers pay for all employees first aid and CPR qualifications.
- Employees engaged at level 4 and above are 'expected' to have first aid qualifications but there is a fundamental difference between a recommended qualification versus it being mandatory.
- A nominated supervisor would be classified as at least level 5 or 6 and their base wage already includes this 'responsibility.'
- The Children's Services Award already appropriately governs when first aid should be paid and no evidence was filed in relation to other training and development so the claim should be dismissed.
- Granting the claim could have the adverse effect of deterring employees from upskilling the workforce.

[341] The ECEC Employers submit that many employers pay for all employees' first aid and CPR qualifications,[280] even for employees not required to hold these positions, as this makes rostering easier for the employer.[281] Both the ECEC Employers and AFEI submit that there is 'no credible evidence that employees are being forced into training which they do not wish to pay for.'[282]

[342] As to the findings sought, the ECEC Employers submit that there is insufficient evidence before the Full Bench to establish the claim and that the evidence which has been filed appears solely directed at CPR and first aid course fees. Further, the ECEC Employers seek the following findings:

1. The evidence discloses that some employers pay for all employees to undertake first aid and CPR qualifications, notwithstanding that this is not required.[283]
2. In the event that employers are required to pay employee time for training, employers would be more selective about who is allowed to attend rather than continuing to pay for the course for all employees.284

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[279] ECEC Employers submission, 16 April 2019 at paras 7.4-7.8.

[280] Exhibit 38 – Amended witness statement of Kerry Mahony, 11 April 2019 at para 101; Exhibit 35 – Witness statement of Ms Sarah Tullberg, 9 April 2019 at para 107; Exhibit 28 – Witness statement of Kristen Carol McPhail, 12 April 2019 at paras 101-102.

[281] ECEC Employers submission, 16 April 2019 at para 7.4.

[282] ECEC Employers submission, 29 May 2019 at para 9.4; AFEI submission, 2 June 2019 at para 19; AFEI submission, 16 April 2019 at para 58; AFEI submission, 17 July 2019, at para 16.

[283] ECEC Employers submission – findings sought, 29 May 2019 at para 9.2 referring to Exhibit 38 – Witness statement of Kerry Joseph Mahony, 11 April 2019 at para 101; Exhibit 28 – Witness statement of Kristen Carol McPhail, 12 April 2019 at paras 101-103.

[284] ECEC Employers submission – findings sought, 29 May 2019 at para 9.3 referring to Exhibit 38 – Witness statement of Kerry Joseph Mahony, 11 April 2019 at para 102; Exhibit 35 – Witness statement of Sarah Tullberg, 9 April 2019 at para 108; Exhibit 28 – Witness statement of Kristen Carol McPhail, 12 April 2019 at 103.

3. There is no credible evidence that employees are being forced into training which they do not wish to pay for. The ECEC Employers note that Ms Wade's first statement at [48] alleges that some staff members struggle to pay for training and have to use rent or groceries money to pay for training but submit that this evidence is unsupported and should be afforded little weight.285

[343] AFEI submits that if granted, UWU's claim would increase costs for employers, particularly small to medium sized enterprises[286] and also highlighted the possibility that employees with more than one employer could claim reimbursement for their first aid certificate renewal from multiple employers.[287]

[344] AFEI submits that there is no basis to insert this clause into the Children's Services Award as no evidence was produced in the proceedings which supports a finding that employees are required to pay for training courses that their employer has directed them to attend.

7.1.1 Consideration

[345] It is convenient to deal first with the evidentiary findings sought by the UWU.

[346] The ECEC Employers do not contest Findings 1 and 2. Findings 3 and 4 are contested.

[347] AFEI agrees with the proposition in Finding 1 proposed by the UWU, to the extent that it was the consensus in the evidence, but submit that this cannot be relied on as evidence as to the whole industry because the evidence provided was only given by operators of long day care centres and out of school hours care providers.[288] We agree with AFEI in this regard.

[348] As to the evidence of the employers in the sectors identified, we accept that there was a general consensus that where an employer requires an employee to undertake training then that training should be paid 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.'[289] Mr Fraser and Ms Brannelly agreed that it was the employer's responsibility to pay for training that they want the employee to do for their benefit[290] and Ms Chemello and Ms Tullberg indicated that they already paid for staff training.[291]

[349] Further, a number of 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

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[285] ECEC Employers submission – findings sought, 29 May 2019 at para 9.3 referring to Exhibit 12 – Supplementary Witness statement of Alicia Ann Wade at para 48.

[286] AFEI submission, 16 April 2019 at para 56.

[287] Ibid, at para 57.

[288] AFEI response to background paper 2, 17 July 2019 at para [16].

[289] Transcript, 6 May 2019 at PN1351.

[290] Transcript, 7 May 2019 at PN1959; Transcript, 8 May 2019 at PN3500.

[291] Transcript, 7 May 2019 at PN2822; Transcript, 8 May 2019 at PN3735-PN3736.

required by the employer then that meets that definition. I agree.'[292] Ms Tullberg agreed training should be work time 'if the employer is directing the staff'.[293]

[350] 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.'[294]

[351] AFEI contests propositions 2, 3 and 4. As to the proposition that employees in this sector have to pay for required training themselves, or undertake that training on weekends or during periods of annual leave, AFEI submits that the UWU evidence refers only to maintaining first aid and CPR qualifications, and on that basis the use of the word 'training' is too broad. We return to the scope of the evidence shortly.

[352] The UWU also contends that the evidence supports a finding that 'there is an expectation across the ECEC sector that employees hold first aid qualifications and CPR qualifications'.[295] Ms Hennessy's evidence is relied on in support of this finding and, in particular, the following passage from her cross examination:

> **'Arndt:** Almost finished Ms Hennessy. At 31, you say it's not a formal requirement that you have first aid or CPR? Sorry, I misspoke. You say it's not a formal requirement that all educators have first aid and CPR?
>
> **Hennessy**: Yes.
>
> **Arndt**: Do you mean by that, that no one from your employer requires you to have one?
>
> **Hennessy**: My understanding is there has to be a certain number of people on site that have CPR. I don't know what the number is; what sort of percentage it is.
>
> **Arndt**: I might just ask the question again. Perhaps I wasn't clear. When you say it's not a formal requirement that all educators have these certificates, are you saying that no one from your employer has ever asked you to - has ever required you to have one these certificates. Or, are you saying something different?
>
> **Hennessy**: In my Centre, we are all expected to have one. I'm not sure how that differs from a requirement, but it is an expectation that everyone in my Centre - I'm not sure about the company, I'm afraid, sorry.
>
> **Arndt**: At 34, when you say it's a requirement that the CPR course is refreshed every 12 months and first aid refreshed every three years, whose requirement is that?

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[292] Transcript, 8 May 2019 at PN3503.

[293] Transcript, 8 May 2019 at PN3737.

[294] Transcript, 7 May 2019 at PN1959-PN1961.

[295] UWU submission, 9 July 2019 at para 57.

> **Hennessy**: I would say that that is a Centre requirement rather than the company requirement. That is - that is how often a CPR course should be refreshed as opposed to - like I said, I'm not sure, I'm sorry.
>
> **Arndt**: That's okay. If you're no sure it's fine, but just so that I'm clear, in 31 you say it's not a formal requirement for all educators to have these certificates. How could it be the case that it's the Centre's requirements? Sorry, I think I'm confused with your answer?
>
> **Hennessy**: I think I maybe got my language a little confused when I was going through this. So, I think that it's a requirement that the CPR course is refreshed. I think that's maybe just a misspoke on my part and it may not be an actual requirement, but a strong expectation.'[296]
>
> (Emphasis added)

[353] It seems to us that Ms Hennessy's evidence is somewhat qualified – she is confining her remarks to the Centre at which she works and is uncertain of the position in respect of other Centres operated by the Company which owns her Centre. In our view the evidence is insufficient to warrant the finding proposed by the UWU.

[354] As to the UWU's Finding 2, it may be accepted that some employees are required to have a first aid certificate. Ms Warner's evidence was that she was required to have a first aid certificate and a CPR certificate.[297] Employees at Ms Alicia Wade's centre who take on the role of Responsible Person are required to have both certificates. Similarly, Ms Pixie Bea was required to have a first aid certificate and CPR training when she worked at the Mornington Street Early Learning and Kinder.[298]

[355] The evidence as to whether employees were paid to attend training and/or reimbursed for course fees is mixed. No clear picture emerges as to the practice in the ECEC sector.

[356] Ms Wade's evidence was that she was not reimbursed for undertaking first aid or CPR training, and nor was she paid for the time spent in such training.[299] At [39] and [45] – [46] of her statement Ms Wade says:

> '39. 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). My employer recommends that other employees also have first aid certificates and CPR training given we work with young children and there may be unexpected incidents or emergencies.
>
> ….
>
> 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.'[300]

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[296] Transcript, 6 May 2019 at PN333-PN337.

[297] Exhibit 17 – Witness statement of Preston Tori Warner, 8 March 2019 at para 57.

[298] Exhibit 8 – Witness statement of Pixie Bea, 4 March 2019 at para 36.

[299] Exhibit 11 – Witness statement of Alicia Ann Wade dated 8 March 2019 at paras 45 – 46.

[300] Ibid, at paras 39 – 46.

[357] Ms Wade was not cross examined on this aspect of her evidence.

[358] Ms Bea's evidence in respect of a Centre at which she had worked previously (the Mornington Street Centre) was that employees were not paid to undertake first aid or CPR training.[301] It is not clear whether other employees at the Mornington Street Centre were directed or required to undertake this training. At [36] of her statement Ms Bea says:

> 'At Mornington Street, I was required to have a First Aid Certificate and CPR training. From recollection, it was expected that Diploma qualified educators had a First Aid Certificate and it was optional for Certificate III qualified educators.'[302] (Emphasis added)

[359] Ms Warner's evidence was:

> 'My employer does organise the … training and can assist in getting a discounted rate … but they do not pay for any of the course fees or for the time spent in training.'[303]

[360] Ms Warner also states that a previous employer did pay the course fee for a first aid certificate and for the time spent in training.[304]

[361] Ms Hennessy's evidence was that her employer paid for the cost of first aid and CPR courses, but that she was expected to complete the courses in her own time, on the weekend or in the evening.[305]

[362] In summary, the UWU's proposed Finding 3 is only supported by the evidence of Ms Wade and Ms Bea (in respect of a centre at which she had worked previously). So while it is accurate to state that there are some employees in the sector 'who have to pay for required training themselves and undertake training without reimbursement of course fees or recognition of the time spent in training as time worked', we are not satisfied that the experience of these two witnesses can reasonably be said to be representative of employees in the ECEC sector generally, or even of a significant number of those employees.

[363] Turning to the findings sought by the ECEC Employers, we accept that the evidence discloses that some employers pay for their employees to undertake first aid and CPR training. The UWU also accepts that this is the case. As to Finding 2, that (in essence) if the claim was granted employers would be more selective about who is allowed to attend rather than continuing to pay for the course for all employees; the evidentiary support for this proposition is limited.

[364] The ECEC Employers rely on the evidence of Mr Kerry Mahony; Ms Sarah Tullberg and Ms Kristen McPhail in support of the findings sought. Only Ms McPhail definitively supports the proposition put by the ECEC Employers. At [103] of her amended statement, Ms McPhail says:

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[301] Exhibit 8 – Witness statement of Pixie Bea, 4 March 2019 at para 38; Transcript, 6 May 2019 at PN462–PN463.

[302] Exhibit 8 – Witness statement of Pixie Bea, 4 March 2019 at para 36.

[303] Exhibit 17 – Witness statement of Preston Tori Warner, 8 March 2019 at para 58.

[304] Ibid, at para 59.

[305] Exhibit 6 – Witness statement of Bronwen Hennessy, 11 March 2019 at para 32.

> 'It is a large cost for us to provide this First Aid and Emergency Asthma and Anaphylaxis training at approximately $125 per person. As such, I would not holding this training if I also had to pay overtime to staff as well as paying for the course. I am concerned that requiring employers to pay for the course and the time worked (plus overtime) may serve as a deterrent for best practice standards and services may go back to complying only with what is legislatively required (eg; 1 person onsite at all times with a First Aid certificate'.[306]

[365] The other witnesses are more equivocal. At [108] of her statement Ms Tullberg says:

> 'Last financial year I also spent approximately $7500 in professional development for my employees. If I had to pay their wages as well I would *possibly* provide less training for the staff members as it would be unaffordable to pay for both wages and the training. (emphasis added).'[307]

[366] As to Mr Mahony, it appears that his comments are directed at external training which is optional rather than required; and the claim is limited to training which the employee is *directed* to attend. So much is clear from [102] of Mr Mahony's amended statement:

> 'We also have a professional development program for every educator based on their individual needs with a budget of $20,000 per year. Their participation in external courses is optional for them and we pay for the course but staff attendance is unpaid. We also run in-house training which is not optional and we pay both for the training and for staff attendance on an overtime basis. If I had to pay overtime (or ordinary hours) for staff to attend external training as well as the cost of the training, this would diminish the $20,000 training budget and less staff would get to upskill and attend training. I would have to be more selective with which staff are able to be trained to attend external courses.'[308]

[367] We are not persuaded that the evidence supports the broad proposition advanced by the ECEC Employers. Further, we note the UWU's submission that the proposition put by the ECEC Employers is not a relevant consideration:

> 'If the variation proposed by [the UWU] was made, the relevant question in determining whether the training course fee and time was to be paid would be whether the employer required the employee to undertake the training'.[309]

[368] In conclusion, on the limited evidence before us we are not satisfied that the variation proposed is necessary to achieve the modern awards objective.

[369] We agree with the observation of the ECEC Employers (and AFEI) that the UWU's evidence is substantially directed at first aid and CPR training, rather than training generally. The evidence in respect of that requirement to attend training other than first aid and CPR training, for which the employee was not paid or reimbursed for course costs, was sparse and lacked specificity. For example, Ms Bea refers to undertaking a course about incorporating

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[306] Exhibit 28 – Amended witness statement of Kristen McPhail, 12 April 2019 at para 103.

[307] Exhibit 35 – Witness statement of Sarah Tullberg, 9 April 2019 at para 108.

[308] Exhibit 38 – Amended witness statement of Kerry Mahony, 11 April 2019 at para 102.

[309] UWU submission, 19 July 2019 at para 54.

Indigenous practices and art into ECEC, at her own expense.[310] However, during cross examination it became clear that Ms Bea had not *sought* reimbursement from her employer for undertaking the course.[311] But even if the claim was limited to first aid and CPR training, at this time there is insufficient evidentiary foundation to warrant an award variation.

[370] Further, the claim requires payment in circumstances where the employee is *'directed to participate in training'* and the evidence of employees who are so directed but not reimbursed for course costs or their time, is very limited. We do not propose to vary the Children's Services Award in the terms sought.

[371] As to the s.134 considerations, as a general proposition we accept that where an employer directs a low-paid employee to attend training then the cost of that training, and the time spent by the employee in undertaking that training, should be paid by the employer. However, as we have noted, the evidence does not carry the UWU the required distance. The evidence does not lead us to conclude that an award variation is warranted. As to the other s.134 considerations, no party contended that the matters in s.134(1)(b)(c), (d), (da), (e), (g) or (h) of the FW Act were relevant to this claim.

[372] As to s.134(1)(f), we accept that granting the claim would increase business costs, depending on the extent to which employers direct employees to undertake training for which the employer does not presently pay the course fees and the employees' time.

[373] We are not satisfied that it is necessary to vary the Children's Services Award in the manner proposed in order to achieve the modern awards objective. We reject the claim. In doing so we wish to make it clear that our rejection of the claim is not on the basis of a lack of intrinsic merit; but, rather, that the evidence before us is insufficient to warrant an award variation.

7.2 Laundry Allowance

[374] Clauses 15.2(a) and (b) of the Children's Services Award deal with the circumstances in which an employee is entitled to a 'laundry allowance,' as follows:

> '**15.2 Clothing and equipment allowance**
>
> **(a)** Where the employer requires an employee to wear any special clothing or articles of clothing the employer must reimburse the employee for the cost of purchasing such clothing. The provisions of this clause do not apply where the employer pays for the clothing required to be worn by the employee.
>
> **(b)** Where an employee is required to launder any clothing referred to in clause 15.2(a) the employee will be paid an allowance of $9.49 per week or $1.90 per day, or where the uniform does not require ironing, $5.98 per week or $1.20 per day.'[312]

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[310] Exhibit 8 – Witness statement of Ms Pixie Bea, 4 March 2019 at para 42.

[311] Transcript, 6 May 2019 at PN453.

[312] *Children's Services Award* 2010 [MA000120], cls. 15.2(a) and (b).

[375] UWU seeks to add a note about the use of on-site laundry facilities at the end of clause 15.2, as follows:

> 'Note: The existence of on-site laundry facilities that can be used by employees to launder uniform items does not make this allowance not payable.'[313]

[376] UWU submits that the laundry allowance is intended to compensate employees for the costs associated with washing and maintaining their uniform but that 'some employers are refusing to pay the laundry allowance on the basis that there are on-site laundry facilities available at the centre.'[314]

[377] UWU contends that although ECEC centres generally have on-site laundry facilities associated with their principal activities (i.e., washing and drying of towels, bibs and blankets etc), employees may not necessarily be able to use those facilities for a range of reasons.[315] The UWU asserts, by way of example, 'it would be expected that centre laundry would take priority over individual employees washing their shirts,'[316] and that due to the sector's ratio requirements, there are difficulties if an employee leaves the floor and attempts to use laundry facilities:[317]

> 'ECEC centres are run to a strict ratio as per the NQF and staff must be 'on the floor' and at their allocated place at their allocated time, otherwise the centre runs the risk of being in breach of the NQF. Break time is not sufficient to run a load of laundry and a staff member cannot simply put one or two shirts and run a load when they wish.'[318]

[378] As to the modern awards objective, the UWU submits that s.134(1)(a) is relevant as 'award reliant employees on low wages should not have to bear the cost of laundering uniforms'[319] and that s. 134(1)(c) (*the need to promote social inclusion through increased workforce participation*) is relevant as out of pocket costs for low-paid employees 'could discourage participation in the workforce.'[320]

[379] The ECEC Employers oppose the insertion of the proposed 'Note' regarding on-site laundry facilities and submit that it does not make sense to pay employees an allowance to wash their uniforms in situations where:

- the employee is washing their uniform during work time (i.e. at a cost to the employer) or the employees uniform is washed by someone else at the centre;

- the employer pays for electricity, water, detergent; and

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[313] UWU submission, 15 March 2019 at para. 175.

[314] UWU submission, 15 March 2019at paras. 169-170.

[315] UWU submission, 15 March 2019 at para. 171.

[316] UWU submission, 19 July 2019 at para. 56.

[317] UWU submission, 19 July 2019 at para. 56.

[318] UWU submission, 15 March 2019 at para. 172.

[319] UWU submission, 15 March 2019 at para. 189.

[320] UWU submission, 15 March 2019 at para. 189.

- there is no cost to the employee.[321]

[380] AFEI also opposes the claim and submits that the variation is unnecessary.[322]

[381] We do not propose to grant the claim as we are not satisfied that the UWU has established a sufficient merit case to warrant the variation proposed.

[382] Turning first to the evidence; it is common ground that ECEC employees need a freshly laundered uniform for each day of work and, further, that a number of employers do not pay the laundry allowance as they do not require their employees to wear a uniform.

[383] The UWU principally relies on the evidence of Ms Bea in support of its claim. Ms Bea's evidence relating to the laundry allowance claim is at [20] to [34] of her first statement (Exhibit 8) and was the subject of cross examination[323]. Ms Bea's evidence related to her previous employment working as a casual (and later part-time) educator at a long day care centre in the ACT (the Mornington Street Early Learning and Kinder) from April 2018 to January 2019. During the course of that employment, Ms Bea was required to wear a uniform and was provided two polo shirts and she was not paid a laundry allowance. At [26] of her statement, Ms Bea recounts a conversation she had with her employer's Area Manager about this issue on or about 30 or 31 January 2019:

> 'I said words to the following effect: Why don't we get paid the laundry allowance?
>
> She said words to the following effect: We have laundry facilities on site so we don't have to pay the laundry allowance.'

[384] During cross examination Ms Bea accepted that from this conversation she understood that she was entitled to use the on-site laundry facilities, but it was her evidence that it was not 'practically possible' to do so, because both of the washing machines at the centre were operating all day and her other duties prevented her from doing her washing at work.[324] Ms Bea conceded that she did not raise these practical impediments to her utilising the on-site laundry facilities with management.[325]

[385] In short, the evidence principally relied on by the UWU only reflects the experience of one employee at one centre and the asserted practical impediments to employees using the on-site laundry facilities were not raised with management. Further, Ms Bea's evidence that two washing machines at the centre at which she worked were in perpetual operation is not consistent with the evidence of other witnesses in the proceedings (with the obvious caveat that those witnesses were located at other centres).

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[321] ABI submission, 29 May 2019 at paras. 10.1 to 10.2; ABI submission, 19 July 2019 at para. 78.

[322] AFEI submission,31 May 2019 at para. 20.

[323] Transcript, 6 May 2019 at PN426-PN446.

[324] Transcript, 6 May 2019 at PN440-PN441.

[325] Transcript, 6 May 2019 at PN431-PN433.

[386] In the course of his cross examination, Mr Fraser rejected the proposition that the on-site laundry facilities at his centre can get busy.[326] Ms Chemello gave similar evidence.[327] Ms Llewellyn advised she has two washers and dryers on-site that her employees can use[328] and in response to questions about employees having difficulty accessing the machines, Ms Llewellyn stated that there is, 'definitely opportune time for them to wash their uniform if needed'.[329]

[387] Viewed as a whole, and contrary to the UWU's contention, the evidence tends to support a finding that on-site laundry facilities in ECEC centres can be accessed and used by employees.[330]

[388] The UWU also relied on the evidence that some centres paid a laundry allowance despite the fact that employees were able to utilise on-site laundry facilities to wash their clothes if they wished to do so.[331] We do not consider that the evidence as to the practice of some employers warrants granting the UWU's claim.

[389] We agree with the submission advanced by the ECEC Employers that, in essence, it makes no sense to pay an employee a laundry allowance in circumstances where they are able to wash their uniform during work time using their employer's on-site laundry facilities, at no cost to the employee.

[390] As mentioned in Chapter 2, the modern awards objective requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)-(h) of the FW Act. 'Fairness' in this context is to be assessed from the perspective of the employee *and* employer covered by the modern award in question. Granting the UWU's claim would not be fair to the employers covered by the Children's Services Award.

[391] As to the s.134 considerations, we accept that low-paid employees should not have to bear the cost of laundering a uniform which they are required to wear. But that does not advance the UWU's case because the evidence does not support the premise underlying the proposition put. Clause 15.2(b) provides that an employee is entitled to be paid an allowance in circumstances where they are required to launder any clothing their employer requires them to wear. The allowance is referable to the cost of laundering the prescribed clothing. In circumstances where the employee utilises their employer's on-site facilities to launder their uniform there is no evidence that they incur any cost.

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[326] Transcript, 7 May 2019 at PN1962-PN1970.

[327] Transcript, 7 May 2019 at PN2829.

[328] Transcript, 9 May 2019 at PN4320.

[329] Transcript, 9 May 2019 at PN4325.

[330] Alexandra Hands gave evidence that her centre washes all the work-supplied uniforms for staff, but that she would pay a laundry allowance if employees chose to take their uniform home to wash themselves: Transcript of 9 May 2019 at PN4799 to PN4808; Exhibit 43 – Witness statement of Alexandra Hands dated 12 March 2019.

[331] Pamela Avril Maclean gave evidence that her centre pays the laundry allowance even though employees can use its facilities to wash their clothes if they wanted to: Transcript, 7 May 2019 at PN2602 to PN2605. Also see Exhibit 25 – Amended witness statement of Pamela Avril Maclean dated 15 April 2019 and Transcript, 7 May 2019 at PN2826; Witness Statement of Chemello at paras. 27 – 28 and Transcript at PN2829.

[392] Further, in the context of this claim there is no substance to the UWU's contention that out of pocket expenses for low-paid employees 'could discourage workplace participation.' The premise underlying the contention has not been established. In particular, it has not been established that employees are in fact incurring out-of-pocket expenses in respect of the laundering of uniforms which they are required to wear.

[393] As to the other s.134 considerations, no party contended that the matters in s.134(1)(b), (d), (da), (e), (g) and (h) of the Act were relevant to this claim.

[394] As to s.134(1)(f), granting the claim *may* increase business costs; but any increase would depend on the circumstances and the proper interpretation of clause 15.2(b). The state of the evidence before us is such that it is not possible to form any firm conclusions. In any event, any impact on businesses is not likely to be significant.

[395] Ultimately, we are not satisfied that it is necessary to vary the Children's Services Award in the manner proposed in order to achieve the modern awards objective. We therefore reject the claim.

7.3 Clothing Allowance

[396] Clause 15.2(c) of the Children's Services Award provides that an employee who is required to wear protective clothing or equipment is to be supplied with that clothing or equipment by their employer or the cost of purchase by the employee is to be reimbursed. The UWU contends that the clause requires clarification on the basis that hats and sun protection should be considered 'protective clothing' for the purposes of the clause. In short, the UWU submits that its members have reported difficulties in obtaining reimbursement for the cost of hats and sun protection purchased for work purposes, and the proposed variation will provide more certainty for employees.

[397] The UWU seeks to vary clause 15.2(c) by inserting the words 'hat, sun protection (including sunscreen lotions)', as follows:

> 'Where an employee is required to wear protective clothing or equipment such as hats, sun protection (including sunscreen lotions), goggles, aprons or gloves, the employer will either supply such clothing or equipment or reimburse the employee for the cost of their purchase.'

[398] The UWU submits that:

> 'Given that outdoor play is an important component of ECEC and that educators may be spending a number of hours each day outside, it is appropriate that sun hats and sunscreen are either provided by the employer or the cost reimbursed.'[332]

[399] The UWU acknowledges that ECEC centres generally provide sunscreen for children and, at some centres, employees will also be able to use the product.[333] However the UWU submits that some centres may ration the amount of sunscreen used, requiring employees to

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[332] UWU submission, 15 March 2019 at para. 187.

[333] UWU submission, 15 March 2019 at para. 185; UWU Submission dated 19 July 2019 at para. 58.

purchase additional sunscreen for adequate sun protection.[334] The UWU also submits that some employees with sensitive skin may need to purchase their own sunscreen,[335] and sunscreen commonly costs around $15 to $20 for a 500 millilitre bottle.[336]

[400] As to the cost of hats, UWU submits:

> 'Sun hats commonly cost from around $10 - $80. Depending on the climate, with regular wear, and in the company of children, the hat may require replacement every 6 months - 2 years.'[337]

[401] The UWU contends that the variation it seeks is 'in line with the modern awards objectives'. [338] As to the s.134 considerations, the UWU relies on s.134(1)(a) and (b). In relation to s.134(1)(a) it is submitted that it is not appropriate that award-reliant employees on low wages should have to bear the cost of purchasing sun protection. [339] As to s.134(1)(b) the UWU submits:

> 'There is a high level of part time and casual employment within this sector. Numerous out of pocket costs for low paid employees in the course of employment could discourage participation in the workplace.'[340]

[402] The ECEC Employers do not contest the UWU's contention that sun hats and sunscreen should be paid by the employer[341] but submits that the proposed variation is unnecessary because the evidence suggests employers already provide sunscreen and hats for outdoor play.[342] Witnesses Ms Llewellyn, Mr Mahoney, Ms Maclean and Ms McPhail gave evidence that their centres provided sunscreen and hats to their staff, for role-modelling, risk management and sun-safety purposes.[343]

[403] The ECEC Employers also note that as presently drafted, the claim places no 'cap' on the cost of items purchased by employees and could give rise to employers having to reimburse unreasonable expenses.[344] In its reply submission the ECEC Employers did not oppose a variation to clause 15.2(c), if the claim was amended as follows:

- Only the words 'hats' and 'sunscreen lotion' are inserted into the clause (and not the generic term 'sun protection'); and

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[334] UWU submission, 15 March 2019 at para. 185.

[335] UWU submission, 15 March 2019 at para. 186.

[336] UWU submission, 15 March 2019 at para. 184.

[337] UWU submission, 15 March 2019 at para. 183.

[338] UWU submission, 15 March 2019 at para. 189.

[339] UWU submission, 15 March 2019 at para. 189.

[340] UWU submission, 15 March 2019 at para. 189.

[341] ECEC Employers submission, 19 July 2019 at para. 80.

[342] ECEC Employers submission, 16 April 2019 at paras. 9.3-9.4.

[343] Exhibit 39 – Statement of Nicole Llewellyn dated 9 April 2019 at para. 101; Transcript, 9 May 2019 at PN4027, PN4333 to PN4334; Exhibit 38 – Witness statement of Kerry Joseph Mahony dated 11 April 2019 at paras. 106-107; Exhibit 25 – Witness statement of Pamela Avril Maclean dated 15 April 2019 at paras. 129-130; Exhibit 28 – Witness statement of Kristen Carol Mcphail dated 12 April 2019 at para. 107.

[344] ECEC Employers submission, 16 April 2019 at para. 9.4; Exhibit 25 – Witness statement of Pamela Avril Maclean dated 15 April 2019 at [130].

- reimbursements be 'reasonable' and validated by receipts or otherwise.[345]

[404] In response to the ECEC Employers' proposal, the UWU submits that it is prepared to amend the claim to be restricted to 'hats' and 'sunscreen lotion' but objects to the addition of the word 'reasonable'.[346]

[405] AFEI did not contest UWU's contention that approved providers of a service must ensure sun protection policies and procedures are in place[347] or that it is important for educators to teach children about sun safety;[348] but submits that there is no evidence to support the UWU's proposed variation that ECEC employees are required to purchase their own hats.[349]

[406] There is a broad measure of agreement that the evidence supports the following findings:

1. Some educators in the ECEC sector spend a significant amount of time outdoors in the course of performing their duties.

2. Each centre-based service must have an appropriate area for outdoor play, with at least seven square metres of unencumbered outdoor space for each child being educated and cared for at the service.350 The outdoor space must allow children to explore and experience the natural environment and may include features such as gardens, sandpits, pebble/gravel pits and water play areas.351

3. Services are assessed on the extent to which children are engaged in meaningful experiences in outdoor environments.352

4. The approved provider of a service must ensure that appropriate policies and procedures are in place regarding sun protection.353

5. It is important for educators to teach children about sun safety.

6. Some ECEC employers already provide hats and sunscreen to staff.

[407] As mentioned in Chapter 2, the modern awards objective requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and

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[345] ECEC Employers submission, 16 April 2019 at para. 9.5.

[346] UWU submission, 9 July 2019 at paras. 63-64.

[347] AFEI submission, 10 July 2019 at para. 50; Background Paper 1, 13 June 2019 at para. 141.

[348] AFEI submission, 10 July 2019 at para. 50; Background Paper 1, 13 June 2019 at para. 141.

[349] ECEC Employers submission, 2 June 2019 at para 21.

[350] 'Guide to National Quality Framework', ACECQA, first published February 2018, last updated October 2018, p. 390, downloaded from: https://www.acecqa.gov.au/sites/default/files/2018-11/Guide-to-the-NQF_0.pdf

[351] Ibid, at page 392. Noting that the Guide to National Quality Framework also states at (p 390) that 'an area of unencumbered indoor space may be included in calculating the outdoor space of a service that provides education and care to children over preschool age if the regulatory authority has given written approval and this space has not already been included in calculating the indoor space – that is, it cannot be counted twice': see AFEI Submission 10 July 2019 at [48].

[352] Ibid, at page 392.

[353] Ibid, at page 393.

conditions', taking into account the matters in ss.134(1)(a)-(h) of the FW Act. 'Fairness' in this context is to be assessed from the perspective of the employees *and* employers covered by the modern award in question. It seems to us that in the ECEC sector it is appropriate that hats and sunscreen lotion for ECEC employers should be paid for by the employer. An award provision in such terms would be 'fair' as that word is understood in the context of the modern awards objective.

[408] As to the s.134 considerations, we accept that low-paid employees should not have to bear the cost of purchasing a hat and sunscreen lotion for use at work. While some ECEC employers already provide hats and sunscreen to date, the practice is not universal. In an uncontested bar table statement[354] the UWU contended that some centres may ration the amount of sunscreen lotion, necessitating the purchase of additional sunscreen lotion by some employers and, further, some employees with sensitive skin may need to purchase their own sunscreen lotion. The 'needs of the low paid' (s. 134(1)(a)) is a consideration which weighs in favour of the variation proposed by the UWU.

[409] Section 134(1)(b) requires that we take into account 'the need to *encourage* collective bargaining'. We are not persuaded that the variation proposed would '*encourage* collective bargaining', it follows that this consideration does not provide any support for the proposed variation.

[410] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c). The UWU submits that the cost of purchasing sunscreen lotion and hats may discourage workforce participation. No evidence was advanced in support of the submission put and we doubt that such costs would discourage a prospective employee from seeking employment in the ECEC sector. We regard this consideration as neutral.

[411] The considerations in ss.134(1)(d), (da), (e), (g) and (h) are not relevant in the present context. No party contended to the contrary.

[412] The consideration in s.134(1)(f) is not confined to the impact of the exercise of modern award powers on 'productivity, employment costs and the regulatory burden;' it is concerned with the impact of the exercise of those powers 'on business'.

[413] As we have mentioned, the ECEC Employers would not oppose a variation to clause 15.2(c) provided that the variation provides that reimbursements be 'reasonable' and validated by receipts.[355] The ECEC Employers submit that the UWU's proposal could mean employers need to reimburse employees for unreasonable expenses because there would be no limit on the cost of items purchased by employees.[356] We also note that in the course of her evidence Ms Maclean stated that a required reimbursement could cause disputes between employees and employers if an employee bought expensive sunscreen or designer hats.[357]

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[354] See *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228 at 243 per Barwick CJ.

[355] ECEC Employers submission, 16 April 2019 at para. 9.5(b),

[356] ECEC Employers submission, 16 April 2019 at para. 9.4.

[357] Witness Statement of Pamela Avril Maclean at para. 130.

[414] The UWU submits that the ECEC Employers' proposed additional requirement that the expense be 'reasonable' and only paid when validated by receipts would constitute a substantive variation to clause 15.2(c)[358] and submits that there is no evidence that employees are making unreasonable claims. The UWU also submits that the current clause does not permit uncapped claims as it is phrased in terms of the employee being 'required' to wear or use the item for which reimbursement is sought.[359]

[415] It is convenient to deal with the last point first. The argument advanced by the UWU is not pertinent to the concern raised by the ECEC Employers. It may be accepted that the scope of the clause is confined to circumstances where an employee is *required* to wear protective clothing or equipment. Such clothing or equipment must be provided by the employer or if purchased by the employee the cost is to be reimbursed. The limitation that the employee must be *required* to wear the protective clothing or equipment says nothing about the imposition of any cost constraint in the event the required clothing or equipment is not supplied by the employer but is purchased by the employee (and subject to reimbursement).

[416] The UWU's second point is also unpersuasive. There is no evidence of unreasonable claims because there is presently no explicit reference to sunhats or sunscreen lotion in the clause and hence the capacity to seek the reimbursement of, say, designer sunhats does not arise.

[417] Nor do we agree with the UWU's submission that imposing a constraint on the capacity to seek reimbursement would amount to a substantive change. It seems to us entirely reasonable to impose a limitation on an employer's liability to reimburse an employee for such costs. We do not think it necessary to include a provision to the effect that reimbursements be 'validated by receipts or otherwise,' but we do think it is appropriate that reimbursement be limited to 'reasonable' costs incurred.

[418] Subject to the amendments mentioned above, we consider granting the claim would not have a significant adverse affect on business.[360]

[419] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss. 134(1)(a)–(h) of the FW Act. We have taken into account those considerations, insofar as they are relevant to the matter before us and we are satisfied that it is necessary to vary the Children's Services Award in the manner proposed in order to achieve the modern awards objective. We will allow the claim, subject to the

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[358] UWU submission, 9 July 2019 at para. 64.

[359] UWU submission, 9 July 2019 at para. 64.

[360] In oral evidence, Ms Llewellyn acknowledged that if the current award was amended to clarify that providing sunscreen and hats to staff was a requirement it would not affect her business operations (Transcript, 9 May 2019 at PN4333-PN4334). In oral evidence, Mr Mahony also acknowledged that a clarification of a requirement to provide hats and sunscreen would make no difference to his centres as most centres already do so (Transcript, 9 May 2019 at PN4028; Witness Statement of Mahony at paras 106-107). Ms Pamela Maclean also provides and pays for hats and unlimited sunscreen for staff at her centres[360] and submitted that most centres she knows provide these items (Exhibit 28 - Witness Statement of Kristen McPhail at paras 129 – 130)

amendments discussed. The UWU and the ECEC Employers are to confer on the terms of such a variation and submit a proposed form of words within seven days.

7.4 Higher Duties Claim

[420] The UWU seeks to delete clause 18.1(e) of the Children's Services Award[361], which currently reads:

> '**18.1** An employee engaged in duties carrying a higher rate than their ordinary classification for two or more consecutive hours within any shift or day will be paid for the time so worked at the higher rate provided that:
> …
>
> **(e)** an employee who is required to undertake the duties of another employee by reason of the latter employee's absence for the purpose of attending (with pay) an approved training course (including in-service training) will not be entitled to payment under this clause.'[362]

[421] In the alternative, the UWU seeks to amend clause 18.1(e) to remove the words '(including in-service training),' as follows:

> '**(e)** An employee who is required to undertake the duties of another employee by reason of the latter employee's absence for the purpose of attending (with pay) an approved training course ~~(including in-service training)~~ will not be entitled to payment under this clause.'

[422] The UWU submits that an employee should be appropriately remunerated a higher rate when back-filling or replacing a colleague who was attending employer-directed paid training in the short to medium term[363] and that higher duties renumeration should be paid irrespective of the reason why the primary role is not being performed: 'it should be irrelevant whether the employee who would normally perform those duties is on leave or on employer directed training or some other activity that takes them away from their usual duties.'[364]

[423] In support of its alternate claim the UWU submits:

> 'It is our view that there are more than enough qualifications within clause 18.1 that restrict the occasions on which an employee will be entitled to the higher rate. We see no practical reason why employees should not be paid at a higher rate when their colleagues are absent from the workplace to undertake training and they would otherwise be entitled to the higher rate as per the other clauses in 18.1. If an employee is undertaking duties higher than their usual classification, then it should be irrelevant whether the employee who would normally perform those duties is on leave or on employer directed training or some other activity that takes them away from their usual duties. The employee acting within that role is carrying out the duties and

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[361] UWU submission dated 15 March 2019 at para 209.

[362] *Children's Services Award* 2010 [MA000120], cl 18.1(e).

[363] UWU submission, 15 March 2019 at paras 209-212.

[364] Ibid, at para 210.

so should be paid at the higher rate, regardless of whether the employee who usually occupies that role is in training or not.'[365]

[424] As to the modern awards objective, the UWU contends that s.134(1)(c) is relevant:

'When employees '*act up'* into positions that carry higher duties, they are building skills sets that they may otherwise not have the opportunity to develop … Removing clause 18.1(e) ensures that employees who act up and undertake higher duties in the short to medium term are remunerated appropriately. This in turn will promote social inclusion as employees are able to better progress through and stay in the workforce if they are encouraged to consistently '*skill up*'.[366]

[425] The ECEC Employers submit that the existing higher duties clause appropriately balances various issues unique to the ECEC industry and it:

'has come about by various negotiations between the parties to try and accommodate the payment of higher duties whilst childcare centres comply with onerous legislative requirements (including ratio requirements and health and safety).'[367]

[426] As to the purpose of clause 18.1(e), the ECEC Employers submit:

'It allows an employer to pay for any employee's first aid training (during the working week including the hours an employee spends at training) whilst another employee to fill in for them. Without this clause employers may be more inclined to schedule training on the weekend or outside of hours. In any other industry, it may be reasonable to pay higher duties. But this clause is holistic and looks at the centres costs as a whole. This clause requires the employer to pay for time spent at training as time worked (for one employee) and as a result does not have to pay the employee filling the higher duties.'[368]

[427] The ECEC Employers provided the following response to a question which asked why employers would be more inclined to schedule training on the weekend or outside of hours (and pay the employee undergoing the training the applicable penalty rates) if clause 18.1(e) was deleted:

'We are instructed that employers are on balance more likely to schedule training on the weekend or outside of operating hours (and pay the employee undergoing the training the applicable penalty rates) if clause 18.1(e) was deleted, because even with penalty rates, the cost for replacing and paying higher duties for another staff member while paying the staff member being trained is still more expensive and difficult to organise than holding training on the weekend or after hours.'[369]

[428] As to the regulatory requirements said to support clause 18.1(e), the ECEC Employers point to the regulatory requirements on ECEC operators to provide 'like-for-like' replacement of employees in the roster to ensure regulatory compliance. The ECEC Employers submit that

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[365] Ibid, at para 210.

[366] Ibid, at para 212.

[367] ECEC Employers submission, 16 April 2019 at para 10.2.

[368] Ibid, at para 10.3.

[369] ECEC Employers submission, 10 July 2019 at para 80.

this means that it is not an option for ECEC operations, unlike other businesses, to simply 'continue on' in the absence of a staff member who is being trained.[370]

[429] The ECEC Employers also submit that, in addition to an inability to simply 'work with less staff' while a staff member is being trained, the industry itself is subject to regulatory requirements which require more regular training than in other industries.[371] These include child protection training as required in each state and territory, various training requirements to achieve and maintain an ECT qualification, first aid qualifications, anaphylaxis management training, emergency asthma management training and CPR renewal training.

[430] The ECEC Employers also oppose the alternate claim on the basis that the UWU has not specified what scope of 'in-service' training would be excluded from the clause. The ECEC Employers contend that the term 'in service' is meant to convey the fact that the employee undertaking training is working in a service and is undertaking training to professionally develop (or maintain accreditations/licenses necessary to remain 'in service'). [372]

[431] AFEI opposes the UWU's claims on the basis that there is no probative evidence to satisfy the Commission that such variations are necessary. AFEI submits that the higher duties clause was drafted to respond to industry-specific nuances and relevant regulatory requirements.[373]

[432] Terms prescribing higher rates of pay when undertaking the duties of a higher classification have long been a feature of the Federal award system. One of the first reported arbitral decisions in respect of this issue was in 1922 when Justice Powers, the then President of the Commonwealth Court of Conciliation and Arbitration, awarded a higher rate of pay for tram conductors when called upon to perform the higher function of driving. In the course of his judgment the President said:

> 'I am quite satisfied on the evidence that conductors who are liable to be called upon to drive the trams from time to time during months, sometimes years, and who do so without instructors are entitled to more than the present maximum conductors' rates
>
> …
>
> The position claimed by the union is admitted by the answer, namely that conductors are called upon from time to time for years to perform the higher function of driving and are still paid conductors' rates because the Department does not think fit to require them to keep on for continuous periods of two months.
>
> That does not appear to me as fair and is quite contrary to the practice of this Court, which is to order rates to be paid based on the highest function any employee is called upon to undertake in the ordinary course of his employment. Conductors know that after they are qualified to drive they will be, and are, called upon to do a driver's work, and to do that work when the Department requires them to do so, and just as long as the Department thinks fit.

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[370] Ibid.

[371] ECEC Employers submission, 10 July 2019 at para 79.

[372] ECEC Employers submission, 10 July 2019 at para 83.

[373] AFEI submission, 16 April 2019 at paras 60-62.

> Following the practice of this Court, and in fairness to conductor drivers, I feel bound to make an award requiring payment of 6d. a day in addition to the ordinary conductors' rates to conductors who are called upon after the second year of their service to drive the cars on more than sixty days in continuous or broken periods.'[374]

[433] In essence, the Court found that fairness required that the higher duties be paid at a higher rate. Considerations of fairness remain a central feature of the award system and finds expression in the modern awards objective.

[434] In the context of the current Review a Full Bench varied the higher duties clause in the *Pharmaceutical Industry Award 2010*. The clause in question had restricted higher duties payments to *full-time* employees. The Full Bench extended the operation of the clause to *all* employees, stating:

> 'An entitlement to higher duties should apply to all employees carrying out duties in a higher classification. We see no reason why as a matter of industrial merit, this entitlement should be limited to full-time employees.'[375]

[435] As we have mentioned, the modern awards objective requires that the Commission ensures that modern awards, together with the NES, provides a 'fair and relevant minimum safety net of terms and conditions,' taking into account the s.134 considerations. Further, the minimum wages objective requires that the Commission establish and maintain a safety net of '*fair minimum wages*.' The meaning of this expression was considered in the *Equal Remuneration Decision 2015*:

> 'The fundamental feature of the minimum wages objective is the requirement to establish and maintain 'a safety net of fair minimum wages.' We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for 'fair minimum wages' is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.'[376]

[436] The above passage was cited with approval in the *2017 – 18 Annual Wage Review decision*.[377]

[437] The proposition that wages payable under a modern award bear a proper relationship to the value of the work performed underpins payments for higher duties. *Prima facie* employees undertaking higher duties should be entitled to the higher payment associated with the classification which encompasses those higher duties. Clause 18.1(e) represents a departure from that general industrial principle.

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[374] *Australian Tramway Employers Association v Melbourne and Metropolitan Tramways Board* (1923) 17 CAR 681 at 694 – 695.

[375] [2015] FWCFB 7236 at [170].

[376] [2015] FWCFB 8200 at [272].

[377] [2018] FWCFB 3500 at [99].

[438] We note that of the 96 modern awards which contain a 'higher duties' clause a small number exclude the payment for higher duties in certain circumstances.[378] In our view the justification for any such exclusion must be clearly established as a matter of merit, having regard to the particular context in which the relevant modern award operates.

[439] In the present matter the regulatory context in which ECEC employers operate is said to support the terms of the present exclusion (see the summary of the ECEC Employers' submissions set out above). We are not satisfied that the regulatory context warrants the retention of the exclusion in clause 18.1(e). We see no valid reason for distinguishing the performance of higher duties in circumstances where an employer is absent for the purpose of attending training as opposed to, for example, an employee being absent on leave. In both circumstances it is likely that the position of the person performing the higher duties will need to be backfilled. Nor does the fact that the regulatory environment may necessitate more training than in other industries warrant a departure from the *prima facie* position. Training and professional development are a feature of many industries and we are not persuaded that the circumstances of those covered by the Children's Services Award are so markedly different as to justify the retention of the exclusion in clause 18.1(e).

[440] As to the s.134 considerations, the 'needs of the low paid' (s.134(1)(a)) is a consideration which weighs in favour of the variation proposed by the UWU.

[441] Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that the variation proposed would '*encourage* collective bargaining', it follows that this consideration does not provide any support for the proposed variation.

[442] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c). The UWU submits that deleting clause 18.1(e) will encourage workforce participation. No evidence was advanced in support of the submission put and we doubt that the deletion of the sub clause would materially affect workforce retention in the way posited by the UWU. We regard this consideration as neutral.

[443] The considerations in ss.134(1)(d), (da), (e), (g) and (h) are not relevant in the present context. No party contended to the contrary.

[444] The consideration in s.134(1)(f) is not confined to the impact of the exercise of modern award powers on 'productivity, employment costs and the regulatory burden;' it is concerned with the impact of the exercise of those powers 'on business'. We accept that granting the claim will impose additional costs on businesses covered by the Children's Services Award and this is a factor which weights against granting the claim.

[445] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account

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[378] For example the *Business Equipment Award 2010* – higher duties allowance will not apply where the employee being relieved is on annual leave or personal/carer's leave, until the absence exceeds 1 week (at which point the relieving employee must be paid for that week and any additional days); *Broadcasting, Recorded Entertainment and Cinemas Award 2010* – higher duties allowance does not apply to journalists; *Hospitality Industry (General) Award 2010* – higher duties allowance does not apply to food and beverage attendants grade 2 and 3.

the particular considerations identified in ss.134(1)(a)–(h). We have taken into account those considerations, insofar as they are relevant to the matter before us, and we are satisfied that it is necessary to vary the Children's Services Award in the manner proposed in order to achieve the modern awards objective. We will vary clause 18.1 by deleting clause 18.1(e).

7.5 Annual Leave

[446] Clause 24.4(b) of the Children's Services Award currently provides:

> **24.4(b) Annual Leave**
>
> During the Christmas vacation only, an employee may be directed to take annual leave. An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of four weeks.

[447] The current clause permits an employer to direct an employer to take an undefined period of leave over the Christmas vacation period, which may be partly or entirely unpaid.[379]

[448] The UWU seeks to amend the Children's Services Award to require employers, who direct their employees to take annual leave without pay over Christmas, to pay ordinary time to those employees in circumstances where they have not accrued any leave.[380] In the alternative, the UWU seeks to reduce the maximum amount of leave without pay that an employee can be directed to take, to two weeks, and to amend clause 24.4(c) so that employees may only be directed to take paid annual leave. Two options are proposed.

[449] Option 1 involves the amendment of clause 24.4(b), as follows:

> '(b) During the Christmas vacation only, an employee may be directed to take annual leave. ~~An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of four weeks~~. Where an employee has insufficient accrued leave to maintain their ordinary rate of pay during the vacation period, an employee will be paid the ordinary rate of pay during such a period.'[381]

[450] The UWU also seeks to delete clause 24.4(c) and insert a definition of 'Christmas vacation' that limits a Christmas vacation period to a maximum of 4 weeks:

> **'Christmas vacation** means a period of not more than 4 weeks in the months of December and January during which the workplace is closed and no work is available.'

[451] Clause 24.4(c) currently provides:

> (c) Notwithstanding clause 24.4(a) in establishments which operate for more than 48 weeks per year, an employer may require an employee to take annual leave by giving at least four weeks' notice as part of a close-down of its operations.

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[379] UWU submission, 15 March 2019 at para 214.
[380] UWU submission, 2 May 2019 at page 1.
[381] Ibid, at para 222.

[452] Option 2 involves the amendment of clause 24.4(b), as follows:

> '(b) During the Christmas vacation only, an employee may be directed to take annual leave. An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of ~~four~~ two weeks.'382

[453] The UWU also seeks to amend clause 24.4(c) to ensure that employees may only be directed to take *paid* annual leave, as follows:

> '(c) Notwithstanding clause 24.4(c) in establishments which operate for more than 48 weeks per year, an employer may require an employee to take paid annual leave by giving at least four weeks' notice as part of a close-down of its operations.' 383

[454] Finally, the UWU also seeks to insert a definition of 'Christmas vacation' that limits a Christmas vacation period to a maximum of 4 weeks, as set out above.

[455] As noted in the Background Document published on 13 June 2019 (at [161]) the review of clause 24.4 of the Children's Services Award has been referred to the Plain Language Full Bench.[384]

[456] A Background Document published on 5 July 2019 stated that the issue would remain with the Plain Language Full Bench *unless* it was generally agreed that the matter should be dealt with by us. The following question was put to all parties:

Q.35 All parties are invited to comment on whether this claim should be dealt with by the Substantive Issues Full Bench or the Plain Language Full Bench?

[457] The ECEC Employers and the AFEI were content for this claim to be dealt with by the Plain Language Full Bench

[458] The UWU submitted that the claim should be dealt with by us because:

> There is a substantive merit issue which needs to be resolved and the appropriate place for this to be resolved is in the substantive review of the award. We would also observe that the issue is relatively straightforward in light of the evidence concerning close downs and the Christmas vacation which has been heard.[385]

[459] As there is no consensus in respect of which Full Bench is to deal with this issue, it will remain with the Plain Language Full Bench.

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[382] Ibid, at para 216.

[383] Ibid, at para 216.

[384] See [2017] FWC 5861 and [2019] FWC 2869.

[385] UWU submission, 9 July 2019 at para 65.

8. Claims in relation to the Educational Services (Teachers) Award 2010

8.1 Coverage

[460] The IEU seeks to amend certain provisions relating to award coverage for directors of childcare centres with teaching degrees. The IEU submits that if teachers appointed as Directors are paid under the Children's Services Award this will almost always lead to the teacher being paid less than they would be if they were paid under the Teachers Award[386] and that these Directors should be covered by the Teachers Award and *not* the Children's Services Award.

[461] Currently, clause 4.1 of the Teachers Award provides:

> '**4.1** This award, subject to clauses 4.2 to 4.6, covers employers throughout Australia in the school education industry, children's services and early childhood education industry and their employees as defined in clause 3.1 to the exclusion of any other modern award.'

[462] Clause 3.1 of the Teachers Award defines 'employee' as follows:

> '**employee** means a person employed as a teacher in the school education industry or children's services and early childhood education industry who is a national system employee within the meaning of the Act.'

[463] Clause 3.1 of the Teachers Award defines 'teacher' as follows:

> '**teacher** means a person employed as such by a school, children's service or early childhood education service and who performs duties which include delivering an educational program, assessing student participation in an education program, administering an education program and performing other duties incidental to the delivery of the education program. So as to remove any doubt, teacher includes a teacher in a senior leadership position, but not a principal or deputy principal.'

[464] Clause 3.1 of the Teachers Award defines 'director' as follows:

> '**director** means the employee appointed by the employer to be responsible for the overall management and administration of a service in which an early childhood/preschool teacher is employed.'

[465] The IEU seek to vary the definition of 'teacher' in the Teachers Award to ensure the award covers teachers in early childcare centres who are engaged as Directors. The following proposed variation to clause 3.1 as follows:

> '**teacher** means a person employed as such by a school, children's service or early childhood education service and who performs duties which include delivering an educational program, assessing student participation in an education program, administering an education program and performing other duties incidental to the delivery of the education program. So as to remove any doubt, teacher includes a person with teaching qualifications appointed as a Director of an early childhood education service (whether or not that person directly performs day to day

[386] IEU submission, 29 May 2019 at para 16.

> teaching activities), teacher in a senior leadership position, but not a principal or deputy principal.'[387]

[466] The IEU also proposes an amendment to clause B.1.10 of the Children's Services Award:

> 'A Director is an employee who holds a relevant Degree (other than a teaching qualification), or an AQF Advanced Diploma, or a Diploma in Children's Services, or a Diploma in Out-of-Hours Care; or is otherwise a person possessing such experience, or holding such qualifications deemed by the employer or the relevant legislation to be appropriate or required for the position, and who is appointed as the director of a service.' [388]

[467] The IEU contends that all teacher-qualified Directors are covered by the Teachers Award and, briefly stated, submits that a person employed as a Director by an early childhood centre who: [389]

- has teaching qualifications;
- is engaged in a role which is centrally concerned with the administration of an educational program with ancillary tasks;
- uses the skills learned as part of obtaining that teaching qualification in the performance of the roles; and
- is, or can be, counted towards the services mandatory minimum number of employed teachers

is correctly considered as being 'employed as a teacher' within the meaning of clause 3.1 of the Teachers Award, giving those words their ordinary meaning.

[468] The IEU also submits that teacher Directors in preschools generally and in childcare centres in NSW and the ACT[390] have historically been covered by the relevant award for teachers, and that there was no indication in the decisions leading to the Teachers Award being made that the Commission had any intention of departing from this. Childcare centres in other states did not deliver educational programs at that time requiring qualified teachers, and as such this issue was not contemplated in the childcare awards.[391]

[469] IEU submits that teacher-qualified Directors are usually paid as teachers, however it is aware of some 'isolated instances in for-profit, award-reliant childcare centres where teacher qualified Directors are paid under the Children's Services Award' and therefore paid less.[392]

[470] The IEU submits that the variations proposed are consistent with what it claims is the correct interpretation of the Teachers Award as it currently stands, and are intended to address

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[387] IEU submission, 15 March 2019 at para 16.

[388] IEU submission, 15 March 2019 at para 17.

[389] IEU submission, 15 March 2019 at para 12.

[390] *Child Care Industry (Teachers) (Australian Capital Territory) Award 1999*.

[391] IEU submission, 15 March 2019 at para 13.

[392] IEU submission, 15 March 2019 at para 7.

an ambiguity in the coverage of the award which has the potential to give rise to disputation. Counsel for the IEU characterised the variations sought as 'avoidance of doubt' clauses.[393]

[471] The IEU submits that:

> '…on the current drafting of the Award a dispute occasionally arises as a result of an employer's misunderstanding of the Award and how employees are classified (i.e. on the mistaken belief that it is designation, rather than qualification and substantive work, that defines an employee's role).
>
> This is undesirable. It means the Award is not necessarily 'simple' or 'easy to understand' within the meaning of s.134(1)(g) of the *Fair Work Act 2009* (Cth). Accordingly, a variation to Clause 3.1 of the Award to remove this potential ambiguity is necessary to achieve the Modern Awards Objective…'[394]

[472] The IEU submitted that the existence of clause 15.1 of the Teachers Award, which prescribes an allowance to ECEC teachers who are appointed as Directors, supports its claim:

> 'This clause is otiose if teachers working in ECEC sectors cease to be covered by the Teachers Award if they are appointed as directors. It is apparent from the presence of a Director's allowance that the Commission intended, when making the Teacher's Award, for the coverage to be as per the IEU's claim.'[395]

[473] IEU submits that its proposed variation is necessary to achieve the modern awards objective,[396] and to make the award 'simple' and 'easy to understand' within the meaning of s.134(1)(g) of the FW Act.

[474] The proposed variations are opposed by the UWU, the ECEC Employers and the AFEI.

[475] The UWU submits that directors of early childhood services with a teaching degree may be covered by either the Children's Services Award or the Teachers Award depending on the duties performed by the employee:

> 'A teacher is a person employed to deliver, assess and implement an educational program. Such an employee is properly classified under the Teachers Award. A Director who is not delivering, assessing and implementing an educational program is not a teacher, and is properly classified under the Children's Services Award. Alternatively, a Director who performs a significant teaching role as part of their duties should be classified under the Teachers Award.'[397]

[476] The UWU note that clause B.1.10 of the Children's Services Award recognises that Directors may hold a relevant degree, including a '*3 or 4 year Early Childhood Education qualification*' and that clause 15.1 of the Teachers Award provides a specific allowance for early childhood/preschool teachers who are appointed as Directors.

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[393] Transcript, 9 August 2019 at PN32.

[394] IEU submission, 15 March 2019 at paras 15 and 16.

[395] IEU submission, 29 April 2019 at para 4.

[396] IEU submission, 15 March 2019 at para 16.

[397] UWU submission, at para 114.

[477] The ECEC Employers submit that:

> 'it is clear when an employee has a teaching degree and uses that to deliver an educational program that employee is remunerated in accordance with the Teachers Award. However if an employee has a teaching degree but is performing the role of Director (e.g. overall operations of the centre) they should be remunerated in accordance with the Children's Services Award.'[398]

[478] The ECEC Employers contend that the variations proposed are substantive and would have the result of:[399]

- inappropriately favouring teaching degrees over any other qualification Directors of childcare centres may hold (for example, accounting degrees or Diplomas of childcare);[400]
- not considering the benefits of other qualifications;[401]
- not understanding the nature and requirements of a Director of a childcare centre; and
- increasing the minimum wages of Directors of childcare centres who are already remunerated in accordance with the highest level of the Children's Services Award (level 6) and a Directors Allowance.

[479] AFEI submits that the evidence filed by the IEU is too limited for the Commission to assess the potential implication of such a significant variation for the industry and that 'the IEU has not demonstrated that it is necessary to disturb the current award coverage of Directors.'[402] Further, AFEI contends that the variation would mean that a Director who holds a teaching qualification (irrespective of whether it is utilised in connection with the Director's employment or whether the Director has or intends to maintain teaching accreditation) could no longer be covered by the Children's Services Award.

[480] In its submission in reply of 26 April 2019, the IEU submits that both AFEI and the ECEC Employers misstate the nature of the IEU's claim in that it is not a change in the coverage of either award but a clarification of the current coverage scheme.[403]

[481] As we have mentioned, a modern award may include permitted or required terms (such as 'coverage terms') 'only to the extent necessary to achieve the modern awards objective' (s.138 of the FW Act). We are not satisfied that the inclusion of the variations proposed by the IEU are necessary in the sense contemplated by s.138.

[482] The IEU advances its proposed variations on the basis that the current award terms are ambiguous and have the potential to give rise to disputation about the proper award coverage

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[398] ECEC Employers submission, 16 April 2019 at para 12.4

[399] ECEC Employers submission, 16 April 2019 at para 12.3

[400] ECEC Employers submission, 29 May 2019 at para 14.4; Exhibit 18 - Witness Statement of Jae Fraser, 15 April 2019 at para 147; Exhibit 13 - Witness Statement of Karthika Viknarasah, 11 April 2019 at para 156.

[401] Transcript, 9 May 2019 at PN3317.

[402] AFEI submission, 16 April 2019 at paras 73-76.

[403] IEU submission, 26 April 2019 at para 2.

of teacher Directors. We are not persuaded that the potential for disputation warrants the variation proposed. As counsel for the IEU acknowledged during the course of closing oral arguments, the issue sought to be addressed by the variations 'doesn't arise terribly often'.[404] Further, the evidence of disputes arising in respect of this issue is, to say the least, sparse.

[483] Ms Mravunac, Director of the San Marino World of Learning in NSW, gave evidence that she used to be paid under the Children's Services Award as a level 6.2 but:

> 'After requesting a review of my award coverage with San Marino, they have agreed to start paying me as a Level 11 under the *Educational Services (Teachers) Award 2010* and backpay me to 1 January 2018.'[405]

[484] The IEU submits that Ms Mravunac's evidence is 'significant for the fact that she evidences the dispute that arises from time to time'.[406] The fact that one teacher Director raised an issue with their employer about appropriate award coverage which was then resolved, presumably to the satisfaction of both parties, is hardly significant evidence of disputation arising from time to time. Nor does Ms James' evidence advance the matter.

[485] Ms James is an Early Childhood Organiser employed by the IEU (NSW/ACT Branch). At [28] to [31] of her statement Ms James sets out the details of disputes concerning the pay of teacher Directors at some for-profit childcare centres in which she has been involved:

> 'Member ML was employed at a long day care centre as a Director under the Educational Services (Teachers) Award. In 2014 this centre was taken over by G8, who changed ML's job title from Director to "Centre Manager" and informed her that going forward ML would be employed under the Children's Services Award. ML questioned this change of award and G8 responded that they considered her previous employer had incorrectly employed her under the *Educational Services (Teachers) Award*, but they would continue to pay her current rate of pay "as an above award payment". ML's redacted Award Reclassification Letter is annexed and marked as Annexure 20.
>
> Union Member JG was employed as an office-based Director in a not-for-profit service that closed in 2016. This centre paid JG as a 4 year trained teacher on the top incremental step plus a Director's Allowance. Guardian Early Learning Group offered JG a role as an office Based Director to be employed under the Children's Services Award at $28.11 per hour, which was $18.00 per hour less than she was paid at the not-for-profit service. JG declined the offer. Guardian Early Learning Group then agreed to match JG's rate of pay but still insisted on employing her under the *Children's Services Award*. JG's redacted contracts are annexed and marked as Annexure 21 and Annexure 22.
>
> In 2017, member MS sought advice from the Union regarding her contract as a Director with Cherry Blossom Early Learning Centre. This contract stated that MS would be employed under the *Children's Services Award* despite her Job Description, which stated MS would be expected *"To ensure the delivery of the children's program is in accordance with the services [sic] philosophy, goals, aims, objectives, policies and procedures"* and *"To oversee, advice [sic] and support staff in the implementation of the programs, ensuring that all individual children's*

[404] Transcript, 9 August 2019 at PN40.

[405] Exhibit 41 – Witness statement of Ana Mravunac, 15 March 2019 at para 5.

[406] Transcript, 29 August 2019 at PN34.

needs are met…" "Person Specification" included *"Experience in planning and implementing an early childhood program"*. The incomplete Employment Contract provided to MS is annexed and marked as Annexure 23 and her job description is annexed and marked as Annexure 24.

In 2017, member RM sought telephone advice after being offered a position as a Director at Lawrence Community Preschool under the *Children's Services Award*. The Union advised RM of the correct Award and corresponding rate of pay. Once advised of this error, the Preschool immediately agreed to pay RM according to the correct Award rate and it appears that the Preschool were genuinely confused by the wording in the *Children's Services Award* and thought this Award applied to teaching directors.'[407]

[486] The disputes referenced relate to the period from 2010 (when the awards commenced) until 15 March 2019 (the date of Ms James' statement). Of the four matters referred to by Ms James:

- Member 'ML's' centre was taken over by G8 who changed her job title from Director to 'Centre Manager' and informed her that she would be employed under the Children's Services Award. ML questioned the change of award and G8 agreed to continue to pay her at her current rate of pay.
- Member 'JG' was offered a role by the Guardian Early Learning Group as an office-based Director under the Children's Services Award. JG declined the role and Guardian then agreed to match JG's previous rate of pay (as a 4 year trained teacher on the top incremental step plus a Director's allowance).
- Member 'MS' simply sought advice from the IEU concerning her contract, but there is no evidence as to the advice given or whether the matter was even raised with the employer.
- Member 'RM' was offered a position as a Director which was to be paid under the Children's Services Award and sought the IEU's advice as to the correct award. The IEU advised 'RM' that the Teachers Award was the correct award. Once advised of the IEU's position 'the Pre-school immediately agreed to pay RM according to [the Teacher's Award]'.

[487] We note that in each of the matters referred to by Ms James the issue appears to have been resolved by discussion. There is no evidence of any dispute being referred to the Commission.

[488] In these circumstances, we see no pressing need to clarify the coverage of teacher Directors. The variations proposed are not necessary to ensure that the award achieves the modern awards objective. Accordingly, we dismiss the claim.

8.2 Minimum Engagement

[489] Clause 14.5 of the Teachers Award provides as follows:

'**14.5 Casual employee**

[407] Exhibit 32 – Witness statement of Lisa James, 15 March 2019 at paras 28 – 31.

(a) The salary payable to a casual employee will be:

(i) no higher than the salary at Level 8 in clause 14.1 where the employee is engaged for less than five consecutive days; or

(ii) where the employee is engaged for five or more consecutive days the salary will be the appropriate salary for the classification as specified in clause 13—Classifications,

calculated in accordance with the table below:

Full day	Weekly rate calculated in accordance with clause 14.3 divided by 5 plus 25%
Half day	Weekly rate calculated in accordance with clause 14.3 divided by 10 plus 25%
Quarter day	Weekly rate calculated in accordance with clause 14.3 divided by 20 plus 25%

(b) Provided that:

(i) a casual employee in a school will be paid for a minimum of half a day; where a day is the usual required attendance time for an employee at that school and a half day is half the usual required attendance time; and

(ii) a casual employee in a children's service or early childhood education service may be paid for a minimum of a quarter day.'

[490] The IEU submits that it is aware of occasions where ECEC operators pay casual employees for *only* a quarter of a day when they work between a quarter and a half a day. The IEU relies on Ms James' evidence in this regard. In her first statement Ms James says:

> 'In my role as Organiser, I have come across employers in the early childhood sector that have read Clauses 14.5 of the *Educational Services (Teachers) Award 2010* as giving them the right to pay a teacher for quarter day if they work less than half a day.'[408]

[491] The IEU contends that the payment of casual employees for only a quarter of a day when they work between a quarter and a half day is based on an unsustainable interpretation of clause 14.5 for the following reasons:

(i) It is inherently unlikely, in that it countenances employees being required to work for free.[409]

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[408] Exhibit 32 – Witness statement of Lisa James, 15 March 2019 at para 32.

[409] IEU submission, 15 March 2019 at para 21.

(ii) The alternative interpretation ignores the word 'minimum.' The clause provides that, regardless of how long they work, an employee must be paid at least for a quarter-day, not that work done between the first and second quarter of a day will be unremunerated.410

(iii) The second part of clause 14.5(b)(i) is concerned with actual required attendance time. Given the definitional table already at clause 14.5(a), this only has work to do if it is linking the payment to be made to the attendance required. In other words, a casual employee in a school will be paid a half day in circumstances where they are only required to work half a day.411

[492] The IEU proposes to vary clause 14.5(b) of the Teachers Award to correct what is said to be an ambiguity.

'**(b)** Provided that:

(i) a casual employee in a school will be paid for a minimum of half a day; where a day is the usual required attendance time for an employee at that school and a half day is half the usual required attendance time, and the employee is only required to attend for up to a half day; and

(ii) a casual employee in a children's service or early childhood education service may be paid for a minimum of a quarter day, where a day is the usual required attendance time for an employee at that service and a quarter day is half the usual required attendance time at that service, and the employee is only required to attend for up to a quarter day.

(iii) For the avoidance of doubt, an employee who is required to attend for a period of time between a quarter day and a half day will be paid a half day, and between a half day and a full day a full day.' 412

[493] The IEU submits that correcting the ambiguity is necessary to achieve the modern awards objective. [413]

[494] The UWU supports the IEU's claim to vary clause 14.5(b)(ii). The ECEC Employers and the AFEI oppose the claim.

[495] The ECEC Employers submit that the variations to the minimum engagement clause proposed by the IEU are unnecessary and that the current minimum engagement clause in the Teachers Award is complex, but self-explanatory.[414]

[496] The ECEC Employers submit that the evidence filed by the IEU is insufficient to warrant a change to the Teachers Award on the basis that there is some ambiguity, asserting that '[n]o

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[410] IEU submission, 15 March 2019 at para 22.

[411] IEU submission, 15 March 2019 at para 23.

[412] Ibid, at para 25.

[413] Ibid, at para 25.

[414] ECEC Employers submission, 16 April 2019 at paras 13.1 and 13.4.

evidence has been provided by casual teachers whose employers are paying them incorrectly or by Ms James as to the number of business she has 'come across' that are paying incorrectly.'[415] Further, the evidence provided by the ECEC Employers suggests that many ECEC employers do not engage casual teachers and those that do are aware of clause 14.5 and how to correctly calculate a quarter day/half day for a casual under the award.

[497] In her evidence Karthika Viknarasah states:

> '…I do not hire any casual teachers as I do not believe that they can look at the long term vision of the Centre if they are just filling in.
>
> However, if I did hire a casual teacher, I would calculate a quarter day in accordance with the Teachers Award which is the weekly rate in accordance with clause 14.3 of the Award divided by 20 plus 25% taking into consideration that the weekly pay for an employee will be determined by dividing the annual rate by 52.18 and the fortnightly rate by 26.09. I believe I would need to add 4% on top of this as the additional allowance for ECTs who work in long day care settings.
>
> I have not heard of any services that pay their casual employees only a quarter of a day when they work between a quarter and a half day and would pay as necessitated above by the Award.'[416]

[498] Similarly, Sarah Tullberg states:

> 'I do not employ any casual teachers, but if I did, they would be paid a minimum of a quarter of day when they perform a quarter of a day and be paid for half a day when they perform half a day's work.'[417]

[499] The ECEC Employers submit that the evidence of the ECEC Employers' witnesses suggests that: [418]

- many ECEC employers do not engage casual teachers (as they do not provide continuity of care and are expensive);[419] and
- those that do employ casuals, are aware of clause 14.5 and how to correctly calculate a quarter day/half day for a casual under that award.[420]

[500] The ECEC Employers agree with the IEU's interpretation of the clause regarding the payment of casual teachers,[421] acknowledging that 'the IEU's drafting simply confirms how the

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[415] ECEC Employers submission, 16 April 2019 at para 13.2.

[416] Exhibit 13 - Witness Statement of Ms Karthika Viknarasah, 11 April 2019 at paras 161-163.

[417] Exhibit 35 – Witness Statement of Ms Sarah Tullberg, 9 April 2019 at para 114.

[418] ECEC Employers submission, 16 April 2019 at para 13.3.

[419] Exhibit 13 –Witness statement of Ms Karthika Viknarasah, 11 April 2019 at para 161; Exhibit 28 – Witness statement of Ms Kristen Carol McPhail, 12 April 2019 at para 118; Exhibit 39 – Statement of Ms Nicole Llewellyn, 9 April 2019 at para 107; Exhibit 35 – Witness statement of Ms Sarah Tullberg, 9 April 2019 at para 113; Exhibit 38 – Statement of Mr Kerry Joseph Mahony, 11 April 2019 at para 121.

[420] Exhibit 13 –Witness statement of Ms Karthika Viknarasah, 11 April 2019 at para 162; Exhibit 35 – Witness statement of Ms Sarah Tullberg, 9 April 2019 at para 114.

[421] ECEC Employers submission, 10 July 2019 at para 107.

clause should be interpreted.'[422] However, the ECEC Employers submit that they are concerned that the issue raised by the IEU is not actually remedied by their proposed drafting.[423] The ECEC Employers suggest that 'the concept of a quarter day and a half day in the Teachers Award may be assisted by inserting hourly figures or better clarifying what a quarter day is',[424] but stress that this suggestion is not a formal claim.[425]

[501] AFEI submits that the claim should be rejected:[426]

> 'The proposed variation is not fair, as it would result in an unwarranted payment for time not worked, and is not necessary. The Commission has not been provided any probative evidence which would demonstrate that the clause is necessary to achieve the modern award objectives.'[427]

[502] AFEI claims that the IEU's proposed variation at clause 14.5(b)(ii) 'would result in more uncertainty':[428]

> 'To the extent that any ambiguity exists, it is better resolved by reference to the minimum payment, reflecting on quarter of a 7.6 hour day, or for such time actually worked.'[429]

[503] In its reply submission of 26 April 2019, the IEU submits that AFEI does not explain how it is said to be fair for an employee to be required to work for free, nor does AFEI put forward any alternative interpretation of the current clause. The IEU contends that the variation proposed should be made given that:

- there is no apparent dispute that the correct interpretation of the clause is in accordance with the IEU's proposed drafting;
- the IEU, the major union in the sector, states that it is from time to time causing uncertainty and disputation, and has filed evidence in support of this; and
- there is no suggestion that there will be any adverse impact on any employer (aside from those who are not currently complying with the Award).[430]

[504] Further, in the course of closing oral submissions counsel for the IEU responded to the ECEC Employers' suggestion that the interpretation of clause 14.5 may be assisted by 'inserting hourly figures or better clarifying what a quarter day is,' as follows:

> 'that is … a substantive change to the award. It would lower the amount that a person who works for more than a quarter but less than half a day would receive. It is not an appropriate response

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[422] Ibid, at para 108.

[423] Ibid, at para 108.

[424] Ibid, at para 111.

[425] Ibid, at para 111.

[426] AFEI submission, 16 April 2019 at para. 80.

[427] Ibid, at para 79.

[428] AFEI submission, 10 July 2019 at para. 58.

[429] Ibid, at para. 59.

[430] Transcript, 9 August 2019 at PN31.

to the IEU's claim which is clarifying and ensuring that what the award, as set, was intended to do, is clearly able to be understood as doing that.'[431]

[505] We begin our consideration of the claim by noting that during the course of the proceeding we raised an issue with the parties regarding clause 14.5(a). As set out earlier, clause 14.5(a) states:

> **'14.5 Casual employee**
>
> **(a)** The salary payable to a casual employee will be:
>
> **(i)** no higher than the salary at Level 8 in clause 14.1 where the employee is engaged for less than five consecutive days; or
>
> **(ii)** where the employee is engaged for five or more consecutive days the salary will be the appropriate salary for the classification as specified in clause 13—Classifications.
>
> calculated in accordance with the table below: …'

[506] In Background Paper 1 published on 13 June 2019 we put the following question to all parties:

> *'Q.53 Clause 14.5(a) appears to place a cap on the salary payable to a casual employee who is engaged for less than five consecutive days:*
>
> *(i) What is the parties' understanding of how this cap operates?*
>
> *(ii) What is the rationale for the imposition of such a 'cap'?*
>
> *(iii) What is the history of this provision and, in particular, has the 'cap' been the subject of an arbitral determination.'*

[507] In response to question 53, AFEI submits that the 'salary level' for a casual employee is based on years of experience as a teacher more generally, except that for shorter casual engagements (that is less than five consecutive days) subject to a cap of eight years' service, with longer engagements not so capped, noting that casual engagement periods are also capped at 4 weeks, or by agreement no more than 10 weeks.[432]

[508] As to question 53(iii), AFEI submits that it 'is unaware of the history of this particular provision but notes that the predominant state awards in NSW appear to contain lower caps of 4 years' service, relating to casual pay levels. In both cases the caps reflect the short term nature of casual engagements and potentially limited opportunity for employees with general teaching service to contribute to the operation of the particular service.'[433]

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[431] Ibid.

[432] AFEI submission 10 July 2019 at para 60.

[433] Ibid at para 61.

[509] The ECEC Employers did not provide a response to the question.

[510] The UWU was unaware of why the cap on the salary payable to a casual employee engaged for less than five days has been imposed and submits that:

> 'On the face of it, it seems to be an unfair restriction on the wages of casual employees without any apparent justification.
>
> The cap appears to have been inserted following consultation on the Exposure Draft of the Teachers Award that was released on 22 May 2009. The Exposure Draft did not contain a cap. We are not aware of a decision in respect of the cap.'[434]

[511] In its submission of 10 July 2019, the IEU stated that it 'is conducting research into these matters and will provide further submissions as soon as possible.'[435] No further submission was filed.

[512] We note that the Exposure Draft published by the Commission on 22 May 2009 did *not* include the cap. The provision at that time, read:

> '**14.4 Casual employee**
>
> The salary payable to a casual employee will be the appropriate salary as specified in clause 13—Classifications, calculated in accordance with the table below:
>
> **Full day** Weekly rate calculated in accordance with clause 14.2 divided by 5 plus 25%
>
> **Half day** Weekly rate calculated in accordance with clause 14.2 divided by 10 plus 25%
>
> Provided that a casual employee will be paid for a minimum of half a day; where a day is the usual required attendance time for an employee at that school and a half day is half the usual required attendance time.'

[513] The Commission's research area has identified that the 'cap' to a casual employee's salary for an engagement of less than five consecutive days originated from submissions made by the Associations of Independent Schools (AIS) to the Full Bench, during Stage 3 of the award modernisation proceedings.[436]

[514] In its submission dated 6 March 2009, the AIS proposed a cap to the rate of pay of casual teachers:

> 'The rationale behind this proposal is that the workload and responsibilities of teachers engaged on a casual basis is much lower than that of an on- going or permanent teacher. Casual teachers are rarely involved in programming and curriculum development, student assessment or marking. Nor are they required to participate in the usual co-curricular activities.'[437]

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[434] UWU submission 9 July 2019 at paras 136–137.

[435] IEU submission 10 July 2019 at para 26.l

[436] http://www.airc.gov.au/awardmod/fullbench/industries/awardmodindustry.cfm?award=education

[437] AIS submission, 6 March 2009 at para 84.

[515] The AIS referred to a number of existing awards that already included this cap:

> 'The *Teachers (Independent Schools) (State) Award 2004 – NSW*[438] caps the casual rate at step 8 on a 14 step salary scale, the *Teachers (Non-Government Schools) (ACT) Award 1999*[439] caps the casual rate at step 6 and step 9 on a 12 step salary scale. The *Independent Schools (Teachers) Tasmania Award*[440] prescribes payment of casual teachers with no marking or preparation responsibilities at 82.5 per cent of the daily rate.'[441]

[516] In its attached draft Award, the AIS proposed this amendment:

> '17.3 (b) the salary level used to calculate the full day or half day rate for a casual employee will be a maximum of level eight in the salary scale in clause 15, Minimum Salary.'[442]

[517] The AIS and the IEU apparently reached an agreement to limit the salary cap so that it was only applicable to a casual engagement period of five consecutive days or less. This agreement was not referenced in any of IEU's supplementary written submissions, but acknowledged by the IEU in the hearings:

> 'The underlying basis of that agreement which is not expressed in our comment on the exposure draft is that there would be a cap at level 8 in the structure for the first week in which a casual was employed. We agree with the employers that in most cases at least it reflects the fact that the full range of duties are not performed. An employee typically would not be required to undertake marking during that relevant period.'[443]

[518] Based on this agreement, the AIS removed the salary cap on casual employees who have been engaged for more than five consecutive days from their draft Award:

> 'Following the IEUA modifying its position in the submission and the draft award on a number of matters related to casual employment, the Associations are prepared to modify their position in relation to remuneration for casual teachers, to reflect an understanding between the IEUA and the Associations. The Associations now support no reduced maximum level for casuals who have been engaged for more than five consecutive days. It is widely acknowledged that the responsibilities for a casual teacher engaged for no more than five consecutive days are significantly less than a teacher engaged for a longer period. For example, responsibilities for lesson planning, marking and participation in out of classroom activities are often less. At no stage have the Associations indicated any willingness to agree to no cap for all casuals.'[444]

[519] In its supplementary submission of 12 June 2009, the AIS explained further:

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[438] AN120543.

[439] AP799560CRA.

[440] AN170051.

[441] AIS submission, 6 March 2009 at para 85.

[442] Parties' Draft Award - Associations of Independent Schools *Independent Schools Teachers Award 2010*, attached to AIS submission, 6 March 2009. This clause was also reiterated in their draft award dated 27 April 2009.

[443] Transcript, 26 June 2009 at PN2471 (Mr Odgers, appearing for Independent Education Union of Australia).

[444] AIS submission, 6 May 2009 at para 10.

> 'As outlined in our earlier submissions it is widely acknowledged that a short-term casual engagement (one week) requires a significantly reduced commitment from the teacher involved. There is no requirement to plan and prepare lessons as in most cases these have been left by the absent teacher or prepared by the relevant faculty in advance nor is there any requirement to perform marking. Further, casual teachers on short-term engagements rarely become involved in any co-curricular activities beyond standard playground supervision.
>
> The IEUA has agreed that it is appropriate to include a salary cap for casual teachers engaged for 5 days or less. The Associations propose the following clause be inserted to reflect the agreement between the parties:
>
> > 'The maximum salary payable to a casual employee will be Level 8 unless the employee is engaged for more than 5 consecutive days. In that case, the employee shall be paid the appropriate salary as specified in clause 13 – Classifications, calculated in accordance with the table below:''[445]

[520] The next published Exposure Draft on 4 September 2009 *included* the cap. The provision then read:

> **'14.4 Casual employee**
>
> The salary payable to a casual employee will be no higher than the salary at Level 8 in clause 14.1 unless the employee is engaged for more than five consecutive days. In the latter case the salary will be the appropriate salary for the classification as specified in clause 13—Classifications, calculated in accordance with the table below:
>
> **Full day** Weekly rate calculated in accordance with clause 14.2 divided by 5 plus 25%
>
> **Half day** Weekly rate calculated in accordance with clause 14.2 divided by 10 plus 25%
>
> Provided that a casual employee will be paid for a minimum of half a day; where a day is the usual required attendance time for an employee at that school and a half day is half the usual required attendance time.'

[521] The finalised Teachers Award expresses the casual cap slightly differently, removing the phrase 'unless the employee is engaged for more than five consecutive days' and replacing it with 'where the employee is engaged for less than five consecutive days':

> **'14.5 Casual employee**
>
> **(a)** The salary payable to a casual employee will be:
>
> **(i)** no higher than the salary at Level 8 in clause 14.1 where the employee is engaged for less than five consecutive days; or
>
> **(ii)** where the employee is engaged for five or more consecutive days the salary will be the appropriate salary for the classification as specified in clause 13—Classifications,

[445] AIS submission, 12 June 2009 at paras 43-44.

calculated in accordance with the table below…'

[522] As we have mentioned in the context of our consideration of the UWU's higher duties claim in the Children's Services Award, a necessary element of the statutory requirement for 'fair minimum wages' is that the level of wages paid to award-reliant employees bears a proper relationship to the value of the work performed by these employees. In relation to the 'cap' in clause 14.5(a)(i) of the Teachers Award it appears that the provision is the outcome of an agreement between the employers and the IEU. The parties had also agreed that the 'cap' reflects the fact that the full range of duties are not performed by casual employees who are engaged for less than five consecutive days. In these circumstances, and in the absence of any application to remove the 'cap' we do not propose to take this issue any further. We return to this issue shortly.

[523] As to the balance of clause 14.5 of the Teachers Award, we agree with the ECEC Employers' characterisation of the clause, it is complex and, in our view, unnecessarily so. But we are not persuaded that the deficiencies in the clause are satisfactorily addressed in the IEU's proposed variation. Indeed the proposed variation adds to the complexity of the current term. For example, at clause 14.5(b)(ii) the IEU proposes the following additional words:

> ' … where a day is the usual required attendance time for an employee at that service and a quarter day is half the usual required attendance time at that service, and the employee is only required to attend for up to a quarter day.'[446]

[524] It is far from clear how a 'quarter day' can be 'half the usual required attendance time' in circumstances where 'a day is the usual required attendance time.'

[525] Modern award terms dealing with casual employees commonly provide for the applicable rate of pay and a minimum engagement period. The rate of pay is usually expressed as the appropriate minimum classification rate plus a casual 'loading' of 25 per cent. Casual employees are paid for all time worked, usually subject to a minimum engagement period.

[526] The rationale for minimum engagement provisions in modern awards was discussed in the 4 yearly review of modern awards – Award stage – Group 4 – *Aged Care Award 2010* decision (the *Aged Care Decision*).[447]

[527] In that decision the Full Bench observed that the question of minimum engagement terms did not receive any systematic consideration during the award modernisation process which led to the current modern awards and largely preserved the predominant provisions concerning minimum engagements contained in pre-reform awards.[448] As explained by the Full Bench in *Re Victorian Employers' Chamber of Commerce and Industry*:[449]

> 'The Award Modernisation Full Bench of the Australian Industrial Relations Commission (AIRC) did not address the question of minimum engagements in any of its decisions and statements made in connection with the award modernisation process. This is because minimum

[446] IEU submission, 15 March 2019 at para 25.

[447] [2019] FWCFB 5078.

[448] See [2017] FWCFB 3541 at [402].

[449] [2012] FWAFB 6913 at [12].

> engagements did not emerge as a significant issue during that process. Minimum periods of engagement have been a common feature of State and Federal awards for a very long period. The rationale for minimum periods of engagement is one of protecting employees from unfair prejudice or exploitation. Given the time and monetary cost typically involved in an employee getting to and from work, it has long been recognised that employees, especially casual employees, can be significantly prejudiced if a shift is truncated by the employer on short notice (as would otherwise be lawful in a typical casual engagement) or the employee can be pressured into accepting unviable short shifts in order to retain access to longer shifts. The inclusion of a minimum engagement period in a modern award invariably reflected the fact that such provisions were to be found in a sufficient proportion of the pre-reform awards and NAPSAs that are operated within the coverage of the modern award.' (emphasis added)

[528] Similar observations were made by the Full Bench in the *Metals Casual Decision*:[450]

> 'the minimum income from a casual engagement determines whether or not people who rely on social security or who have children will accept the job. Travel costs, child care expenses erode savagely any earnings. Any reduction in the expected length of a daily engagement has a severe impact on an already disadvantaged employee, and most heavily so for intermittent casual workers. The difficulties in balancing the requirements of the social welfare Newstart program with an offer of casual work are often too great to make the job worth the extra trouble.'

[529] The Full Bench in the *Casuals and Part-time Employment Decision*,[451] observed that the rationale for minimum engagement periods in modern awards was:

> 'to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134.'[452]

[530] The Aged Care Decision noted[453] that the short point to be extracted from the above decisions is that minimum periods of engagement protect employees from exploitation by ensuring that they receive a minimum payment for each attendance at their workplace in order to justify the cost and inconvenience of each such attendance.

[531] It is our *provisional* view that clause 14.5 of the Teachers Award be varied to:

- to provide that casual employees are paid the appropriate minimum classification rate plus a 25 percent casual loading for all time worked; and
- provide minimum engagement periods, consistent with the current award term.

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[450] (2000) 110 IR 247 at para [126].

[451] [2017] FWCFB 3541.

[452] Ibid at [399].

[453] [2019] FWCFB 5078 at [186].

[532] We invite submissions in response to our *provisional* view in accordance with the timetable set out in Section 9 – Conclusion: Next Steps of this decision.

9. Conclusion: Next Steps

[533] The outcomes of each of the claims dealt with in this decision is summarised below.

9.1 The Common Claims

[534] We have dismissed the Ordinary Hours Claim and the Rostering Claim for the reasons set out in Sections 6.1 and 6.2, respectively.

[535] We propose to address two further issues in respect of rostering.

[536] We note that clause 10.4(a) – Part time employment, requires that ad hoc agreed changes in the days to be worked or in starting and/or finishing times must be made in writing. Similarly, clause 21.7(b) – Rostering, provides that any agreement to waive or shorten the 7 day notice period required to change an employee's rostered hours 'must be recorded in writing and form part of the time and wages records'. We acknowledge that the expressions 'made in writing' or 'recorded in writing' may give rise to practical problems and may not be reflected in current practice in the ECEC sector.

[537] We also note that clause 22.6(f) of the *Aged Care Award 2010* states:

> **'(f)** Rostering arrangements and changes to rosters may be communicated by telephone, direct contact, mail, email, facsimile or any electronic means of communication.'

[538] It is our *provisional* view that the variation of clauses 10.4(a) and 21.7(b) of the Children's Services Award in similar terms to clause 22.6(f) of the Aged Care Award is necessary to ensure that the award achieves the modern awards objective.

[539] The second issue concerns clauses 10.4(d)(iii), 21.7(b)(ii) and 21.7(b)(iii) of the Children's Services Award. These provisions deal with the exceptions to the requirement (absent agreement) to provide 7 days' notice of a changes in hours or roster.

[540] These provisions are to be redrafted in plain language with examples to assist those who are required to implement the provisions in practice. The two clauses should also be consistent. We note that there is no equivalent to clause 21.7(b)(iii) in clause 10.4.

[541] A conference will be convened shortly to provide interested parties with an opportunity to comment on both of these issues.

[542] In respect of the UWU's non-contact time claims, we have dismissed the UWU's claim to increase the prescribed non-contact time in clause 21.5, for the reasons set out in Section 6.3.1.

[543] We have decided to provide Educational Leaders with an entitlement to an additional 2 hours non-contact time per week, for the reasons set out in Section 6.3.2. The UWU and the ECEC Employers are directed to confer as to the form of the variation determination to give effect to our decision and to submit a draft variation determination within 7 days.

9.2 Children's Services Award

[544] We have rejected the Training Allowance and Laundry Allowance claims. Our rejection of the Training Allowance claim is not on the basis of a lack of intrinsic merit; but, rather, that the evidence before us is insufficient to warrant an award variation.

[545] As to the Clothing Allowance Claim, we propose to vary clause 15.2(c) as set out below:

> 'Where an employee is required to wear protective clothing or equipment such as hats and sunscreen lotion, goggles, aprons or gloves, the employer will either supply such clothing or equipment or reimburse the employee for the cost of their purchase. Reimbursement will be limited to reasonable costs incurred.'

[546] The UWU and the ECEC Employers are to confer on the terms of such a variation and submit a draft variation determination within seven days.

[547] We have granted the higher duties allowance claim and will vary clause 18.1 by deleting clause 18.1(e).

[548] The UWU's Annual Leave Claim will remain with the Plain Language Full Bench.

9.3 Teachers Award

[549] We dismiss the IEU's Coverage Claim.

[550] In respect of the IEU's Minimum Engagement Claim it is our *provisional* view that clause 14.5 of the Teachers Award be varied to:

- to provide that casual employees are paid the appropriate minimum classification rate plus a 25 percent casual loading for all time worked; and

- provide minimum engagement periods, consistent with the current award term.

[551] We invite submissions in response to our *provisional* view. Submissions are to be filed by **4pm Tuesday, 16 June 2020**. Submissions in reply are to be filed by **4pm Tuesday, 23 June 2020**.

[552] Any party wishing to request an oral hearing is to advise chambers.ross.j@fwc.gov.au in writing by **4pm Wednesday, 24 June 2020**. Absent any such request, the matter will be determined on the papers.

[553] All submissions are to be sent to amod@fwc.gov.au in both word and PDF formats.

9.4 Other matters

[554] During the course of the proceedings we invited the parties to comment on whether the claims for an Educational Leader Allowance overlap with the proceedings in C2013/6333 and AM2018/9. Those proceedings are before a differently constituted Full Bench which has reserved its decision.

[555] We do not propose to determine two of the claims before us, at this time. These claims are the claims in respect of an **Educational Leader Allowance** and a **Responsible Person Allowance**. These claims will be listed for Mention after the Full Bench in C2013/333 and AM2018/9 has handed down its decision.

[556] There is one final matter we wish to raise, on our own initiative.

[557] During the course of the proceedings a number of witnesses commented on the difficulty associated with referring to two awards. In Ms Paton's statement she says:

> 'Despite a long history in the child care industry, I find the Awards difficult to interpret and apply because they are not straightforward or written in plain English. I also do not think the Awards work together or consider all the other legislation that applies to the ECEC sector.'[454]

[558] Further, Ms Viknarasah says:

> 'I often find that the Awards are not simple or easy to understand. I find it confusing and difficult to try to adhere with all the requirements placed on me by the Awards as well as keeping up with the legislation and regulations which I will mention below. I also find it inefficient that every centre has to read and understand two Awards, even though Teachers could easily be covered under the Children's Services Award.'[455]

[559] We see no good reason why the operator of an ECEC centre should have to refer to two awards in order to determine the terms and conditions applicable to the employees at their centre. It is our *provisional* view that the relevant part of the Teachers Award be transferred to the Children's Services Award.

[560] We invite submissions in response to our *provisional* view. Submissions are to be filed by **4pm Tuesday, 16 June 2020**. Submissions in reply are to be filed by **4pm Tuesday, 23 June 2020**.

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[454] Exhibit 21 at para [79].

[455] Exhibit 13 at para [38].

[561] Any party wishing to request an oral hearing is to advise chambers.ross.j@fwc.gov.au in writing by **4pm Wednesday, 24 June 2020**. Absent any such request, the matter will be determined on the papers.

[562] All submissions are to be sent to amod@fwc.gov.au in both word and PDF formats.

PRESIDENT

Appearances:

L. Saunders of Counsel for IEU

A. Dowdle for IEU

C. Mathers for IEU

M. Wright for IEU

S. Bull for UWU

N. Dabarera for UWU

J. Arndt for ABI

S. Whish for ABI

N. Shaw for AFEI

S. Bahas for AFEI

I. Arrabalde

E. Arrabalde

Hearing details:

Sydney
2019
6, 7, 8 and 9 May 2019

Final written submissions

I and E Arrabalde, 20 August 2019

ECEC Employers, 19 August 2019

IEU, 19 July 2019

UWU, 19 July 2019

AFEI, 17 July 2019

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ATTACHMENT 1 – submissions filed

Party/witness	Submissions
Submissions and witness evidence in response to the Directions issued on 11 December 2019	
UWU	Submission – 15 March 2019 Submission in Reply – 12 April 2019 and 29 April 2019 Submission – findings sought dated 29 May 2019 Submission to Background Document, 9 July 2019 Submission to Background Document 2, 19 July 2019
IEU	Submission – 15 March 2019 Submission in Reply – 15 April 2019 and 29 April 2019 Submission – findings sought dated 29 May 2019 Submission to Background Document, 10 July 2019 Submission to Background Document 2, 19 July 2019 IEU Correspondence, 13 September 2019 (post 9 August 2019 hearing) Email in response to Note filed by ACA, ABI and NSWBC - 13 September 2019
I and E Arrabalde	Submission – 15 March 2019 Submission in Reply – 26 April 2019 Submission – findings sought dated 29 May 2019 Submission to Background Document, 5 July 2019 Submission to Background Document 2, 19 July 2019

Party/witness	Submissions
	Submission, 20 August 2019 (post 9 August 2019 hearing) Submission in response to Note filed by ACA, ABI and NSWBC – 20 August 2019
ACA, ABI and NSW BC	Submission – 15 March 2019 Submission in Reply – 16 April 2019 and 29 April 2019 Submission – findings sought dated 29 May 2019 Submission to Background Document, 10 July 2019 Submission to Background Document 2, 19 July 2019 Further Submissions, 16 August 2019 (post 9 August 2019 hearing) Note following closing submissions – 16 August 2019
Australian Children's Education and Care Quality Authority	Submission – 15 March 2019
AFEI	Submission in Reply – 17 April 2019 Reply Submission – findings sought dated 2 June 2019 Submission to Background Document, 10 July 2019 Submission to Background Document 2, 17 July 2019

Attachment 2 – witness evidence 6 – 9 May 2019

Hearing Date	Witness	Party	PN Reference
Monday 6 May 2019 Transcript of Proceedings	Bronwen Faye Hennessy	UWU	186-358
	Pixie Bea	UWU	365-495
	Marianne Fenech	UWU	499-686
	Alicia Anne Wade	UWU	705-964
	Karthika Viknarasah	ABI & NSWBC	971-1381
	Elizabeth Jane Arrabalde	I & E Arrabalde	1390-1424
Tuesday 7 May 2019 Transcript of Proceedings	Preston Tori Warner	UWU	1455-1542
	Jae Dean Fraser	ABI & NSWBC	1553-2028
	Katy Louise Paton	ABI & NSWBC	2042-2401
	Pamela Avril Maclean	ABI & NSWBC	2434-2625
	Ann Marie Chemello	ABI & NSWBC	2641-2849
	Kristen Carol McPhail	ABI & NSWBC	2863-3135
Wednesday 9 May 2019 Transcript of Proceedings	Lindy Jane Farrant	IEU	3210-3372
	Kylie Ann Brannelly	ABI & NSWBC	3401-3522
	Sarah Elizabeth Tullberg	ABI & NSWBC	3527-3570
	Julie Anne Frend	IEU	3767-3874
	Kerry Joseph Mahony	ABI & NSWBC	3893-4042
Thursday 10 May 2019 Transcript of Proceedings	Nicole Louise Llewellyn	ABI & NSWBC	4081-4388
	Ana Mravunac	IEU	4394-4533
	Alexandra Hands	ABI & NSWBC	4540-4836

Attachment 3 – Exhibits tendered on 6 – 9 May 2019

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TN REFERENCE
Exhibit 1	6 May 2019	UWU	ACECQA – Guide to the National Quality Framework, last updated October 2018 (filed 15 March 2019)	123
Exhibit 2	6 May 2019	UWU	ACECQA – National Quality Standard: Information Sheet, The role of educational leader, April 2018 (filed 15 March 2019)	167
Exhibit 3	6 May 2019	UWU	ACECQA – National Quality Standard: Information Sheet, Responsible person requirements for approved providers from 1 Oct 2017, 30 August 2017 (filed 15 March 2019)	171
Exhibit 4	6 May 2019	UWU	Department of Education and Training (for COAG), Belonging, Being and Becoming The Early Years Learning Framework for Australia (filed 15 March 2019)	175
Exhibit 5	6 May 2019	UWU	ACECQA – The Educational Leader Resource (filed 29 April 2019)	178
Exhibit 6	6 May 2019	UWU	Statement of Ms Bronwen Hennessy – dated 11 March 2019	199

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TN REFERENCE
Exhibit 7	6 May 2019	UWU	Supplementary Statement of Ms Bronwen Hennessy – dated 10 April 2019	199
Exhibit 8	6 May 2019	UWU	Statement of Ms Pixie Bea – dated 4 March 2019	397
Exhibit 9	6 May 2019	UWU	Supplementary Statement of Ms Pixie Bea – dated 10 April 2019	398
Exhibit 10	6 May 2019	UWU	Statement of Dr Marianne Fenech – dated 14 March 2019	505
Exhibit 11	6 May 2019	UWU	Statement of Ms Alicia Ann Wade – dated 8 March 2019	715
Exhibit 12	6 May 2019	UWU	Supplementary Statement of Ms Alicia Ann Wade – dated 12 April 2019	715
Exhibit 13	6 May 2019	ABI & NSWBC	Statement of Ms Karthika Viknarasah – dated 11 April 2019	980
Exhibit 14	6 May 2019	The Individuals	Statement/Submissions of Elizabeth Arrabalde – dated 14 March 2019	1401
Exhibit 15	6 May 2019	The Individuals	Second Statement/Submissions of Elizabeth Arrabalde – dated 26 April 2019	1408
Exhibit 16	7 May 2019	IEU	Roster	1436
Exhibit 17	7 May 2019	UWU	Statement of Ms Preston Tori Warner – United Voice dated 8 March 2019	1455
Exhibit 18	7 May 2019	ABI & NSWBC	Statement of Mr Jae Fraser – dated 15 April 2019	1567

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TN REFERENCE
Exhibit 19	7 May 2019	IEU	Seek job advertisement dated 1 April 2019	1648
Exhibit 20	7 May 2019	IEU	Position Description	1825
Exhibit 21	7 May 2019	ABI & NSWBC	Statement of Ms Katy Paton – dated 14 March 2019	2049
Exhibit 22	7 May 2019	IEU	Employment contract	2135
Exhibit 23	7 May 2019	IEU	Employment contract	2157
Exhibit 24	7 May 2019	UWU	ACECQA National Quality Standard Assessment and Rating Report	2389
Exhibit 25	7 May 2019	ABI & NSWBC	Statement of Ms Pamela Avril Maclean – dated 15 April 2019	2444
Exhibit 26	7 May 2019	IEU	Roster/Signing sheet	2529
Exhibit 27	7 May 2019	ABI & NSWBC	Statement of Ms Ann Marie Chemello – dated 1 March 2019	2657
Exhibit 28	7 May 2019	ABI & NSWBC	Statement of Ms Kristen Carol McPhail – dated 12 April 2019	2879
Exhibit 29	7 May 2019	IEU	Screenshot of text message chain	2973
Exhibit 30	7 May 2019	UWU	ACECQA National Quality Standard Assessment and Rating Report	3134
Exhibit 31	8 May 2019	IEU	Statement of Ms Lindy Jane Farrant – dated 14 March 2019	3221

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TN REFERENCE
Exhibit 32	8 May 2019	IEU	Statement of Ms Lisa James – (*Statement was tendered but witness did not appear*) dated 15 March 2019	3379
Exhibit 33	8 May 2019	IEU	Statement in Reply of Ms Lisa James – (*Statement in Reply was tendered but witness did not appear*) dated 15 April 2019	3381
Exhibit 34	8 May 2019	ABI & NSWBC	Statement of Ms Kylie Brannelly – dated 15 April 2019	3415
Exhibit 35	8 May 2019	ABI & NSWBC	Statement of Ms Sarah Tullberg – dated 9 April 2019	3537
Exhibit 36	8 May 2019	IEU	Survey results from Knox and Wallaby Childcare Centres	3583
Exhibit 37	8 May 2019	IEU	Statement of Ms Julie Frend –dated 15 March 2019	3777
Exhibit 38	8 May 2019	ABI & NSWBC	Statement of Mr Kerry Joseph Mahoney – dated 11 April 2019	3900
Exhibit 39	9 May 2019	ABI & NSWBC	Statement of Ms Nicole Llewellyn –dated 9 April 2019	4107
Exhibit 40	9 May 2019	IEU	Financial report	4235
Exhibit 41	9 May 2019	IEU	Statement of Ms Ana Mravunac – dated 15 March 2019	4401

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TN REFERENCE
Exhibit 42	9 May 2019	IEU	Statement in Reply of Ms Ana Mravunac – dated 29 April 2019	4426
Exhibit 43	9 May 2019	ABI & NSWBC	Statement of Ms Alexandra Hands – dated 12 March 2019	4548

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Tab	Document	Date
Exhibits and documents handed up		
1.	MFI-1: Produced by IEU – Education and Care Services National Regulations 2011-653	Handed up 9 August 2019
2.	MFI-2: Produced by IEU – Education and Care Services National Regulations – clauses 150, 177 and 183	Handed up 9 August 2019
3.	Exhibit 44: Produced by IEU – Overtime Cost Savings – 11am – 7:30pm shift	Handed up 9 August 2019
4.	*Motor Trades' Association of New South Wales and others* – Reason for Decision [2012] FWA 9731 at [136] and [143]	Handed up 9 August 2019