

**IN THE FAIR WORK COMMISSION
AT SYDNEY**

MATTER: AM2018/18; AM2018/20

4 YEARLY REVIEW OF MODERN AWARDS – EDUCATIONAL SERVICES
(TEACHERS) AWARD; CHILDREN'S SERVICES AWARD

IEU SUBMISSIONS RE CASUAL MINIMUM ENGAGEMENT

INTRODUCTION

1. In its decision in *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* [2020] FWCFB 3011 the Full Bench invited submissions on its provisional view on the minimum engagement and payment of casual teachers.
2. The Commission's provisional view was 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.*"
3. The IEU's submissions proceed on the basis that the Full Bench does not intend, through this provisional view, to make amendments which alter (and in particular, which would reduce) conditions, and that it is instead a question of clarification.
4. If this is incorrect, the IEU will seek to make further submissions in reply to any such proposal.

CONCURRENT PROCEEDINGS

5. The IEU notes, at the outset, that the manner in which the Teacher's Award sets out payment rates for casuals is the subject of concurrent proceedings in matter AM2020/24.
6. A consent position has been reached (albeit with dispute about the current status quo in one respect, not relevant for present purposes) that the draft determination at Annexure A be made.

7. This determination inserts a table setting out the casual rates for teachers (including the alternative rates for teachers employed in childcare services which operate for at least 48 weeks of the year).
8. That determination includes a footnote in respect of teachers employed on a casual basis for less than five consecutive days. That determination will need to be amended in light of *this* Full Bench’s view in respect of cl.14.5.

RATES OF PAY FOR CASUALS

9. The IEU agrees with the Full Bench’s observation that the ‘wage cap’ imposed on short term casuals by 14.5(a)(i) is an historical oddity. The Full Bench’s provisional view is best given effect by amending the clause as follows:

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:~~

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%

MINIMUM ENGAGEMENT PERIODS

10. In the IEU’s view, cl.14.5(b) does as a matter of fact provide minimum engagement periods for casuals. Although clauses such as this are conventionally described as minimum engagement clauses, in reality they are minimum payment clauses: the payments specified must be made *even if* the casual does not work for the whole period. An indicative example is at cl.11.3 of the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*:

11.3 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of 4 consecutive hours' work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for no less than 3 consecutive hours.

11. It is apparent that payment here is not linked inexorably to actual work; it is better understood as a wages guarantee.
12. That clause is expressed in hours because that is how the Manufacturing Award defines the working day: see, e.g. cl.17.2.
13. The same cannot be said for the Teachers Award: see cl.19. The nature of teachers' work as professionals, and the manner in which schools and preschools operate, mean that work is arranged in days, of flexible length, rather than in fixed shifts. This is why the minimum engagement periods set by cl.14.5 are set in units of a day.
14. The engagement of casuals in this manner is ubiquitous in the sectors. In almost all cases of casual engagement, a teacher is called in for the day. Very occasionally, a half or quarter (as applicable) engagement is required where another teacher is unexpectedly required to leave the school or centre during the day.
15. What a 'day' means will vary from school to school and centre to centre; hence the reference to the day being 'the usual required attendance time'. It is not practically possible to standardise this, including by converting it to hours. The IEU does not presently understand that this is what is being contemplated by the Bench. If this is incorrect, the IEU would seek to be heard further.
16. As it stands, 14.5(b) provides a minimum engagement period of:
 - a. half a day for casual teachers other than those covered by Schedule B, or otherwise a full day;
 - b. a quarter day for casual teachers covered by schedule B, or otherwise a half day or a full day.
17. In this context, the IEU submits that no amendment is necessary. It would seek to be heard further on the text of any proposed amendment.

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16 JUNE 2020

**IN THE FAIR WORK COMMISSION
AT SYDNEY**

MATTER: AM2018/18; AM2018/20

4 YEARLY REVIEW OF MODERN AWARDS – EDUCATIONAL SERVICES
(TEACHERS) AWARD; CHILDREN’S SERVICES AWARD

**IEU SUBMISSIONS RE ‘PROVISIONAL VIEW’ ON TRANSFER OF PROVISIONS
OF EDUCATIONAL SERVICES (TEACHERS) AWARD 2010 TO THE
CHILDREN’S SERVICES AWARD 2010**

Introduction

1. In its decision in *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* [2020] FWCFB 3011 and its subsequent Statement [2020] FWCFB 3118, the Full Bench invited submissions on its ‘provisional view’ that the ‘relevant parts’ of the *Educational Services (Teachers) Award 2010* (the **Teachers Award**) be transferred to the *Children’s Services Award 2010* (the **Children’s Services Award**).
2. The IEU, which represents teachers employed in early childhood education and care services across Australia, opposes this. The course proposed by the provisional view:
 - a. is impracticable, and will create more confusion than it resolves;
 - b. is not soundly based, and in its formation has denied natural justice to affected employees and other interested parties; and
 - c. presents a very real risk of creating future reductions in the conditions and esteem of professional teachers (who are overwhelmingly female) working in ECEC services, work which is both of critical social importance and historically undervalued on a gender basis.

The proposal is impracticable

3. From the Decision and the Statement, the IEU understands that the proposal is to effectively:
 - a. excise teachers working for employers otherwise covered by the Children's Services Award from the coverage of the Teachers Award;
 - b. replicate all relevant provisions in the Children's Services Award (so as to achieve the stated aim of no reduction, or material change, in conditions).
4. This can only be done in compliance with s.163(1), which would require a formal finding that the Children's Services Award is 'appropriate' to cover teachers. It plainly is not as it presently stands; substantive redrafting would be necessary.
5. The Teachers Award is relevantly in two parts:
 - a. the body of the award and schedules A and C-F, which regulates pay and conditions for all teachers;
 - b. Schedule B, which prescribes certain specific conditions which apply to teachers working in *some* ECEC services (i.e. those which operate 48 weeks or more per year).
6. As a starting point, it must be recognised that the Full Bench's '*provisional view*' cannot be satisfied by simply including Schedule B in the Children's Services Award. This schedule:
 - a. does not apply to all teachers working in the early childhood industry;
 - b. does not provide conditions identical to those applicable to workers covered by the Children's Services Award; and
 - c. does not comprehensively set out the entitlements of those teachers it *does* apply to.
7. As to the bulk of the award, some small number of clauses are generic; for example, cl.8 and 9 contain the model consultation and dispute resolution clauses respectively, and cl.5-7 are standard award machinery clauses.

8. Others, principally those providing substantive entitlements, are unique. Teaching, by its nature, involves different structures and patterns of work than most other award-covered employees, driven by term structures and the salaried nature of the work. Part 5, dealing with hours of work, is illustrative of this. Further, the classification or salary structure, discussed below, does not bear any connection to that set out in the Children's Services Award.
9. What the proposal advanced in the '*provisional view*' in fact requires is the wholesale replication of the bulk of the Teachers Award in the Children's Services Award, as well as Schedule B. As well as increasing the length of the award by at least half, it creates two distinct categories of quite different employees (one, teachers, with a further subcategory).
10. How can this be said to be simpler or easier to understand? At the most, it prevents an employer from having to refer to two different documents – not inherently a particularly difficult task. In exchange, it greatly increases the documentary complexity of the Children's Services Award.
11. It also will not provide the expected simplicity or purported efficiencies for all employers. Much of the work of teachers engaged in early childhood education occurs in the context of schools. Recent ABS data indicates that pre-school programs are delivered by ECTs in close to 500 independent and catholic schools across Australia.¹ If the '*provisional view*' was implemented, it would require these schools to suddenly employ their teachers under two awards rather than one.
12. On a practical level, even if the provisional view is implemented, the alleged '*complexities*' of multiple modern awards will remain. The Clerks—Private Sector Award 2020 covers employees in the early childhood sector that are wholly or principally engaged in clerical work. There will still be more than one modern award in play.
13. In that sense, therefore, the IEU contends that the proposal is not workable, and should be abandoned.

¹ 42400DO001_2019 Preschool Education, Australia, 2019, Table A2.

The provisional view was not soundly or fairly formed

14. The *'provisional view'* was, it appears, formed on the basis of two throw-away comments by for-profit operators:
 - a. one, Ms Paton, who considers awards generally difficult due to their drafting, and has non-specified concerns about the way the two awards interact; and
 - b. another, Ms Viknarasah, who similarly finds both awards confusing, and considers it *'inefficient'* to have two awards because teachers could *'easily be covered under the Children's Services Award'*.
15. Neither witness speaks for anyone other than their own centres. Neither witness, in respect of the matters they were tested on, was particularly impressive or reliable.
16. Neither was tested on these minor parts of their statements. This is because the general complaints they were raising *were not in issue in the proceedings*. The Full Bench did not avert at any point to the fact it was apparently considering the question of award coverage of teachers in ECEC services at large (such that it would be in a position to form any kind of view in this respect).
17. Had it done so, the IEU would not only have tested this evidence but led evidence of its own. It is apparent from the response to the *'provisional view'* that other interested parties – including the AIS, which unlike the ACA actually represents the majority of relevant award-covered enterprises, and which opposes the proposal – would have similarly participated. The approach taken by the Bench has denied relevant persons this opportunity.
18. It is fundamentally unfair for the Full Bench to have, absent of such notice and on such inadequate evidence, formed a view:
 - a. that the current coverage arrangements are inadequate; and
 - b. as to how these inadequacies should be addressed,on this basis. The proposal should be abandoned on this basis alone.

19. In any event, the two comments do not actually support the '*provisional view*'.
20. Replicating the Teachers Award into the Children's Services Award will not make it any easier for Ms Paton to read and understand. Nor will it resolve her – utterly unidentified – concerns about their interaction. The minor convenience of a single document is all that will be achieved, and this will as set out above be outweighed by the fact this document will be extremely unwieldy.
21. As to Ms Viknarasah, it is, as set out above, not at all the case that teachers can '*easily*' be covered by the Children's Services Award – unless of course she means that it would be more appropriate for teachers to be *classified and paid under that Award*, which would of course result in a significant diminution in their conditions, an abandonment of recognition of their professional skills and status; not at all what the IEU understands the '*provisional view*' to be.
22. Accordingly, the evidence relied on cannot be said to support the '*provisional view*'.
23. In any event, for reasons set out below, it is not the case that there is no good reason for separate award coverage for educators and professional teachers. This is not an accident; it was a considered decision in the award modernisation process. Fundamentally, it reflects the different work, status and skills of teachers as opposed to educators.

How the two awards came about

24. During the s576E proceedings in 2009 leading to the creation of both awards the issue of whether or not teachers in the early childhood sector should be part of an occupationally based teachers award(s) or whether they should be part of the Children's Services Award was very much a live issue. It was fully considered by the Commission at the time, with the aid of submissions by the relevant industry and occupational interests.
25. The IEUA, as well as the Australian Education Union, advocated for an occupational award for all teachers (or alternatively, multiple occupational awards). The AEU's submissions summarise the position:

“The AEU submits that comparably qualified teachers with comparable roles should all be included in the Teachers Award. Teachers in kindergartens, preschools and child care centres not operated by a school who are comparably qualified with those working in schools, are required to undertake the same educational programmes and have the same degree of accountability as those working in centres operated by schools should be covered by the Teachers Award. These teachers may move from employment as a teacher in a child care centre to employment in a kindergarten operated by a school with the same qualifications and position description requirements.”²

26. This position was supported by a significant number of employers across Australia. For example, SDN Children’s Services argued for such an approach on the basis that ECTs were professionals, had a different array of conditions compared to childcare workers and expressed a fear that putting ECTs into a children’s services modern award would lead to a reduction of wages and conditions of ECTs, which would have a negative impact on teacher retention.³ Smaller operators also made similar submissions. Borilla Kindergarten Community Kindergarten Association captured a view common among centres across Australia:

“We wish to register our objection to the establishment of a single separate Industry Award where our teachers and staff are removed from the Early Education Award and combined with Child Care workers is of great concern to us. We believe this will result in a loss of conditions for our staff and ultimately result in our highly qualified staff leaving this sector to another where their professionalism is highly regarded. It is our opinion that a single separate Industry Award will under value the huge undertaking our teachers do every day in preparing our children for full time education and making the whole concept of education exciting and rewarding so the children want to be involved. We are proud that are teachers are professional four year trained, early

² *Written submissions of the Australian Education Union on the Exposure Drafts of the Full Bench dealing with this matter issued on 22nd May 2009, 12 June 2009. paragraph 14.*

³ AM2008/33 s576E – Award modernisation, Transcript 17/3/2009, PN558-PN570.

childhood specialised teachers and believe they should remain in the Education sector rather than be incorporated with Childcare.”⁴

27. On 22 May 2009, a Full Bench having considered the wide range of submissions on the matter in a Statement ([2009] AIRCFB 450) discussed the question at [54] to [59]. Relevantly, it stated that:

[56] Currently classifications for preschool teachers can be found in teachers’ awards, preschool teachers’ awards and in awards covering other children’s services. A person with a degree in early childhood education can teach in either a dedicated preschool, a childcare centre, or in a school, including in the lower primary grades.

[57] We have decided, at this stage, to include preschool teachers working in services operated by a school in the draft Educational Services (Teachers) Award 2010. We will defer for further consideration, in Stage 4, the question of award coverage for preschool teachers working in preschools, kindergartens and childcare centres. Our decision to do so should not be taken as indicating that we have formed a final view in relation to award coverage for those teachers.

[58] We received a number of submissions concerning award coverage for schools including whether there should be separate coverage based on who operated the school in question. Our provisional view is that we should not relate award coverage to the faith or religion of the school. We have, however, considered it appropriate to produce separate draft awards for teachers and for non-teaching staff. For the most part this is the model which has prevailed in the industry and is consistent with the approach we have taken in higher education, with respect to academic and non-academic staff. The nature of the employment of teachers has particular features which differentiate teachers from other employees.

⁴ Submission by Borilla Community Kindergarten dated 27 May 2009 (Matter AM2008/33).

[59] *Traditionally teachers' awards have not regulated ordinary hours of work. This has reflected the nature of the flexibility in working arrangements whereby teachers work unregulated hours during term time and to a large degree are able to be absent from the workplace during school holiday periods. The approach we have taken in the exposure draft is to provide for hours of work to be averaged over a period of one school year with a cap on the number of days on which a teacher can be required to attend the workplace. The corollary to this in the exposure draft applying to non-teaching staff is a provision providing the option for staff to be on leave without pay during non-term time and for their wages to be averaged over the school year. There are some other arrangements existing in the industry but due to their limited coverage they are not reflected in the exposure draft.*

28. In the subsequent Stage 4 proceedings on 25 September 2009, another Full Bench issued a Statement ([2009] AIRCFB 865):

Educational services – preschool teachers

[58] *The issue of appropriate award coverage for preschool teachers was raised when the Full Bench was considering educational services – other than universities, in Stage 3. The decision was made at that time to defer consideration of this issue until children's services were being considered in Stage 4. This would enable all interested parties who might have a view to provide input to our deliberations.*

[59] *Currently the nature of award coverage for preschool teachers is variable. For the most part they have been covered by specific early education teachers' awards and, to a limited extent, by awards covering other teachers. In other cases they are covered by awards which also cover other employees in the child care industry or other employees in preschools or kindergartens.*

[60] *There was strong support for the inclusion of preschool teachers in awards covering the "children's services and early childhood education*

industry". Equally there were strong arguments put that preschool teachers should be covered by an occupational award.

[61] After considering the submissions and the proposals advanced by the interested parties we have decided at this stage that it is more appropriate to include preschool teachers in an occupational award covering both primary and secondary school teachers. We have taken into consideration in reaching this view, the qualifications required by early childhood education teachers, their capacity to work in schools and preschools as well as childcare centres, the lack of any relationship between teaching and children's services employees in terms of classification structures and the differences in conditions of employment.

[62] We understand that government policies will lead to an increase in the number of preschool teachers employed in childcare centres. It is, however, also likely that those policies will mean that access to early childhood education for children who are not in long day care will continue to be provided through preschools, kindergartens and preschool facilities attached to schools. The focus on the provision of early childhood education by university qualified teachers is appropriately reflected by their inclusion in an occupational award, the Educational Services (Teachers) Award 2010.

[63] We have drafted amendments to the Educational Services (Teachers) Award 2010 to reflect the inclusion of preschool teachers and we now release that exposure draft for comment.

29. This became the final view, which resulted in the present Award arrangements.

30. It cannot in this context be said that there is no reason for the present arrangements. The award modernisations were complex and involved deliberation on positions, including in respect of this issue, put forward by *all* affected parties. It is both unfair and an inappropriate use of the Commission's resources to propose to throw that work away on the basis of off-the-cuff comments made by partisan witnesses in unrelated proceedings.

Teachers are teachers wherever they work

31. In any event, the good reasons that led to the present arrangement remain. Teachers working in early childhood services still, as they did in 2009:
- a. have the same qualifications as their colleagues in primary schools and often work across both, sometimes simultaneously, performing fundamentally the same work;
 - b. are qualified professional employees, and are (and should continue to be) provided with the same conditions as their professional colleagues;
 - c. do not (at least without serious devaluation of their professional qualifications) slot into the pay and classification structures currently within the Children's services award;
 - d. perform different work to their educator colleagues, and are employed in a different capacity;
 - e. work and are paid as salaried employees with flexible hours, in fundamentally different ways to their waged educator colleagues.
32. Much of this is a matter of evidence, including expert evidence. The IEU has not had the opportunity to provide this. It relies instead on the voluminous material to this effect filed in the Equal Remuneration/Work Value proceedings currently on foot (discussed below).
33. Fundamentally, the presence of early childhood teachers in the teacher's award reflects and supports community and regulatory expectations.
34. As the Full Bench observed in the 25 September 2009 statement:
- The focus on the provision of early childhood education by university qualified teachers is appropriately reflected by their inclusion in an occupational award, the Educational Services (Teachers) Award 2010.*
35. This focus has only increased, as the implementation of the Uniform National Law has imposed increased minimum requirements on early childhood services to engage qualified teachers to work with children. The existence of a

professional award reflects not only the work that these teachers perform, but the expectations of regulators and the industry more broadly - teachers (including teachers who are directors) in early childhood, just like their colleagues in the school sector, are all required to enter the workforce with four or five year full time university undergraduate qualifications.

36. It would be an odd response to increasing professionalisation within the industry to remove said professionals from the award applying to their professional colleagues.

Other implications of the proposal

37. The IEU is concerned that the provisional view to excise ECTs from their occupational award, will also, in the minds of many, excise ECTs from their profession. It will reintroduce an historical dynamic, that has only in recent decades been addressed, that viewed ECTs as somewhat lesser teachers than their colleagues in the school sector. The IEU, early childhood academics and the industry broadly see ECTs embedded within the profession of teaching and the practice of education rather than the more care-centred focus of the children's services sector.
38. The IEU holds genuine fears that the reintroduction of this historical dynamic will exacerbate existing shortages of ECTs and only increase the drift of such qualified teachers to the primary school sector.

The equal pay proceedings

39. This is not the first time the IEU has agitated the question of the undervaluation of work performed by teachers in early childhood services. Two applications are presently on foot:
 - a. a s.302 application for an equal remuneration order; and
 - b. a s.158 application to vary the Teachers Award.
40. Teachers in early childhood settings are much more likely to be award-reliant than their colleagues in schools. This is particularly so in the for-profit sector (where Ms Paton and Ms Viknarasah operate).

41. The s.158 application seeks to have the wage rates in the Teachers Award varied on a work-value basis, in practical terms bringing them closer to those actually paid to teachers in schools. This claim was partly based on particular work value increases in the early childhood sector justifying the increase.
42. If the '*provisional view*' was adopted, teachers in the early childhood sector would, for absolutely no reason, potentially lose the benefit of any increase the IEU achieves to the wage rates in the Teacher's Award. At a minimum a separate s.158 application would need to be made in respect of the Children's Services Award, which the IEU anticipates would be met with the customary heavy resistance from the for-profit childcare sector.
43. Of course that is presently unknowable; the decision is reserved. What is clear, however, is that this Bench's '*provisional view*' has the potential to drastically interfere with the current s.158 proceedings – which have to date involved over 32 days of hearing, and considerable use of the time and resources of the Commission and the parties.
44. This should not be done on the back of passing comment from two employer witnesses (one of which, it should be observed, gave evidence in those proceedings also, in which she opined that there was no difference between teachers and educators).
45. It is too glib to say that any increase would be automatically passed on to the teachers covered by the Children's Award. This is not a feature of the award system. If the awards are to travel in lockstep in respect of teacher's conditions, what is the point of having two?

Conclusions and proposed approach

46. There were sound reasons at the time the awards were made to have a specific occupational award for all teachers. While this does create a situation where two awards apply to some early childhood services, this minor complexity is outweighed by the much greater appropriateness of having professional teachers covered by a professional occupational award.

47. It should not be disturbed solely due to throwaway remarks – which were at the time otherwise irrelevant evidence – made by two small for-profit employers, who speak for no-one but themselves. This is particularly so given that the inconvenience each raised is either more imagined than real, or is not actually addressed by the '*provisional view*'. The IEU observes that an enterprise agreement would just as readily address their concerns.
48. The '*provisional view*' should, for the reasons set out above, not be implemented. In the alternative, given the manifest complexity and the need to provide procedural fairness and natural justice to all involved, the Full Bench must convene a full hearing on the question.

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30 JUNE 2020