

## **IN THE FAIR WORK COMMISSION**

**Matter No: 2018/18 and 2018/20**

**Section 156 - Four Yearly Review of Modern Awards –*Children’s Services Award 2010 & Educational Services (Teachers) Award 2010*– Substantive review**

### **OUTLINE OF SUBMISSION**

#### **UNITED VOICE**

1. This submission is made pursuant to the Direction of the Fair Work Commission (‘the Commission’) on 11 December 2018 requiring any ‘*interested party*’ to file evidence and submissions in support of outstanding substantive claims in the 4 yearly review of the *Children’s Services Award 2010* (‘the Children’s Services Award’) and the *Educational Services (Teachers) Award 2010* (‘the Teachers’ Award’), collectively referred to as the ‘Awards’. This review addresses claims across the Awards that relate to early childhood education and care (‘ECEC’).

#### **Introduction**

2. United Voice has 7 outstanding claims in the review of the Children’s Services Award. These claims can be identified as the following items on the ‘*Summary of Proposed Substantive Variations*’ which was republished 22 November 2017:
  - *S1 – Allowances – Educational Leader and Responsible Person*
  - *S14 – Training clause*
  - *S19 – Allowances –Clothing and equipment allowance*
  - *S20 – Allowances –Clothing and equipment allowance*
  - *S23 – Higher Duties*
  - *S29 – Non –contact time*
  - *S30 –Annual leave*
3. United Voice has 1 outstanding claim in the review of the Teachers’ Award. This claim can be identified as ‘*S1 – Allowances - Educational Leader and Responsible Person*’ in the

*‘Summary of Proposed Substantive Variations’* which was published 14 February 2017. We have one additional claim in the review of the Teachers’ Award which concerns non-contact time in similar terms to our claim S29 in the Children’s Services Award.

### **S1 –Allowances –Educational leader and Responsible person**

4. United Voice claims an allowance for employees who take on the role of Educational Leader and Responsible Person in the Children’s Services Award and the Teachers’ Award.

#### Award history

5. The Children’s Services Award was made on 4 December 2009 by the Australian Industrial Relations Commission (‘AIRC’).<sup>1</sup>
6. Children’s Services was part of the stage 4 industries/occupations considered in the award modernisation process. Consideration of stage 4 awards commenced in June 2009.<sup>2</sup>
7. The Teachers’ Award was made on 4 September 2009 by the AIRC.<sup>3</sup> *‘Educational services – Preschool teachers’* was considered as part of the stage 4 industries/occupations as there were divided views about whether teachers in ECEC should be covered by the Children’s Services Award or an occupational award. A variation to the Teachers’ Award occurred on 4 December 2009 to include pre-school and early childhood teachers employed in children’s services, as well as other changes.<sup>4</sup>
8. The National Quality Framework (NQF) was yet to commence at the time that the Children’s Services Award and the Teachers’ Award were made. The national strategy for quality ECEC was under consideration, with the Council of Australian Governments (COAG) releasing a strategy paper in July 2009.<sup>5</sup> An Information Paper on the Education and Care Services National Law and the proposed National Regulations was released by the Department of Education, Employment and Workplace Relations in December 2010, about one year after the Children’s Services Award and the Teachers’ Awards were made.<sup>6</sup> The NQF was introduced in 2012.
9. The Decisions made in respect of the making of Children’s Services Award and the Teachers’ Award occurred prior to the introduction of the NQF, and did not give consideration to matters arising out of the NQF.

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<sup>1</sup> [2009] AIRCFB 945.

<sup>2</sup> See: Award Modernisation Stage 4 [2009] AIRCFB 641, 29 June 2009.

<sup>3</sup> [2009] AIRCFB 826.

<sup>4</sup> [2009] AIRCFB 945.

<sup>5</sup> *‘Investing in the Early Years –A National Early Childhood Development Strategy’*(Strategy Paper, COAG, 2 July 2009), downloaded from

[https://www.startingblocks.gov.au/media/1104/national\\_ecd\\_strategy.pdf](https://www.startingblocks.gov.au/media/1104/national_ecd_strategy.pdf)

<sup>6</sup> *‘The Education and Care Services National Law and the proposed National Regulations’* (Information Paper, Department of Education, Employment and Workplace Relations, December 2010), downloaded from [https://www.acecqa.gov.au/sites/default/files/acecqa/files/Reports/NQF\\_National\\_Info\\_Paper.pdf](https://www.acecqa.gov.au/sites/default/files/acecqa/files/Reports/NQF_National_Info_Paper.pdf)

## The National Quality Framework

10. The National Quality Framework (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.
11. 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.<sup>7</sup>
12. There are several elements to the NQF that include:
  - 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 – Australian Children’s Education and Care Quality Authority (ACECQA), which guides the implementation of the NQF and works with regulatory authorities.<sup>8</sup>
13. The legislative framework for the NQF is the Education and Care Services National Law (National Law) and the Education and Care Services National Regulations (National Regulations). The National Law and the Regulations apply to most long day care, family day care, kindergarten/preschool and outside school hours care services in Australia.<sup>9</sup>
14. Victoria was the first state to pass the *Education and Care Service National Law Act 2010*.<sup>10</sup> The *Education and Care Services National Regulations* were made in Victoria on 9 December 2011 and came into effect on 1 January 2012.
15. 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.<sup>11</sup> The National Law

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<sup>7</sup> ‘Guide to National Quality Framework’, Australian Children’s Education and Care Quality Authority (ACECQA), first published February 2018, last updated October 2018, page 8, downloaded from: [https://www.acecqa.gov.au/sites/default/files/2018-11/Guide-to-the-NQF\\_0.pdf](https://www.acecqa.gov.au/sites/default/files/2018-11/Guide-to-the-NQF_0.pdf).

<sup>8</sup> Guide to National Quality Framework, page 8.

<sup>9</sup> Guide to National Quality Framework, page 8.

<sup>10</sup> 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).

<sup>11</sup> *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), *Education and Care Services National Law (WA) Act 2012* (WA).

broadly harmonises the regulation of ECEC across Australia, though there are some variations across states. These variations are not significant for the purpose of our claims.

16. 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 2015 (regulations 1 and 3) and 1 August 2012 (the remaining regulations).
17. 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.
18. The National Law introduced the National Quality Standard (NQS), which is found in Schedule 1 of the National Regulations. The NQS is used to assess ECEC services to determine rating levels.
19. There are 7 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
  - 7) Governance and leadership
20. ECEC services are assessed and rated by the relevant state and territory regulatory authority. For example, the relevant body in NSW is the Early Childhood Education Directorate, NSW Department of Education. The relevant body in Victoria is the Department of Education and Training. The relevant body in QLD is the Regulation, Assessment and Service Quality, Early Childhood and Community Engagement, Department of Education and Training.
21. 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*'.
22. 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 action could include suspension of the service approval and withdrawal of access to the Child Care Subsidy.
23. 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.
24. 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 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.

25. 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. As noted, failing to comply with the NQF can result in an individual employee being held liable for civil penalty offences and gross non-compliance will result in the closure of centres. The NQF has also introduced minimum staffing qualification requirements. Accordingly, the responsibilities and skill level of all educators within the sector have increased. We do not seek to address all of those changes within this submission, nor do our claims attempt to obtain appropriate compensation for all educators as a result of these fundamental changes.

### **Work value**

26. Our claim in relation to allowances is not a matter where s 156(3) of the *Fair Work Act 2009* ('the Act') is relevant. This claim does not vary minimum rates under the Awards.
27. No material change in circumstances is required to enliven the Commission's capacity to review matters in the 4 yearly review.<sup>12</sup> This is in part an incidence of the recognition of the 4 yearly review being a wide ranging 'review'<sup>13</sup>. A fundamental and material change in circumstances will make the case for change more compelling.
28. The NQF has occasioned material change in the sectors covered by the Awards.
29. The NQF and related matters provide a basis to vary minimum rates in the Awards. This claim is not agitating this issue.
30. The additional responsibilities imposed on employees by the NQF in respect of the role of Educational Leader and Responsible Person are not reflected in the classification structures of the Awards. These responsibilities are not necessarily attached to classifications under the Awards. Employees classified at different levels can, and will, have to assume these responsibilities depending on the staffing cohort of a centre at a point in time. It would therefore be complex to deal with these changes to the duties of employees covered by the Awards within the respective classifications structures in the context of minimum rates paid. This feature of the NQF favours an industrial response in the form of allowances.
31. Within this 4 yearly review, we only address 3 distinct areas that have changed in relation to the NQF:

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<sup>12</sup> *Shop, Distributive and Allied Employees Association and another v The Australian Industry Groups and others* [2017] FCAFC 161.

<sup>13</sup> As above at paragraph 38.

- a) the creation of the role of ‘*Educational Leader*’ and the need for compensation for employees appointed to the role;
- b) the creation of the role of ‘*Responsible Person*’ and the need for compensation for employees appointed to the role; and
- c) the increased programming duties arising out of the NQF and the need for increased non-contact time to allow employees to complete such duties within ordinary hours.

*Educational Leader allowance*

- 32. Under the National Regulations, each centre is required to have an employee appointed to the role of an Educational Leader.
- 33. Regulation 118 of the National Regulations states:

*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.*

- 34. The employee appointed to the role of an Educational Leader has defined additional responsibilities and takes on a leadership role in the educational programming and direction of the centre.
- 35. The ACECQA Information Sheet ‘*The role of the educational leader*’ sets out the role as follows:

*The role of the educational leader is primarily to:*

- *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*
- *ensure that children’s learning and development are guided by the learning outcomes of the approved learning frameworks.*

*The educational leader also has a significant role in:*

- *guiding and developing educators and families’ understandings 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*

• *building a culture of professional inquiry with educators, coordinators and staff members to develop professional knowledge, reflect on practice and generate new ideas.*<sup>14</sup>

36. Within the workplace, the employee in the role of an Educational Leader will plan and develop programs for educational learning within the centre, provide guidance and support to other educators in the implementation and development of programs, prepare special programs for children with diverse needs, and maintain pedagogical knowledge about developments in educational theory in ECEC.

37. The leadership and direction provided by the Educational Leader is critical in ensuring that a centre based service is complies with the NQS.<sup>15</sup>

38. The role is directed to a centre meeting the following areas of the NQS<sup>16</sup>:

- Standard 7.2: Effective leadership builds and promotes a positive organisational culture and professional learning community.
- Element 7.2.2: The educational leader is supported and leads the development and implementation of the educational program and assessment and planning cycle.

39. The Educational Leader's work is also critical in meeting the outcomes of Quality Area 1 of the NQS<sup>17</sup>:

- Standard 1.1: The educational program enhances each child's learning and development.
- Standard 1.2: Educators facilitate and extend each child's learning and development.
- Standard 1.3: Educators and co-ordinators take a planned and reflective approach to implementing the program for each child.

40. In 'Report for the Fair Work Commission for the Four Yearly Review of Modern Awards AM2018/18 Children's Services Award & AM2014/266 Educational Services (Teachers) Award 2010', Dr Marianne Fenech states:

*2.3. Today, the educational leader is pivotal to the provision of quality education and care in ECEC settings, contributing to the meeting of standards in all quality areas of the NQS (Australian Children's Education and Care Quality Authority (ACECQA), 2017b). Scholars (Fleet, Soper, Semann, & Madden, 2015) have noted that*

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<sup>14</sup> 'National Quality Standard Information sheet: The role of the educational leader' ACECQA, April 2018, page 2, downloaded from [https://www.acecqa.gov.au/sites/default/files/2018-05/QA7\\_TheRoleOfTheEducationalLeader.pdf](https://www.acecqa.gov.au/sites/default/files/2018-05/QA7_TheRoleOfTheEducationalLeader.pdf)

<sup>15</sup> 'National Quality Standard Information sheet: The role of the educational leader' page 1.

<sup>16</sup> 'National Quality Standard Information sheet: The role of the educational leader' page 1.

<sup>17</sup> 'National Quality Standard Information sheet: The role of the educational leader' page 1.

*expectations on educational leaders to meet these standards and facilitate quality and quality improvement are “high” (p. 29).<sup>18</sup>*

41. Regulation 118 states that the Educational Leader must be suitably qualified and experienced. The role of Educational Leader is generally designated to an employee who is diploma qualified or an early childhood teacher (‘ECT’). It may also be designated to an employee who has a certificate III qualification. This will vary across centres, depending on which employee is most appropriate employee for that role within a particular centre. One of our Educational Leader witnesses, Preston Warner, has a Diploma of Early Childhood Education and Care and around 9 years’ experience in the sector.<sup>19</sup> Our other Educational Leader witness, Bronwen Hennessy, has completed a certificate III in early childhood education and care, and has 17 years’ experience in the sector.<sup>20</sup>
42. At some centres, one employee will be appointed to the role for the length of their employment. Other employers may choose to appoint an Educational Leader on a periodic basis, for example, for a period of one year. In the prolonged absences of the appointed Educational Leader another employee will perform this role.
43. The evidence of our witnesses, Bronwen Hennessy and Preston Warner, who are Educational Leaders at their centres, demonstrates the varied responsibility inherent within this role.
44. Both witnesses give evidence that they are responsible for leading the programming and planning for the centre, supporting other educators, leading critical reflections, and creating specialised programs for children with different needs.<sup>21</sup>
45. On leading programming, Preston Warner states that her role includes:

*... leading the development of educational programs for the children in the centre and ensuring that evidence of what each child has learnt across a year is documented in observations and photos. Each child has a portfolio and each child’s individual needs must be considered in creating programs.<sup>22</sup>*

46. In terms of supporting other educators, Preston Warner indicates that she has:

*... purposeful conversations with other educators to check in on how they are doing during the day’ and that ‘during non-contact time, I will make time to talk individually with all other educators. I will discuss any issues they*

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<sup>18</sup> Statement of Dr Marianne Fenech dated 14 March 2019, Annexure C: *Report for the Fair Work Commission for the Four Yearly Review of Modern Awards AM2018/18 Children’s Services Award & AM2014/266 Educational Services (Teachers) Award 2010*, page 6.

<sup>19</sup> Statement of Preston Tori Warner dated 8 March 2019, paragraphs 11 and 16.

<sup>20</sup> Statement of Bronwen Hennessy dated 11 March 2019, paragraph 5 and 11.

<sup>21</sup> Statement of Warner, paragraphs 19 and 22, statement of Hennessy paragraph 17- 20.

<sup>22</sup> Statement of Warner paragraph 19(a).



*are facing in educating children, and assist in problem solving or addressing these issues.*<sup>23</sup>

47. Similarly, Bronwen Hennessy states that she is:

*..heavily involved in the mentoring of other junior educators to support them in working to the standards that are required under the NQF. This involves proof reading communications that are published on the Kindy Hub and providing them with useful feedback on their written reports and their interactions with the children.*<sup>24</sup>

48. Both Preston Warner and Bronwen Hennessy lead ‘critical reflection’ with the other educators. Preston Warner states that critical reflection includes:

*assisting educators with reflection on their educational practice, and ensuring that each team is carrying out education and care as they should in accordance with the NQF.*<sup>25</sup>

49. Bronwen Hennessy provides evidence that:

*part of my role as the educational leader is to lead critical reflections of the staff and develop plans to ensure that the reflections are acted upon and put into practice. This involves consultations with staff to develop these reflections and then further meetings with the other members of the management team to discuss how we can implement the changes that need to occur.*<sup>26</sup>

50. Both these witnesses indicate that ensuring the inclusion of children with different needs is an important aspect of their role as Educational Leader. Preston Warner states that ‘[A]s part of my educational leader role, I am responsible for guiding the programming to ensure that it is inclusive’.<sup>27</sup> Bronwen Hennessy provides the following detail:

*As Educational Leader, I work closely with other educators to ensure that children with special needs are receiving the educational and developmental support they need to thrive. This involves observing the children closely and recognising stimuli or materials they respond positively to and effecting plans to incorporate these into their everyday learning. Greenacres works*

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<sup>23</sup> Statement of Warner paragraph 19(b).

<sup>24</sup> Statement of Hennessy paragraph 20.

<sup>25</sup> Statement of Warner paragraph 19(c).

<sup>26</sup> Statement of Hennessy paragraph 21.

<sup>27</sup> Statement of Warner paragraph 22.

*with Gowrie South Australia to secure resourcing and funding for children with special needs. When we have a child in our centre that has special needs, we submit an application to Gowrie with supporting documentation that provides evidence of how the requested resources would support the child. As Educational Leader, I am usually responsible for overseeing these applications and liaising with staff from Gowrie when they come to the centre to observe the children. These applications can be complex and time consuming, especially if there is more than one child or they have multifaceted needs.*<sup>28</sup>

51. Dr Fenech reports the following regarding the skills of an Educational Leader:

*1.6. The NQS nor the legislative standards are prescriptive about the qualifications, experience, skill or role description for the person chosen to be the educational leader. A review of relevant literature, however, reveals some consensus on the knowledge base and skill set required for this specialist role (ACECQA, 2017a, 2017b, 2018, n.d.-a; Rouse & Spradbury, 2016). This expertise involves:*

- Strong communication and interpersonal skills*
- In-depth knowledge of theory relevant to ECEC, particularly in relation to child development, attachment, children as learners, curriculum approaches*
- Deep knowledge of the national quality standards and approved learning frameworks*
- Understanding of leadership theory and capacity to lead, mentor, support and influence educators with diverse qualifications and backgrounds*
- Highly developed thinking and analytical skills*
- Capacity to build a learning community based on inquiry, action research and reflection*<sup>29</sup>

52. The evidence of our members and of Dr Fenech demonstrates that the Educational Leader role requires employees to take on additional responsibility and demonstrate leadership skills within the workplace. Further, the evidence demonstrates that the Educational Leader has a

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<sup>28</sup> Statement of Hennessy paragraph 19.  
<sup>29</sup> Fenech Report, page 5.

supervisory role, and must observe the work of other educators, and provide guidance and direction to other educators within the centre.

53. The role requires additional skills above and beyond that which is required in an employee's substantive classification within the Awards.
54. Neither of the Awards recognises the role of the Educational Leader and there is no allowance or any other compensation for this role within the Awards.

#### *Responsible person allowance*

55. 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.
56. Section 162(1) of the National Law states:

*s 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.*

57. 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.<sup>30</sup>
58. In most centre based services, the Nominated Supervisor is the Director of the service. When the Nominated Supervisor is on site, the Nominated Supervisor will be designated as the Responsible Person.
59. When the Nominated Supervisor is not on site, another employee will take on the role of Responsible Person, in accordance with s 162 (c), that is, as a 'person in day-to-day charge of the service'.
60. 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.<sup>31</sup> In

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<sup>30</sup> s161 of the National Law.

<sup>31</sup> Regulation 150.

addition, the centre must display the name and position of the Responsible Person in charge of the education and care service at any time.<sup>32</sup>

61. 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*
- (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.*

62. 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.*

63. In each case, consideration is also given to the person's history of compliance and any previous decisions under the law.<sup>33</sup>

64. 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.<sup>34</sup>

65. Our claim for an allowance for Responsible Person seeks to insert a provision into both Awards that would apply to the person who is the designated Responsible Person on an hourly basis. This is because a centre cannot lawfully operate without a designated Responsible Person. Our claim makes provision for the Nominated Supervisor to receive the allowance whilst they are the Responsible Person on site.

66. 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

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<sup>32</sup> Regulation 173(2)(c).

<sup>33</sup> Regulation 117B (2) & (3), Regulation 117C (2) & (3).

<sup>34</sup> s162A of the National Law.

and planning is carried out in accordance with the NQF. The Responsible Person must also maintain relationships with parents and families.

67. The Dr Fenech report highlights the importance of the role of Responsible Person:

*Paula Jorde Bloom, a seminal scholar on early childhood leadership, described directors as “the gate-keepers of quality. They are responsible for creating the climate that promotes optimal growth and development of children as well as for implementing the systems that ensure quality is maintained” (Bloom & Bella, 2005, p. 32). It is this maintenance of quality that a responsible person, nominated supervisor or otherwise, must ensure and be accountable for.<sup>35</sup>*

#### *Nominated Supervisor*

68. In centre based services, the Nominated Supervisor will generally be the Responsible Person for the majority of the time that the centre is open. The Nominated Supervisor is also generally the Director of the centre.

69. The responsibility that the Nominated Supervisor takes on under the National Law and Regulations is significant. The Nominated Supervisor is responsible for ensuring that the centre is managed in accordance with the NQF.

70. A failure on part of the Nominated Supervisor to ensure this could result in the approved provider being fined or facing prosecution for a breach or breaches of the NQF.

71. In addition, the Nominated Supervisor faces personal liability for particular offences under the National Law and Regulations. For example:

- a Nominated Supervisor can face a penalty of \$10, 000 if they fail to ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service;<sup>36</sup>
- a Nominated Supervisor can face a penalty of \$10,000 if they fail to ensure that, whenever children are being educated and cared for by the service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose; and<sup>37</sup>
- a Nominated Supervisor can face a penalty of \$2000 if they fail to implement, and ensure, that all staff members and volunteers at the service implement adequate health and hygiene practices and safe practices for handling, preparing and storing food.<sup>38</sup>

72. The Nominated Supervisor faces personal liability not only for their own actions (or inaction) but is vicariously liable for the acts and omissions of other educators at the service. The

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<sup>35</sup> Fenech report, page 11.

<sup>36</sup> s165(2) of the National Law.

<sup>37</sup> s169 (3) of the National Law.

<sup>38</sup> Regulation 77(2).

personal liability is not restricted to the periods that the nominated supervisor is present at the service. Nominated Supervisors can face penalties for issues that arise even when they are not present at the service.

73. Our witness Alicia Wade, who is Nominated Supervisor at Aussie Kindies –Torquay in Queensland, gives evidence of the potential consequences if there is a serious breach within the centre of an NQF standard:

*... If the breach is severe, a Nominated Supervisor can lose their Blue Card. The Blue Card is a Working with Children Check administered by the Queensland Government. If I lost my Blue Card, I wouldn't be able to work in ECEC anymore and I would struggle to meet my financial commitments.*<sup>39</sup>

74. This is a significant level of responsibility and risk for employees who are on moderate wages. A Director of a service under the Children's Services Award working full time can earn from \$61,848.80 per annum (Level 6.1, commencement year, service licensed for up to 39 children) to a maximum award rate of \$69,503.20 (Level 6.9, after 2 years of service, service licensed for 60 or more children).
75. Our claim for a Responsible Person allowance specifically includes Nominated Supervisors whilst they are the Responsible Person on site because of the high level of responsibility and risk that is placed upon these employees under the National Law and Regulation. It is appropriate that these employees receive appropriate compensation for the work they undertake when designated as Responsible Person.

#### *Person in day to day charge*

76. 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.
77. The employee who is designated Responsible Person could be an Assistant Director, the ECT, a diploma qualified educator or a certificate III qualified educator.
78. This employee will be the '*person in day to day charge*' for the purposes of s 162(1)(c) of the National Law.
79. The evidence of our member Alicia Wade provides context for how this works at her centre:
- Aussie Kindies Torquay is open for 12 hours each weekday. I am at the centre for 8 hours, 4 days a week. For 4 hours on each of those days, another employee will be appointed as the Responsible Person. Sometimes one employee is appointed as Responsible Person for the whole 4 hours, sometimes two employees will be appointed as Responsible Person for 2*

<sup>39</sup>

Statement of Alicia Ann Wade dated 8 March 2019 paragraph 28.

*hours each. On the day that I am not at work the Assistant Director will be appointed as Responsible Person for the length of her shift, which is generally 6.30am to 3pm. Another employee will be appointed as Responsible Person for the remaining 3 and half hours.*<sup>40</sup>

80. The evidence of witness Preston Warner provides the context at her centre, St Cecilia's Child Care and Kindergarten, in Queensland:

*My Director is the Nominated Supervisor and when she is on site, she is the Responsible Person. When my Director is not on site, I am appointed to the role of Responsible Person. Between us, my Director and I cover the 'bookends' of the day –this means that each day, one of us will work the opening shift and the other will work the closing shift. This means that I am generally Responsible Person for 3 hours per day, each day the service is open.*<sup>41</sup>

81. An employee who is Responsible Person but is not the Nominated Supervisor takes on additional responsibility. Whilst this employee is the Responsible Person they must be able to effectively supervise and manage the centre to ensure that the centre is meeting the requirements of the National Law and Regulations.

82. Preston Warner notes::

*When I am Responsible Person, I am responsible for ensuring the safety of the children, the cleanliness of the centre, that the physical environment is appropriate, that staff ratios are being met, and for responding to any account enquiries. I am also responsible for parent relations and for taking parents tours through the centre.*<sup>42</sup>

83. If there is a breach of the NQS and the Responsible Person fails to ensure that the centre is meeting relevant standards, the approved provider of the centre can face prosecution and possible loss of the service's approval to operate. This is a significant level of responsibility. In her evidence Preston Warner states that: *'If an incident or issue were to occur whilst I am Responsible Person, I have the responsibility for that.'*<sup>43</sup>

84. It is common for the employee designated as Responsible Person to be expected to carry out their substantive role in addition to their duties as Responsible Person, without any additional pay. For example, a Children's Services Award employee who is classified at the Level 3.4 (Diploma) grade may be designated Responsible Person on a shift from 10am to 6.30pm

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<sup>40</sup> Statement of Wade paragraph 31 and 32.

<sup>41</sup> Statement of Warner paragraphs 30-31.

<sup>42</sup> Statement of Warner paragraph 37.

<sup>43</sup> Statement of Warner paragraph 40.

because the Director (the Nominated Supervisor) is off site in training. The employee would be expected to continue to carry out their substantive duties during that period, in addition to the role of Responsible Person. The employee would only be paid their minimum award rate of \$24.81 per hour during that period, even though they are taking on significant additional responsibility.

85. The evidence of Preston Warner speaks to this:

*‘When I am Responsible Person, I still work on the floor and continue to carry out my other duties. I do this whilst also taking on a supervisory role with the other staff. I keep an eye on how staff are going, and assist them when they approach me with questions or issues.’<sup>44</sup>*

86. The role of Responsible Person, for both the Nominated Supervisor and the person in day to day charge, requires additional skills and responsibility above that found in the classification descriptions or indicative duties of classification structures of the Awards.

87. In the 2012 transitional award review of the Children’s Services Award United Voice made an application to vary the footnotes contained in clause 14.1 of the Award to insert a fourth footnote as follows:

*‘\*\*\*\*Where the relevant regulations or statutory requirements require the appointment of a supervising officer (howsoever described), an employee appointed or required to act as such will be paid no less than Level 6 for the period.’<sup>45</sup>*

88. The application sought to ensure that when an employee who was a Certified Supervisor was placed in charge of a service (that is, when the Nominated Supervisor was not on site), the employee would be paid no less than Level 6 for the period of time that they were responsible for the service. The application was opposed by several employer organisations.

89. There has been a change in terminology in respect of the role of Responsible Person within the NQF in the period between the 2012 transitional review and now.

90. Since 1 October 2017 (1 October 2018 in Western Australia) approved providers have been able determine who the Responsible Person in each service is, provided that the person meets the requirements of the relevant regulations.<sup>46</sup> Approved providers and individual employees are no longer required to go through an application process with the regulatory authority to obtain a Supervisor Certificate.

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<sup>44</sup> Statement of Warner paragraph 38.

<sup>45</sup> United Voice, Application to vary a modern award 2012 review, 6 March 2012.

<sup>46</sup> ‘National Quality Standard Information sheet: Responsible Person Requirements for Approved Providers from 1 Oct 2017’, ACECQA, 30 August 2017, page 1.



91. Prior to 1 October 2017, the regulatory authority granted Supervisor Certificates, on application, either by a service or by an individual. Only once the Supervisor Certificate had been obtained could a person (or class of people within a service) be appointed to the role of Responsible Person.
92. This variation did not change the substance of the role of the Responsible Person nor the associated responsibilities; rather it was put in place ‘to reduce red tape for approved providers’.<sup>47</sup>
93. The Decision in Modern Awards Review 2012 –application to vary the Children’s Services Award 2010<sup>48</sup> stated:
- [17] UV further submitted that there was an inconsistency between clauses 18.1(d) and 14.1 of the award in that the award is silent on the level that an employee acting in this position should be paid, and the variation proposes that the level be no less than level 6.11.*
- [18] This clause was opposed by AFEI which submitted that there is no error or ambiguity and Schedule B provides a detailed classification structure within which employees must be classified according to the work they perform and other matters, while clause 18.1 provides a clear and exhaustive entitlement to receive additional pay for that period at the appropriate level in the classification structure. Falcon Pty Ltd submitted that the UV interpretation of the national law and regulations was not entirely correct. ABI submitted that the proposed variation is not necessary because there is no inconsistency between clause 14.1 and clause 18.1(d) as claimed. Schedule B does the work that UV claims is needed to be done by the proposed new footnote. It provides that an employee appointed to act as a Director of a Centre or a Supervising Officer will be paid for at the rate applicable for a Director or Supervising Officer.*
- [19] In my view the application made by UV with respect to clause 14.1 is not made out. There is no conflict between clauses 14.1 and 18.1(d). I accept that clause 14.1, 18.1(d) and Schedule B provide an appropriate safety net with respect to persons appointed to act as a Director of a Centre or a Supervising Officer. There are no issues within Schedule 5, Item 6 which I consider appropriate to remedy. I dismiss the application.*
94. Seven years on, it is apparent that clauses 14.1, 18.1(d) and Schedule B do not operate to provide an appropriate safety net for those employees who are appointed to what is today’s equivalent to ‘Supervising Officer’.
95. Instead, employees are required to take on the role of Responsible Person without any additional pay. Preston Warner, who is classified at Level 4.2 of the Children’s Services

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<sup>47</sup> ‘National Quality Standard Information sheet: Responsible Person Requirements for Approved Providers from 1 Oct 2017’, page 1.

<sup>48</sup> [2012] FWA 9296.

Award, states ‘I do not receive an allowance for the role of Responsible Person nor do I receive any additional compensation for taking on the role’.<sup>49</sup>

96. It is apparent that there is a need for a mechanism to provide appropriate compensation for employees in the role of Responsible Person, and this can be achieved in the form of an allowance.

**Amount**

97. The claim we make in respect of the Educational Leader allowance in the Children’s Services Award is as follows:

<i>Centres with:</i>	<i>% of standard rate</i>	<i>Amount per week</i>
<i>No more than 39 places</i>	<i>7.5</i>	<i>62.81</i>
<i>40-59 places</i>	<i>10</i>	<i>83.74</i>
<i>60 and above places</i>	<i>12.5</i>	<i>104.68</i>

98. The claim we make in respect of the Educational Leader allowance in the Teachers’ Award is as follows:

<i>Centres with:</i>	<i>% of standard rate</i>	<i>Amount per week</i>
<i>No more than 39 places</i>	<i>6.5</i>	<i>62.31</i>
<i>40-59 places</i>	<i>8.7</i>	<i>83.39</i>
<i>60 and above places</i>	<i>10.9</i>	<i>104.48</i>

99. The size of the allowance varies depending on the centre size. An employee in the role of Educational Leader at a larger centre will have to lead the programming in respect of a greater number of children (and educators) so it is appropriate that they receive a higher allowance to compensate for the additional responsibility. The structure of our claim is based on the classification structure for Directors under the Children’s Services Award (see Schedule B.1.10 (b) – (d) and the allowance structure for Director’s in the Teachers’ Award (see clause 15.1).

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<sup>49</sup> Statement of Warner paragraph 42.

100. The claim we make in respect of the Responsible Person allowance in the Children's Services Award is as follows:

<i>Centres with:</i>	<i>% of (hourly) standard rate</i>	<i>Amount per hour</i>
<i>No more than 39 places</i>	<i>15</i>	<i>3.31</i>
<i>40-59 places</i>	<i>20</i>	<i>4.41</i>
<i>60 and above places</i>	<i>25</i>	<i>5.51</i>

101. The claim we make in respect of the Responsible Person allowance in the Teachers' Award is as follows:

<i>Centres with:</i>	<i>% of (hourly) standard rate</i>	<i>Amount per hour</i>
<i>No more than 39 places</i>	<i>13</i>	<i>3.28</i>
<i>40-59 places</i>	<i>17.5</i>	<i>4.42</i>
<i>60 and above places</i>	<i>21.8</i>	<i>5.50</i>

102. Like the Educational Leader allowance, the claim recognises that an employee designated as Responsible Person at a larger centre will have responsibility for a greater number of children and staff, and it is appropriate that they receive a higher level of pay.

103. The amount of the allowances in our claim is set at what can be considered an appropriate level to compensate for the high level of responsibility required of an employee appointed as Educational Leader or designated as Responsible Person. The Educational Leader allowance is a weekly allowance as there is a level of stability in this appointment across a period of time. The Responsible Person allowance is an hourly allowance as the person who is designated as Responsible Person in a centre may change several times across a working day.

104. To the extent possible, the amounts across the Awards align. As the Awards each contain a different standard rate, there is some variation.

105. The allowances are not reimbursement allowances and should be referable to a percentage of the hourly rate. The disutility sought to be compensated for relates to periods of work where additional responsibilities apply.

### *Modern award objectives*

106. The Commission must ensure that modern awards, together with the National Employment Standards (NES'), provide a '*fair and relevant minimum safety net of terms and conditions taking into account the modern awards objectives*'.<sup>50</sup>
107. Paragraph s 134 (1)(a) of the Act requires the Commission to take into account '*the relative living standards and the needs of the low paid.*'
108. The roles of Educational Leader and Responsible Person are significant roles that are critical in ensuring that a centre meets the requirements of the National Law and Regulations, and in ensuring that care and education are provided in accordance with the NQS.
109. Wages of the ECEC workforce, like most low paid feminised industries, are predominantly determined by awards. This is particularly so for educators covered under the Children's Services Award. Using ABS data, the 2011 and 2014 Productivity Commission reports into the sector reported that over 70 per cent of educators and 35 per cent of directors had their wages set via the award in comparison to 20 per cent of the rest of the workforce.<sup>51</sup> A significant percentage of teachers in ECEC are also award reliant. In 2011, the Productivity Commission report estimated that collective agreements set the wages of 93 per cent of primary school teachers but only 63 per cent of ECEC teachers' wages.<sup>52</sup> It is likely that there is a higher percentage of employees in this sector that are award reliant now, given the general decline in collective bargaining across the last decade.<sup>53</sup>
110. The vast majority of employees in this sector earn low wages, with commencement rates for a Certificate III qualified educator (Level 3.1) at \$22.04 per hour and for a Diploma qualified educator (Level 3.4) at \$24.81 per hour. ECTs in the ECEC sector earn lower wages than teachers in other settings. Directors, who can be considered to earn a moderate level of wage in the context of the Awards, actually earn a relatively low wage when considering the high level of responsibility required in the role. Given the wage rates in the sector, it is not appropriate for employees to be expected to take such significant additional duties and additional responsibilities without any compensation.

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<sup>50</sup> s134 of the Act.

<sup>51</sup> Productivity Commission, *Early Childhood Development Workforce*, Research Report, November 2011, page 65, downloaded at <https://www.pc.gov.au/inquiries/completed/education-workforce-early-childhood/report/early-childhood-report.pdf>

Productivity Commission, *Childcare and Early Childhood Learning*, Inquiry Report, Volume 2, page 319, downloaded at <https://www.pc.gov.au/inquiries/completed/childcare/report/childcare-volume2.pdf>

<sup>52</sup> Productivity Commission, *Early Childhood Development Workforce*, page 65.

<sup>53</sup> See Fair Work Commission, *Statistical report – Annual Wage Review 2018-19*, 8 March 2019, page 36, Table 7.1: Award reliance by industry, per cent, downloaded from <https://www.fwc.gov.au/documents/wage-reviews/2018-19/statistical-reporting/statisticalreport1.pdf>

Award reliance across all industries has increased from 15.2% in 2010 to 22.5% in 2018.

111. Paragraph 134(1)(e) requires the Commission to ensure that modern awards in the provision of a fair and relevant safety net take into account ‘*the principle of equal remuneration for work of equal or comparable value*’.

112. ECEC is a sector that is overwhelmingly female. In long day care, 96.1% of the workforce is female and overall, 91.1% of the workforce is female.<sup>54</sup>

113. Section 12 of the Act defines equal remuneration for work of equal or comparable values with reference to subsection 302(1) of the Act. The subsection reads:

*Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.*

114. In the 2015 Equal Remuneration Decision<sup>55</sup> the Full Bench observed:

*[34] The objects of the FW Act make no specific mention of pay equity. The principle of ‘equal remuneration for work of equal or comparable value’ appears in three parts of the FW Act: the modern awards objective (s.134(1)(e)); the minimum wages objective (s.284(1)(d)); and the equal remuneration provisions found in Part 2–7. The dictionary in s.12 of the FW Act defines ‘equal remuneration for work of equal or comparable value’ in terms of the meaning given to that expression in Part 2–7 of the FW Act (in s.302(2)).<sup>56</sup>*

115. In the context of an award review, there is no requirement for a comparator as required for an order under section 302 of the Act for the gendered nature of the inequality noted here to be relevant. The Full Bench in the *Equal Remuneration Decision* at [292] observed:

*Our conclusion that Part 2–7 requires a comparator group of the opposite gender does not exclude the capacity to advance a gender-based undervaluation case under the FW Act. We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2). Those provisions allow the variation of such minimum rates for ‘work value reasons’, which expression is defined broadly enough in s.156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of*

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<sup>54</sup> Social Research Centre, *2016 Early Childhood Education and Care National Workforce Census*, September 2017, page 16, downloaded at [https://docs.education.gov.au/system/files/doc/other/2016\\_ecec\\_nwc\\_national\\_report\\_sep\\_2017\\_0.pdf](https://docs.education.gov.au/system/files/doc/other/2016_ecec_nwc_national_report_sep_2017_0.pdf)

<sup>55</sup> [2015] FWCFB 8200 (‘the Equal Remuneration Decision’).

<sup>56</sup> At [34].

*gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s.156 (3) or s.157 (2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.*

116. Allowances are not a component of what the Act terms ‘*modern award minimum wage*’ as subsection 284(3) notes the rate of minimum wages comprises ‘*wages ... casual loadings and piece rates.*’ Allowance are commonly ‘*terms and conditions*’ found in modern awards.
117. It is useful to bear in mind that the Commission is directed to consider the principles of equal remuneration in the making of modern awards in the modern awards objective, in the minimum wage objective and in Part 2-7 of the Act. The Parliament therefore has expressly directed the Commission to consider as a relevant factor gendered differences in outcome in these 3 distinct processes. Gendered undervaluations do not only concern wages. Our claim concerns a variation to the Awards which are part of the safety-net of fair and relevant terms and conditions which must be varied in accordance with the modern awards objective. The fact that the allowances will be paid to predominantly to women whose work is undervalued is relevant as a consideration.
118. The Commission’s comments on the relevance of gender-based undervaluation above are relevant to the modern awards objective. The presence of the paragraph 134(1) (e) consideration within the modern awards objective without any qualification is significant.
119. More broadly, there is a question of whether the Awards as they stand are ‘*fair and relevant*’. Our position is that in order for the Awards to be ‘*fair and relevant*’, the Awards must recognise the positions of Educational Leader and Responsible Person, and provide appropriate compensation for employees carrying out those roles.
120. The Awards cannot be said to be fair, as award covered employees are being required to carry out work with complex additional responsibility but with no additional compensation. As noted these responsibilities are not static and are designed to pertain to workplaces and not particular employees.
121. The Awards cannot be said to be ‘*relevant*’ as each award fails to recognise that the National Law and Regulations requires each centre based service to have an employee in the role of

Educational Leader and Responsible Person. The NQF is a fixed national requirement imposed on the sector and it is appropriate that the Awards reflect this.

122. The Awards should be varied to recognise the role of Educational Leader and Responsible Person and provide an allowance for the employees appointed to these roles. In failing to do so, the Award cannot be considered to be meeting the modern awards objectives.

### **S29 – Non-contact time**

123. The United Voice claim for an increase in non-contact was originally for an increase from 2 hours to 8 hours in the Children’s Services Award, which we later amended to a claim for 4 hours of non-contact time. As a result of the evidence of our members, this claim is amended as follows:

- (a) We seek to amend clause 21.5(a) of the Children’s Services Award to increase non-contact time from two hours to four hours for employees responsible for the preparation, implementation and/or evaluation of a developmental program.*
- (b) We seek to insert a new clause 21.5(b) in the Children’s Services Award that provides specific non-contact time for Educational Leaders. We seek 2 hours per week non-contact time for an Educational Leader at a service licensed for up to 39 children, 3 hours per week non-contact time for an Educational Leader at a service licensed for between 40 and 59 children and 4 hours per week for an Educational Leader at a service licensed for 60 or more children.*
- (c) We seek to amend clause B.3.2 of the Teachers’ Award to ensure that teachers in early childhood services operating for at least 48 weeks per year receive the same increase, in that non-contact time for teachers in a service is increased from two hours to four hours. Further, we seek to insert an additional clause which provides a teacher who is an Educational Leader with non-contact time on the same terms as outline above in (b).*

124. There is a significant amount of *‘preparation, implementation and/or evaluation of a developmental program for an individual child or group of children’*<sup>57</sup> that educators are required to complete within non-contact time, and the introduction of the NQF has significantly increased the scope and duration of this work and, in some case, made any failure to do the work in a timely manner a contravention.

125. The non-contact time clauses within the Awards have not been varied since award modernisation. Clause 21.5 of the current Children’s Services Award appears as it did when the award was made.

126. Clause B.3.2 of the Teachers’ Award has not been varied since the award was made (then titled *‘clause A.3.2 of the Teachers’ Award’*).

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<sup>57</sup>

Clause 21.5 of the Children’s Services Award.

127. In a centre based service, there is little opportunity to complete non-contact time activities outside of specific time that is set aside. Centre based services must operate in accordance with set staff to children ratios, and staff who are allocated to be caring for and educating children at a particular time cannot simply walk away to complete programming. Educators must be alert and responsive to children at all times that they are on the floor. In this environment, the Awards allocation of non-contact time takes on a particular significance, as in many cases it is the only non-contact time that will be provided (if that, given some centres do not even provide educators within the Awards' minimum requirement<sup>58</sup>).
128. Within the allocated non-contact time, educators are expected to complete a wide variety of tasks including 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, liaising with relevant organisations and professionals where necessary (i.e. inclusion support agencies, speech pathologists, psychologist). Such tasks must be undertaken within the framework of the NQF, with educators referencing the NQS and the Early Years Learning Framework ('EYLF') where relevant.
129. It is important to note that employers will differ in how programming duties are allocated at a centre. Some employers will require all educators at the centre to undertake programming. Other employers will require that the Room Leader or Lead Educator of each room (i.e. nursery room, toddler room, preschool or kindergarten) undertake the programming for all children within the room.
130. The expectation under the NQS is that the educational program is developed based on the needs of *each* child.<sup>59</sup> 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.<sup>60</sup> This is particularly so with children who are from different cultural backgrounds or have disabilities.
131. 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.
132. Quality Area 1: Educational Program and Practice is most significant in terms of the educational program. Each quality area contains several standards, and within those

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<sup>58</sup> See statement of Pixie Bea dated 4 March 2019 paragraphs 48-49.

<sup>59</sup> Guide to National Quality Framework, page 96.

<sup>60</sup> Guide to National Quality Framework, page 103 -104.



standards, several elements. In assessing whether a centre is meeting a quality area, the assessor from the regulatory authority will review service information, review a service's quality improvement plan and will visit the service premises to assess and rate the service.<sup>61</sup> When visiting, the assessor may make determinations by observing the centre, discussing matters with the approved provider, nominated supervisor and/or educators or by sighting centre documentation.<sup>62</sup>

133. There is crossover between the different standards and elements with the NQS. Some documentation will address several aspects of the NQS. The below is provided as an example of the *type* of work educators are required to maintain as part of the NQF during non-contact time, not as an exhaustive list of documentation that must be kept. It is provided to give an indication of the many different standards and elements within the NQS that educators must consider, reflect upon and document within non-contact time.

134. Some of the documentation that may be sighted when assessors rate Quality Area 1 is as follows:

#### *Standard 1.1: Program*

135. Element 1.1.1, Approved Learning Framework: *'Curriculum decision-making contributes to each child's learning and development outcomes in relation to their identity, connection with community, wellbeing, confidence as learners and effectiveness as communicators.'*

- Documentation that has been gathered in a variety of ways about children's progress towards the learning outcomes and planning that establishes further learning goals.
- Documented programs that include planned experiences and/or strategies to support individual children's goals.
- Documented programs demonstrating that an assessment of the learning outcomes has led to goals being identified for the group of children that are designed to intentionally support aspects of learning.<sup>63</sup>

136. Element 1.1.2, Child-centred: *'Each child's current knowledge, strengths, ideas, culture, abilities and interests are the foundation of the program.'*

- Examples of how educators plan programs that are responsive to children's knowledge, strengths, ideas, culture, abilities and interests.
- Evidence that information about each child, their family, culture and community is collected and used to plan programs.<sup>64</sup>

137. Element 1.1.3, Program learning opportunities: *'All aspects of the program, including routines, are organised in ways that maximise opportunities for each child's learning.'*

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<sup>61</sup> Guide to National Quality Framework, page 89.

<sup>62</sup> Guide to National Quality Framework, page 89.

<sup>63</sup> Guide to National Quality Framework, page 102.

<sup>64</sup> Guide to National Quality Framework, page 104.

- Policy documentation outlining routines and the written program, including examples of how educators plan programs that are maximising opportunities for learning.<sup>65</sup>

### *Standard 1.2: Practice*

138. Element 1.2.1, Intentional teaching: *‘Educators are deliberate, purposeful, and thoughtful in their decisions and actions.’*

- Documented examples of reflective practice.
- Planning documentation that identifies resources to support ongoing learning.
- Documentation that monitors children’s learning, wellbeing and engagement.<sup>66</sup>

139. Element 1.2.2, Responsive teaching and scaffolding: *‘Educators respond to children’s ideas and play and extend children’s learning through open-ended questions, interactions and feedback.’*

- Project or inquiry work where children are given the opportunity to take the lead in an investigation, or collaborate with peers, teachers, family members and other members of the community.<sup>67</sup>

140. Element 1.2.3, Child directed learning: *‘Each child’s agency is promoted, enabling them to make choices and decisions that influence events and their world.’*

- Documented reflections that demonstrate changes in practice to support children’s agency.<sup>68</sup>

### *Standard 1.3: Assessment and planning*

141. Element 1.3.1, Assessment and Planning cycle: *‘Each child’s learning and development is assessed or evaluated as part of an ongoing cycle of observation, analysing learning, documentation, planning, implementation and reflection’.*

- Information gathered about each child that shows that educators understand each child and their learning and development including their learning styles, and any identified support for that child.
- Examples of children’s representation of their learning and other work is documented and displayed in sensitive and respectful ways.
- Evidence that children’s ideas, interests and points of view are sought and respected during planning and implementing the program.
- Evidence that educators have reflected on each child’s planned and unplanned/ spontaneous experiences.
- Evidence that educators have reflected on the program and their practices, and identified any changes or improvements required.

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<sup>65</sup> Guide to National Quality Framework, page 106.

<sup>66</sup> Guide to National Quality Framework, page 113.

<sup>67</sup> Guide to National Quality Framework, page 116.

<sup>68</sup> Guide to National Quality Framework, page 119.

- Documented analysis of each child’s learning and development, using the learning outcomes as points of reference, that assists in planning for each child information about what has occurred during the program so that families know the learning opportunities and experiences that have been offered to their children.
- Documented evidence of each child’s developmental needs, interests, experiences and participation in the program.<sup>69</sup>

142. Element 1.3.2, Critical Reflection: ‘*Critical reflection on children’s learning and development, both as individuals and in groups, drives program planning and implementation.*’

- Documentation that shows evidence of critical reflection, such as reflection journals or diaries.
- Documentation that reflects on all aspects of the program and may include jottings about:
  - » the effectiveness of arrivals/departures
  - » interactions, responsiveness and relationships with particular children
  - » transitions and routines
  - » planned experiences and spontaneous child directed learning
  - » incidental and planned group times
  - » the environment and experiences provided
  - » intentional teaching strategies
  - » communication with colleagues and families
  - » any other aspects of practice to prompt further thinking and discussion
  - » the effectiveness of resources and equipment used
  - » experiences and learning outcomes achieved
  - » review of curriculum content and pedagogy
- If the service has a Strategic Inclusion Plan, how the service reflects on adaptations made to reduce barriers to participation.<sup>70</sup>

143. Element 1.3.3, Information for Families: ‘*Families are informed about the program and their child’s progress.*’

- Transition statements for children transitioning to school.
- The educational program, including planning and reflections for families about the experiences and learning that have occurred.
- The educational program displayed in an accessible location for families to view and understand.
- Documented information about each child’s developmental needs, interests, experiences, participation and progress that is shared with families.<sup>71</sup>

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<sup>69</sup> Guide to National Quality Framework, pages 126 - 127.

<sup>70</sup> Guide to National Quality Framework, page 131.

144. Some of the documentation that may be sighted when assessors rate other quality areas is as follows:

145. Quality Area 2: Children's Health and Safety

- Assessors may observe educators observing the symptoms of children's illnesses and injuries and systematically recording and sharing this information with families (and medical professionals where required).<sup>72</sup>
- In relation to excursions: evidence of planning for excursions that includes a written risk assessment undertaken prior to conducting an excursion and provided to families prior to conducting excursions, and that supervision implications were considered.<sup>73</sup>

146. Quality Area 3: Physical Environment

- Documented evidence that indicates the educational leader, nominated supervisors, educators and co-ordinators work collaboratively with family members, specialists and/or resource agencies to:
  - » plan for the inclusion of children with additional needs
  - » access adaptive equipment to support children's requirements
  - » facilitate access to support services required while the child is at the service.<sup>74</sup>

147. Quality Area 5: Relationships with children

- Plans for the inclusion of children who require additional support.
- Evidence that educators and co-ordinators draw on the diverse knowledge, experiences and views of their colleagues when reviewing their teaching strategies and experiences planned for children, to ensure that all children have opportunities to achieve learning outcomes.
- Evidence of planned and spontaneous experiences and routines where educators support the engagement of individual children and groups of children in experiences of their own choosing.
- Documentation of children's learning that shows evidence that educators' interactions with children are used to support children's developing ideas, skills and relationships.<sup>75</sup>
- Individual behaviour guidance plans for children, including evidence of consultation with their families and if appropriate, input and suggestions from other professionals and support agencies.<sup>76</sup>

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<sup>71</sup> Guide to National Quality Framework, page 134.  
<sup>72</sup> Guide to National Quality Framework, page 149.  
<sup>73</sup> Guide to National Quality Framework, page 166.  
<sup>74</sup> Guide to National Quality Framework, page 194.  
<sup>75</sup> Guide to National Quality Framework, page 231-232.  
<sup>76</sup> Guide to National Quality Framework, page 245.

148. Quality Area 6: Collaborative partnerships with families and communities

- Information from the family about each child's background, experiences, preferences and home routines is updated, recorded in the child's documentation and used to support curriculum decision-making.<sup>77</sup>
- Newsletters, communication books or other methods of communication with families.<sup>78</sup>
- Examples of summaries of the child's progress towards the learning outcomes when transitioning between different age settings.
- Examples of plans and statements to assist children in making positive transitions from the service to formal schooling.<sup>79</sup>

149. Dr Fenech reports that:

*5.4. While there is no prescriptive way programming is to be undertaken, it 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. To this end educators' programming must:*

- *Be child-centred, building on each child's individual interests, knowledge, abilities, culture, strengths and ideas. Educators are to actively seek information about each child from his/her family.*
- *Maximise opportunities (interactions, experiences, routines and events) to stimulate and enhance children's learning and development*
- *Use play-based learning*
- *Make intentional, pedagogically-informed practice decisions that draw on: the NQS and approved learning framework; educators' professional knowledge and skills base; their knowledge of each individual child and their families and local community; and the service philosophy*
- *Utilise available and appropriate resources to facilitate and extend children's play*
- *Be inclusive, ensuring every child's participation*
- *Incorporate routines (e.g., nappy changing, meal times, transitioning from outside to indoors) as opportunities for learning*
- *Incorporate all curriculum areas (literacy, creative arts, numeracy, science & technology) when providing experiences for children that actively support or initiate the investigation of ideas, complex concepts and thinking, reasoning and hypothesising*

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<sup>77</sup> Guide to National Quality Framework, page 259.

<sup>78</sup> Guide to National Quality Framework, page 261.

<sup>79</sup> Guide to National Quality Framework, page 269.

- *Address developmental domains (language, cognitive, social, emotional, physical)*
- *Be communicated to families*
- *Be subject to ongoing critical reflection*
- *Strive for ongoing improvement*

(ACECQA, 2018; DEEWR, 2010).

5.5. *What is evident from this list of requirements is that programming is more complex than a mere technical implementation of a prescribed curriculum.*

*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).<sup>80</sup>*

150. These programming requirements play a significant role in the provision of quality ECEC.

On this, Dr Fenech states:

*6.1. 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).<sup>81</sup>*

151. Two hours of non-contact time per week is not sufficient for educators to complete the required tasks.

152. The evidence of our witnesses Bronwen Hennessy and Preston Warner indicates the difficulty in completing programming within the 2 hours of non-contact time, resulting in work either being completed after work or whilst on the floor.<sup>82</sup> Further the inadequacy of the current provisions in the Awards for non-contact time force employees to complete the required tasks in their own time or as unpaid overtime.

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<sup>80</sup> Dr Fenech report, pages 12-13.

<sup>81</sup> Dr Fenech report, page 15.

<sup>82</sup> Statement of Bronwen Hennessy paragraph 26 and statement of Preston Warner paragraph 50-51.

153. Our witness Bronwen Hennessy states:

*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 occasions I have completed the programming while on the floor, in between activities with the children.*<sup>83</sup>

154. The evidence of witness Alicia Wade, who is a Centre Manager, is that it is difficult for educators to complete the requirements within the 2 hours of non-contact time per week.<sup>84</sup>

Alicia Wade has noticed educators trying to complete tasks whilst they are on the floor with the children, and has also observed that some educators are completing programming tasks after work: *'I am an admin on the Story Park program and I get notifications when educators input information into the program. I sometimes receive notifications at 9pm, 10pm or even 2am.'*<sup>85</sup>

155. The evidence also demonstrates that there is a difference in quality when an appropriate amount of non-contact time is provided. Witness Pixie Bea states: *'I have found that if I have sufficient non-contact time I am able to prepare better quality programs that are meaningful for the children.'*<sup>86</sup>

156. Further, employees in the role of Educational Leader are commonly not provided with additional time in order to complete tasks specific to the role, or only provided with irregular ad-hoc time that does not enable them to properly carry out their role.

157. The roles and duties of Educational Leaders are outlined within this submission in paragraphs 32-52. The work that is outlined is both substantial and significant. For the Educational Leader to complete the work, additional non-contact time is required.

158. There is no specific non-contact time for Educational Leaders in the Awards.

159. The evidence of our members demonstrates there is a need for specific non-contact time in which to complete Educational Leader duties. Preston Warner is both Educational Leader and Lead Educator for the Junior Room.<sup>87</sup> She generally receives 2 hours of non-contact time per week for programming, and in her workplace, she is meant receive 2 hours of non-contact time for work related to the Educational Leader role.<sup>88</sup> Most weeks she only receives 1 hour of non-contact time for the Educational Leader role and it is rare that she receives additional non-contact time.<sup>89</sup>

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<sup>83</sup> Statement of Hennessy paragraph 26.

<sup>84</sup> Statement of Wade paragraph 52.

<sup>85</sup> Statement of Wade paragraph 54 and 65.

<sup>86</sup> Statement of Bea paragraph 57.

<sup>87</sup> Statement of Warner paragraph 4.

<sup>88</sup> Statement of Warner paragraph 43-44.

<sup>89</sup> Statement of Warner paragraph 44-45.

160. Similarly, Bronwen Hennessy is both Educational leader and Assistant Nursery Room Educator, and has programming duties for both roles.<sup>90</sup> She is provided with 2 hours non-contact time every second week (the other educator in the room is provided with the non-contact time in the other week) for work related to her role as Assistant Nursery Room Educator and 2 hours of non-contact time per week to complete her work as Educational Leader.<sup>91</sup>

161. Bronwen Hennessy states:

*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 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<sup>92</sup>*

162. Effective educational leadership is critical in achieving the NQS and Educational Leaders require specific non-contact time to complete the additional non-contact tasks. The Awards should be amended to ensure Educational Leaders are provided with sufficient non-contact time to complete their work.

163. Our claim recognises that providing educational leadership in a larger centre will necessarily require more non-contact time than in a smaller centre and makes provision for the hours of non-contact time to be provided on the basis of size of the centre.

#### *Modern awards objectives*

164. Paragraph s 134 (1)(a) requires the Commission to take into account ‘*the relative living standards and the needs of the low paid.*’ As stated in paragraph 110 the wages within the ECEC sector are generally low. It is not appropriate for award-reliant employees on low wages to have to complete programming and related work, or work related to educational leadership, outside of work hours, in their own time, unpaid. Sufficient time must be provided within the Awards for this work to be completed. The current provision for 2 hours of non-contact time within the Children’s Services Award and Teachers’ Award is inadequate, and

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<sup>90</sup> Statement of Bronwen Hennessy, paragraph 4.

<sup>91</sup> Statement of Hennessy paragraph 23 and 27.

<sup>92</sup> Statement of Hennessy paragraph 27.



cannot be said to be meeting the modern awards objectives. Both Awards should be amended to increase the minimum amount of non-contact hours to 4 hours, and to introduce specific non-contact time for Educational Leaders.

165. Further, in order for the Awards to be *'fair and relevant'*, there must be recognition that there are substantial programming requirements within the NQF, and that these programming requirements cannot be adequately completed within 2 hours of non-contact time per week. It cannot be considered fair for award-reliant employees to be having to complete work in their own unpaid time.

### **S19 – Allowances –Clothing and equipment allowance**

166. Clause 15.2 of the Children's Services Award contains a clothing and equipment allowance in the following terms:

*(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.*

*(c) Where an employee is required to wear protective clothing or equipment such as goggles, aprons or gloves, the employer will either supply such clothing or equipment or reimburse the employee for the cost of their purchase.*

167. Clause 15.2(b) provides for a laundry allowance for those employees who are required to wear any special clothing or articles of clothing by the employer.

168. Centre based services in ECEC vary in regards to whether they require employees to wear uniforms. Some employers will not require employees to wear a uniform. Other employers will require employees to wear clothing with the company or organisation name printed on it. Common types of uniforms in the sector include t-shirts (short sleeved and long sleeved), polo shirts and shirts. For colder months, the uniform may also include a vest, jacket or jumper.

169. The laundry allowance in the Children's Services Award appropriately provides a level of compensation for employees for the costs associating with washing and maintaining their uniforms.

170. However, some employers are refusing to pay the laundry allowance on the basis that there are on site laundry facilities available at the centre.

171. ECEC centres generally do have on site laundry facilities, and these facilities are for laundry associated with their principal activities. There is a significant amount of laundry to be

washed in a centre environment, including bed sheets, bath towels, bibs, hand towels and blankets. The existence of a washing machine and dryer on site does not mean that an employee is able to use those facilities.

172. Further, 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.

173. The evidence of our witness Pixie Bea demonstrates that the existence of laundry facilities at an ECEC centre does not mean staff members are able to use those facilities. Pixie Bea worked at a Mornington Street Early Learning and Kinder in the A.C.T. and was informed that the reason she was not paid the laundry allowance was due to the presence of laundry facilities on site.<sup>93</sup>

174. Witness Pixie Bea gives evidence that there was no practical capacity for the employees to use the laundry facilities on site.<sup>94</sup>

175. A note should be added below clause 15.2(b) 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.*

## **S20 – Allowances –Clothing and equipment allowance**

176. Clause 15.2(c) of the Award provides for the cost of any items of protective clothing or equipment purchased to be reimbursed to the employee.

177. We argue that hats and sun protection should rightfully be considered ‘*protective clothing*’ for the purposes of this clause. However, United Voice members have reported having difficulties in getting the cost of hats and sun protection purchased for work purposes reimbursed and as such, this clause requires clarification.

178. Educators spend a significant amount of time outside. Our witness Bronwen Hennessy states that ‘*on a sunny day we can spend around 4-5 hours outside with the children.*’<sup>95</sup>

179. Each centre based service must have an appropriate area for outdoor play, with at least 7 square metres of unencumbered outdoor space for each child being educated and cared for at the service.<sup>96</sup> 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.<sup>97</sup>

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<sup>93</sup> Statement of Bea, paragraph 26.

<sup>94</sup> Statement of Bea paragraph 27.

<sup>95</sup> Statement of Bronwen Hennessy paragraph 38.

<sup>96</sup> Guide to National Quality Framework, page 390.

<sup>97</sup> Guide to National Quality Framework, page 392.

180. Services are assessed on the extent to which children are engaged in meaningful experiences in outdoor environments.<sup>98</sup>
181. The approved provider of a service must ensure that appropriate policies and procedures are in place regarding sun protection.<sup>99</sup>
182. It is important for educators to teach children about sun safety. Witness Bronwen Hennessy states: *‘We teach the children that it is important to always wear sun protection, including hats and sunscreen, when they go outside. It is important that we role model this for the children, so we always make sure we wear hats and sunscreen when we are outside with the children.’*<sup>100</sup>
183. The costs of sun hats and sun protection can add up over a period of employment. 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.
184. Sunscreen commonly costs around \$15 - \$30 for a 500 ml bottle.
185. Generally, ECEC centres will provide sunscreen for children. At some centres, employees will also be able to use this sunscreen. However some centres may ration the amount of sunscreen used and employees may need to purchase additional sunscreen to ensure that they are adequately protected from the sun.
186. Further, some employees with sensitive skin may not be able to use the general sunscreen and may need to purchase their own.
187. 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.
188. We seek that clause 15.2(c) is varied in the following terms:

*‘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’*

#### *Modern awards objectives*

189. The variations United Voice seek to clause 15 of the Award are in line with the modern awards objectives, specifically:
- s 134(1)(a) *relative living standards and the needs of the low paid* – It is not appropriate that award reliant employees on low wages should have to bear the cost of laundering uniforms or purchasing sun protection themselves.

<sup>98</sup> Guide to National Quality Framework, page 192.

<sup>99</sup> Guide to National Quality Framework, page 393.

<sup>100</sup> Statement of Bronwen Hennessy paragraph 38.

- s 134(1)(b) *the need to promote social inclusion through increased workforce participation* –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.

#### S-14 Allowances Training

190. Section 15 of the Award deals with allowances paid to employees under various circumstances. We seek the insertion of a new clause at 15.9 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.*

191. We seek this insertion of this new clause as United Voice members have reported difficulties with getting reimbursed for course fees and time spent in training. Further, the introduction of the NQF and the evolving standards expected of educators under the framework have resulted in additional expectations on educators, particularly in relation to first aid and CPR training. Our witness evidence highlights that employers in the ECEC sector are frequently requiring that employees cover their own costs to undertake this training.

192. For employees, the costs associated with first aid and CPR training is a significant issue in this sector.

193. The National Regulations state:

##### *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—*

*(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.<sup>101</sup>*

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<sup>101</sup>

Regulation 136.

194. This legislative requirement has meant that the expectation that educators have specialist first aid qualifications, including anaphylaxis and asthma management, has increased since the implementation of the NQF.
195. In order to meet the above requirement, some employers will require that all staff have first aid qualifications, whilst others will require that employees in certain positions maintain first aid qualifications.
196. It is not a formal requirement under the National Regulations that all employees have first aid qualifications; however it has become a widely expected standard within the ECEC sector that employees will have and maintain first aid qualifications. This is especially relevant in smaller centres that have fewer educators on the floor at one time. The requirement to have one first aid qualified educator on the floor at all times would inevitably mean that most staff are first aid qualified to ensure that the Regulation requirements are met.
197. Witness evidence from Bronwen Hennessy indicates that there is an expectation within the sector that educators are trained in CPR and first aid. Ms Hennessy's position description states that first aid and CPR are "recommended qualifications".<sup>102</sup>
198. First aid courses are lengthy, expensive and require at least 8 - 16 hours of face to face sessions. TAFE NSW offers a first aid course designed for education and care workers that costs \$205.00 and St John's offers a similar course that costs \$255.00. First aid courses are also required to be refreshed every 3 years and CPR should be refreshed annually.<sup>103</sup>
199. The Award does not currently have a provision that requires the employer to reimburse the cost of any training or qualifications that the employee is required to do for their role.
200. 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.

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<sup>102</sup> Statement of Hennessy statement paragraph 31.

<sup>103</sup> Safe Work Australia, *First aid in the workplace: Code of Practice*, May 2018, page 18, downloaded from [https://www.safeworkaustralia.gov.au/system/files/documents/1901/code\\_of\\_practice\\_-\\_first\\_aid\\_in\\_the\\_workplace\\_0.pdf](https://www.safeworkaustralia.gov.au/system/files/documents/1901/code_of_practice_-_first_aid_in_the_workplace_0.pdf)

201. Two awards currently have clauses similar to our proposed clause:

Award	Clause
<i>Manufacturing and Associated Industries Award</i>	<p><i>32.5 Training costs</i></p> <p><i>(a) Any costs associated with standard fees for prescribed courses and prescribed textbooks (excluding those textbooks which are available in the employer’s technical library) incurred by an employee in connection with training agreed to by the employer must be reimbursed by the employer on the production of evidence of such expenditure by the employee, provided that reimbursement may be on an annual basis subject to the presentation of reports of satisfactory progress.</i></p>
<i>Food, Beverage and Tobacco Manufacturing Award</i>	<p><i>26.5 Training costs</i></p> <p><i>(a) Any costs associated with standard fees for prescribed courses and prescribed textbooks (excluding those textbooks which are available in the employer’s technical library) incurred by an employee in connection with training agreed to by the employer must be reimbursed by the employer on the production of evidence of such expenditure by the employee, provided that reimbursement may be on an annual basis subject to the presentation of reports of satisfactory progress.</i></p>

202. Our witness Alicia Wade indicates that she was not reimbursed for the cost of her CPR and first aid courses and she undertook the courses in her own time. As she states:

*My most recent CPR course was in August 2018. I undertook the course in my own time and paid for the course myself. The course cost \$70.*

*I was not reimbursed for first aid training or the CPR training by my employer and nor are the other employees at my centre.*

*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.<sup>104</sup>*

203. Witness Bronwen Hennessy also states that she is expected to undertake her first aid and CPR courses in her own time:

*Greenacres currently pays for the costs of a first aid and CPR course but I am expected to complete the courses either on the weekend or in the evening.*

*The last time I completed the CPR course was in July 2018 and the first aid course was July 2017. I completed the CPR course during an evening after work and the first aid course on a weekend. I was not paid for the time that it took to complete these courses.<sup>105</sup>*

204. Considering the low wages associated with the ECEC sector, it is unreasonable and unsustainable for employees to continue to shoulder the costs associated with ensuring they are compliant with the standards required under the NQF. Further, whilst it is recognised that it may not be practical for employees to always undertake training within normal working hours, the time taken to do the relevant training should be recognised as time worked so that employees are not financially disadvantaged by undertaking training that is required by their employer.

205. Our witness evidence demonstrates that the costs of training courses places a financial burden on employees. Alicia Ward states:

*Employees at my centre either undertake the training on the weekend or take a day off as annual leave.*

*Through conversations with other staff members, I am aware that some employees at my centre struggle to pay for the cost of the training. There are several employees who are single mothers at my centre who have to use money set aside for rent or groceries to pay for the training.<sup>106</sup>*

206. The variation we seek is in line with the modern awards objective, specifically:

- a. S134(1)(a) *The relative living standards and the needs of the low paid* – amending the Award with the variations we seek in relation to training would improve the living standard and needs of the low paid workers covered under this Award. As has already

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<sup>104</sup> Statement of Wade paragraph 44-46.

<sup>105</sup> Statement of Hennessy paragraph 32 – 33.

<sup>106</sup> Statement of Wade paragraph 47-48.

been noted, 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.

207. 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.

### S-23 Higher Duties

208. Clause 18.1 currently reads:

*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) and approved training course (including in-service training) will not be entitled to payment under this clause.*

209. We seek the deletion of clause 18.1(e) so that employees who take on higher duties when their colleague is on employer directed training will be paid the higher rate.

210. 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 so should be paid at the higher rate, regardless of whether the employee who usually occupies that role is in training or not.

211. In the alternative, if the Commission is minded to keep clause 18.1(e), then we seek deletion of the words '*in-service training*' so that employees who take on higher duties while their colleague is taking part in in-service training will still be paid the higher rate.

212. When employees '*act up*' into positions that carry higher duties, they are building skill sets that they may otherwise not have the opportunity to develop. Section 134(1)(c) of the Act should be taken into consideration when reviewing clause 18.1 of the Award. 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’.

### **S-30 Annual Leave**

213. The 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.*

214. The current clause 24.4(b) 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.

215. This claim is related to our claim defining the ‘Christmas vacation’ as 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.

216. Our current claim seek to amend the clause as follows:

#### ***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~~ two weeks.*

217. The substance of the claim is that the right of the employer to stand down an employee without pay over the Christmas vacation periods be reduced from 4 weeks to 2 weeks. If the Christmas vacation is defined as no more than a 4 weeks period, at least 2 weeks of any Christmas vacation close down would have to be paid annual leave or paid at the ordinary rate.

### **Amended claim**

218. In reviewing this claim, it is apparent that clause 24.4(b) ostensibly provides a power to an employer to stand down an employee. It is also unclear how such a term is part of a ‘fair and relevant safety net of terms and conditions’ and a permissible term of a modern award.

219. The problem with clause 24.4(b) is that it does not contemplate consent between the parties but provides a power to the employer to compel an employee to be absent from the workplace and not be paid for up to 4 weeks.

220. Clause 24.4(c) of the Award 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.*

221. This clause appears redundant in light of clause 24.4(a) and clauses 24.5 and 25.6 and 24.7 which deal with excessive leave accruals and the right of an employer to direct an employee to take paid annual leave. The potential concern with clause 24.4(c) is that it is apt to lead to inefficiencies in the management of an employee's annual leave and displace for employees covered by the Children's Services Award the Act's assumption that paid annual leave is taken by agreement 'between an employer and his or her employer.'<sup>107</sup> Clause 24.4(c) provides an unqualified discretionary right to employers to direct an employee take annual leave presumably during school holiday periods other than the Christmas vacation period. There is no requirement that the employee has an excessive accrual. An employer can under clause 24.4(c) exhaust an employee's remaining annual leave entitlement and force the employee to make an agreement to take annual leave in advance under clause 24.8 and place the employee in deficit. The clear possibility of an employee perpetually being in deficit in relation to annual leave is an undesirable state of affairs. The clause does not specify what period the employer can direct the employee to take annual leave. An employee's entire annual leave entitlement (and future entitlements) should not be taken entirely at the direction of the employer. The removal of this clause will diminish this possibility occurring for employees covered by the Children's Services Award.

222. The amended claims is:

**24.4(b)**

*(b) During the Christmas vacation only, an employee may be directed to take annual leave. 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.*

**24.4(c)**

*(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 paid annual leave by giving at least four weeks' notice as part of a close-down of its operations.*

223. We retain the portion of the claim that seeks to insert a definition of 'Christmas vacation'.

The length of a 'Christmas vacation' period with the Award is currently undefined and could potentially be as long as 6 to 8 weeks. This is an unacceptably lengthy amount of time for a Christmas shutdown, and could result in employees being made to use all their annual leave

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<sup>107</sup>

s 88(1) of the Act.

in one block. Our claim seeks to insert a definition of Christmas vacation that limits the period to a maximum of 4 weeks.

224. We attach an amended draft determination.

### **General matters**

225. Courts and quasi-judicial tribunal such as the Commission must deal with the substance of a provision and not what it is labelled.<sup>108</sup> The Commission which is a statutory tribunal posited with making and varying modern awards in accordance with the Act must ensure that these instruments conform in substance to the parameters set by the Act and cannot ‘*recite itself*’ in to power.

226. As a Full Bench of the Commission observed *Parkes Victoria v AWU*<sup>109</sup> in the context of making a workplace determination:

*[294] The Commission does not have jurisdiction to include in the workplace determination any terms (agreed or otherwise) that pertain to an excluded subject matter. To the extent that an agreed term deals with an excluded subject matter (within the meaning of s.5 of the Referral Act), s.267 (2) has no valid operation. This is because the Referral Act is the sole source of the Commission’s power in these proceedings and, as Fullagher J. said in Australian Communist Party v The Commonwealth:*

*“... a stream cannot rise higher than its source.” (Footnotes omitted)*

227. Accordingly, labelling a provision as one concerning ‘close downs’ or in relation to ‘leave’ is of no significance if it is in substance a provision giving an employer a right to stand down an employee.

### **Terms concerning ‘leave’**

228. Leave is generally provided for in the Award in accordance with the NES.<sup>110</sup>

229. The Act does not contain a generic concept of leave and guarantees and regulates specific forms of leave. Unpaid absences from work not in accordance with the Act or the industrial instrument are matters for the employee and the employer to agree on. Such absences are part of the freedom of the parties to make *ad hoc* variations to the contract of employment and necessarily consensual. With paid annual leave, subsection 88(1) of the Act clearly indicates that the starting point for taking annual leave is agreement between the employer and the

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<sup>108</sup> *Australian Communist Party v the Commonwealth* (1951) 83 CLR 1; *Thomas v Mowbray* [2007] HCA 33 (2 August 2007).

<sup>109</sup> [2013] FWCFB 950.

<sup>110</sup> Clause 24, annual leave; clause 26, community leave; clause 27, public holidays; clause 25, personal/carer’s leave and compassionate leave.

employee. There is no NES entitlement to ‘*leave*’ simpliciter but entitlements to various types of leave for specific circumstances. How these different types of leave can be used and managed are also matters that must follow the Act as they form part of the NES and the safety net expressed as a statutory directive in the modern awards objective.

230. Specific terms concerning the various forms of leave recognised by the Act and management of these entitlements are not mandatory content of a modern award and many modern awards are silent on some forms of leave or simply note that the entitlement is in terms of the NES.

231. Section 55 of the Act is relevant. When a term within a modern award departs from the NES entitlement, the principles found in section 55 concerning the interaction of the NES and terms of a modern award applies. Modern Awards cannot derogate from the entitlements in the Act. In relation to ancillary or supplementary terms connected with an NES entitlement such terms are permissible only to the extent that the effect of those terms are not detrimental to an employee in any respect when compared to the NES.’<sup>111</sup>

232. The Act does not make provision for unpaid generic leave. Sections 70, 71 and 72 provides for an entitlement to unpaid parental leave. Section 80 provides for unpaid maternity leave. Section 82A provides for unpaid no safe job leave. Section 85 provides for unpaid adoption leave. Section 102 provides for unpaid carer’s leave. Compassionate leave is capped at 2 days although the Act provides that an employee and employer can agree on other separate periods of paid compassionate leave. Compassionate leave is generally paid leave. These rights to take unpaid leave are all entitlements that benefit the employee and their utilisation is at the employee’s prerogative. An employee will have a right to types of unpaid leave in certain circumstances and makes a request to the employer.

233. An employee must have completed at least 12 months of service to be entitled to paid leave under Division 5 which deals with parental leave and leave generally<sup>112</sup> Annual leave and personal/carers and compassionate leave accrue progressively in the first year of service and accumulate from year to year.<sup>113</sup> For an employee engaged in November who will possess only a small amount of annual leave, there is no notional ‘*leave*’ of any description that the employer can direct the employee to take for 4 weeks if she is stood down over the Christmas/New Year period.

234. The only express provisions in the Act and the NES where the employer can direct an employee to take unpaid leave is found at sections 73 and 82(2). These provisions concern pregnancy and where it would be unsafe medically for a pregnant employee to perform her usual duties and where there is no safe alternative work. These provisions have no relevance to clause 24.4(b) of the Award.

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<sup>111</sup> Subsection 55(4).

<sup>112</sup> Section 67.

<sup>113</sup> Sections 87 and 96(2).

235. The Act provides for modern awards to contain terms concerning annual leave at section 93 and section 139 provides that modern awards may include terms concerning ‘*leave, leave loading and arrangements for taking leave.*’ The Act further curtails the capacity of an employer to stand down an employee without pay to 3 specific circumstances listed at subsection 524(1) of the Act. We examine these relevant sections of the Act below.

### Section 93

236. Section 93 of the Act is titled ‘*Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave.*’

237. On 3 April 2009, in a decision<sup>114</sup> concerning the procedure for carrying out award modernisation process and the request from the Minister for Employment and Workplace Relations in relation to annual leave, the award modernisation Full Bench observed:

*[16] We turn now to the annual leave issue. The National Employment Standards (NES) deal, among other things, with the manner in which annual leave is to be taken. They provide that leave is to be taken at a time which is agreed between the employer and the employee. Despite that provision, the consolidated request allows the Commission to make a modern award which, in some circumstances, permits an employer to compel an employee to take annual leave. The relevant provision is in cl.33 of the consolidated request. We set out the provision as it stands following the 18 December 2008 amendment:*

*“33 The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to include terms that:*

*“ ...*

*• require employees, or allow employees to be required, to take **paid annual leave**, (Our Emphasis) but only if the requirement is reasonable; ...*

238. Section 93(1) deals with cashing out paid annual leave and is not generally relevant.

239. Subsections 93(3) and (4) notes:

*Terms about requirements to take paid annual leave*

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<sup>114</sup>

[2009] AIRCFB 345.

*(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.*

*Terms about taking paid annual leave*

*(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.*

240. The Annual Leave Full Bench observed in its first decision<sup>115</sup> in 2015:

*[348] The Act does not contain a specific provision in relation to “shut downs” or “close-downs”, but s.93(3) provides that a close-down provision may be included in modern awards and enterprise agreements; it reads:*

*“Terms about requirements to take paid annual leave*

*(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.”*

*[349] The Explanatory Memorandum to the Fair Work Bill 2008 makes it clear that the subsection was intended to encompass close-down provisions. One of the examples provided in the Explanatory Memorandum was a term which enabled an employer to require an employee to take a period of leave in circumstances where the employer decided to “shut down the workplace over the Christmas/New Year period” (see paragraph [91] above). We return to s.93 (3) shortly.*

241. Annual leave under the Act is always paid annual leave. If an employee wants to extend a holiday because he or she has insufficient annual leave and the industrial instrument makes no provision for additional annual leave or does not provide a facility to purchase additional annual leave, any absence from work is an agreed absence from work and an *ad hoc* variation to the contract of employment.

242. Section 93 provides no support for clause 24.4(b) as it only concerns directions to take paid annual leave. The text of the statute, the explanatory memorandum and the main authoritative decision of the Commission in the limited sense that the issue is addressed, all indicate that the capacity of an employer to shut down a business and cease to require an employee to work without the employee’s consent can only be done when there is paid leave that can be taken. Another alternative is that the employer pays the employee and the employee is notionally still working. The last sentence of clause 24.4(b) cannot be characterised as a provision in aid of paid annual leave.

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<sup>115</sup>

4 Yearly Review of Modern Awards –Annual Leave [2015] FWCFB 3406 at [11] to [39].

### **Paragraph 139(1)(h)**

243. The only other possible source of power for a modern award to contain a term allowing an employer to direct an employee to take unpaid ‘leave’ might be found in section 139 of the Act. Paragraph 139(1)(h) provides that a modern award may contain terms about ‘*leave, leave loading and arrangements for taking leave.*’ Where section 139 speaks of ‘leave’, it should be read as forms of leave recognised by the Act. As noted, there are limited circumstances where the Act allows an employer to direct an employee to take unpaid parental leave. The circumstances where this right arises are all connected with the pregnancy of the employee.
244. Directing an employee over the Christmas vacation to have an unpaid absence cannot be characterised as a matter under paragraph 139(1)(h) or as ancillary to ‘leave’.
245. Paragraph 139(1)(c) deals with ‘*arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours.*’ In circumstances where an employee is engaged as a permanent full time or part time employee, this paragraph does not assist in justifying a close down provision which allows an employer to direct an unpaid absence.

### **Stand downs**

246. The Act regulates ‘*stand downs*’ in Part 3-5. The guide at the commencement of the part notes an employer may ‘*stand down a national system employee without pay.*’ The term stand down is not defined but has an established industrial meaning and this meaning is unmodified by Part 3-5 although the Part defines the circumstances where an employer can stand down an employer covered by a modern award and provides for a capacity to variations to these circumstances in instruments other than modern awards.
247. A stand down typically concerns industrial action initiated by employees, a break down in machinery or some stoppage beyond the control of the employer. Stand downs concerns the employer closing down the ‘*shop*’ due to something extraordinary and beyond the employer’s control. Stand downs have never provided employers with a facility to temporary lay off employees and not pay them because business is slow or it is otherwise advantageous for the employer to suspend permanent employee’s contract of employment or reduce the workforce.
248. Professor Andrew Stewart summarised the established common law concerning the employer’s obligation to provide work in the context of stand downs:

*As a matter of common law, and unless the terms of the employment contract says otherwise, an employee is entitled to be given work to perform, so that they earn whatever remuneration has been agreed. An employer has no automatic right to stand*

*down an employee merely because there is no work for them to do: Devonald v Rosser (1906).*<sup>116</sup>

249. The circumstances where an employee can be stood down are limited. Subsection 524(1) notes:

***524 Employer may stand down employees in certain circumstances***

*(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*

*(a) industrial action (other than industrial action organised or engaged in by the employer);*

*(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*

*(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*

250. Subsection 524(2) is not relevant here as it concerns enterprise agreements and contracts of employment which can contain specific terms concerning stand downs. These instruments (but not modern awards) can contain provisions that expand or decrease the circumstances where an employer can stand down employees.

251. An implication from the structure of section 524 is that modern awards cannot have terms concerning stand downs as contemplated by subsection 524(2) and that subsection 524(1) is the provision that regulates the standing down of award free and award reliant employees. Creighton & Stewart observe:

*Stand down does not, however, appear to be one of the matters that can be dealt with in a modern award under Division 3 of part 2-3. This means that national system employees who are award/agreement free, those who are covered only by modern awards, and those whose contracts or enterprise agreements are silent as to stand downs may be stood down **only** [Our Emphasis] in reliance on s524(1).*<sup>117</sup>

252. Deputy President Gostencnik noted in *Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australian and Anor v FMP Group (Australia) Pty Ltd*<sup>118</sup> in relation to section 524(1):

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<sup>116</sup> Andrew Stewart, *Stewart's Guide to Employment Law* 3<sup>rd</sup> edition, the Federation Press at [10.19]; see also Creighton & Stewart, *Labour Law*, 5<sup>th</sup> edition, Federation Press at [13.39].

<sup>117</sup> Creighton & Stewart, *Labour Law*, 5<sup>th</sup> edition, Federation Press, at [13.41].

<sup>118</sup> [2013] FWC 2554 at [14] to [22].



*[31] Section 524(1) is intended to relieve an employer of the obligation to pay wages to employees who cannot be usefully employed in certain limited circumstances. The consequences of a stand down can be severe for an employee as the employee may be deprived of wages for a lengthy period. Whether a particular employee can be usefully employed is a question of fact to be determined having regard to the circumstances that face the employer. The circumstances and their effect on the capacity of an employer to usefully employ a particular employee cannot be known in advance of the circumstance arising, although educated guesses may be made. Section 524(1) is unlikely to have been intended to operate so as to deprive an employee of wages and to relieve an employer of the obligation to pay wages before one of the circumstances in s.524 (1)(a)-(c) has arisen. Indeed the structure and language of s.524 (1) shows that there needs to be a temporal connection between one of the circumstances arising and the standing down of an employee because the employee cannot usefully be employed. The words “because of” in s.524 (1) are used to indicate a causal link between the occurrence of a circumstance and the absence of useful employment. In that sense, the alleged absence of useful employment for the Relevant Employees cannot be said to have been caused by industrial action, as no industrial action had taken place at the time the Relevant Employees were stood down.*

253. In the 2012 transitional review, the status of close down clauses was address. The issues raise in this submission did not appear to have been traversed in any depth. The Transitional Review appeared to be principally concerned with adapting existing close down clauses in modern awards to accommodate that the Act allowed annual leave to accrue progressively.<sup>119</sup>

254. Annual leave common issue proceedings (AM2014/47) did not directly address the issue of whether close down provisions are disguised stand down powers in modern awards. The annual leave common issue did reject a claim by a group of employers for a close down clause which did contemplate an employee in effect being able to direct an employee to take unpaid leave for any part of the close down where there was insufficient paid annual leave to cover the period where the enterprise was shut. The Full Bench rejected the claim on its merits as not conforming to the modern awards objective and it was not necessary to engage with the broader issue of whether aspects of the claim constituted a stand down provision in a modern award.<sup>120</sup> As this common issue was addressing annual leave under the Act that is always paid leave, the absence of any clear consideration of terms in modern awards that contemplate unpaid absences is partly explicable.

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<sup>119</sup> See: *Modern Award Review 2012- Annual Leave* [2013 FWCFB 6266 at [73] to [74]; and generally *Modern Award Review 2012-Annual Leave* [2012] FWCCB 255.

<sup>120</sup> 4 Yearly Review of Modern Awards –Annual Leave [2015] FWCFB 3406 at [336] to [383].

255. The annual leave full bench did refer consideration of ‘*close down*’ provisions to the award stage review of specific award within the 4 yearly review.<sup>121</sup> There does not appear to be any sense in which the matters raised here have been previously arbitrated or where there is any authoritative statement that resolves the matter one way or another. The Act’s innovative aspects, principally the NES and the status of modern awards as safety-net instruments made in conformity with the modern awards objective, make industrial authority and practise concerning close down provisions prior to 2009 of limited utility. Our claim here and the agitation of this matter now is appropriate and consistent with the Commission’s intentions as to how the matters should be programmed.
256. This Award is not alone in having a term that in substance allows an employer to stand down an employee.<sup>122</sup> Clause 24.4(b) stands out as both a blunt facility where the power to stand down is unqualified. A feature of the Award’s treatment of leave is that in practice many employees covered by the Award may have little or no capacity to determine by agreement with their employee when they take annual leave.
257. Most of the clauses in modern awards that permit the employer to direct an employee to take unpaid leave provide for notice requirements and ‘*steps*’ mainly concerned first exhausting the annual leave of an employee and in some cases a requirement for the agreement of the employee before unpaid leave must be take.<sup>123</sup> A number of modern awards that do not permit the employer to direct an employee to take unpaid leave during close downs refer to such

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<sup>121</sup> At [383].

<sup>122</sup> A cursory reviews indicates that the following modern awards have clauses that allow an employer to in effect direct an employee to be on unpaid leave during a close down: Clause 38.3(a), *Building and Construction General On-site Award 2010*; Clause 24.4 *Cement and Lime Award 2010*; Clause 29.6, *Cleaning Services Award 2010*; Clause 26.4, *Concrete Products Award 2010*; Clause 27.9, *Contract Call Centres Award 2010*; Clause 19.7, *Coal Export Terminals Award 2010*; Clause 27.8, *Electrical Power Industry Award 2010*; Clause 34.11 , *Food Beverage and Tobacco Manufacturing Award 2010*; Clause 24.9, *Gardening and Landscape Services Award*; Clause 24.8, *Journalists Published Media Award 2010*; Clause 41.10, *Manufacturing and Associated Industries and Occupations Award 2010*; Clause 37.8, *Meat Industry Award 201*; Clause 23.6, *Mining Industry Award 2010*; Clause 23.4 *Miscellaneous Award 2010*; Clause 15.3, *Parliamentary Departments Staff Enterprise Award 2010*; Clause 24.9, *Pest Control Industry Award 2010*; Clause 26.10, *Pharmaceutical Industry Award 2010*; Clause 34.3, *Plumbing and Fire Sprinklers Award 2010*; Clause 27.9, *Poultry Processing Award 2010*; Clause 24.9, *Premix Concrete Award 2010*; Clause 29.4, *Quarrying Award 2010*; Clause 30.3, *Racing Clubs Events Award 2010*; Clause 23.8, *Road Transport (Long Distance Operations) Award 2010*; Clause 29.7, *Road Transport and Distribution Award 2010*; Clause 27.11, *Seafood Processing Award 2010*; Clause 24.9, *Security Services Industry Award 2010* Clause 29.3, *Silviculture Award 2010*; Clause 26.6, *Storage Service and Wholesale Award 2010*; Clause 24.3, *Surveying Award 2010*; Clause 23.9 *Telecommunications Services Award 2010*; Clause 41.7, *Textile, Clothing, Footwear and Associated Industries Award 2010*; Clause 33.11, *Timber Industry Award 2010*; and Clause 29.12, *Vehicle Manufacturing Repairs Services and Retail Award 2010*.

<sup>123</sup> Clause 29.6 of The Cleaning Services Award is an example of a more sophisticated close down clause. The clause limits close downs to 4 weeks, excludes public holidays as annual leave or unpaid leave days and at clause 29.6(c) places an obligation on the employer to find alternative work for an employee with insufficient annual leave.

events in terms that the employer ‘*may stand off for the duration of the close down.*’<sup>124</sup> This would appear to acknowledge a close downs status as a stand down. The *Travelling Shows Award 2010*, covering likely highly seasonal work, does not permit close downs.<sup>125</sup> The 3 hospitality awards<sup>126</sup> which cover sectors where the work is seasonal, award reliant and also low paid permits close downs but annual leave must be taken. There a number of modern awards where the treatment of close downs are in conformity with the Act. Clause 35.6 of the *Legal Services Award 2010* is one example:

### **35.6 Close downs**

*Annual leave is to be taken at a time agreed between the employer and employee. However, an employer may require an employee to take annual leave as part of a close down of its operations, or part of its operations, where the request is reasonable, by giving at least four weeks’ notice.*

## **Conclusion**

258. If the characterisation of the facility provided to the employer in clause 24.4(b) is a right to stand down employees, the term is an impermissible term and the last sentence in clause 24.4(b) should be removed.

259. Any attempt to justify the offending last sentence of clause 24.4(b) as a term that is supplementary or ancillary to NES leave provisions is fraught. Leave in its various forms under the Act is an entitlement of the employee with related provisions to allow employers to manage its utilisation and accrual. It is pellucid that a term in a modern award that allows an employer of a permanent ECEC worker that earns \$49,030.80 a year to have no income for 4 weeks over Christmas/New Year period is detrimental. There is further nothing in the Award that can be said to balance or compensate for this detriment. That the Act at section 524(1) provides the circumstances where an employer can stand down an employee under a modern award further militates against terms in modern awards that go beyond the scope of the section 524(1). The Parliament intended that where greater facility to stand down employees is sought these are available in bargained outcomes or should be agreed between the parties. The inclusion of such a term in a modern award is inconsistent with the scheme of the Act.

260. In the alternate, if the Commission considers the facility in the Award to direct a permanent employee to not work and be not paid for up to 4 weeks is permissible, there are merit

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<sup>124</sup> Clause 25.5 of the *Mobile Crane Hiring Award 2010* provides that employees must agree to more than one 21 day close down; and Clause 34.3 of the *Plumbing and Fire Sprinklers Award 2010* is in similar terms.

<sup>125</sup> No doubt the clowns are engaged as casual employees.

<sup>126</sup> Clause 34.3, *Hospitality Industry (General) Award*; clause 35.3, *Restaurant Industry Award 2010*; and clause 30.5, *Registered and Licensed Clubs Award 2010*.

arguments to curtail or remove such a facility. There is a good merit argument to simply remove the facility as the Award covers low paid overwhelmingly female employees.

261. The current period for which the clause permits an employee to be deprived of remuneration is notionally at large and should be reduced to 2 weeks.

262. The current provision permits an employer to direct an employee to take their entire yearly paid leave entitlement entirely at the direction of the employer at the same time. An employee should be left with some annual leave that they can use as they wish. Section 88(1) of the Act clearly indicates that employees should have some choice as to when annual leave is taken.

263. The onus for managing annual leave lies with employees. The employer has an obligation to manage the accrual of and spread of annual leave being taken by employees throughout the year. Decreasing the maximum amount of unpaid annual leave to be taken over the Christmas vacation places this onus back on to the employer to ensure that employees are not being forced to go without pay for an unreasonable amount of time.

**United Voice**

**15 March 2019**