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**Fair Work Commission: 4 yearly Review of modern awards**

**NOTE FOLLOWING CLOSING SUBMISSIONS  
9 AUGUST 2019**

**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 and NSWBC**

**16 AUGUST 2019**

## **1. BACKGROUND**

- 1.1 This note is provided following the hearing of these proceedings on 9 August 2019.
- 1.2 During that hearing, closing submissions of the parties were delivered and the following issues were noted as requiring a short further submission by the ECEC employers:
- (a) confirming and identifying relevant evidence that went to the proposition that if a centre was about to breach ratio requirements a centre may call parents to collect children<sup>1</sup>;
  - (b) commenting on exhibit 44 tendered by the IEU on 9 August 2019; and
  - (c) commenting on the matters raised by Ms Arrabalde in respect of waivers during her closing submissions.

## **2. EVIDENCE FOR THE PROPOSITION THAT RATIOS CAN BE MANAGED THROUGH CALLING PARENTS TO TAKE CHILDREN HOME.**

- 2.1 Commencing at PN193 of the transcript, the ECEC employers submitted that a centre could mitigate the consequences of non-compliance with ratios by simply closing.
- 2.2 During an exchange with the President, it was put that there had been evidence heard in the proceedings which went to the proposition *“that at times if you were about to breach your ratio requirements you'd simply call parents and you ask the parents to come and pick up as many children as you need, to get back to compliance.”*<sup>2</sup>
- 2.3 The evidence for that proposition is found in the statements of:
- (a) Mr Mahony at [82]: *‘If no one is available, the next step is for the Centre Director and/or other qualified members of management to go on the floor to replace the absent employee. We do this because we must do everything to avoid breaching the ratio requirements, which means much of the vital daily administration and management that is required doesn’t get done because we’re focusing on meeting our ratio requirements. If we are unable to staff the Centres appropriately this might mean sending children home because the safety and care of the children is your primary consideration.’*
  - (b) Mr Fraser - [95] - *‘In a worst case scenario where you can’t get enough staff you would need to call parents ask them to come and pick up their children because you can’t meet your legally mandated ratio.’*
- 2.4 Obviously this evidence does not go to establish that this scenario actually occurred, but rather that it has been considered as a possible consequence of non-compliance.

## **3. COMMENTS ON EXHIBIT 44**

- 3.1 As stated by Ms Saunders, Exhibit 44 is a purely mathematical calculation.
- 3.2 Upon review, there does not appear to be any issue with that calculation.
- 3.3 By way of submission, review of these costings should (as contemplated by Ms Saunders) take into account that *at minimum* two staff members would need to be rostered on. The actual amount of employees required would depend on the number of children present. In

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<sup>1</sup> See Transcript at PN197-PN202

<sup>2</sup> PN197

the event that the ratios required more than two staff, the costs would need to be multiplied again.

- 3.4 The ECEC employers do not concede that the amounts disclosed on Exhibit 44 are insignificant.

**4. COMMENTS IN RESPECT OF SUBMISSIONS BY MS ARRABALDE IN RESPECT OF WAIVERS**

- 4.1 As noted on 9 August 2019, the closing submissions by Ms Arrabalde contained a number of assertions as to the existence of practices and conduct which can only be described as new evidence.

- 4.2 We respectfully submit that these statements during closing submissions should be afforded very little (most likely no) probative weight.

- 4.3 With respect to Ms Arrabalde's submissions as to waivers, we have been granted a further opportunity to comment on these submissions, with specific relevance to our Rostering Claim.

- 4.4 During her closing submissions, commencing at PN318, Ms Arrabalde asserted:

*At PN319 - Non-compliance in terms of ratios would not affect your quality rating*

- 4.5 This is incorrect. The National Quality Framework includes Element 4.1.1 which is the 'Organisation of educators across the service supports children's learning and development'.

- 4.6 The Guide to the National Quality Framework at p 209 states in the Assessment Guide for meeting Element 4.1.1:

*Assessors may observe how the organisation of educators throughout the day supports children's learning and development and ensures that educator-to-child ratios are maintained, including during administration and/or programming time.*

- 4.7 This element is also 'underpinned' by the relevant ratio laws included in the National Law and National Regulations. Failure to comply with ratios will affect satisfaction of this standard (as well as obviously being a breach of the National Law).

*At PN321 - In the event that your ratios are not compliant, you can apply for a waiver.*

- 4.8 This is not contested.

*At PN322 - A waiver is more paperwork, so what you have to do is log in to a system called... [NQAIT] system and you fill out a form, and the form basically says - you put the date, you put who you are and the nominated supervisor. You have to say what happened, why it happened, what you did to alleviate any risk and once you've submitted that form it gets assessed within a pretty long timeframe after the event, I think it's at least 28 days, or it is 28 days, and then once you've submitted the form you're compliant. So even if you are under ratios you can still be compliant if you submit the paperwork.*

- 4.9 It is not contested that waivers can be applied for. An approved provider may apply to a regulatory authority for a waiver of an element of the National Quality Standard and/or the National Regulations. The regulatory authority must notify the applicant of its decision within 60 calendar days after the application is made.

- 4.10 The process of waivers is in evidence before the Full Bench in the Guide to the National Quality Framework at Section 2 - Part 3.

- 4.11 What is seemingly not considered in the submission of Ms Arrabalde is the prospect that waivers can be refused. Waivers are subject to a decision making process from the regulator which is not guaranteed and it is entirely unacceptable and inconsistent with the objective of the National Law to simply 'rely' on an ex post facto waiver which may or may not be granted.
- 4.12 As noted on the ACECQA website: *'applying for a waiver should be a last resort; providers should explore other avenues before making an application.'*
- 4.13 It is also contested that it is acceptable for centres to work in breach of ratios, relying on the prospect granting of a waiver, having regard to:
- (a) the risk to children if an educator is forced to work in an environment that is in breach of ratio (including operation with a sole educator);
  - (b) the risk to children should the service operate with a sole educator and either the educator or child sustain a sudden injury or illness;
  - (c) the risk of civil penalties should an incident occur whilst the service knowingly operated the service in breach of ratio requirements;
  - (d) the impact on liability through insurance cover should a serious incident occur whilst a provider knowingly operated in breach of the prescribed laws (ordinarily this would void insurance coverage); and
  - (e) the impact on the culture and work environment for educators should this be a service provider directive.

*At PN324 - Working in early childhood is quite interesting because the only way that a regulatory authority would find out that you're not compliant is if you tell them.*

- 4.14 This is incorrect. Complaints, reports and enquiries to the relevant regulators can and are made by educators and parents. Audits of relevant records are also a routine part of the assessment process.

*At PN331- [If you were below the ratios on a specific day practically], ...what you would do is you say that you were under the minimum staffing requirements for this amount of time but it wasn't such a bad thing because we had staff who were qualified and staff that are experienced and we changed the way that we might have combined the rooms so that we do have capable staff looking after the children during that time, and you just have to list all the reasons how you mitigated the risk and also just say that there was no risk to the children at any time. The regulatory authority, they send you a receipt for a waiver. So you can apply for waivers for all sorts of reasons but they send you a receipt but you probably will never hear from them again. It's just a procedural thing, it's paperwork. You put it through and it has no impact on the centre whatsoever, because you have once again become compliant.*

- 4.15 This is incorrect (or at best a very incomplete characterisation of the relevant legislative and compliance framework).

As outlined on the ACECQA website:

*[The] regulatory authority will review each application [for a waiver] on a case-by-case basis.*

*To issue a waiver, the regulatory must be certain that:*

- *genuine steps have been made or are being made to meet the requirements*
- *children’s safety, health and well-being is not compromised or at risk*
- *a plan is in place for the service to meet the requirements by the time the waiver is due to expire (in the case of a temporary waiver).*

*Your regulatory authority has up to 60 days to assess a complete application. Incomplete applications will be returned to approved providers for further information, lengthening the process.*

*You can check the status of your waiver application through the NQA IT System.*

*A regulatory authority can revoke a waiver at any time, and an approved provider can apply to have a waiver revoked at any time.*

4.16 Our submission above commencing at 4.9 also applies here.

## **5. ADDITIONAL MATTER**

5.1 During closing submissions, Ms Arrabalde made a series of assertions and submissions in relation to historical legislative frameworks in respect of the ECEC industry. Upon review of Ms Arrabalde’s previous submissions we could not identify that these assertions had been made before.

5.2 The two relevant submissions are (our emphasis added):

*... the way that the National Quality Framework has changed the sector is that you are never good enough. (PN528)*

*....*

*You have to be working on yourself as a person, you have to help the staff develop, which is why mentoring is so important, and you have to help the children be the best that they can be. So if you’re not continuously putting extra time, extra work, extra effort, you are not performing your role correctly. To say that the classifications are absorbing all the changes in the National Quality Framework is just incorrect. There was never these expectations before 2012 that were put upon employees in the sector. (PN530)*

5.3 To ensure clarity of our position, we respectfully respond to Ms Arrabalde’s submissions as follows.

5.4 It is common ground that the assessment and ratings process and the National Quality Standards form part of the National Quality Framework.

5.5 Ms Arrabalde submits that the NQF created expectations that didn’t exist for employees prior to 2012. This is incorrect. The expectations referred to by Ms Arrabalde in PN529 or PN530 (or best practice aspirations) were present in previous versions of the assessment and rating process and the National Quality Standards when they were implemented in 2000 and 2005. Previous iterations have existed nationally since 1994 and before that were state-based.

5.6 The concept of a minimum standard, legal requirements for compliance and aspirations of a “high quality” service have existed for some time. Furthermore the actual standards (QIAS or NQS) have not changed significantly since 2000 as can be evidenced in the statement of Ms Viknarasah who attaches a copy of the 2005 QIAS (7 standards) at Annexure KV-1.

- 5.7 The assessment and rating process was previously called the Quality Improvement and Accreditation system. To be abundantly clear, there has been an assessment and rating process for private ECEC centres since before 2000. It was a national system of accreditation whereby the assessors (then called validators) were appointed by the states to rate centres on quality. A centre would be assessed according to the QIAS principles (of which there were 7 Quality areas) and given a rating of High Quality, Good Quality, Satisfactory and Unsatisfactory. These ratings categories were amended in 2012 with the NQF to be what we now know as:
- (a) Significant Improvement Required
  - (b) Working Towards National Quality Standard
  - (c) Meeting National Quality Standard
  - (d) Exceeding National Quality Standard
- 5.8 To the extent that guidance papers are released by the relevant body (now ACECQA) about various roles and expectations, this was also done in 2000 and 2005 to assist businesses in providing quality care and education to children. Such guidance materials have always been viewed as helpful but do not require compliance as they are not a law or regulations. Compliance with guidance material may assist to achieve a high rating, but a centre can still operate effectively with a rating of 'working towards' (or 'satisfactory' as it was in 2000).

**AUSTRALIAN BUSINESS LAWYERS & ADVISORS**

**On behalf of Australian Childcare Alliance Inc, Australian Business Industrial, the New South Wales Business Chamber Ltd**

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