

## BEFORE THE FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

**Title of matter:** 4 yearly review of modern awards – *Award stage* — *Group 4 awards* – Substantive Issues

**Section:** s.156

**Matter Number:** AM2018/18 and AM2018/20

**Awards:** *Children's Services Award 2010* and *Educational Services (Teachers) Award 2010*

**Document:** Submissions of the Australian Federation of Employers and Industries (AFEI)

**Filed:** In response to the Fair Work Commission Background Paper issued 5 July 2019

---

**Lodged by:** Australian Federation of Employers and Industries

**Telephone:** (02) 9264 2000

**Address for** Australian Federation of Employers and Industries

**Facsimile:** (02) 9264 5699

**Service:** PO Box A233, Sydney South NSW 1235

**Email:** Nicola.shaw@afei.org.au

# Submissions in response to questions in Background Paper 2

## Introduction

1. On 5 July 2019 the Commission released Background Document 2 in matter AM2018/18 and AM2018/20, the 4-yearly review of the *Children's Services Award 2010* and *Educational Services (Teachers) Award 2010* ('the Background Document').
2. Background Document 2 does not purport to be a comprehensive discussion of the issues involved in the matter, and it does not represent the view of the Commission on any issue.<sup>1</sup> The background document relates to the findings sought by the parties in relation to witness evidence heard on 6, 7, 8 and 9 May 2019. It poses a number of questions for the parties concerning the findings sought by the parties.
3. The purpose of these submissions is to address certain questions in Background Document 2 directed to AFEI.
4. While AFEI does not otherwise comment on the content of the background document in these submissions, this should not be taken as an acceptance of any propositions in the background paper which do not relate to a question directed to AFEI.

## Responses to the Questions

### ***Q 10 Which of the findings sought by UV (at [19] above) and the Individuals (at [20] above) are contested?***

5. The proposition at the heart of the educational leader allowance claim is that the award does not take into account the responsibilities associated with being designated to lead the development and implementation of educational programs in the service. That proposition is contested by AFEI: in this regard, AFEI relies upon its submissions filed 2 June 2019 and its written responses filed 10 July 2019 to questions posed in the background document of 13 June 2019, most notably responses to questions 7, 8, 9 and 10. While, those responses can be taken in answer to question 10 of Background Document 2 of 5 July 2019, it will assist to take this opportunity to draw attention to particular aspects of AFEI's position.

---

<sup>1</sup> Background Document, Page 1

6. The allowance claim is said to be supported by the requirement of an approved service provider to designate an individual to lead the development and implementation of educational programs in the service. The requirement at Regulation 118 of the National Regulations is as follows:

*The approved provider of an education and care service must designate, in writing, a suitably qualified and experienced educator, co-ordinator or other individual as educational leader at the service to lead the development and implementation of educational programs in the service.<sup>2</sup>*

7. It is readily apparent that the regulation is concerned with 'educational programs'. In the context of the industry to which the award applies,<sup>3</sup> it would be an unremarkable experience for an employee to be engaged/involved with educational programs. In fact, this would likely explain the frequent reference to 'programs' within the indicative duties of classification levels 2 to 6.<sup>4</sup> In this regard:

- '*Assist in the implementation of the children's program under supervision*' is an indicative duty of Level 2.
- '*Assist in the preparation, implementation and evaluation of developmentally appropriate programs for individual children or groups*'; and '*Record observations of individual children or groups for program planning purposes for qualified staff*' are indicative duties of Level 3.
- '*Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups*' is an indicative duty of Level 4.
- '*Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs*' and '*Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training*' are indicative duties at Level 5.
- '*Supervise the implementation of developmentally appropriate programs for children*' is an indicative duties at Level 6.

8. It is relevant that each classification level expresses a degree of responsibility. Responsibility is more substantial at the higher end of the structure, especially in relation to supervision of the work of others. For instance, those at levels 4 to 6 can be expected to supervise work of lower level classifications. To illustrate, a Level 3 employee can be expected to *assist* in the implementation of developmentally appropriate programs, a Level 5 employee can be expected to *direct* employees in that implementation, and a Level 6 employee can be expected to *supervise* that implementation and have *overall* responsibility for management and administration.

---

<sup>2</sup> *Education and Care Services National Regulations*, Regulation 118

<sup>3</sup> *Children's Services Award 2010* MA000120 at cl.3.1 defines the industry as 'the industry of long day care, occasional care (including those occasional care services not licensed), nurseries, childcare centres, day care facilities, family based childcare, out-of-school hours care, vacation care, adjunct care, in-home care, kindergartens and preschools, mobile centres and early childhood intervention programs'.

<sup>4</sup> *Children's Services Award 2010* MA000120 at Schedule B – Classification Structure.

9. Regulation 118 expresses a leadership expectation. That is so because the individual is designated to *'lead'* the development and implementation of programs within the service. In the hierarchy of the classification structure, qualities of leadership are similarly expected from levels 4 to 6 — this is clear from the indicative duties associated with each of those levels.
10. Therefore, taking into account:
  - the leadership expectations of levels 4 to 6; and
  - the significance of development and implementation of educational programs in the context of indicative duties of the classification structure,  
—the inevitable conclusion is this: responsibility for leading the development and implementation of educational programs is a responsibility that is already known to the award and thus has been taken into account in the rates of pay, most notably pay rates for levels 4 to 6.

**Q. 12 Which of the findings sought by UV (at [24] above) are contested?**

11. The UV submission extracts at [24] expressly mention particular responsibilities being *'mentoring of other employees'*, *'leading critical reflection'*, *'undertaking research.'* Insofar as UV submits that these particular responsibilities are outcomes of being designated to lead the development and implementation of educational programs, then that submission is not contested by AFEI. However, to the extent that UV advances the proposition that these responsibilities are not taken into account in the classification structure, that proposition is contested by AFEI.
12. AFEI's position is that the classification structure responds adequately to these responsibilities and this is demonstrated in the terminology of the classification structure at levels 4 to 6. For instance, *'mentoring of other employees'* corresponds with these indicative duties at levels 4 to 6, or at least is incidental to these duties:
  - *Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs. (Level 5)*
  - *Supervise the implementation of developmentally appropriate programs for children. (Level 6)*
  - *Provide professional leadership and development to staff. (Level 6)*
13. Similarly, with regard to *'leading critical reflection'* and *'undertaking research'*, these are matters that should be seen sensibly as incidental or ancillary to the indicative duties of these classification levels and therefore are matters that have been taken into account in the award.

14. With respect to the non-contact time claim, it will assist to consider the sub-clause in its complete form.

**21.5 Non-contact time**

*(a) 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 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.*

*(b) Wherever possible non-contact time should be rostered in advance.*

**(AFEI underlining)**

15. Thus the sub-clause expresses a minimum entitlement. If it is shown that the minimum requirement is insufficient with respect to a particular service, a longer period might be accommodated as a result of employer/employee agreement. This strikes a fair balance between the interests of employer and employee. Further, the entitlement is a relatively significant period of time. In this regard, 2 hours represents just over 5% of weekly hours.<sup>5</sup> Therefore, in its current form, the clause 21.5 is both fair and relevant.

## Training allowance

**Q.14 Which of the findings sought by UV (at [28] above) are contested?**

16. AFEI agrees with the first proposition to the extent that it was the consensus in the evidence, but this cannot be relied on as evidence as to the whole industry. This is demonstrated by the fact that the evidence provided for was given by operators of long day care centres and out of school hours care providers only.
17. AFEI contests the proposition that employees in this sector are being required to undertake training by their employer without reimbursement. It is further contested that employees in this sector have to pay for required training themselves, or undertake that training on weekends or during periods of annual leave.
18. AFEI relies on its submission filed 16 April 2019 and 2 June 2019. As UV's evidence refers only to maintaining first aid and CPR qualifications, we submit the use of the word training is too broad.

---

<sup>5</sup> On assumption of full time employment at 38 ordinary hours per week i.e.  $2/38 = 0.0526315$ .

19. The evidence relied on by UV in seeking this variation is that of Ms Alicia Ann Wade<sup>6</sup> and Ms Warner. Ms Wade's position description attached to her statement<sup>7</sup> expressly states first aid and CPR certificates are critical qualifications required for performance of the role.<sup>8</sup> As outlined in our submissions dated 16 April 2019, where holding and maintaining a first aid certificate is a requirement of the role, the Modern Award should not require an employer to cover this cost. This is consistent with the explanatory memorandum.<sup>9</sup> No evidence has been provided where first aid and CPR training are not an inherent requirement of the role.
20. The fourth proposition put by UV is also contested. AFEI relies on its submissions made on 16 April 2019 and 2 June 2019.

## Laundry Allowance

### ***Q.16 Which of the findings sought by UV (at [32] above) are contested?***

21. The fourth proposition by UV is contest by AFEI and we rely on our submissions dated 16 April 2019 and 2 June 2019. No evidence was provided in the proceedings which could support an evidentiary finding that employees were neither paid the laundry allowance nor had laundry facilities available to them.
22. The insertion of the note would allow employees who do have access and use the laundry facilities to also be entitled to the allowance. The allowance is an expense related allowance, payable for the expense incurred by an employee. The variation sought is unnecessary and would not provide a fair and relevant minimum safety net of terms and conditions.
23. AFEI does not contest propositions 1, 2 and 3.

## Clothing allowance

### ***Q.18 Which of the findings sought by UV (at [36] above) are contested?***

24. The proposition is contested by AFEI. AFEI relies upon its submissions filed 2 June 2019 and its written responses filed 10 July 2019 to questions posed in the background document of 13 June 2019, most notably responses to question 30.

## Teachers Award—Coverage Claim

### ***Q.20 Which of the findings sought by IEU (at [44] above) are contested?***

25. AFEI disputes a number of proposition sought by the IEU on the basis that there is insufficient evidence to make the findings sought at 3, 4, 5 and 6. AFEI relies on its submissions dated 16 April 2019.
26. AFEI does not contest proposition of 1, 2, 3(c), 3(d).

---

<sup>6</sup> United Voice Factual findings Submission [98]-[101]

<sup>7</sup> Exhibit 11

<sup>8</sup> United Voice Factual findings Submission [97]

<sup>9</sup> Fair Work Bill (2008), Explanatory Memorandum, at [1292]