
Fair Work Commission: 4 yearly Review of modern awards

RESPONSE TO FWC BACKGROUND DOCUMENT 2

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/18 &
AM2018/20)**

**CHILDREN'S SERVICES AWARD 2010
AND EDUCATIONAL SERVICES (TEACHERS) AWARD 2010 -
SUBSTANTIVE ISSUES**

ACA, ABI, NSWBC, NOSHSA and JAG

19 JULY 2019

BACKGROUND

1. This response to the Fair Work Commission Background Paper is made in accordance with the Statement of the Fair Work Commission issued on 5 July 2019¹ on behalf of the:
 - (a) Australian Childcare Alliance Inc. (ACA);²
 - (b) Australian Business Industrial (ABI);
 - (c) New South Wales Business Chamber (NSWBC);
 - (d) National Outside School Hours Care Services (NOSHSA); and
 - (e) Junior Adventure Group (JAG)

(ACA/ABI)

2. ACA/ABI has identified that out of the 22 questions in total, 11 relate either directly or indirectly to ACA/ABI.

Question One

“7. There is a degree of confusion as to the legal effect and status of the elements of National Quality Framework (NQF) amongst the participants in the ECEC sector, including whether responsibilities arising from the NQF also arise from other sources. Some examples from the evidence in the proceedings include:

(a) Evidence of Dr Fenech:

(i) In respect of Responsible Persons, (TN at [630]-[639]), Dr Fenech stated that s168 of the National Law requires Responsible Persons to oversee educational programs. Upon review of that section, this appears to be incorrect. As was put to Dr Fenech, being in day-to-day charge of a service (i.e. a Responsible Person who is not an Approved Provider or Nominated Supervisor) does not place any additional legal responsibilities on a person under the National Law (see p 408 of Exhibit 1 – guide to the National Quality Framework and Dr Fenech’s own evidence TN at [624]).”

The ECEC Employers are invited to expand on the import of the point made at [7](a)(ii) above.

3. The significance of the point made at [7](a)(ii) is two-fold.
4. Firstly, the point is raised to substantiate the general finding identified in the text of [7], that there is a degree of confusion as to the legal effect and status of the elements of NQF amongst the participants in the ECEC sector, including whether responsibilities arising from the NQF also arise from other sources. The fact that Dr Fenech, an academic who is relied upon by UV as a expert witness and someone who has a research background in the area appears to be in error as to the responsibilities of a person in day-to-day charge of a service demonstrates this confusion.
5. Dr Fenech’s Report at page 2 identifies that ‘[t]he responsible person is required to oversee educational programs.’ When asked at PN630 where that obligation comes from, Dr Fenech identified Section 168 of the National Law and “that’s in respect to the nominated supervisor. So my comment on page 2 is when, in the absence of the nominated supervisor,

¹ [2019] FWCFB 4671

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

the responsible person is therefore responsible for ensuring that the educational programs are developed and delivered in accordance with the national approved framework.”

6. Dr Fenech’s evidence above and at PN638 was that s 168 of the National Law had the effect that in the absence of a Nominated Supervisor, the person in day to day charge of a centre essentially inherited all of the obligations of the nominated supervisor, including the responsibility to oversee educational programs.
7. Section 168 of the National Law states:

168 Offence relating to required programs

(1) The approved provider of an education and care service must ensure that a program is delivered to all children being educated and cared for by the service that—

(a) is based on an approved learning framework; and

(b) is delivered in a manner that accords with the approved learning framework; and

(c) is based on the developmental needs, interests and experiences of each child; and

(d) is designed to take into account the individual differences of each child. Penalty: \$4000, in the case of an individual.

\$20 000, in any other case.

(2) A nominated supervisor of an education and care service must ensure that a program is delivered to all children being educated and cared for by the service that—

(a) is based on an approved learning framework; and

(b) is delivered in a manner that accords with the approved learning framework; and

(c) is based on the developmental needs, interests and experiences of each child; and

(d) is designed to take into account the individual differences of each child.

Penalty: \$4000.

8. On the face of s 168, Dr Fenech’s evidence is simply not correct that responsibility for educational programs falls to Responsible Persons.
9. Further, and with respect, reviewing Dr Fenech’s evidence, the Full Bench should not be inadvertently led to a conclusion that other obligations arising for a Nominated Supervisor (other than overseeing educational programs) somehow automatically attach to the position of Responsible Person in the absence of the Nominated Supervisor. To the extent that Dr Fenech’s evidence suggests this, it should not be accepted.
10. It is not in contest that status as an educator in day to day charge (i.e. a Responsible Person who is not Nominated Supervisor or Approved Provider) does not bring with it any additional legal responsibilities (see PN624). This is significant in understanding what obligations fall to the Responsible Person (when that role is undertaken by an educator in day to day charge).

In the absence of any relevant law or regulation conferring obligations upon a Responsible Person (person in day to day charge), the Full Bench should not accept that Responsible Persons (person in day to day charge) inherit the obligations and responsibilities of a Nominated Supervisor.

11. The second point of significance relates specifically to whether the introduction of the NQF created further responsibilities for Responsible Persons.
12. It was put to Dr Fenech at PN651 and PN653 that the obligations Dr Fenech identified as being relevant to a Responsible Person (*"entry and exit from the premises, provision of food and beverages, administration of medication prescription/non prescription drugs/alcohol, children's sleep and rest, excursion, staffing... oversee educational programs and the supervision of safety of children"*) all pre-existed the introduction of the National Quality Framework.
13. Dr Fenech's response was that the *"The educational programs is definitely different since the introduction of the National Quality Framework. That under the law and the national regulations, it talks about the responsible person as the nominated supervisor ensuring that the programs are developed and delivered in accordance with an approved learning framework"*.
14. Again, given that oversight of educational programs does not fall to the Responsible Person (it instead is the responsibility of the Approved Provider and Nominated Supervisor as per s 168) Dr Fenech's evidence should in fact lend support to the proposition that all of the responsibilities listed by Dr Fenech as being relevant to a Responsible Person pre-existed the introduction of the NQF.
15. For abundant clarity, ACA/ABI maintain the only change brought about by the NQF was the term 'Responsible Person'. As described by Ms Tullberg in Exhibit 35³, the obligation for an Approved Provider (then called a Licensee) to designate a person to be a Responsible Person and the requirement to make sure that person was 'present on the premises' pre-date the NQF in Victoria by at least 16 years where the term 'Nominated person' was used instead of Responsible Person.⁴

Question Three

Other interested parties are invited to comment on the findings sought by IEU (at [5] above) and UV (at [6] above).

16. In respect of the IEU's findings at [5], ACA/ABI contest the following findings.
Finding 2.(b) - that the overwhelming majority of teachers and educators employed in ECEC services are "low paid".
17. ACA/ABI refer to their submissions dated 10 July 2019, paragraph 5 on this point with respect to the Children's Services Award 2010 and non-teacher educators.
18. With respect to teachers paid in accordance with the Educational Services (Teachers) Award 2010, ACA/ABI submit that the Penalty Rates decision held that the *"threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a)." When looking at ABS statistics, the 2/3 median full time earnings from the Characteristics of Employment Survey⁵ is \$886.67 and*

³ Exhibit 35 - Statement of Sarah Tullberg paragraphs [90] - [94]

⁴ s 30 Children's Services Act 1996 (VIC)

⁵ in conjunction with the analysis conducted by the Full Bench (in Background Document 1) of employees in the Children's Services Award relevant are the ANZSIC divisions P: Education and Training and Division Q: Health care and social assistance

Survey of Employee Earnings and Hours is \$973.33 per week. Under the Educational Services (Teachers) Award 2010 a level 3 (Graduate) is paid \$1,045.14⁶ per week which cannot be considered to be low paid when compared against the median full time earnings.

Finding 4(c) Difficulties in recruiting and retaining suitable staff.... are in part caused by poor wages and conditions in the sector.

19. ACA/ABI disputes the sweeping proposition that the ECEC sector has 'poor wages and conditions'.
20. With respect to recruitment and retention, this statement also oversimplifies the complexities of an industry where ratio requirements (for degree qualified teachers and Certificate III or Diploma qualified educators) have increased the number of qualified staff required in the sector and that those regulatory ratio requirements have contributed significantly to the difficulty recruiting and retaining suitably qualified staff as demand outstripped supply since the regulatory changes. Furthermore, in direct contrast to the IEU's position the Productivity Commission Report 2015 Part 2, page 325⁷ suggests that:
 - a. there is not a retention issue - the Productivity Commission Report (2015) stated that teachers and directors spent more time in the sector than educators. The average tenure of educators was 7 years and for teachers and directors it was 11 years; and
 - b. to the extent difficulties in recruitment and retention are caused in part by 'poor wages and conditions' - the 2013 National ECEC workforce census staff survey found that the main reasons why staff thought they may finish their current job in the next 12 months also included:
 - i. to seek work outside the sector (30.2 per cent);
 - ii. return to study, travel or family reasons (22.4 per cent); and
 - iii. the job was stressful (20.5 per cent).⁸

21. Furthermore, we submit that the wages of degree qualified teachers and diploma qualified educators are not 'poor' as they are not considered 'low paid' when compared to other professions (see submissions at paragraphs 17 and 18 above).

Finding 4.(d) Difficulties in recruiting and retaining suitable staff ... will likely be exacerbated by further reductions in conditions.

22. ACA/ABI refer to the above submission.

Finding 5

23. ACA/ABI contest the entirety of this finding. There is no evidentiary basis to suggest that such findings apply to 'many' employees or further that such a finding could somehow be isolated to the 'for profit' ECEC industry.

Finding 7

24. This finding should be qualified on the basis that, again, there does not appear to be a sufficient basis for isolating such findings to the 'for profit' ECEC industry.
25. With respect to the UV's findings at [6], ACA/ABI contest both findings.

⁶ LDC 4% added

⁷ See Productivity Commission Report cited in ACA Submission dated 15 March 2019 and Exhibit 38 Annexure KM-2

⁸ See figure 8.8 (Productivity Commission Report 2015)

26. ACA/ABI contest that the NQF has made a ‘significant’ change in the nature of the work within the sector and that the Awards do not reflect the NQF. In the submission of ACA/ABI, the NQF simply codified and consolidated various states’ legislation. Although terms such as ‘Responsible Person’ were created in the NQF, this does not mean that the position was new. Mr Fraser gave evidence that “before the NQF, there was always someone in charge of the centre”⁹ and that the “NQF did not create this role ... it merely standardised a concept that already existing and legislated that there would be a penalty, to the Approved Provider if they did not have a responsible person on-site”.¹⁰

Question Five

Which of the findings sought by UV (at [9] above) and IEU (at [10] above) are contested?

27. ACA/ABI contest all of the findings sought by UV at [9].
28. ACA/ABI do not contest the following findings of the IEU at [10]: 3, 4, 5(a)-(c), 6, 7(a), 8(a)-(b).

Question Seven

Which of the findings sought by UV and IEU (at [12] and [13] above) are contested?

29. With respect to the UV findings, ACA/ABI do not contest finding 4 at [12].
30. With respect to the UV findings which are contested:
31. Finding 1 is uncontested save for the first sentence.
32. In respect of Finding 2, it is correct that a number of employer witnesses during the hearing gave evidence which did not suggest (and in fact denied) that they sought a power to ‘force’ employees to vary their rosters at short notice.¹¹
33. In the submission of ACA/ABI, 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.
34. In the submission of ACA/ABI, reviewing the relevant evidence which UV states is relevant to Finding 2, it apparent that such evidence was provided on a general basis that, as an employer, such witnesses would not (or in some cases literally could not) force their employees to work varied shifts on short notice.
35. What was generally not covered in covered in cross-examination during these exchanges was the prospect that an employee’s absence would put the centre in breach of the law. The only witnesses who canvassed this situation (where, in the words of the relevant draft determination: “in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required is required to change an employee’s rostered hours” were:
- c. Ms Paton who when asked whether she wanted the ability to ‘demand’ employees come in to the workplace said:

MS SAUNDERS: You don't need to have that ability, do you?

⁹ Amended statement of Jae Fraser at [114]

¹⁰ Ibid

¹¹ Employers can, under the current award provisions, require an employee to vary their roster without 7 days notice albeit that such requirement brings with it an obligation to pay overtime.

MS PATON: I would love to have that ability, yes. I would like to clarify that what I said before was about the type of person I am. I should - I would always seek to request something of someone before demand it, as a human.

MS SAUNDERS: As an employer you want to be able to demand that that person comes in?

MS PATON: Yes.

MS SAUNDERS: Do you think that's fair as an employer?

Ms PATON: Yes I do.

MS SAUNDERS: But not as a person?

MS PATON: I personally would have a great relationship with my staff and if I rang someone and they couldn't do it I would ring the next one. I would respect that if they couldn't. But at the same time if I'm going to not legally be able to open my centre I would say 'You have to be there'.

d. Mr Fraser who advised he did not want his employees to have to agree to roster changes in circumstances where there was, *"a potential of being in breach of the regulations, then, no, we don't have an opportunity to wait for them to agree."*¹²

36. ACA/ABI's position with respect to the IEU's proposed findings at [13] are outlined below.
37. ACA/ABI do not contest the IEU findings in [13](1) that employers can and do maintain staffing ratios in various ways. ACA/ABI submits that the costs, difficulties and outcomes arising from these current practices warrant a change to the existing rostering provisions.
38. Firstly, to be highly rated by ACECQA, Area 4.1.2 of the NQS relates to "Staffing Arrangements" and services must ensure every effort is made for children to experience continuity of educators at a service. Therefore, if a service is using a lot of casual employees or agency staff, that can affect their rating which is a large deterrent.
39. Kristen McPhail gave evidence that continuity of care is incredibly important for the ECEC sector and that casual employment and the use of agencies is therefore not desirable. She stated in her statement that *"in order for children to part with their parents easily and have a sense of belonging to their environment, they need the continuity."*¹³ Ms McPhail stated that employing casuals is not *"the answer"*¹⁴ as it is important for casual employees to have child-specific knowledge. Ms McPhail states that she refuses to use agencies as she does not believe they can adequately care for the children in her service.
40. In Jae Fraser's statement, he stated that agency staff can cost as much as \$45-\$50 per hour which is approximately 3 times more than the award rates. Apart from the large cost on a service, Mr Fraser stated that agency staff also 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."*¹⁵
41. The IEU's findings at [13] (2), (3), (4), (5) are not contested.
42. With respect to the IEU's findings at [13] (6) and (7), we refer to our submissions at 32-35.

¹² PN1428

¹³ Kris McPhail Statement at [74]

¹⁴ Ibid at [72]

¹⁵ Jae Fraser Statement at [93]

Question Eight

Which of the findings sought by UV (at [15] above) and the Individuals (at [16] above) are contested?

43. With respect to the findings sought by UV, ACA/ABI submit as follows.
44. Findings 1, 3, 6, 7, 8(ii), 13 are uncontested.
45. With respect to the remaining proposed findings, which are contested, ACA/ABI submit as follows.
46. With respect to point 4, while it is conceded that a Responsible Person must be present at a centre at all times, ACA/ABI is unsure of the significance of identifying this as the 'defining characteristic' of the Responsible Person role. The nature of the ECEC industry means that almost all relevant work is performed at a centre and employees are not rostered to perform work anywhere else. In that sense, it could be said that the 'defining characteristic' of all ECEC roles is that work is required onsite.
47. With respect to point 5, UV seek a finding that the role of Responsible Person is not encompassed in the current Modern Awards and the contention that it is "*nonsensical in light of the role not being appurtenant to any classification.*" ACA/ABI respectfully disagrees.
48. As we have stated in our reply submission on 16 April 2019, two of the Employer witnesses stated that the duties of the Responsible Person existed well before the implementation of the NQF in 2012 and therefore would have been contemplated in the making of the Modern Awards.
49. Sarah Tullberg stated from a Victorian perspective: "*I know that the concept and duties of a 'Responsible Person' has existed in Victoria for decades and I believe it existed as early as the commencement of the Children's Services Act 1996 over twenty years ago.*"¹⁶
50. Additionally, Pam Maclean from Queensland stated "*the role of Responsible Person, as required by the National Quality Framework (NQF) is not a new concept despite not being explicitly mentioned in the Children's Services Award 2010 or Educational Services (Teachers) Award 2010. Speaking from my own experience, acting in such a role, I always knew that role as being called the 'early group leader' or 'late group leader'. These people were the ones to make operational decisions as required until the Director arrived at work. We were instructed about the choices we could make and who to contact in an emergency and it was regarded as part of our normal role. Rosters were devised using the team members who were qualified, experienced and capable to undertake such a role to make sure someone 'responsible' was always on-site.*"¹⁷
51. Additionally, ACA/ABI submit that the duties and responsibilities of the Responsible Person are captured in the Children's Services Award classification structure. Even though the exact words 'Responsible Person' do not appear in the award (as that term did not exist), there was always someone responsible for centre. Every duty or responsibility proposed by the parties can be captured in the classifications for Levels 4 - 6 in the Children's Services Award.
52. As stated in our reply submissions on 16 April 2019 examples of level 4 and level 5 being captured by the Responsible Person role is clear with the classifications.
53. For example, a Level 4 has in their classifications '*Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups, responsible to the*

¹⁶ Reply submissions at 4.6

¹⁷ Reply submissions at 4.7

Assistant Director/Director for the supervision of students on placement, responsible for ensuring a safe environment is maintained for both staff and children and responsible for ensuring that records are maintained accurately for each child in their care.'

54. A level 5 is 'Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues.'
55. In respect of point 8(i) ACA/ABI disagree that the proposed Responsible Person allowance would not impose any additional record keeping obligations. It was a point of contention during the hearing as to the meaning of 'staff record' in s 150 of the National Regulations.¹⁸ In contrast to the view of UV, ACA/ABI submit that 'staff record' in the National Regulations does not have the same meaning as 'employee record' or 'payslip' in the Fair Work Act 2009 (Cth). Further, ACA/ABI submit that there is no additional record that needs to be maintained in addition to displaying the names of staff in accordance with s150.¹⁹ The Employer evidence suggests that s150 is legally complied with by using an arrow²⁰ or laminated name tag²¹ that is stuck to a particular educator's picture at the front entrance of a service (which is moved throughout the day depending on who the Responsible Person is at any given time). There is no need keep a record of who the Responsible Person is on a roster (though some employers do this) or to maintain an hourly 'record' in the same way an employer would record overtime or personal leave.²² ACA/ABI submit that keeping such a record would be in addition to the 'staff record' obligations in s150.
56. In respect of points 9, 10, 11 and 16 it is not clear to ACA/ABI that the payment of an above award wage would necessarily disentitle an employee to an allowance award provision. Such a contention would presumably depend on the contractual arrangements entered into by the employer and the employee. ACA/ABI would welcome further explanation of this point by UV to ensure clarity as to the scope of its claim.
57. Points 14 and 15 are previously addressed in our submissions.
58. Points 17 is contested on the basis that it assumes that allowances would not be payable for those employees engaged on higher classifications.
59. In respect of the Individuals findings at [16], ACA/ABI submit as follows:
60. Points 2 and 5 are uncontested.
61. Point 1 is uncontested however for reasons previously submitted, the evidence disclosed that such responsibilities and duties either do not arise specifically from the designation as Responsible Person (arising instead from other designations under the NQF or the Awards), arise for all educators engaged in the service or are considerably qualified when applied to Responsible Persons (person in day to day charge).
62. Point 3 is not understood.
63. Point 4 is agreed however those designated as Responsible Person require skills and abilities to perform their roles independent from their designation as Responsible Person.
64. Point 6 is not contested save for the third sentence.

¹⁸ PN3031 - PN3061

¹⁹ PN3061

²⁰ PN1230 (Ms Viknarasah cross examination)

²¹ PN3032 (Kristen McPhail cross examination)

²² PN1870

65. Point 7 is not contested in so far that it is acknowledged that some employees currently designated as Responsible Persons are being paid above award rates. There is no evidence that state of affairs is seeking to 'reward' those employees for being so designated.
66. In respect of Point 8 ACA/ABI submit that an allowance every time someone is designated Responsible Person (throughout the day for 15 minutes to several hours) would be an additional record keeping obligation for employers that is not captured by s150 of the National Regulations.²³ Recording (and paying) such an allowance would be an additional administrative and payroll obligation that s150 does not currently require. It would also be more difficult than payment of other irregular payments like personal leave as suggested by Mr Fraser under cross examination.²⁴

Question Ten

Which of the findings sought by UV (at [19] above) and the Individuals (at [20] above) are contested?

67. ACA/ABI respectfully contest the findings sought by UV at [19].
68. Save for points 2, 5, 11 and 12, ACA/ABI respectfully contest the findings sought by the Individuals at [20].
69. In seeking their respective findings, the UV and Individuals have attempted overstate the educational leader role, suggesting that it is a concept created in 2012 and that it is an extensive role with a clear and voluminous list of duties.
70. The statements of Fraser, Viknarash and Brannelly provided evidence that the duties of an Educational Leader existed before the NQF. The creation of the NQF was to harmonise and codify the already existing roles into a new federal standard, not to create a brand new classification structure, roles and duties. In childcare services, there have always been educational programs and persons leading and coordinating the development of those programs. Similarly, there have always been Nominated Supervisors which were called Authorised Supervisors before the NQF but is substantially the same role.
71. The Viknarash statement states:

"The ECEC sector to my knowledge has always had an educational leader, even before the NQF as services still needed to be accredited and a person was still in charge of guiding that educational program. Annexed and marked 'KV-1' is an example of a 2005 NCAC Quality Practice Guide which shows that the role of educational leader needed to be performed under Quality Area 3 (Programming and Evaluation) and Quality Area 4 (Children's Experiences and Learning) in order to meet the qualities required of a centre. This clearly shows that there was a person fulfilling the role of "Educational Leader" well before the NQF and therefore this role was contemplated and given consideration in the making of the Modern Award created in 2009 by the Australian Industrial Relations Commission."

Question Twelve

Which of the findings sought by UV (at [24] above) are contested?

²³ See submission at paragraph [52] above.

²⁴ PN1870

72. Findings 1, 2, 4 and 5 at [24] are contested. Finding 3 is partially contested, with ACA/ABI submitting that an Educational Leader *may* require specific non-contact time in which to undertake their duties.
73. ACA/ABI's responses to findings 1, 2, 4 and 5 are contained in its response to the previous background paper.

Question Fourteen

Which of the findings sought by UV (at [28] above) are contested?

74. Findings 1 and 2 are uncontested. Findings 3 and 4 are contested.

Question Sixteen

Which of the findings sought by UV (at [32] above) are contested?

75. Findings 1 and 4 are contested. Findings 2 and 3 are uncontested.
76. Concerning the contested finding 1, ACA/ABI's submission in respect of Ms Bea's evidence is addressed in our response to Background Paper 1.
77. Concerning finding 4, ACA/ABI respectfully contest that the evidence filed is sufficient to suggest that there is a 'real' problem with uniform allowance and that this problem could be solved by the insertion of their proposed allowance clause.
78. As previously stated in ACA/ABI's reply submissions dated 16 April 2019, it does not make sense to pay employees an allowance to wash their uniforms where:
- (a) the employee is washing their uniform during work time (eg; at a cost to the employer) or the employee's uniform is washed by someone else at the centre (eg; another employee or Director); and
 - (b) the employer pays for electricity, water, detergent; and
 - (c) there is no cost to the employee.
79. The evidence has shown that employees had the ability to use the washing facilities at the employer's cost if they needed.²⁵

²⁵ Fraser Statement at [126]-[127]; McPhail Statement at [105]-[106]; Llewellyn Statement at [99]-[100]; Mahony Statement at [105]

Question Eighteen

Which of the findings sought by UV (at [36] above) are contested?

80. As previously stated in ACA/ABI's Reply Submissions dated 16 April 2019, there is no real contest in the evidence that sun hats, sunscreen should be provided and/or paid by the employer.²⁶ However, the two small issues that ACA/ABI took with the proposed allowance is that firstly it places no 'cap' on the cost of items purchased by employees, which could give rise to employers having to reimburse unreasonable expenses e.g. an expensive branded hat or sunscreen and secondly, 'sun protection' was a vague term that could again, lead to unreasonable expenses on the employer. On this basis, ACA/ABI agreed to the UV claim on the basis that the claim was amended to 'hats' and 'sunscreen lotion' only (and not the generic term "sun protection"); and those reimbursements be 'reasonable' and validated by receipts or otherwise.

Question Twenty

Which of the findings sought by IEU (at [44] above) are contested?

81. ACA/ABI contest the following findings sought by the IEU at [44]:

- a. 3. - ACA/ABI dispute that all teachers appointed as directors would carry out the tasks itemised by the IEU in this list. In particular ACA/ABI dispute the duties listed at (a), (b) and (c). The reality is some teacher/directors will perform a more managerial role as a director and others (smaller services) will likely switch between a teaching role (directly delivering the program) and managerial director duties. The duties of the employee depend on the nature of the role and the service.
- b. 5. - ACA/ABI disagree with the "usual" industry practice being to pay degree qualified teachers in accordance with the Teachers Award. ACA submits that its members either:
 - i. consider the duties in the two awards and chose the most appropriate (e.g. is the teacher directly teaching or a managerial director);
 - ii. consider whether the teacher has completed a degree that is "recognised" by the relevant licensing and accreditation authority; or
 - iii. choose the award which contains a higher wage rate.
- c. 7. - ACA/ABI agree that usually the Teachers Award wages are higher. However, there are occasions when the Director's wage under the Children's Services Award would be preferential to being paid as a Teacher Level 3, 4 or Level 5.

82. ACA/ABI otherwise do not contest the findings sought by the IEU.

²⁶ Employer Reply Submissions dated 16 April 2019 at 9.1.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

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19 July 2019



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