



GREENWAY CHAMBERS

IEU CLOSING SUBMISSIONS

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IEU CLOSING SUBMISSIONS

INTRODUCTION

1. The Award rate for teachers has not moved to reflect increases in work value since at least 1996. The result is an Award that contains rates of pay that are considerably below the rates necessary to achieve the modern awards objective.
2. The practical effect of the wholly inadequate rates impacts a small subset of teachers, those who teach our youngest children. The vast majority of primary and secondary school teachers in both the government and non-government sector are employed under enterprise agreements that provide for rates in excess of those claimed by the IEU in its s157 claim. However most Early Childhood Teachers (**ECTs**) are paid at or only slightly above the Award rate, which means they are paid on average 22% to 30% less than their primary and secondary school teacher colleagues, and in some cases up to 49% less.¹
3. ECTs are overwhelmingly women. Many chose to teach because of a vocation or belief in the importance of the work that they are doing. There is no rational or just reason why they should be paid so much less than their equally qualified colleagues teaching at primary and secondary school level.
4. The wage differential contributes to shortage issues for early childhood teachers and turnover. It is not uncommon for long day care centres, for example, to fill the minimum ratio requirement for ECTs with trainees who, upon achieving qualification, move to primary schools where they can enjoy better pay and conditions.² This is also true of fully qualified teachers. As Mr Carrol said:

PN6585 ...particularly for a new centre, we faced quite significant competition for talent...we continue to face competition from the primary sector. That's twofold, both in terms of pay but also other entitlements like holidays, et cetera.

5. The resultant turnover and shortage inevitably reduces the quality of the educational outcome for children in their first five years, a period now recognised as the most important educational period for children. There is significant public interest in lifting the rates of pay for ECTs.

¹ See Schedule C, IEU submissions 26 November 2018.

² See, e.g. Ms Prendergast at PN8116: *'So I don't have enough experience with having that many people coming through my own service to be able to say to you yes, they moved straight on, but when I speak to people in the sector, that's what they're telling me. They will employ somebody, they will keep them for three years; that person will finish their qualification, and then they will move onto the school.'*; Statement of Viknarah, Exhibit 116 at [141]

6. Addressing wage under-valuation of ECTs will impact upon the gender pay gap in this country. That wage gap arises because occupations which are predominantly female, such as this one, are paid significantly less than male dominated occupations.
7. The IEU by these proceedings seeks to address this undervaluation in two steps. They are not mutually exclusive. First, it makes application under s157 to lift the minimum Award rates for all teachers. This will in practice lift the actual rates of pay for ECTs. The only opposition to this case has come from the for-profit long day care industry, which employs a small fraction of all teachers covered by the Award. The evidence from primary and secondary school teachers of change was uncontested, and the increases sought not opposed by those who employ the overwhelming majority of those covered by the Award, whether in the early childhood education sector or otherwise. The ACA has sought to downplay the extent of changes in work value of ECTs. However no application is made that ECTs should have different Award rates of pay than other teachers. This is unsurprising – the overwhelming evidence demonstrates that a teacher is a teacher, and that the work value of an ECT is no lower than that of other teachers (noting they have the same qualifications and in most locations a requirement to meet the exact same national teaching standards). The largely uncontested case should lead to substantial increases in the Award rates of pay.
8. The second step is an application for an equal remuneration order pursuant to s302. Such an order would be specifically directed to ECTs. ECTs, who are overwhelmingly women, perform work at least of equal or comparable value to male primary school teachers and should not be paid less than them. Alternatively, their work is of comparative value to at least the lowest paid quartile of professional engineers in their first 5 years of work, and ECTs accordingly should not be paid less than them.

EQUAL REMUNERATION ORDER

Introduction

9. The nature of the application for an equal remuneration was set out in the IEU's outline of submissions of 22 December 2017. Those submissions identified the employees to whom the order would apply, the requisite jurisdictional facts to be established, the method by which comparative work value is to be determined, and the discretionary considerations that arise when determining whether to make an order.
10. In summary, the Commission must be satisfied of a requisite jurisdictional fact, namely that a group of employees who would be the beneficiaries of the proposed order, who are of a particular gender, do not receive the same

remuneration as another group of employees of the other gender who perform work of equal or comparable value.³ To establish that fact requires:

- a. identification of the two groups of workers;
 - b. a finding that their work is of equal or comparable value; and
 - c. a finding that the remuneration is not equal.
11. If those facts are established the Commission has the discretion to make the order. The existence of the jurisdictional facts are outlined in respect of each comparator group below.
12. As to questions of discretion, there is no requirement on the applicant to satisfy the FWC that the remuneration was established on a discriminatory basis.⁴ Nor is it necessary to establish that the identified difference in remuneration is wholly or substantially related to gender.⁵ The Commission's discretion will be exercised mindful of the "*general purpose of the provisions is to remedy gender wage inequality and promote equal pay*".⁶ That general purpose would be achieved by lifting the rates of pay of an overwhelmingly female (96%+) group of workers to rates that are paid to male teachers and/or male dominated groups such as professional engineers.
13. ECTs have struggled to maintain pay parity with other teachers, despite recognition by industrial tribunals of their equal work value. While it is not necessary to demonstrate that the comparative underpayment is related to their gender, it is the case that factors that are related to gender are part of the reason, including:
- a. Social expectations and gendered assumptions about the role of early childhood teachers as 'nurturers' and 'carers' of preschool age children rather than teachers;
 - b. An undervaluation of early childhood teaching skills on the basis that they are skills that 'naturally' occur in women rather than are learnt or developed;
 - c. The historical undervaluation of professional work predominantly done by women based on a discriminatory view that it is less skilful and valuable than professional work traditionally done by men, and in particular that the value of the work of teaching preschool children is not skilful and valuable work akin to that of other professionals.

³ Equal Remuneration Decision at [158].

⁴ Equal Remuneration Decision [187].

⁵ Equal Remuneration Decision [158] and [212].

⁶ Equal Remuneration Decision [178].

14. Further, ECTs share almost all the factors that have been said to contribute to pay inequity in Australia, which Part 2-7 is intended to address,⁷ including:
 - a. Early childhood centres and preschools provide a service rather than creating products, being a service which is (wrongly) seen as not justifying high remuneration;
 - b. The profession is marked by high turnover and low tenure;
 - c. The profession is heavily award reliant, with limited capacity to obtain enterprise agreements;
 - d. Employers are often small, providing limited capacity for workers to act collectively;
 - e. There are low levels of union density;
 - f. There is little evidence that early childhood teachers receive over award payments; and
 - g. There is limited capacity to move into more senior roles.

Primary Comparison

15. The primary comparison is to male primary school teachers in NSW employed in the government and the catholic systemic school system.
16. In light of the submissions, two issues are raised by the employers going to the question of whether the Commission has the power to make the order. They are:
 - a. A contention that primary school teachers do not do work of equal or comparable value to that of early childhood teachers; and
 - b. A contention that since primary school teachers are not predominantly male the comparator that has been chosen is not a male comparator group.
17. These two issues will be dealt with first. The employers separately contend that even if there is jurisdiction the Commission would not make an ERO as a matter of discretion and point to a number of matters going to discretionary issues. These issues arise in respect of the application under s 157 to vary the award. To avoid repetition, discretionary issues relevant to the two claims are dealt with in a separate section of the submissions.

⁷ See the Equal Remuneration Decision at [22] and [23] which summarised the factors said to contribute to the gender pay gap.

Equal or Comparable Value

18. There are necessary differences in the way in which a teacher approaches teaching a Year 12 student, aged 18 years, and a 4 year old in a preschool. Much the same might be said in respect of a registered nurse in an operating theatre compared to one on a paediatric cancer ward or a chemical engineer and a civil construction engineer. The fact that there are differences, such as the particular curriculum being taught, the method of assessment and the nature of the interactions, does not mean that the value of the work is in any relevant way different when considered as a whole. This is clearly established by reference to the matters dealt with under the following headings.

19. Schmidt J in the 2001 Decision noted how in 1970 the award made had lifted early childhood teachers to pay parity with school teachers, and said:

Some 30 years later, the position today is that 3 and 4 year trained teachers employed in [the early childhood] sector have the same training as those employed in primary schools, employed to teach children of up to 8 years of age. Others have specialised qualifications in early childhood education. On the evidence children of up to 6 years of age attend these preschools and long day care centres and those as young as 4 years of age attend schools, a considerable period of overlap in age groups. There was evidence of considerable movement of staff between employment in these preschools and long day care centres and schools.

20. Many of ACA's witnesses would have difficulty with its' submission that the work is not comparable to primary and secondary school teaching. As Ms Toth put it:

PN7600 Primary schools are looking at the work that we're doing in early childhood education and they're recognising the value of play in learning, so rather than adhering that really structured, sit at your table and do worksheet type approach, they're looking at what we're doing and they're taking it on board.

PN6918: Of course it's very different to teaching a high school student. We're talking about a very different developmental stage? – It is a different developmental stage, but many of the skills transfer across age groups.

Same Award

21. From its inception the Award has applied to all teachers equally. The classifications apply equally.

22. This is an approach which has found favour for decades. In NSW early childhood teachers were recognised as deserving pay parity with other teachers since a consent award made in 1970.⁸ Subsequent differences in pay in NSW

⁸ *Teachers (Non-Government Preschools) (State) Award* [2001] NSWIRComm 335 (2001 Decision) at [336]

were not the result of any arbitrated view that they should be paid less. Rather, they were a direct result of consent positions which led to school teachers achieving increases greater than the arbitrated outcomes for early childhood teachers.

23. Contrary to the submissions made by the employers, no finding was made in the NSW work value cases to the effect that ECTs had a lower work value than other teachers. Instead:

a. Schmidt J in the 2001 decision held at [396] that she did not accept the views expressed by employer witnesses as to the nature of differences in the work of early childhood teachers and those employed in schools, saying: *“I am convinced no proper basis for such views was demonstrated.”*

b. In the 2009 Decision⁹ the NSW Full Bench concluded at [77]:

We are satisfied that the very large gap of up to 27 per cent between the pay of early childhood teachers in the non-government sector compared to the government sector, is a significant contributing factor to the teacher shortage. **The gap is not justifiable on any test, especially when what is at stake in early childhood education.”**

Same Qualifications

24. Early childhood teachers usually obtain a degree which qualifies them to teach at both early childhood and primary school level. These are specialist qualifications, superintended by the Australian Children’s Education and Care Quality Authority. Dr Press summarised the qualification requirements as follows:¹⁰

Early childhood teachers and primary teachers become qualified through similar pathways. In general, both early childhood teachers and primary teachers undertake four year undergraduate degrees; or a post-graduate teaching qualification at university. Some universities offer pathways to an early childhood teaching degree from a 2-year vocational qualification.

Early childhood teaching degrees cover the age ranges; birth to five years; birth to eight years; or birth to twelve years depending upon the teacher course accreditation requirements of each State and Territory, and the decisions of each university in how they respond to these requirements. Primary teaching degrees cover the years from kindergarten (the year before year 1) to year 6; kindergarten (the year before year 1) to year twelve. Early childhood teacher qualifications (birth to eight years; or birth to twelve years) enable early childhood teachers to work in primary schools and ECEC settings.

⁹ *Teachers (Non-Government Early Childhood Service Centres other than Preschools) (State) Award 2009 [2009] NSWIRComm 198 (2009 Decision).*

¹⁰ Statement of Press, Exhibit 9, [3.1]

Courses that cover ECEC settings must also be approved by the Australian Children's Education and Care Quality Authority (ACECQA). Hence, courses that prepare teachers to work in ECEC settings and primary school are subject to two standards approval bodies.

25. The witness evidence was to the effect that principles of pedagogy and the skills and knowledge attained in the degree are applied in both early childhood and primary school settings. Most tellingly, Mr Donnelly and Ms Hilare, who have worked in both sectors, described functionally identical work. The primary difference was identified by Ms Hilare (exhibit 54) as relating to the conditions.

Some of the key differences in my experience between the primary school and early childhood setting are the conditions surrounding the work. As a school teacher, I programmed and planned for the approximately 10 week term, across a range of curriculum areas. In that position, I had the time off to complete this class with release from face to face teaching. I received a tea break and a lunch break, and 2 hours release from face to face a week, and I could use non-term time. There were gaps in the day that allowed me to refuel. In early childhood, on the other hand, I receive half an hour unpaid lunch break during my 8-hour day. My experience is that there is simply not enough time given to teachers to properly plan and program in early childhood settings.

26. No contrary evidence has been led by any other party. ACA was in a position to do so, but its witness with contemporary experience and a high-level understanding of teaching practice, Mr Salt, withdrew his evidence without explanation.
27. The age of the children is not substantially different at primary school level. An early childhood teacher would commonly be teaching children to the age of 5 years old. Teachers in primary school will be teaching children who are 5 years old in the first class. The evidence demonstrates that the approach to teaching children at that level, including a focus on play-based teaching, is common.

Same National Teaching Standards

28. The current national teaching standards commenced in 2011.
29. They apply to teachers at both early childhood level, primary school level and secondary school level. As the standards demonstrate, there are common fundamental skills that are applied by teachers at every level. Those common skills are necessarily differently applied for the different ages of children, but there is no suggestion that there are different standards or requirements apply for different levels of teaching: the standards are identical regardless of what age range a teacher is schooling.¹¹

¹¹ See, eg Australian Professional Standards for Teachers – Teacher Accreditation, IEU Document 104, exhibit 76; Australian Professional Standards for Teachers (2011), IEU Document 107, exhibit 76.

30. The Commission will recall being shown the instructional videos which portray some of the skills as published by AITSL. These videos include examples drawn from early childhood settings, such as “Dinosaur’s Roar” which was shown to Merryn Toth, who confirmed it was an accurate reflection of the work performed by teachers at her centres.¹²

Requirements for Registration/Accreditation

31. Early childhood teachers in NSW, South Australia, Victoria and Western Australia are required to be registered, with the exact same registration requirements in those states for early childhood teachers as apply for all primary and secondary school teachers. They must demonstrate that they have achieved a “proficient” status within three years of graduating (five years if working part time). That is judged against the teaching standards. If a teacher does not maintain at least proficient status then they can lose registration and are then no longer entitled to teach. If the teacher does not achieve proficient status then, again, they lose the right to be a teacher. Similarly, if they fail to comply with teaching standards, their accreditation can be revoked.¹³
32. Registration requirements (whether linked to the national standards or otherwise) were slower to be introduced in the early childhood sector. In Queensland, Northern Territory, ACT and Tasmania, there is not currently a requirement for early childhood teachers to similarly be registered, although some employers will require registration. The fact that the same requirement does not yet exist in those locations does not detract in any way from the submission. What the registration requirements demonstrate is a recognition at a government level standard of work required by an early childhood teacher is no different to that required for primary and secondary school teachers.
33. Further, as Dr Dockett explains in her report, the delay in introducing registration requirements for early childhood teachers has been caused by a range of factors including:¹⁴
- a. until 2012, the lack of consistent national laws and regulatory requirements across all services;
 - b. the complexity of the sector, notably the range of different service types and diverse settings in which teachers work;
 - c. a lack of understanding in the community and at government level as to the significance of the early childhood education, with the sector

¹² Transcript 2/7/19 XXN Toth PN6902-6906

¹³ See, eg *Teacher Accreditation Act 2004* (NSW) s.24(1)(g); National Review of Teacher Registration – Consultation Paper, IEU document 149, exhibit 76

¹⁴ Report of Dockett, exhibit 9, p.8-9.

improperly disregarded as care and community services rather than being education-focused; and

- d. relatedly, an undervaluation of the role of teachers and a misunderstanding of their professional skills (much in the way urged by ACA in these proceedings),

and more correctly relates to the systematic undervaluation of teachers' work for reasons including gender, rather than reflecting a true difference in the work.

National Curriculum

34. Prior to 2009 when the national quality framework commenced there was no obligation on early childhood teachers to teach to any particular curriculum and each individual employer took their own approach. This was the case even in the areas of the sector which were (at least from 2004) subject to national initiatives designed to promote quality improvements. The Quality Improvement and Accreditation System, discussed in more detail below, did not require students to be taught any particular curriculum.¹⁵ This is not to suggest that early childhood education services did not engage in teaching work, but reflects instead a more disparate approach with the consequent varying of quality standards.

35. Since 2009 early childhood teachers have been required to teach to the Early Years Learning Framework (**EYLF**), which provides a curriculum of learning outcomes teachers must strive to achieve. As Dr Irvine observed in her report:¹⁶

The EYLF introduced outcomes-based education in Australian ECEC, identifying five high-level learning outcomes. This marked a significant shift in curriculum planning in ECEC, requiring all staff to learn how to plan engaging learning experiences based on the EYLF principles and practices and contributing to the new national learning outcomes. Acknowledging their training as curriculum experts, more is expected from university qualified ECTs.

36. The employers point to the difference between the framework and the national curriculum that applies to primary school and secondary school students. They do so without any recourse to expert evidence, or really any lay evidence. Indeed, Mr Fraser (albeit begrudgingly) described it as '*the childcare version of a school curriculum*'.¹⁷ Necessarily as children get older the curriculum requirements are going to increasingly focus on particular knowledge and skill outcomes. Both curriculums though include a common focus on teaching students how to learn, how to develop skills which will allow them to be effective members of the community. Both curriculums require teachers to use judgment and pedagogy to determine how best to achieve the curricular outcomes for the given child. If anything, the broader and less prescriptive EYLF requires higher

¹⁵ Supplementary Statement of Prendergast, SP-2-2

¹⁶ Report of Dr Irvine, Exhibit 133, [17].

¹⁷ Statement of Fraser, Exhibit 85, at [9]

levels of judgment in pedagogical decision-making than the more prescriptive curriculum that applies at primary and secondary school level. Ms Connell describes this process:¹⁸

I plan intentional teaching practices to scaffold children's learning, based on each child's stage of development, including their interests and abilities. This is based on my observations and applying my judgement and analysis to the developmental stages of the child's learning. I create a program for the children aimed at improving their skills in a range of areas including language, literacy and mathematics, which are linked to the outcomes of the EYLF.

CCER POSITION

37. Not all employers have contended that early childhood teachers have a different work value than primary and secondary school teachers.
38. The Catholic Commission for Employment Relations represents organisations who employ both primary school and early childhood teachers, unlike ACA members. (As for AFEI, it is unclear whether it has any members who are employers of teachers). It is the one active party as well-placed as the IEU to actually evaluate the work performed by both groups.
39. The CCER submission of 14 May 2018 states without qualifications at [23]:

Given the qualifications and professional standards of early learning teachers are equivalent to primary school teachers, the CCER acknowledges the legitimate aspirations of early learning teachers for increased rates of pay

and otherwise does not cavil with the proposition that teachers in early childhood education perform work of equal or comparable value to primary and secondary school teachers.

ACA POSITION

40. The for-profit early childcare industry, represented by ACA, has developed over the last two decades. It has moved from a form of operation primarily directed at providing childcare for working parents to one which increasingly has a focus on providing an education.¹⁹ This is less evident in Western Australia where most children in their final year of early childhood education are taught at a primary school.
41. This change has been driven by government initiatives which have had two features:

¹⁸ Statement of Connell, exhibit 61, paragraph 19.

¹⁹ Ibisworld report, December 2017, p6, which is p32 to the statement of Carroll, exhibit 94.

- a. funding provided to for profit centres to provide an educational programme for children in their last year of early education (4-5 years);
 - b. obligations placed on early childhood long day care centres to employ a minimum ratio of degree qualified teachers.
42. It is clear that at a government level, both Commonwealth and State, there is a view that in order to achieve proved educational outcomes for children in the critical year before commencing primary school, it is both appropriate and necessary for them to be taught by degree qualified professional teachers.
43. It is clear that notwithstanding these changes ACA members chafe at an obligation to have to employ degree qualified teachers.
44. A second aspect of ACA witnesses was a tendency to compare workers' ability based on particular experiences they have with particular workers – leading some to suggest that for them a non-degree qualified educator with some years of experience was in their view “better” than a fresh graduate teacher.
45. Whether for the reasons just identified or otherwise, ACA comes to this case actively putting a proposition that the work of degree qualified teachers in an early childhood setting is of no different work value than that of non-degree qualified educators. This contention is advanced by reference to the regulatory framework, in particular the fact that the National Quality Standards do not mandate that degree qualified teachers have a different role than educators. This submission conveniently ignores the fact that by regulation long day care centres are mandated to employ a minimum level of degree qualified teachers. It also ignores the fact that at least in some states (Victoria, Queensland and NSW) long day care centres are effectively subsidised by government funding to provide an educational programme to children in their final year of early childhood education (4-5 years) on condition that that programme is taught by a degree qualified professional.
46. Notwithstanding those matters ACA submits that there is no different value in the work done by a degree qualified professional and an educator. This submission under values the work of teachers. It appears to be predicated on the proposition that they perform the same day to day tasks. The daily routine, summarised crudely and at such a general level as to be meaningless by some of ACA's witnesses,²⁰ disregards the actual nature of the work. Unlike, for example, machine production processes (where the same action produces the same result), there is a significant difference in the quality output and outcome for children of the same activity performed by persons with differing qualifications. The ACA position requires the Commission to disregard the general proposition that greater qualifications lead to greater work value, as well

²⁰ Statement of Toth, [115] Statement of Viknarasah at [114]; Statement of Kearney at [143], Statement of Hands at [96]

as the generally accepted fact that quality of early childhood education is centrally affected by the level of staff qualifications.

47. In any event, such a submission belies some of the evidence given by ACA's own witnesses such as:
- a. Ms Toth accepting that the work is performed with different levels of skill, gained in part through formal training, confirming that she supported her diploma staff to upskill to university-qualifications, and that – all things being equal - she would expect a university qualified teacher to perform the work to a higher level of skill than if they only had a diploma;²¹
 - b. Mr Fraser, albeit somewhat begrudgingly, accepting that he would have higher expectations as to quality and complexity of work of teachers as opposed to educators;²²
 - c. Ms Hands agreeing that a person with a degree qualification would have a higher level of knowledge of early childhood education, theory and technique than someone with a diploma,²³ and that she would expect a deeper level of understanding of reflective practice and emerging pedagogical theory of teachers, and for them to use this in their work;²⁴ and
 - d. Ms Prendergast volunteering that educational and developmental theory being something that *'teachers would learn when they're doing their teaching degree...and it would be something they would be expected in any school, in any state to understand and know.'*²⁵
48. This submission also belies ACA witnesses' statements made to their parents and the community more generally via their websites in which they proudly emphasise the degree qualified or professional status of their employees and the educational programme that they can provide.
49. Mr Fraser's website²⁶ was perhaps the clearest example of this, with the fact of access to degree qualified professionals repeated, deliberately, across multiple pages and in the video with Mr Fraser describing his staff as degree-qualified. His defence of this – that parents simply do not understand the term 'educator' – is unconvincing; the better view is that the website, as a marketing tool, is targeting (and reflecting) community and industry understandings as to the actual specific value added by teachers. It was, however, a consistent theme:

²¹ PN6949-6963; PN7053, 7059, 7064-7067

²² PN6345

²³ PN8758

²⁴ PN8822-8826

²⁵ PN8466

²⁶ Exhibit 91

these employers are keen to tell the public that they have highly-qualified staff, and in particular degree-qualified workers.²⁷

50. In order to try and make good the submission that degree qualified teachers are no different to other educators (and thus of lesser value than primary and secondary school teachers) the ACA must ignore:
- a. the evidence that they not only have higher educational qualifications, but that they use them in their job;
 - b. the fact that they are required to achieve minimum standards in order to maintain their right to teach;
 - c. as mentioned above, the fact that governments mandate minimum levels of educators with degree qualifications – something which would make no sense if in fact there was no difference between degree qualified teachers and other educators.

CONCLUSION

As to first jurisdictional requirement

51. Frankly, the submission that early childhood teachers do not have equal or comparable work value to primary school teachers barely has to be considered to be rejected. The matters set out above point to the inevitable conclusion that there is equal or comparable value in the work of an early childhood teacher and a primary school teacher.

Male primary school teachers are an appropriate comparator

52. The employers contend both as a matter of jurisdiction and discretion that an ERO order could not be made by reference to a comparator of male primary school teachers because primary school teachers are not, as a whole, predominantly male.
53. First, the submission that the Commission does not have power to make an ERO order on that basis is incorrect. The Commission in the ERO Decision at [290] identified the jurisdictional requirement. The focus of the legislation is on identifying one or more employees of one gender and comparing them to one or more employees of the other gender who do work of equal or comparable value. There is no reason as a matter of principle or policy why the fact that a subgroup of workers who are male cannot be used as a comparator merely because the majority of workers in that subgroup are female. Indeed such an approach would tend to undermine the essential purpose of the Division: if male call centre operators were being paid 10% more than female call centre

²⁷ Exhibits 79, 80, 100.

operators, the fact that call centre operators are predominantly female not only would not, but as a matter of policy should not, be able to defeat a claim.

54. The IEU has identified male comparators; a number of male primary school teachers. That the comparator group are workers who are male cannot be gainsaid.
55. As to the question of discretion, it is contended that since primary school teachers are not predominantly male, the Commission would not make an order lifting the overwhelmingly female ECT workforce to their level of pay. This submission was addressed in the IEU Reply submissions filed on 25 July 2018 at [44] and following. In short, it would further the objects of Part 2-7 to make an order that lifted the remuneration of a chronically low paid female-dominated industry.
56. The Commission would approach this exercise mindful of the “*general purpose of the provisions to remedy gender wage inequality and promote equal pay*”.²⁸ There is no need for the applicant to demonstrate that an identified difference in pay is wholly or substantially related to gender.²⁹ If the persistent gender wage gap in this country is to be addressed, it is by lifting rates of pay for those occupations that are predominantly female to the level of comparable occupations that are predominantly male.
57. Further, there is evidence that the comparative value of the work of ECTs continues to be wrongly affected by gendered notions of the nature of the work, in particular that it is not sufficiently different to the work of non-degree educated educators which involves a high degree of ‘caring’ for young children which is less demanding and has lower work value than ‘teaching’ at primary school level.³⁰ Indeed, an unfortunate aspect of the ACA case has been the attempt to perpetuate the notion that ECTs do work that is of lower value, because (it appears) of the age of the children.

ALTERNATIVE BASIS OF CLAIM

COMPARISON WITH PROFESSIONAL ENGINEERS

58. The alternative basis for the application for an ERO is to compare the work of early childhood teachers to the work of professional engineers.

Approach to comparison

59. It is undoubted that when comparing two different occupational groups the exercise of determining whether their work is of equal or comparable value is not straightforward. Necessarily they do different work utilising different

²⁸ Equal Remuneration Decision at [178].

²⁹ Equal Remuneration Decision at [158] and [212].

³⁰ Report of Dr Press, exhibit 9 at [5.2].

knowledge and, invariably, in different types of working conditions. The employers rely on these differences to reject this aspect of the claim. Yet, the Division must be given work to do. If it is to be applied in circumstances other than those involving people doing in effect exactly the same work, the Commission must necessarily grapple with whether two different occupational activities are nevertheless of “comparable” value. As the Commission noted in the Equal Remuneration Decision, the use of the word ‘comparable’ was included to allow the Commission to make equal remuneration orders in circumstances of dissimilar work that is ‘comparable’ using a work value inquiry that is “characterised by the exercise of a broad judgement”.³¹

60. The Commission identified the matters that the it will take into account in determining the respective value of work in the Equal Remuneration Decision.³² In essence, the expression ‘work of equal or comparable value’ refers to the equality or comparability of ‘work value’, an established industrial concept used in particular when assessing the value of a large section of a workforce or occupational group. The Equal Remuneration Decision referred in this respect to the *Child Care Industry Case* (2005), where the Full Bench listed the following factors as being relevant to the assessment of work value:

- a. *qualifications necessary for the job;*
- b. *training period required;*
- c. *attributes required for the performance of the work;*
- d. *responsibilities for the work, material and equipment and for the safety of the plant and other employees;*
- e. *conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;*
- f. *quality of work attributable to, and required of, the employee;*
- g. *versatility and adaptability: for example, performing a multiplicity of functions;*
- h. *skill exercised;*
- i. *acquired knowledge of plant and process;*
- j. *supervision over others or necessity to work without supervision; and*
- k. *importance of the work to the overall operations of the plant.*

61. These traditional factors need to be updated to be applied to modern day professions that are service orientated. They also need to be applied in a

³¹ Equal Remuneration Decision at [280].

³² This was dealt with more complete fashion by the Applicant’s 22 December 2017 Outline of Submissions at [28] and following.

manner which is gender neutral, and in the absence of assumptions based on gender: SACS No 1 decision.³³

Evidence as to comparable work value

62. The IEU led lay evidence from professional engineers³⁴ and early childhood teachers to demonstrate:
- a. The equivalence of the qualification requirement: both require as a minimum a four-year university degree;
 - b. The equivalence of the professional obligations: both require that the professional apply their knowledge and skill learnt in their degree and keep up to date in their professional knowledge;
 - c. That ECTs as graduates are expected to do their professional job with limited supervision and guidance, and tend to do something closer to the full duties of the role from the outset; which can be contrasted to graduate professional engineers whose professional decision making and role is limited and supervised on graduation and who work pursuant to direction from more senior engineers,³⁵ and who escalate any problems to more senior engineers to address;³⁶
 - d. ECTs work in noisy, physically and emotionally demanding environments, and environments that can cause illness;³⁷ that is also the case for some engineers (eg mining) while others (such as Toker) are overwhelmingly office based;
 - e. ECTs have from the outset high level safety responsibilities for the children they teach; to be contrasted to graduate engineers who bear no equivalent responsibility.
63. The IEU professional engineer lay witnesses (Toker and Broughton) were cross-examined by ACA. The thrust of the cross-examination was to demonstrate that once they obtained more senior roles their levels of responsibility were higher. None of that cross-examination gainsaid the matters set out above, in particular the comparatively lower level of responsibility of those at graduate level.
64. A key aspect of the IEUs case in this regard was the expert evidence of Leanne Issko of Mercer, an expert in job sizing and matching. As summarised below, her conclusions were not seriously challenged, indeed were essentially

³³ *Re Equal Remuneration Case* (2011) 208 IR 345.

³⁴ Toker, exhibits 52 and 53 and Broughton, exhibit 57.

³⁵ Toker, exhibit 52 at [8] and [18]

³⁶ *Ibid* at [9]

³⁷ See IEU submissions 22/12/17 at [84] for further detail and evidence references.

accepted, by the two employer experts who responded to her report, Mr Khoury (ACA) and Mr Egan (AFEI).

65. In her first report, exhibit 5, Ms Issko applied the CED job evaluation system to examine the comparable job size of ECTs and professional engineers. The factors that are taken into account in determining job size are set out at page 9 of the report. As can be seen, they closely reflect the factors that are considered in a work value exercise, other than that they do not take into account the conditions under which the work is performed.
66. Ms Issko was in a better position than the other two experts to assess the work value of ECTs, having not just read witness statements but also spoken to a number of them to understand the nature of their work. Her work value assessment was that ECTs at graduate level had essentially the same work value points (slightly higher) than graduate engineers (268 vs 255) and essentially the same (very slightly lower) at 5 years experience (322 vs 326).
67. Mr Khoury, giving evidence for ACA, used the Hay job sizing methodology, which is substantially the same as the CED methodology used by Ms Issko.³⁸ Mr Khoury determined job point ranges, rather than a specific job size number. As Ms Issko's reply statement identifies³⁹ (which Mr Khoury accepted in cross examination), Mr Khoury's evidence was:
- a. A graduate ECT has a job size range that is equivalent to that of a 'Junior Civil Design Engineer' (252-308 vs 275-298), the latter position being a graduate with some experience;⁴⁰ and
 - b. A primary or secondary school teacher has essentially the same job size as an 'Experienced Civil Design Engineer' (323-342 vs 314-342).⁴¹
68. Mr Khoury accepted that he had no knowledge, beyond his anecdotal experience as a parent, to say that primary and secondary school teachers are in fact at a higher level than ECTs.⁴² If ECTs are in fact at the same level as primary and secondary school teachers (as the IEU contends has been amply demonstrated) it would mean, as Mr Khoury accepted,⁴³ that an ECT would have essentially the same job size in his view as an 'Experienced Civil Design Engineer' (323-342 vs 314-342).
69. In short, Mr Khoury, using the Hay methodology, confirmed Ms Issko's evidence that ECTs and professional engineers have jobs that are essentially the same size.

³⁸ PN7768, 3/7/19.

³⁹ Exhibit 6, page 6

⁴⁰ PN7808-7809, 3/7/19; Mr Khoury did not provide a comparison of an experienced ECT to that of an experienced professional engineer, as Ms Issko had done.

⁴¹ PN7811, 2/7/19.

⁴² PN7827-PN7838, 3/7/19.

⁴³ PN7844, 3/7/19.

70. Mr Egan gave evidence for AFEI. He used the exact same CED methodology as Ms Issko.⁴⁴ While he came up with slightly different results, the outcome was not significantly different.⁴⁵ In answer to a question from the Vice President he described the difference as “*marginal*”⁴⁶ and agreed that “*in principle*” it was “*not a meaningful difference*”⁴⁷. He further concluded that primary and secondary school teachers have the same work value as *experienced* professional engineers.⁴⁸
71. Mr Egan was not as convincing an expert witness as Ms Issko. He struggled at times to recall his own evidence, which had clearly been prepared for him,⁴⁹ and contradicted himself.⁵⁰ He made broad conclusions as to primary and secondary school teachers comparative work value without identifying any basis for that evidence beyond a classification schema used by the Australian Bureau of Statistics (ABS).⁵¹ To the extent that his conclusions differed from that of Ms Issko, her evidence would be preferred. To the extent it is relied upon, Mr Egan’s evidence further confirmed the overall conclusions of Ms Issko, namely that the work value of ECTs and professional engineers was essentially the same.
72. In conclusion, the expert evidence led both by the employers and the Applicant was consistent, namely that applying long established criteria comparing the job size of different occupational groups shows that early childhood teachers and professional engineers have jobs which are, if not the same, then clearly comparable.
73. This confirms those aspects of the lay evidence, summarised earlier.
74. Based on that evidence the Commission is able to conclude that the work value of ECTs is comparable to that of professional engineers, at graduate level and at the point where they have been in practice for about 5 years (experienced level).

Remuneration comparison

75. There is no doubt that ECTs are paid substantially less than professional engineers. Indeed, ABS data on remuneration of ECTs and “Engineering Technicians”, (summarised in the IEU opening submission of 22 December 2017 at [158] and following⁵²) shows ECTs are paid less than engineering draftpersons and technicians. In other words, non-professionally qualified

⁴⁴ PN9245 and 9253, 4/7/19.

⁴⁵ This was depicted in a table in Ms Issko’s reply statement Exhibit 6, page 6.

⁴⁶ PN9258, 4/7/19.

⁴⁷ PN9260, 4/7/19.

⁴⁸ PN9332, 4/7/19.

⁴⁹ PN9237, 4/7/19.

⁵⁰ PN9287, 4/7/19.

⁵¹ PN9206 and following and PN9301-9308 4/7/19.

⁵² Table 1 on page 36 of the 22/12/17 submissions.

engineering workers who are predominantly male are receiving more remuneration than early childhood teachers who are predominantly female.

76. Ms Issko gave evidence as to the remuneration difference between like jobs in her first report from pages 25 and following, which confirms that graduate ECTs and experienced ECTs are paid substantially below that of equivalent experienced professional engineers. In particular using data as at July 2017 Ms Issko’s evidence in tables 8 and 9 was:

Position Matching Data		25th percentile	median	75th percentile
Graduate engineer	4 years qualified	\$65 700	\$83 863	\$110 869
Experienced engineer	4 to 7 years’ experience	\$104 532	\$140 173	\$157 762

77. Mr Khoury confirmed that “*teaching is a low paid profession*”⁵³ and backed that up with data which demonstrated that ECTs at level 8 under the Award (5 years experience) are paid about 30% less than the market median for that level of work and more than 35% below the median for ‘Engineering’.⁵⁴ Those figures assumed (we contend incorrectly) that ECTs have a lower “Compa-Ratio” level than primary and secondary school teachers (level 14 vs level 15). The disparity in rates against market would be even greater if they were at level 15.
78. The IEU application takes a conservative approach to the comparison to professional engineers. Identifying that professional engineer remuneration at various levels of experience will vary, and that variation may reflect different levels of responsibility and work location, the application takes the rates paid at the first quartile (bottom 25%) of professional engineers as the comparison rate. In other words, at a rate at which 75% of equivalent professional engineers are paid more than the rates that are being sought.
79. The data from the *Professional Engineers Employment and Remuneration Report 2017* (Professional Engineers Report)⁵⁵ provides the following data for remuneration paid to engineers at Table 2 page 18 (the updated figures in bold are the figures from the 2018 Survey⁵⁶ at corresponding Table 2, page 22):

Total Package	25th percentile	median	75th percentile

⁵³ Exhibit 105, p25.

⁵⁴ Exhibit 105, page 26, first table.

⁵⁵ Document 102 in the IEU Master Bundle, exhibit76.

⁵⁶ Exhibit 134.

Graduate engineer Level 1	2017: 4 year qualified	\$65 700	\$71 589	\$79 369
	2018:	\$65,700	\$71,175	\$80,194
Experienced engineer Level 3	2017: 4 to 7 years' experience	\$104 558	\$124 145	\$142 350
	2018:	\$104,105	\$122,455	\$147,248

80. The Levels are defined on page 60 of the 2017 Report. Level 1 is a graduate level entry and Level 3 is midlevel. The engineer outlines and assigns work, reviews work, may supervise work of other professionals and technical staff.
81. The 2017 Professional Engineers Report and the Mercer Report both identify the 25th percentile remuneration level for graduate engineer rate as \$65,700 and the experienced engineer at about \$104,000, there being a difference of some \$26 between the two reports. These reports demonstrate that these rates of remuneration are representative, robust and actually reflect the remuneration received by this group of employees being compared.
82. The remuneration paid to early childhood teachers in long day care centres is in large part based on the Award rate and where there are enterprise agreements, the wage rates are not significantly higher than the Award rates.⁵⁷
83. The evidence⁵⁸ demonstrates that the remuneration paid to graduate teachers and Band 2 top teachers is below the 25th percentile of the remuneration paid to graduate engineers and engineers with between 4 to 7 years' experience.

Conclusion

84. The IEU contends that on the material set out above the Commission would find that, in respect of engineers who are remunerated at the 25th percentile, professional engineers have a work value that is equal or comparable to that of early childhood teachers, and on that basis (and recognising that 75% of professional engineers are paid above this level of remuneration) the Commission has the power to make an order lifting the remuneration of early childhood teachers to that level of remuneration.

⁵⁷ Matthews Statement, exhibit 1, James Statement, exhibit 25.

⁵⁸ Matthews Statement, exhibit 1, James Statement, exhibit 25.

SECTION 157 APPLICATION

Introduction

85. The second limb to the Applicant's case is an application pursuant to s157 to vary to Modern Award by increasing rates of pay.
86. The applications are not mutually exclusive. If the Commission is satisfied as a matter of jurisdiction and discretion the Commission would make both the ERO and vary the award.
87. The case against the application to vary the award is one that has been limited to a case presented in respect of the small percentage of teachers who are employed by the for-profit long day care centre early childhood industry. It is important to focus upon the fact that no case against the application has been led in respect of primary or secondary teachers, or teachers in the industry-dominant not-for-profit early childhood education sector.
88. No real attempt has been made to gainsay the evidence as to the significant changes in work value for primary school and secondary school teachers over the last two decades. The case presented by the employers appears to be limited to a submission that the work value of early childhood teachers has not increased, or at least has not increased to the same degree, as that of other teachers.
89. We have earlier put the submission that there is no proper basis to distinguish ECTs from other teachers from a work value perspective. No application is before this Commission to set different rates of pay for ECTs, or to remove them from the Award in favour of the Children's Services Award.
90. If the Commission accepts the proposition that *a teacher is a teacher*, then it follows that upon the Commission being satisfied there have been work value changes justify an increase, then that is an increase that will apply to all teachers covered by the Award. In any work value exercise that considers a range of workers doing work that is not identical there will be some areas of greater change than others. In the absence of any application to start paying specific allowances to particular workers, the proper approach is to grant an overall increase which recognises that there may be differential increases in work value across the profession as a whole.
91. The increases in work value for early childhood teachers have been no less than that for other teachers, if not more. But even if they were lower, the fact that there is effectively no opposition to the evidence and submissions pointing to significant work value of primary school and secondary school teachers would lead the Commission to grant an increase reflective of that increase in work value that applies to all teachers, including early childhood teachers.

STATUTORY CRITERIA

92. The IEU's submissions of 26 November 2018 identify the key statutory criteria that the Commission must be satisfied of before making the variation sought. In summary, it must be satisfied that the variation is:
- a. justified by work value reasons per s157(2)(a);
 - b. necessary to make in order to achieve the modern awards objective at s134, per s157(2)(b).
93. The following submissions deal with these matters in reverse order. Both have been canvassed in the IEU's previous written submissions, and so what follows is a summary of those matters, along with a summary of the evidence that emerged over the course of the hearing relevant to those matters.

The Modern Awards Objective

A fair and relevant safety net

94. The current Award rates are up to 49% lower than wages paid to teachers employed in government and catholic schools nationally.⁵⁹ On average, they are between 22% to 30% lower, with the compression of relativities between levels meaning this is more exacerbated at the higher end of the scale: that is, more experienced teachers are paid proportionately less relative to a new starter despite their higher levels of skill.
95. Wage rates are fundamental to the award system. A rate that is so unrelated to what the profession is actually paid is neither fair nor relevant. It is notable that this is not an industry where this could be explained as mere market forces or regional variances, given the nature and size of the major employers.

(b) The need to encourage collective bargaining

96. A significant proportion of teachers are currently covered by enterprise agreements, including almost all primary and secondary school teachers. However, a portion of the workforce – primarily early childhood teachers in the for-profit sector – have very low levels of collective bargaining currently.
97. The variation sought will encourage collective bargaining in the award-reliant sector, as having fair and relevant award rates:
- a. actively incentivises collective bargaining for employers, in that it increases the need to negotiate for enterprise-specific trade-offs and productivity benefits;

⁵⁹ See Schedule C, IEU submissions 26 November 2018.

- b. makes collective bargaining a relevant option for employees currently covered by the award, by making the starting point an appropriate minimum rate rather than an undervalued minimum;
 - c. removes disincentives to continue collective bargaining for employers who have negotiated rates at or higher than the correct minimum work value, by removing the gap between these rates and the Award minimum.
98. As for the primary and secondary school sectors, since the rates sought are below current registered rates there is no reason to think they would affect bargaining in those sectors.
- (c) The need to promote social inclusion through increased work force participation*
99. The current Award rates, by their undervaluation of the work, affect the supply of teaching professionals in the part of the sector characterised by award reliance (i.e. the for-profit early childhood education sector).
100. The proposed variation will address this, leading to:
- a. a greater ability for private sector employers to attract and retain early childhood teachers;
 - b. thus greater community access to early childhood education services; and
 - c. from this, a potential increase in workforce participation as parents of young children are more readily able to return to work.
- (d) The need to promote flexible modern work practices and the efficient and productive performance of work.*
101. The proposed new Award rates will promote the efficient and productive performance of work by appropriately recognising and remunerating workers for the skills required to perform the work. This will:
- a. reduce turnover and supply difficulties in sectors of the industry where Award-only coverage dominates; and
 - b. incentivise non-degree qualified educators paid at Award level to participate in further study to upgrade their skills,
- both of which will deliver productivity gains at an enterprise and industry level.

(e) *The principle of equal remuneration for work of equal or comparable value*

102. In this regard, the IEU relies on its submissions in respect of the Equal Remuneration Order, and the submissions below under the heading *Gender Pay Gap*.

(f) *The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and regulatory burden*

103. The cost impact of the application is, in reality, effectively nil for the vast bulk of the industry. It is significant in this regard that no employer outside the for-profit early childhood education sector has resisted the application in this regard.

104. As for the sub-sector represented by the ACA, although the application is described as likely to create an '*existential crisis*' for these operators, when it comes down to it:

- a. no evidence has been put on by the employer parties which would support any claim of unaffordability; and
- b. what has emerged demonstrates that the Commission would treat any submission as to the effect of the increase on business with significant caution.

105. This is discussed in greater detail below.

(h) *The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy*

106. The proposed variation will have a positive effect on business productivity as:

- a. it will provide proper remuneration for the skills and work performed by teachers, leading to consequent productivity improvements;
- b. it will encourage upskilling and the entry and retention of people into the teaching workforce;
- c. it will address skill and labour shortage in the award-reliant sector of the teaching industry (primarily early childhood teaching), increasing community access to high-quality services of this kind and correspondingly increasing workforce participation and productivity in the short and long term, for the reasons set out above.

HISTORY OF WAGE FIXATION FOR TEACHERS

107. In the IEU's opening submissions on its s157 application dated 22 November 2018 we set out at [24]-[31] how the current rates came to the Award. In summary:

- a. the *Teachers (Victorian Government Schools) Interim Award 1993* was made in 1994, being the first Federal award applying to teachers in Victorian government schools;
- b. in 1995, following an application by the AEU, that award was reviewed and the wage rates varied on work value grounds;⁶⁰
- c. the *Victorian Independent Schools – Teachers – Award 1996* was made shortly thereafter, establishing pay parity with government school teachers, replicated in the subsequent *Victorian Independent schools – Teachers – Award 1998 (1998 Award)* ; and
- d. the rates in the 1998 Award, adjusted only by standard annual wage review increases, were included in the modern Award made in 2010.

108. In other words, the rates have not been the subject of any work value consideration, or related increase, since 1995. Although s157(2)(a) does not strictly require a datum point, it is nevertheless useful in considering the question of whether a proposed change is justified by work value reasons, at least in the sense that significant increases in work value over time – here, 23 years – are a strong indication that a proposed variation increasing rates is justified on work value reasons.

109. In opening, the ACA pointed to two additional decisions:

- a. *Re Victorian Independent Schools – Early Childhood Teachers – Award 2004 (PR948154) (the 2004 Decision)*; and
- b. *Re Educational Services – Early Childhood Teachers Interim Award [2016] FWCFB 3716 (the 2016 Decision)*,

and implored the Commission to '*investigate those questions, at least acknowledge the fact that these decisions exist and deal with them properly.*'

110. The 2004 Decision deals with a consent award applying to early childhood teachers in Victorian Independent Schools.

111. This decision is of no use in assessing the question of how the rates in the Award were set. The only reference to the 1998 Award is at [6], wherein Watson SDP concluded that the rates in the proposed award were '*properly fixed*

⁶⁰ *Re Teachers (Victorian Government Schools – Interim) Award 1994*, Print M6311; *Re Teachers (Victorian Government Schools) Conditions of Employment Award 1995*, Print m9746

minimum rates' largely on the basis that they reflected the rates in the 1998 Award; there is no independent consideration as to the appropriateness of those rates. Rather it appears he was proceeding from the prima facie view, that such rates can be presumed to be properly fixed in the absence of evidence to the contrary.

112. Notably, however, his Honour observed:
- a. at [6], '*there is nothing to suggest that the early childhood context would warrant different rates*'; and
 - b. at [7], that the time based *incremental progression provided for in the award is work value based in the sense required by the Paid Rates Decision, with progression dependent upon the satisfaction of criteria reflective of changed work value*'.
113. The Decision, to the extent it is of any relevance, highlights the artificiality of the ACA's claim that early childhood teachers should be paid differently to primary and secondary school teachers, and reflects the long-standing connection between work experience and increased work value in the context of teaching work.
114. The 2016 Decision is similarly irrelevant to any consideration of how the rates were set in the Award. It is again in short form, with five and a half of its six pages concerned with introductory matters and extracts of legislation. The four paragraphs of reasoning do not deal in any way with the manner in which the rates in *that* award were set, or whether they properly reflected the work value of the employees covered. Indeed, at [8] the Full Bench, in dealing with concerns about scope raised by an employer association, characterised the award as '*a safety net that will underpin enterprise agreements*', reflecting perhaps a view that employees would be unlikely to be actually engaged on the bare terms of the award itself.
115. The Award made as a result of the 2016 Decision (the *Victorian Government Schools – Early Childhood – Award 2006* applies to, *inter alia*, teachers employed by school council established under Part 2.3, Division 2 of the *Education and Training Reform Act 2006* (Vic), which are State reference public sector employers. These employees are not affected by the IEU's claim (by virtue of the existence of this award).

INCREASES IN WORK VALUE RECOGNISED IN NSW

116. The decisions of the NSW Industrial Relations Commission on rates of pay to ECTs from 2001 through to 2009 are instructive. ACA submits that because of a different statutory criteria the fact that there were higher rates in NSW can be ignored. This submission ignores the significance of the NSW Decisions – namely the identification of significant increases in work value for early

childhood teaching during the relevant date periods and the significant public interest in addressing the issue of shortage of qualified ECTs. Given the datum point relevant to this case, each of the cases considered by the NSW Commission which led to increases of 20% in 2001, 13% in 2006 (by consent, but for work value reasons) and 12% in 2009, for a total of 45% before considering the compounding effect, are highly instructive.

2001 Decision

117. The 2001 Decision was the first occasion where the work of ECTs was fully considered by the NSW Commission,⁶¹ and it would appear, anywhere. For that reason Schmidt J reviewed the evidence in some detail, concluding that there had been substantial work value change and awarding increases over three years totalling 20%. The case is instructive both for that reason, and because Schmidt J was considering work value change in respect of ECTs in respect of part of the same period (a period from October 1991 to 2001⁶² - although it should be noted that the union's work value case was predicated on change from December 1994⁶³).
118. The case preceded under both the Special Case and Work Value principles. The employer case, which was rejected, was remarkably similar to the case run here, as the following summary demonstrates.
119. The employers contended that the work of teachers was no more valuable than that of non-professional educators.⁶⁴ Schmidt J rejected this proposition concluding: "*The overwhelming evidence was that the quality of understanding and knowledge brought to the work by the two groups differed*".⁶⁵
120. The employers contended that a degree qualification does not adequately prepare teachers for employment in early childhood services or that experience does not add to the value of their work. Schmidt J rejected that, finding that the "*overwhelming evidence is to the contrary*";⁶⁶
121. The employers contended that changes to regulation and accreditation requirements on long day care centres did not affect teachers and did no more than set down procedures centres already had in place.⁶⁷ This was rejected, Schmidt J finding that the changes not only affected service providers "*but also those employed in the services*".⁶⁸

⁶¹ 2001 Decision at [87].

⁶² 2001 Decision at [33]-[35].

⁶³ 2001 Decision at [33].

⁶⁴ 2001 Decision at [21], [302] and [311].

⁶⁵ 2001 Decision at [311]-[313];

⁶⁶ 2001 Decision at [338].

⁶⁷ 2001 Decision at [78].

⁶⁸ 2001 Decision at [319].

122. The employers contended that the changes were of the nature that professional employees would be expected to deal with in the ordinary course.⁶⁹ Schmidt J accepted that all work changes, and that employees are expected as a normal part of their work to accommodate such changes.⁷⁰ Further her Honour accepted that teachers are equipped to deal with these changes, while noting the need for inservice training.⁷¹ However her Honour concluded: “*The fact that employees are able to meet changed work requirements, does not mean that the changed work has no increased value. That is, after all, what the Work Value Principle is concerned with ...*”.⁷²
123. The employers contended that reliance on the rates paid to school teachers involved ‘leapfrogging’ and ‘flow on’⁷³ because the IEU claim was to lift ECT rates to those of other teachers. Having determined that the IEU had demonstrated undervaluation of the work of ECTs, her Honour determined that reference to the rates paid to other teachers were an appropriate reference. Her Honour said: “*I am well satisfied that a case has been made out for significant wage increases and that a fair assessment of proper rates for the teachers employed under these awards cannot be made in a context where rates paid to other similarly qualified and experienced teachers is ignored.*”⁷⁴ Her Honour ultimately concluded that given that the rates paid to other teachers were fixed by agreement, which meant it was not possible to ascertain precisely how, or why, the various rates were fixed, she would refrain from the “*undeniably attractive option of simply awarding the rates claimed, reflecting the rates paid to many school teachers, having in mind the evidence of the similarities in the work performed by these teachers, compared to those employed in schools, as well as their relative responsibilities*”, but nevertheless granted a sizeable increase that lifted the ECT rates to a level just below that of teachers.⁷⁵ Her Honour rejected the notion of a risk of flow on, given the rates would be lower.⁷⁶
124. The employers contended that the industry was highly sensitive to cost increases and that all increases in expenses had to be passed on to families,⁷⁷ and the increases being sought would be ‘the straw which breaks the camel’s back’ leading to long day care centres closing.⁷⁸ These concerns Schmidt J found to be “*somewhat overstated*”,⁷⁹ and her Honour was not satisfied that the ongoing viability of the services would be affected,⁸⁰ findings confirmed by

⁶⁹ 2001 Decision at [65]

⁷⁰ 2001 Decision at [356].

⁷¹ 2001 Decision at [357].

⁷² 2001 Decision at [357].

⁷³ 2001 Decision at [69].

⁷⁴ 2001 Decision at [394].

⁷⁵ 2001 Decision at [400]-[401].

⁷⁶ 2001 Decision at [403].

⁷⁷ 2001 Decision at [72]

⁷⁸ 2001 Decision at [82]

⁷⁹ 2001 Decision at [315].

⁸⁰ 2001 Decision at [325].

history as the Full Bench in 2009 noted.⁸¹ Schmidt J concluded that the evidence demonstrated change in work of a kind sufficient to satisfy the Work Value Principle, being evidence that demonstrated that the work was significantly undervalued.⁸²

125. Her Honour drew upon the seminal 1970 decision which considered changes in the work value of teachers which had placed emphasis on:
- a. Gradual rather than sudden or radical change;
 - b. Progressive changes to teaching methods making the work more exacting;
 - c. Requirements for more reading and research;
 - d. Changes in recording and reporting requirements;
 - e. Changes in teaching standards;
 - f. Impact of greater public awareness of education and its importance⁸³

each of which were changes “amply demonstrated” on the evidence in respect of ECTs in the case before her Honour.⁸⁴

126. While noting that the 1970 case concerned a different group of teachers under a different legislative scheme, her Honour said it demonstrated the types of changes in work which in the past have led to wage increases being awarded to teachers on work value grounds.⁸⁵

127. Her Honour cited at [364] from the majority decision a conclusion that there is an important public interest in schools being staffed by well-qualified teachers who are rewarded for their services at proper levels of remuneration for professional work. Her Honour then concluded at [366] in sentiments that are no less applicable to this case:

The time has long passed since teachers employed in the early childhood services sector were regarded as providing merely a child minding or child care service, rather than an educational one, given the ages of the children attending the centres at which they are employed and that they are not employed in schools. Indeed such views are inconsistent with the Regulations which govern the operation of centres in this sector. They are views which in reality have not had currency since the first consent award was made in 1970 for these teachers, when they were immediately brought up to 80% of the rates paid to

⁸¹ 2009 Decision at [253]-[254].

⁸² 2001 Decision at [335].

⁸³ 2001 Decision at [359]-[360].

⁸⁴ 2001 Decision at [367].

⁸⁵ 2001 Decision at [361].

teachers in schools and parity was phased in over the following four years.

128. Specific matters relied upon by her Honour as evidencing significant change in work value were:
- a. Changes in the way that children are taught;⁸⁶
 - b. Changes to the altered regulatory environment, including the regulatory licensing scheme ⁸⁷ and the Commonwealth Quality Assurance scheme.⁸⁸
 - c. Enactment of child protection legislation;⁸⁹
 - d. Increases in the number of children with special needs affecting the work of teachers;⁹⁰
 - e. An increased emphasis on school transition;⁹¹
 - f. Involvement of teachers in writing policies and discussing them with parents.⁹²
129. In circumstances where ACA at a late stage in proceedings attempted to place emphasis upon the existence of a previous Commonwealth quality framework that commenced before 2009, it is relevant to note that changes to the previous system were identified as a significant contributor to an increase in work value, changes which occurred during the relevant period.

2006 Decision

130. The NSW Commission considered the rates of pay again in early 2006.⁹³ Proceedings had been commenced by the IEU to lift the rates a year earlier. The matter was set down for hearing before a Full Bench, and before Schmidt J to take evidence, on dates between January and March 2006. It was resolved on a consent basis. A 13.5% increase was awarded on a work value basis payable in three stages. The significance of the decision being the further sizeable increase, and the fresh datum point.

⁸⁶ 2001 Decision at [368].

⁸⁷ 2001 Decision at [370].

⁸⁸ 2001 Decision at [371].

⁸⁹ 2001 Decision at [373]-[375].

⁹⁰ 2001 Decision at [376].

⁹¹ 2001 Decision at [366].

⁹² 2001 Decision at [381].

⁹³ *Teachers (Non-Government Early Childhood Service Centers other than Preschools) (State) aWARD* [2006] NSWIRComm 4 (**2006 Decision**).

2009 Decision

131. In November 2009 a Full Bench arbitrated a further claim for the ECT awards, awarding a further 12% increase (described as affecting about 1500 employed in long day care centres and about 3000 employed in preschools).
132. The IEU put the claim forward relying on both the special case principle and the work value principle, in the latter case relying on changes since January 2006.
133. The special case relied in large part on the shortage of teachers in the early education industry, which was said to be significantly affected by the disparity in wages between ECTs and other teachers.⁹⁴
134. The Full Bench concluded that the shortage of ECTs was a matter of “*very considerable public interest*”,⁹⁵ and that the wage disparity with other teachers had “*contributed significantly to the shortage of teachers*”.⁹⁶ At [77] the Full Bench said, in a passage that is no less applicable to this case:

We are satisfied that the very large gap of up to 27 per cent between the pay of early childhood teachers in the non-government sector compared to the government sector, is a significant contributing factor to the teacher shortage. The gap is not justifiable on any test, especially when what is at stake in early childhood education.

135. The work value case rested in part on changes to the regulatory framework,⁹⁷ including changes to the NSW Regulation and the Commonwealth QIAS. The new NSW Regulation required a licensee of a children’s service to develop policies (and set out a long list), which was said to be more onerous and detailed than before.⁹⁸ Evidence was given as to how the practical application of the new regulation on policies for special needs children, given an increase in the number of special needs students,⁹⁹ and involvement of parents in respect of policies.¹⁰⁰ At [90] the Full Bench set out how the QIAS had changed in 2002 and then again in 2006 and 2008. The 7 QIAS quality areas and 33 principles were set out at [91]. The Full Bench relied on this evidence as demonstrating “*the increased workload placed on teachers and directors resulting from greater regulation in the industry and higher volume and more varied administration work*”.¹⁰¹ At [172] the Full Bench concluded that the evidence, including more onerous regulatory requirements, demonstrated that there had been changes in the value of work of employees. At [179] the Full Bench concluded that there had been an increase in work value, although some of the changes were more in the nature of evolutionary changes to work.

⁹⁴ 2009 Decision at [30] and [48].

⁹⁵ 2009 Decision at [70].

⁹⁶ 2009 Decision at [75].

⁹⁷ 2009 Decision at [82].

⁹⁸ 2009 Decision at [84].

⁹⁹ 2009 Decision at [87].

¹⁰⁰ 2009 Decision at [88].

¹⁰¹ 2009 Decision at [123].

136. At [253]-[254] the Full Bench considered and rejected the contention that the increases sought were not affordable and could not be sustained, noting that the same submission had been put before Schmidt J in 2001, and yet there was no evidence that the increases awarded then had in fact led to negative consequences.

The three NSW Decisions in summary

137. The three NSW decisions gave rise to increases of 20%, 13.5% and 12%, or 45.5% before considering the compounding effect. The first and last of these increases were underpinned by work value considerations. The three cases covered a very similar datum period as this case, up to 2009.¹⁰²

138. There is no reason to think that the work of ECTs in NSW in the relevant period was relevantly different to that of ECTs nationally. ECTs were most prevalent in NSW.

139. Against that background, the relevance of the three decisions is five-fold:

- a. They confirm that there was a very considerable increase in work value of ECTs in the relevant period up to 2009 (noting that the IEU has led extensive evidence of further work value changes since then);
- b. One aspect of that increase in work value in that period was the QIAS regime (which applied to long day care but not preschools) and changes to that regime;
- c. They confirm that there is considerable public interest in addressing a shortage of teachers in the early childhood sector by closing the gap between ECT rates of pay and rates paid to other teachers;
- d. They confirm that when determining the rates that should apply the Commission can have regard to the rates paid to teachers in the Government sector; and
- e. They show that considerable increases in rates of pay for ECTs do not threaten the viability of early childhood operators.

WORK VALUE CHANGE

Introduction

140. In this section of the submission we identify significant changes in work value that have occurred for teachers over the last two decades.

¹⁰² As noted earlier in these submissions, the 2001 Decision considered a datum period of October 1991 to 2001 although the union's work value case was predicated on change from December 1994.

141. Inevitably when considering such a large group of workers, particular aspects of change are more pronounced for some rather than others that may occur earlier for some rather than others. Second, change is necessarily a continuum, being introduced for some workers earlier than others.
142. Given the submission by ACA that early childhood teachers, at least, have not had any significant change in their work value over the last two decades, this submission will identify in particular changes in their work value. This is not to detract in any way from the overall submission that the evidentiary case of work value change in respect of primary and secondary school teachers has not been challenged, and that a teacher is a teacher, such that changes in work value need to be considered ultimately as an overall exercise considering changes that have occurred to teachers generally.
143. In summary the applicant points to three broad types of change. **First**, substantially increased professionalism which has given rise to higher quality teachers. This is demonstrated by reference to the evidence that falls under most of the following headings, but in summary the 5 key aspects are:
- a. changes to ITE (initial training education) giving rise to higher quality teachers, in particular:
 - i. quality assurance of teaching programmes;
 - ii. higher qualification (entry) requirements; and
 - iii. increased degree length;
 - iv. and in NSW exit requirements to get a job in a Government school.
 - b. new national registration requirements pursuant to which teachers are required to abide by an ethical standard and meet new national standards for proficiency – ECTs as well;
 - c. new post registration requirements, in particular mandatory continual professional development requirements;
 - d. substantial increase in accountability, driven by increased student testing and reporting of results;
 - e. in respect of ECEC – national quality measures introduced in 2009; and
 - f. changes in community and parental expectations which increase accountability.
144. **Second**, the work is substantially more complex:
- a. Change to an outcome based curriculum has given rise to a fundamental change over recent years, namely differentiating the teaching for each

child, a change that substantially increases the level and intensity of teaching. This individualised approach, involves intentional teaching: planning a lesson, testing or observing and responding on an individual student level, and documenting what is observed/assessed;

- b. There is now a need to constantly record the level of achievement of each child, at a granulated level which assesses each child's proficiency of various categories and subcategories of skill and knowledge for each subject (no longer one mark given for the overall test, but each category of the test is separately marked and then the data input to generate reports);
- c. There is now a need to analyse data on the level of achievement of each child, at a granulated level to determine how to target those areas that need attention and then teach to that individual level;
- d. Demographic changes within the student population have given rise to substantial additional work that derives from an increase in students with special needs or additional needs who need: individualised teaching; altered assessments; individual plans determined in conjunction with parents and health professionals; different and more intense teaching approach; the need to supervise and lead teacher's aides (LSOs), there has also been an increase in students with behavioural difficulties and an increase in students from more diverse backgrounds. This is a particular feature of early childhood teaching, given the substantial increase in students as a result of the move to universal access for 3-4 year olds. It means teachers have become advocates for their students.
- e. The need to use technology in the classroom, which is a required part of the EYLF and national teaching curriculum; and
- f. Standardised curriculums with greater content and scope, requiring more to be covered in the time;

145. **Third**, the work is substantially more intense and demanding than it was:

- a. There is now a need to produce constant updated reports as to progress based on the regular assessments so they can be considered by the school, and a withdrawal of admin support;
- b. Substantially increased reporting requirements to parents, from once a term or year school report, to regular reports on subjects, including or in early childhood daily via apps;
- c. Substantially increased accessibility for parents, including email and phone calls;

- d. Substantially increased obligations to document a variety of information;
 - e. Substantial increase in policies that must be understood and applied;
 - f. An increase in extra-curricular activities requiring teacher time.
146. The key aspects of each of the three overall themes are dealt with below. As can be seen, many of the changes are closely interrelated.

Substantially increased professionalism

147. Teaching work has always been a professional occupation; however, the degree of professionalism has increased significantly over the last two decades as set out below. This has two flow-on effects:
- a. Increased accountability, driven by testing and other factors;
 - b. Higher levels of community and workplace expectations.
148. This has been particularly sharply felt in the early childhood education sector. As Ms Connell explains:¹⁰³

Early Childhood Teachers in NSW entered the teacher accreditation process in July 2016, and as such we are increasingly considered professionals. Based on my experience, there is now a greater expectation from families that I am knowledgeable, that I deliver results and provide more regular documentation. I now have to be cognisant of the Australian Standards for Teachers, the Early Years Learning Framework (EYLF) the National Quality Framework (NQF), the National Quality Standards (NQS), the Education and Care Services National Law (the National Law), the Education and Care Services Regulations (the Regulations), and a range of other regulatory requirements as outlined in my earlier statement. As early childhood teachers continue their advocacy for the importance of early childhood, it is necessary for me to become more knowledgeable in this range of areas. This has led me to engage in greater amounts of research and reading than I ever did in the past.

Initial teacher education

149. Since 1996, initial teacher education has been the subject of a dedicated and deliberate program of reform following multiple government reviews of the sector. This reflects both a requirement for and the achievement of higher levels of skill and knowledge before a person can enter the profession. Ms Hickey, who was not cross-examined, gives extensive evidence of the changes at [48] of her statement. In summary, the changes involve:

¹⁰³ Statement of Connell, exhibit 63, [4].

- a. lengthening the time taken to complete teaching degrees (now four years undergraduate and two years at masters level);
 - b. the 2011 introduction of a national course accreditation scheme superintended by AITSL, imposing strict quality assurance standards;
 - c. in 2015, the imposition of a number of significant increased entry and skill output requirements by the Commonwealth, including:
 - i. higher entry criteria, including literacy and numeracy standards, sophisticated selection criteria based on a range of factors (not just ATAR: see Ms Hickey at PN1874-1878);
 - ii. extensive assessment of graduates to ensure classroom readiness, and standardisation of induction systems;
 - iii. increasing the amount and quality of practicum requirements throughout the degree;
 - iv. higher quality assurance measures, including increased evidence-based monitoring and assessment of university courses; and
 - v. focused research on teacher education effectiveness and practice.
150. In early childhood settings this intensification of training has also manifested in the introduction of specialised birth to 8 degrees, rather than birth to 12. Both permit teachers to work in early childhood education and primary school.¹⁰⁴ As Dr Irvine puts it:

ECT degree programs are intellectually demanding and graduates are expert curriculum workers. Preservice teachers in these programs develop knowledge and expertise in working with several curricula (e.g. the Australian School Curriculum, the Early Years Learning Framework and some state specific curricula such as the Queensland Kindergarten learning guideline) alongside a range of pedagogies to engage diverse learners in active learning.¹⁰⁵

151. Similarly, exit requirements have changed and continue to change, becoming more onerous: by way of example, the NSW Government has announced academic result benchmarks for students commencing in 2019 who wish to seek employment in NSW public schools.¹⁰⁶

¹⁰⁴ Statement of Irvine, [11]-[14].

¹⁰⁵ Statement of Irvine, [13].

¹⁰⁶ Statement of Hickey, [48](d).

National professional standards

152. In 2011, uniform registration requirements for teachers were introduced. These are coupled with common national professional standards. The stated (and evident) purpose of the standards is to increase quality of teaching.¹⁰⁷
153. Professional standards for teachers at primary and secondary level are not new, but the national standards nevertheless represent a significant change. Dr Irvine describes it as follows:

[33] Prior to the introduction of national professional standards for teachers, there was considerable variation in state registration approaches and requirements. Comparison with the previous Professional Standards for Queensland Teachers (Queensland College of Teachers, 2007), highlights strengthened professional expectations in the APST in relation to:

- Inclusive teaching practices including specific reference to differentiated teaching to cater for individual student needs, strategies for teaching Aboriginal and Torres Strait Islander students, and strategies to support full participation of students with a disability;
- Assessment and reporting on student learning including the use of diagnostic, formative and summative approaches to assess student learning, interpreting student data and documenting and reporting on student learning;
- Information and Communication Technology specifically using ICT and teaching students to use ICT to expand learning; and
- Engaging in ongoing professional learning including using the APST to assess and plan professional learning needs, engage in professional learning to improve practice and student learning.

While these aspects of teaching have historically been recognised as important (with the exception of ICT), the APST presents these as universal standards for teaching, and sets new benchmarks for teaching practice and performance.

154. The need for teachers to meet these 37 common standards, and their importance for the accountability of teachers' work, is set out at [17]-[20] of Ms Hickey's statement. The IEU's lay witnesses confirmed the significance of these standards to their day to day work, summarised by Mr Watt:¹⁰⁸

The implementation of APST has required of teachers: reflection on their practice, the complex mapping of teachers' attributes against the teacher Standards for the purpose of initial teacher or graduate registration, and substantial evidentiary requirements to meet the registration at the proficient, highly accomplished and lead teacher

¹⁰⁷ Exhibit 76 - Doc 105: Proficient Teacher Evidence Guide - Early Childhood Teachers, p.0033

¹⁰⁸ Statement of Watt, Exhibit 22, [19].

registration levels. For example, for a teacher to move from graduate to proficient level, they are required to collect significant amounts of evidence to demonstrate how they are meeting the seven Standards and descriptors relating to the particular focus area within each Standard. This could be shown by reference to students' work samples, the teacher's reflection notes or diaries, or notes in programs or student day books. The teacher also needs to demonstrate that their teaching has had a measurable impact on the students' learning. There are corresponding requirements for Highly Accomplished and Lead but the descriptors require performance at a much higher level.

155. Although, as discussed above, not every state or territory requires teachers in early childhood settings to be registered with their state authority, this is in the process of changing. As Dr Irvine observes:

Significantly for ECEC, the report [One teaching profession: Teacher registration in Australia (AITSL, 2018)] recommends the expansion of teacher registration to mandate that all ECTs, regardless of their employment setting, are required to be registered by teacher regulatory authorities, under a consistent national approach (AITSL, 2018, p. iv). Until now, the National Framework for Teacher Registration (AITSL, 2011) has been silent in terms of application to ECTs outside of the school system, and there is variation in ECT registration across jurisdictions. While widely seen as further acknowledgment of the professional work of ECTs in these settings, and welcomed by the ECEC sector, implementation will require new and different ways of working. This includes training experienced ECTs in these settings to mentor and support beginning ECTs to transition from provisional to full registration, and ECTs to collect and document evidence to demonstrate their proficiency against the APST.

156. In short, the creation of standards are an important recognition of standardised minimum skill levels. The creation of standards ensure accountability and so lift the level of professionalism.

Professional development

157. In addition, teachers are now required to engage in ongoing professional development, being 20 hours a year (or 100 hours over 5 years). Ms Ames, a teacher in early childhood services, describes what this in practice involves:¹⁰⁹

I am required to fill in a form documenting the professional development undertaken each year. As far as I am aware primary and secondary school teachers, fill in the same form. Auditing of APST is conducted by VIT. I engage in professional learning and professionally with colleagues, keeping up to date with the NQF, policy development and protocols. I do research in my own time to ensure that my practice is meeting the requirements.

13. In 2017, I attended the following courses and professional development:

¹⁰⁹ Statement of Ames, Exhibit 58, [12]-[13].

- a. Six Practice (Staff) Meetings are a requirement, they are held out of normal working hours (6:15-8:45pm) and are included in the Professional Development quota;
- b. A full day First Aid Level 2 Training including Asthma and Anaphylaxis management;
- c. The Early Learning Association Australia Conference;
- d. Transition: A Positive Start to School Professional Learning workshop;
- e. Supervision Training;
- f. Reconciliation in Action with Annette Sax;
- g. Transition Network meeting, where I liaised with local schools about children's transition to school;
- h. Telling your Story advocacy training;
- i. Relationships: The Heart of Leadership and Advocacy in Early Childhood;
- j. Islamic Museum Lecture and visit; and
- k. 'Celebrations in Early Childhood'.

158. Professional development for teachers is itself not new: the change comes from both the introduction of minimum standards and the reporting requirements. As Ms Connell sets out:¹¹⁰

Before the teacher accreditation requirements were introduced, I was expected to participate in professional development, however there was no recommended amount that I had to complete. I know for a fact that I did not complete 50 hours of teacher identified professional development before the introduction of the requirement.... I am completing a great deal more professional reading since the introduction of the requirements and logging this online with NESAs against the standards.

159. In addition, schools and education facilities are increasingly introducing internal training and professional development programs directed at teachers.¹¹¹ A significant example is G8, which has recently introduced a training program specifically directed at teachers.¹¹² Notably, it focuses on teachers as leaders in 'learning, thinking, practice, self and pedagogy', and (for example):

establish[ing] a mentoring culture in their classroom by provid[ing] advice, support and scaffolding to less experienced and qualified colleagues.¹¹³

¹¹⁰ Statement of Connell, exhibit 63, [7]-[8]

¹¹¹ See, eg Statement of Cooper, Exhibit 46, [4]; Statement of Gleeson, exhibit 67, [4],[9]-[10]; Statement of Heggart, [35]-[36], Statement of Jenkins-Flint, Exhibit 23, [11]-[12]; Statement of McKinnon, exhibit 48, [30].

¹¹² Exhibit 40

¹¹³ Exhibit 40, p.7

Substantially more complex

Individualised learning

160. Changes in pedagogical understanding and practices since 1996, and indeed 2010, have greatly altered the complexity and intensity of work performed by teachers at all levels of schooling. In particular, there is an increased focus on individualised learning – also described as personalised, targeted, or student-centred teaching. The starting block is differentiation, by which alternative assessment and learning techniques are developed to meet the needs of, at its highest, any one child (or, alternatively, groups of demographically similar children).itself a relatively recent phenomenon. More recently, schools have moved to personalisation. Mr Heggart describes this:

[31] More recently, this has become even more complex with a move towards personalisation. Whereas differentiation might target a specific group of students (for example, the more able), personalisation is the notion that each child should experience a personalised learning experience. In effect, this means that teachers need to provide different learning plans and resources for 20 or 30 different children. While there are possibilities to use technology to aid in this process (for example, adaptive technology) it is still a much more complex process for a teacher to plan this than in the past where there might only have been a need for a single lesson plan that was accessed by all students.

161. Ms Pendavingh similarly describes this new phenomenon at [8] of her statement:

My school at present is moving beyond differentiation, which has increased substantially in practice over to the last 10 years, to a model of individual learning. Inherent in this model is the requirement of students to perform more project-based learning. Each student has greater control over what content they learn and how they learn it. It is far removed from teaching earlier in my career, which involved students sitting at their desk and receiving a lecture from the front of the class, to which they would simply listen together. My role as their teacher has become one of a facilitator of multiple learnings.

162. In other words, teachers are no longer the '*sage on the stage*' but have moved to being '*a motivator of 30 individuals*': McKinnon at [33]. This presents added complexity given the different levels of ability now found in any one classroom. As Geoff Maters, the CEO of the Australian Council for Education Research put it:

In any given classroom, students are likely to be at very different points in their learning and development. The most advanced 10 per cent of students in any school grade are typically five to six years ahead of the least advanced 10 per cent of students in that grade.¹¹⁴

¹¹⁴ Document 218 at p.0338.

163. Although individualised learning has, by necessity, always been a feature of quality early childhood education, it has become more prevalent in that sub-sector of the industry following the introduction of the National Quality Framework. Per Dr Irvine (exhibit 133) at [27]:

‘Reflecting the research on effective teaching and inclusive practices, the NQS and EYLF promote the need for, and benefits of, individualised teaching and learning approaches. All educators are expected to nurture positive relationships with individual children, build on individual strengths, facilitate learning interests and engage in intentional teaching to promote and extend individual learning.’

164. Ms Hilare explains, in practice, what this means for ECTs at [6] (exhibit 56):

Following the introduction of the National Quality Framework, the programming requirements for early childhood teachers became significantly more complex. The room-based educational program pro-forma I discuss above changed to an EYLF outcomes based format, detailing both indoor and outdoor programs. These programs now required written evaluations reflecting on both philosophy and practice. In addition to this, I was now required to complete a detailed individual educational program for each child. The implementation of this individual educational program involves, on a daily basis:[..]

the child’s individual portfolio (digital or hard copy) with photographs, work samples and learning stories (which are formal observations re-written for families as the intended audience.) All of which are used as evidence of a child working towards or achieving EYLF outcomes for the biannual reports on individual children’s learning.

165. Similarly, Ms Connell describes the learning cycle at [25] (exhibit 61):

The cycle is very individualised. There is a continual feedback process from each child in the room. This can be many different programs, at many different developmental stages, all at the one time. For example, on one occasion I have had a child who wants to learn the Hawthorn Football Club song, because they saw their team play on the weekend, and while I am doing that another child was struggling to hold a pencil. I need to work on the motor skills of the one child, while working on the language skills of the other. This happens simultaneously for all of the children in a class.

166. At all levels, additional complexity is introduced in respect of children with special needs and those who require additional support. This, and the increased numbers of these children in the average classroom over the last two decades is discussed below. Similarly, the move to individualised teaching is coupled with changes in the manner in and degree to which teachers are required to assess children, and is in large part driven by curriculum change and increased quality standards.

167. Correctly understood, these developments have been a revolution in teaching practice. Although the ideas are not entirely new, the manner by which teachers now implement them – and the expectation, imposed by the surrounding

regulatory and quality frameworks, that they do so – has significantly changed day-to-day teaching practice, with the drive for quality outcomes leading, necessarily, to more complex work.¹¹⁵

Individual and ongoing assessment

168. Similarly, since the rates were set and the award made, there have been significant changes in the nature and volume of standardised testing that teachers are required to undertake. This, at its most obvious, includes the introduction of standardised testing including NAPLAN, Progressive Achievement Testing, state-specific regimes and school-specific (including catholic systemic) testing.¹¹⁶
169. This is more than a volume increase, however. Testing now is part of a program of ongoing individual assessment, including test design, data entry, result analysis including through the use of new technology, ongoing planning based on individual outcomes including determining individual teaching goals, assessing individual student outcomes against their individual plans and, of course, report writing and other documentation.
170. This process of analysis and application is a significant skill which, performed correctly, is time consuming and complex: McKinnon at [21]-[23]. It is not just a single mark, but a mark for each of a range of competencies. It identifies students with learning difficulties and allows individual targeted teaching to be designed for them (whether or not they qualify for additional funding): Connellan at [24]. Further, it increases the accountability of teachers both within a school and to parents, as increasingly test results, and the consequent outcomes, are used as a metric to assess teacher performance.

¹¹⁵ See also Transcript: 26/6/2019, XXN Connell, PN3891 - PN3897; Statement of Connell, Exhibit 61, [16], [18-25], [34]; Statement of Connell, Exhibit 62, [9-12]; Statement of Connell, Exhibit 63, [17-20]; Statement of Connellan, Exhibit 41, [21-24]; Transcript: 25/6/2019, XXN Finlay, PN2896 - PN2899; Statement of Finlay, Exhibit 50, [62-70], [73-74]; Transcript: 3/7/2019, XXN Hands, PN8613 - PN8624; Statement/Report of Irvine, Exhibit 13, [7.5-7.7]; Statement/Report of Irvine, Exhibit 14, [33], [55]; Statement/Report of Irvine, Exhibit 133, [16], [27-30]; Statement of Jenkins-Flint, Exhibit 23, [23]; Transcript: 27/6/2019, XXN Kearney, PN4934 - PN4938, PN5262 - PN5263; Statement of Margerison, Exhibit 37, [20]; Statement of Margerison, Exhibit 38, [15]; Statement of Pendavingh, Exhibit 45, [8-9]; Transcript: 3/7/2019, XXN Prendergast, PN8310 - PN8312, PN8314 - PN8320; Transcript: 2/7/2019, XXN Toth, PN6912 - PN6940, PN7199 - PN7370; Transcript: 4/7/2019, XXN Viknarah, PN9531 - PN9539, PN9588 - PN9591, PN9630 - PN9632, PN9640 - PN9641

¹¹⁶ See also Transcript: 13/6/2019, XXN Aspland, PN1225 - PN1229, PN3891 - PN3897; Statement of Connell, Exhibit 61, [16], [19], [20-25], [29-31]; Statement of Connell, Exhibit 62, [9-12], [17-18], [25-26]; Statement of Connellan, Exhibit 41, [21-24]; Statement of Cooper, Exhibit 46, [4], [6]; Statement of Finlay, Exhibit 50, [36-38], [59-60], [67-70], [73-74]; Statement of Grumley, Exhibit 47, [34-36]; Transcript: 3/7/2019, XXN Hands, PN8613 - PN8624; Transcript: 18/6/2019, XXN Hickey, PN1850; Statement/Report in Reply of Irvine, Exhibit 13, [7.5-7.7]; Statement/Report of Irvine, Exhibit 14, [33], [55]; Statement/Report of Irvine, Exhibit 133, [18], [27-30]; Statement of Jenkins-Flint, Exhibit 23, [23]; Transcript: 27/6/2019, XXN Kearney, PN5262 - PN5263; Statement of Margerison, Exhibit 37, [20]; Statement of Margerison, Exhibit 38, [3-4], [5-6], [15]; Statement of Pendavingh, Exhibit 45, [8-9]; Transcript: 3/7/2019, XXN Prendergast, PN8305 - PN8312, PN8314 - PN8316; Transcript: 2/7/2019, XXN Toth, PN7199 - PN7370; Transcript: 4/7/2019, XXN Viknarah, PN9587, PN9626 - PN9629, PN9640 - PN9641, PN9757 - PN9764; Statement of Watt, Exhibit 22, [28-29], [36-40]

171. Dr Aspland, in cross-examination, explained why this reflected a change, in a response to ACA's contention that testing has been a permanent feature of teachers' work:

PN1225 Teachers have always tested students, have they not? They have, but they've only tested content from their own lay person's perspective, because teachers have not been, whilst they're educationalists, they have not been assessment experts or test designers. So prior to this period teachers tested their own content so they would teach A, B, C, D, they would test A, B, C, D, and if the person didn't pick up C they would re-teach it. So it was very much from a content perspective. It wasn't around the use of psychometric tests.

172. Mr Watt (exhibit 22) discussed at [28]-[29] how this applies in practice, illustrating the dependence of high-quality individual programming on ongoing, detailed testing:

The expectations on teachers in relation to not only data collection but the analysis of the data arising from NAP, the expectation on reflection of the data analysis through adjustment to their teaching-learning programs, the emergence of measurement of learning progressions and the expectations by schools, employers, systems and communities for increasingly individualised and nuanced learning opportunities for all students and their many needs has made the demands on the classroom teacher infinitely more complex.

Teachers are required to measure and assess their students not only against the learning progression relevant to that student's current skills and capacities but also give consideration to the expected outcomes of the student's cohort. Teachers are required to spend considerable time and skill in analysing the data, the volume of which has significantly increased, along with an increase often in the manner and forms in which it has to be reported.

173. An example of how this is implemented day to day was provided by Mr Magerison (exhibit 38) at [15]:

There is also an increasing push for individual learning plans for every student in my class, that would enable me to report any stage of the year to a parent on how their child is performing. For example, we run reading groups every day for a portion of my class. I am now expected to take notes on what happened within that reading group every day. This is in order to be able to report on what happened in the reading group in each week of the term for each individual child. This takes away from the teaching time, as I am required to take notes, however it also adds difficulty in trying to balance and ensure that I meet the learning needs of each of the children in the class. When I ran reading groups 15 or so years ago, I would have marked the child's work and that would be it, and when time came to report, I would look back over their work-book assess their work and create their grade through that process. Now I am required to make individual notes on each child in that reading

group each time we sit with them. At my school there is a similar expectation for the teaching of writing.

174. This is not isolated to the primary and secondary setting: it is a principal feature of the work performed by teachers in early childhood education and care services. As Ms Connell (exhibit 63) said at [25]:

I perform summative and formative assessments weekly within the program against the EYLF. I look at the observations, which detail what each student did in the day, and then map them against the learning outcomes of the EYLF. I then analyse how I can extend that child's learning in the future and engage them in further learning and interest. Twice a year there is a more formative assessment against the EYLF outcomes. This sets out the child's achievements and ongoing developmental plans. Before the introduction of the EYLF, around 10 or 15 years ago I only kept a developmental checklist on each child and conducted an interview with the parents after the checklist, setting out what we would work on for the year.

175. That Ms Connell's experience is representative, and reflects new developments in the field, is confirmed by Dr Irvine (exhibit 113) at 18:

The EYLF introduced the terminology of 'assessment of learning', most often associated with schools and not previously used in Australian ECEC. Borrowing from the school context, the rationale was that assessment is an integral component of effective teaching and learning. The EYLF requires monitoring, assessment and documentation of children's learning progress, against five high level learning outcomes. As in schools, all staff contribute to this documentation (e.g., assistant educators, lead educators, ECTs). However, in day-to-day practice more is expected from ECTs. This includes the expectation that ECTs leading the preschool education program will regularly engage in formative and summative assessment of learning, and use this to develop a transition statement for each child in their group reporting on learning over the preschool year. The transition statement is shared with the child's family and primary teacher to support successful transition to school.

176. Notably – at least in respect of ACA's contention that there is any difference between the work performed by a teacher in early childhood education and that performed in a primary school, Ms Connell's description is functionally identical to that described by Mr Margerison. This is perhaps unsurprising: as Mr Jenkins-Flint (exhibit 23) describes at [23], in many respects the primary sector is picking up and implementing strategies in respect of individualised learning from the early childhood education sector.

Community and parent expectations and accountability

177. Unsurprisingly, the increased focus on professionalisation, and increased accountability including by more granular and standardised assessment output, has had an impact in the general community: parents expect not only that teachers are professionals, but more specifically that they are professionals who will produce results for their children. The introduction of registration

requirements and explicit, well-published entry requirements and quality standards only intensify that. Mr Grumley (exhibit 47) describes this phenomenon at [20]:

Parents now have very high expectations from schools compared to 10 years ago. Parents are much more aware of media reports about the ranking of schools based on NAPLAN or HSC results and are very focussed on the ATAR that they expect their child to achieve. Parents often pressure teachers to make a student sit a particular course to maximise a student's mark even when the teacher considers this course will have the contrary result. Parents more often now query marks their child has received. For example, in term 3 of 2018 I received enquiries from 13 parents concerning their daughter's Year 12 reports just completed, all of these were about the validity of the mark, while the concerns about the mark were unmeritorious this level of justification is increasing.

This problem is related with the constant and growing social expectation for students to receive and finish Year 12 and attain an ATAR. This results in students being allowed to elect higher level English or Standard English where they have an unrealistic prospect for success. Yet as their classroom teacher I am required to provide them with the pathway to succeed as students, while simultaneously maintaining the appropriate academic standards, while having regard to their mental health as young people. Aspirational parents and high expectations from schools compound these problems significantly. Managing these issues in the class makes it difficult to push the top performing students to their best, and requires complex interpersonal skills.

178. Although each teacher witness gave evidence as to higher levels of parental involvement and demand, the change was particularly acute in the early childhood education sector. Ms Gleeson (exhibit 67) described the changes she observed at [37]:

Over the last few years there has been a lot of changes in parent expectations. I have had families consider the taking of a position for their child within our preschool, they might require multiple and in-depth discussions either face to face, on the phone, or via email communications, or through all of the above to convince them of our merit. The topics covered in these discussions might be aspects of curriculum, how the service is provided, preschool education in Australia. Families increasingly want to know more about the educational setting in which they place their child. There are an increasing number of these well intentioned, but high expectations families than in the past. Some aspects of this are positive, while others are increasingly challenging. There are increasing numbers of family conferences throughout the year, which discuss a whole range of issues concerning the child. There is an increasing recognition within parents of the importance of early childhood education and my role in facilitating this learning. This is linked to the increasing evidence base of the importance of early childhood development.

179. Parents of this age expect, and enjoy, an extraordinarily high degree of communication and reporting about their child's experiences and learning,

which is achieved through phone apps, report books and observations tailor-made for each child and written to engage and educate parents.¹¹⁷ This has, naturally, increased the accountability of teachers, who are now significantly more accessible to parents than in previous years.¹¹⁸

180. Ms Connell (Exhibit 63) discusses the new level of contactability at [39]-[40], in the context of early childhood teaching:

I am at the centre for 10 hours a day and I must be available to parents over that 10- hour day. I often receive emails on my days off, evenings, and weekends, and I am expected to answer them. In 2012 the centre for the first time introduced personal teacher and group emails. For example, a parent may contact me informing me that their child had left clothing at the centre that day, and I am required to respond to their concern as soon as possible. However, this also extends to more complicated correspondence regarding children with additional needs or bullying between children. I also make myself available for parent teacher interviews at short notice at the parents' request. I do not receive any time off for parent teacher interviews and it is expected to be done out of our work time for no extra pay. In 2018 the centre introduced a new app-based software for communicating with parents called StoryPark. Parents can send messages to me at anytime through this program, and I am required to have the program on my phone and computer and respond to parents messaging. There is a trend toward digital platforms for parental communication and accountability. It took a lot of training for me to properly get across the technological aspects of StoryPark, including webinars and further training, and further time in streamlining the documentation into an accessible digital form. I was required to spend part of my annual leave in January 2018 learning this program so I would be able to use it from the beginning of Term 1 2018.

4 Parents expect daily and weekly updates on their children. For example, if a child is upset when a parent drops them off, I would be expected to send a photo of the child when they are happy to the parent through StoryPark informing them not to worry. Centres are increasingly sending pictures to parents of what their child is doing through the day. At the end of the day I will sit down and review the photos and the observations I have taken and will often send what is called a child note to the parent detailing what they did. Recording this information digitally and making it available to parents has only occurred through the last 3 or 4 years. Parents often expect more school-based programs and school readiness programs to be implemented, including literacy and numeracy and STEM type subjects, and early learning languages. Parents expect all their communications to be recorded and sent digitally, which requires greater knowledge of how to use digital documentation. All the while I need to be aware of the privacy implications of using digital communications and recording children's data in this way. This includes gathering permissions from parents regarding the various scopes of the different digital programs and

¹¹⁷ See, e.g. Ms Toth at PN7226-7227

¹¹⁸ See, e.g. Statement of Connell, Exhibit 61, [24]; Statement of Connell, Exhibit 63, [4], [26]; Statement of Connellan, Exhibit 41, [21-24]; Statement of Cooper, Exhibit 46, [6]; Statement of Finlay, Exhibit 50, [19-35], [59-60], [69-70]; Transcript: 3/7/2019, XXN Hands, PN8812 - PN8826

devices. Families are increasingly wanting to know about their child's social and emotional development in addition to their learning outcomes.

181. As Mr Donnelly (exhibit 42) observed at [33], this has had a flow-on effect to parental expectations of primary school teachers:

The expectations of parents over the years I have taught have changed significantly, I think in part due to the EYLF. As a kindergarten teacher, parents come into my class with the standard they have become accustomed to in the early childhood setting in terms of parental communication. Parents who expect to receive a daily email or class blog, because that is what they received from their preschool teacher. I think this is part of the broader trend in which some of the high-quality aspects of early childhood are now filtering through to the primary setting. For example, the SeeSaw app to upload photos, videos and comments that the parents can now access to this digital portfolio.

182. This increased accountability and accessibility presents complex challenges for teachers, exposing them to a range of new and potentially very difficult interactions, and corresponding increasing the level of interpersonal skills required. As Mr Cooper (exhibit 46) observes at [9]:

There is an increasing trend toward engagement and accessibility of teachers with parents. One form of this increased accountability is the use of emails to contact teachers from parents. Often, this increase in access has been coupled with a decrease in politeness and respectfulness. Many parents communicate surprisingly rudely with their child's teacher, and managing these interactions (as well as their effect on you personally) is an increasingly complex task.

Curriculum and pedagogical changes

183. A major change to teaching work – and part of the long-running standardisation and lifting of quality standards across the pre- and school systems – has come about through the introduction of national curriculums being the:

- a. Early Years Learning Framework in 2009; and
- b. the Australian Curriculum in 2014.

184. It cannot be doubted that the introduction of an entirely new curriculum has led to increased work for teachers (in addition to greater accountability and professionalism, as both are subject to scrutiny by the relevant national regulator).¹¹⁹ The particular nature of the Australian Curriculum exacerbates this. As Dr Aspland explained in cross-examination:

¹¹⁹ See, e.g. Transcript: 13/6/2019, XXN Aspland, PN1231 - PN1232; Statement of Aspland, Exhibit 15, [8.4-8.5]; Statement of Connell, Exhibit 61, [26-31]; Statement of Connell, Exhibit 63, [4], [17-18], [22], [39-40]; Statement of Cooper, Exhibit 46, [4], [6]; Statement/Report of Irvine, Exhibit 14, [55]; Statement/Report of Irvine, Exhibit 133, [15-16]; Transcript: 27/6/2019, XXN Kearney, PN4862 - PN4865; Statement of Margerison, Exhibit 37, [20]; Statement

PN1231 [...] so the Australian curriculum from an international perspective is conveyed as one of breadths not depth. So it's very crowded. It's got little bits of everything in it rather than a few elements of substance.

PN1232 What's the significance of that fact from the perspective of the teacher delivering the curriculum? So the teacher does not have in the primary and the early childhood area in particular hasn't been prepared to teach deeply in all of the curriculum areas that are required. So this means for them that they have to go off and do extra study or they feel stressed about not having the depth of knowledge to teach the curriculum areas and, as you would know, in the early childhood and primary sectors there are not many specialist teachers to assist teachers to gain that depth of understanding of content.

185. There is some suggestion from ACA that the Early Years Learning Framework is not correctly regarded as a curriculum. This is based on little more than assertion from lay witnesses, apparently based on the fact that it is described as a 'framework' and is outcomes-focused rather than content-prescriptive. This submission struggles in light of the detailed evidence to the contrary provided by Dr Irvine and Dr Press, and the related academic material referenced therein which reveals that the conceptualisation of the Early Years Learning Framework as a curriculum document is, in reality, uncontroversial.

186. Not only is the Early Years Learning Framework a curriculum, it is an important one. As Dr Irvine (exhibit 12) explains:

[23] Prior to 2009, the absence of a government approved early years curriculum in ECEC services was often used as a basis to differentiate the professional status and work of teachers choosing to work in prior to school settings. In Queensland, this was a barrier to obtaining teacher registration. However, with the implementation of the EYLF, this is no longer the case.

[55] It has been argued that the Early Years Learning Framework (EYLF) presents a more nuanced idea of the complexity of early childhood teaching in contemporary education and care settings (Cumming, Sumsion & Wong, 2015). Teasing out expectations and complexity of work, it is expected that ECTs working in these education contexts will:

- respect and enable children's agency in their learning;
- play an active role in promoting and extending children's learning;
- draw on an expanded range of teaching and learning theories, including developmental, socio-cultural, socio-behavioural, critical and post-structural theories to support and extend children's learning;

- Implement an integrated and holistic approach to teaching and learning, contributing to the five high level learning outcomes;
- work in partnership with families and communities to achieve and sustain the best outcomes for children;
- provide rich and inclusive educational programs that cater for individual learners;
- promote cultural awareness and respect for diversity;
- monitor, document and assess children's learning;
- promote lifelong learning dispositions; and
- support successful transition to school, including liaising with schools and the development of transition statements at the end of the kindergarten/preschool year.

Again, while many of these practices have long been associated with quality in early childhood education and care, the EYLF draws on contemporary research and practice wisdom and raises professional expectations for all teachers. Significantly, as a central component of the National Quality Framework (ACECQA, 2018), these expectations are defined, monitored and subject to ongoing external assessment as part of the NQF Assessment and Rating System.

187. Simultaneously, developments in pedagogical understandings have driven continuous changes in teachers' practice, in addition to the shift to individual learning discussed above. This goes beyond ordinary expectations on professionals to adapt to developments: two decades of development have enhanced the sophistication and breadth of the skills required by teachers in a significant way, and correspondingly the quality outcomes for students. Mr Cooper (exhibit 46) provides a comprehensive summary of these changes, and their effect on teaching work, at [4]:

There have been constant changes in teaching methodologies and pedagogies within my school, characterising the last 12-13 years of my teaching. I have been trained and retrained in a succession of cognitive frameworks and pedagogical frameworks most of which has been mandated by the school administration. In more recent times the introductions of new frameworks are mandated by Catholic Education. I have been involved in and subject to pedagogical training in the following order: training in the CCEs (Core Curriculum Elements within the Queensland Curriculum System), training in Higher Order Thinking Skills, Dimensions of Learning, Habits of Mind, Classroom Instruction that Works, John Hattie's Visible Learning, and finally it was the Graduated Release of Responsibility Model (the GRR Model) starting in about 2016. These are theoretical abstract models. They require me to understand the theory, underpinnings, intention, and meta-language, although this is difficult to achieve as each framework gets replaced by the next. The models typically set out in diagrammatic form all the elements of the framework, which I will then be required to learn and determine what each element is composed of. I usually take professional development to learn about these elements and how to

apply them in my teaching practice, through lesson plans and unit plans, and how to adapt my language in the classroom to the use of the frameworks. I need to revise all the documentation that is sent to students and parents to ensure that it properly references the language of the framework. Each time a new framework is introduced I have needed to be substantially retrained, such that I have substantially revised what I do in class in terms of language use, behaviour management, student interaction, order of activities within a lesson and within a unit. Each of these frameworks require additional documentation which I need to be across, be able to manipulate and be able to apply within the classroom.

Changing student demographics

188. Significant changes in student demographics have altered the nature, complexity and challenges involved in teachers' work.¹²⁰ The demographic change includes not only an increase in students with diagnosed learning difficulties or other disabilities (who may be eligible for further support) but a rise in the number of students with non-diagnosed issues who nevertheless require additional support, and students from challenging and non-traditional family backgrounds. The advent of universal access funding in the pre-school sector has, unsurprisingly, meant that this change has been more sharply felt there.
189. Exhibit 76, the 2016 Early Childhood Education and Care National Workforce Census, sets out the most recent statistics. Mr Watt (exhibit 22) describes the change in general terms at [58]-[59]:
58. Since 2013 the Nationally Consistent Collection of Data School Students with Disability has been gradually implemented and now all Australian schools participate. The Nationally Consistent Collection of Data provides the mechanism for federal government funding for these students. The 2015 collection showed that 18 per cent of enrolments in Australian schools are students with disability (see Improving educational outcomes: Emergent data on students with disability in Australian schools at IEU Bundle K [Doc.262]). The 2017 collection showed 18.8% of students in Australian schools are students receiving adjustments for disability (2017 data on students in Australian schools receiving adjustments for disability - IEU Bundle K [Doc.263]). These adjustments can be extensive, substantial, supplementary or able to be supported within quality differentiated teaching practice in one or more of the four broad categories of disability; physical, cognitive, sensory and social/emotional.
190. The practical impact, and the extent of the change, is summarised by Mr Foster (exhibit 7) at 7:

¹²⁰ See, e.g. Transcript: 13/6/2019, XXN Aspland, PN1217 - PN1220; Statement of Connell, Exhibit 61, [16]; Statement of Connellan, Exhibit 41, [21-24]; Transcript: 25/6/2019, XXN Finlay, PN2896 - PN2899; Statement of Finlay, Exhibit 50, [15], [19-38]; Statement/report of Irvine, Exhibit 14, [33]; Statement of Margerison, Exhibit 38, [21]; Statement of Watt, Exhibit 22, [58-59]; IEU Bundle Doc 23: 2016 Early Childhood Education and Care National Workforce Census - September 2017 Exhibit 76, pp.1-59

A typical maths class 20 years ago may have had 25-Year 8 students, and I would essentially be asked to teach the Mathematics program. There may have been one or two students with some learning difficulties, hence modified workload/expectation was provided. Whereas now I have a Year 7 class in which there are 7-8 of 20 who have specific learning needs. While there probably has always been students with specific learning needs. The introduction of personalised learning plans, and the expectation and requirement to meet the needs of each individual learning issue is extremely challenging. The growing modifications and differentiation required to meet these learning needs is considerable.

191. A similar effect is being felt in the early childhood sector. Here, because of the student's stage of learning, the teacher's role is even further complicated by the increase in students with additional needs. Ms Connell (exhibit 61) sets out the requirements at [16]:

I am required to liaise and integrate with a large number of agencies including; other preschools, occasional care, family day-care, primary schools both state and private, early intervention agencies, agencies and professionals involved with additional needs children, councils, TAFE and universities. This requires me to meet at least once a term with parents and support agencies, write reports for therapists, paediatricians, parents and schools. I am required to keep a Daily Communication book for additional needs children for their parents and other agencies they attend. Teachers are required to keep individual daily programs, Individual Education Program, Family Service Plans. Each teacher in our service is responsible for the development of the child's Individual Education Plan in collaboration with families and any other services, agencies and professionals. This involves setting goals, evaluating these and resetting goals each term. The child is also assessed using the 5 learning outcomes of the EYLF and a comprehensive portfolio and profile developed.

192. This is not entirely ameliorated by the (potential) presence of teacher's aides and non-teacher educators. Ms Finlay – who gave extensive evidence about the sharp increase in her service and the significant effect this had had on her and her colleagues, unshaken in heated cross-examination – explained in an exchange with ACA's counsel that:

PN2899 Under the guidance of the early childhood teacher's individual education plan, that is based on the goals for that child and how those goals are to be achieved. So the early childhood teacher actually - he or she will lead that team and after - in our service we call them micro team meetings where we meet as a team and formulate how we're going to work with a child. They are led by the early childhood teacher who has that deeper knowledge of child development and how to implement different strategies with the child. Led by the early childhood teacher as outlined with either the individual education plan or the behaviour management plan or both.

193. Ms Finlay, in addition, explains at [36]-[38] of Exhibit 50 both the increase in the number of children attending early childhood education services with

behavioural difficulties, and the impact on the skills required of teachers that result:

36. Since I commenced work in the sector, there has also been a significant increase in the number of children with significant behavioural issues. Before the adoption of universal access, it is my experience that children with high needs in terms of significant behavioural issues generally did not enter kindergarten. Again, their participation in kindergarten programs is a positive and commendable policy initiative. However, the impact on the complexity of ECT's work and the skills required is significant.
37. Balancing the needs of the child with such behaviours with learning by expressing themselves and not having too many boundaries whilst preventing the child from impeding the learning of others or indeed injuring them is challenging. It comes to down to professional knowledge: you need to know what works, what is evidence-based best practice, you need good communications within your team and to be able to recognise the often subtle signs of problematic behaviours emerging. It's a constant process of monitoring and reflecting on both the impact on the relevant child, staff and other students.

There are real challenges in terms of risk management in the Kindergarten dealing with children with severe behavioural issues and accompanying disabilities, particularly ASD. For example, we currently have one child with ASD who has a propensity to escalate to violence quickly. You have to be ever vigilant for the triggers for such escalations, the signs of escalation and have to be ready to respond, so as to ensure the safety of staff members, other children and the child themselves. With such children, you need pre-planning to develop a procedure to deal with such behaviours for each child. This requires a Behaviour Support Plan to complement the Individual Support Plan of each child with high needs.

194. The change is not limited to children with diagnosed medical conditions, or special learning needs generally. As Mr Margerison (exhibit 38) put it at [21]:

The students these days are less resilient. I think this has an impact on the amounts of time we need to spend with students on non-academic areas. This makes the delivery of learning more compressed and can in turn complicate the teaching required. The number of students who are seeing psychologists is the highest in my twenty-year career. Students after receiving the almost inevitable nasty word from another student, can create a substantial amount of drama which to me twenty years ago I could simply have ignored. There is a growing requirement for me as a teacher to attend to the growing social needs base of all of my students. While this attention to social and emotionally development is a great move in education, it does make my work more challenging. I have to provide support and friendship to a greater number of children, which is complicated by child protection laws and policies. Students who need familial support are a lot more prevalent than they were once.

Technology

195. It need hardly be said that:
- a. significant changes in technology have occurred since either the rates were set or the Award was made;
 - b. these have, as they have in essentially every profession, dramatic effects on the nature, complexity and skill requirements of teacher's work.¹²¹
196. Dismissing this as labour-saving, as ACA essentially does, misunderstands or misstates the fundamental change in the way technology and connectivity are integrated into all aspects of work and life. It is a curriculum requirement (both EYLF and the Australian Curriculum), a requirement of the teaching standards,¹²² and a general expectation, that technology will be integrated into the learning experience: children must be taught not only how to use technology, but how to use it safely and responsibly. To do this, teachers:
- a. shift, as set out above, from being a pure instructor to being a facilitator – an example being the use of *ELLA* language training software as described in Ms Viknarasah's second statement;
 - b. have had to learn how to first use a range of programs including cloud storage facilities, publishing and music production tools, and a range of school and industry specific communication and assessment tools, and then how to teach them;
 - c. deal with, and appropriately filter, a vast amount of available content, to ensure age and subject-matter appropriateness;
 - d. be alert to, and address, student inappropriate use of technology both in and outside of the classroom; and
 - e. themselves become immediately more accessible out of hours through email and, particularly in early childhood, specific mobile applications.
197. The change in work method was described in cross-examination by Mr Margerison, who estimates that 50-60% of his teaching (in terms of resource sharing) is now done through Google Classroom:

PN2165 Now is that a matter of taking what used to be on the blackboard and putting it on the website or is it more nuance than that? What we're asking our children to produce now is a lot different to 22 years ago and technology has changed that. So when we're asking children to produce videos, sound files, podcasts, all

¹²¹ See, e.g. Statement of Connell, Exhibit 63, [39-40]; Statement/Report of Irvine, Exhibit 14, [33]; Transcript: 19/6/2019, XXN Margerison, PN2164 - PN2165; Statement of Pendavingh, Exhibit 45, [8-9]

¹²² Australian Professional Standards for Teachers, Standards 2.6, 3.4 and 4.5.

those sort of ranges come into it. Certainly my resources are put on Google Classroom which enables the students to go back and have a look at what I have done. Sometimes the students will take photos of what we still use a whiteboard, that we might put up on the whiteboard, especially with an agile space where they can't always see the board that we might have used. Well, they will use their technologies for that case but directions and assignments are given on Google Classroom.

198. Similarly, Mr McKinnon describes the practical impact of technology in the rise of 'flipped learning', a fundamental shift in the way that teaching is done.¹²³

Flip learning is where a teacher makes a video of a lesson, which lends itself to a lecture style of lesson i.e. giving notes and describing content. The students then watch the video at home and when they come to class they bring that knowledge with them, where they can then apply the knowledge to problems. Traditionally maths teaching in the classroom involved giving the lecture at the front of the classroom, and showing the students how to do the problem on the whiteboard. Then towards the end of the lesson the students would begin working on the problems in class. The students would return home to complete the problems for homework. By the time they get home the students are towards the problems which are too difficult for them to do, and so they are without the teacher when they really need a teacher's assistance and guidance. The idea of flip learning is that this process is flipped around, so that the students have me as their teacher available to help them when doing the work of solving problems. I make these videos myself and put them on google classroom, where students can make comments and interact. I have had to learn how to do this, and am always working to make the videos more engaging. Flip learning uses technology in a very positive way, however it does use more teacher time and requires new skills.

199. The integration of technology into the early childhood sector, and its impact, is discussed in terms of accountability and parental accessibility above. A demonstration was available during the inspection of Bambini of Lilyfield, where the Bench was able to view a classroom of preschoolers being taught the alphabet via the use of a smartboard in a variety of ways, including large and small group learning experiences. Mr Fraser estimates the cost of upgrading underperforming centres to meet the new practical standard as involving \$25,000 to \$50,000 worth of investment in computer hardware.¹²⁴

Increased legislative requirements: child protection

200. Since 1996, and indeed 2010, there has been steady and significant growth in the number of policies that teachers have been required to understand and

¹²³ Statement of McKinnon, Exhibit 48, [31]

¹²⁴ Exhibit 84, [159]

implement, ranging from child safety and protection requirements, diversity issues, OH&S and complex medical issues.¹²⁵

201. This has been particularly pronounced in early childhood education. Ms Connell, at Exhibit 63, describes the changes that the need to comply with the National Quality Framework have brought:

[16] Compliance with the NQF is far more evidence based than what existed before, requiring teachers to provide a great deal more administrative evidence of compliance. I have to be able to demonstrate that the elements of the EYLF and NQF are imbedded in my practice. The number of policies has grown exponentially in recent years. We now have eight Policies for Educational Program & Practice, including Culturally Relevant Programs and Anti-Bias policies; there are over forty policies for managing Children's Health and Safety, including policies on the Late Collection of Children, Immunisations, Toileting and Administering Medication; there are four policies on Relationships with Children including Physical Contact with Children and Behaviour Guidance; there are six policies on the Physical Environment including Cleaning and Maintenance and Environmental Sustainability; there are fourteen policies for Staffing Arrangements including Staff Qualifications and Professional Development; there are nine policies for Collaborative Partnerships with Families and Communities including Communication Between Staff and Parents and Centre Visitors; there are twenty eight policies for Leadership and Service Management including Fees, Budget, Fundraising, Record Keeping, and Privacy online. In the IEU Bundles at IEU Bundle K [Doc.253] are copies of policies including the Fire and Emergency Evacuations Procedures, Managing and Preventing Recurrent Otitis Media, Curriculum Planning & Documentation, Environmental Sustainability, Staff Support and Psychological Management, Dignity and Rights of the Child, Volunteers/Students/Centre Visitors, and Fraud Prevention and Control. I am required to know and implement these policies into my teaching practice. Most of these policies did not exist before the implementation of the NQF and the EYLF.

General workload increases

202. Much of the above has, in addition to increasing the skill requirements, complexity and quality output of teachers' work, led to a significant increase in the actual workload of teachers. This includes:
- a. Greater detail required in respect of programming, on both a subject and individual level;
 - b. Significantly increased documentation requirements, particularly in early childhood education and care, ranging from standard assessments to

¹²⁵ See, e.g. Statement of Connell, Exhibit 63, [16], [27], Statement of Finlay, Exhibit 50, [36-43], Statement of Margerison, Exhibit 38, [21], Transcript: 4/7/2019, XXN Viknarasah, PN9757 - PN9764

individual learning plans, risk assessments and behavior management plans for students with particular needs;

- c. Increased need to work out of hours, both to complete core tasks and professional development and to respond to parent contact;
- d. Less administrative support, particularly in schools;
- e. Increased participation in extra-curricular activities of a greater range than in previous decades; and
- f. Greater need to mentor and provide leadership to junior staff seeking accreditation.

203. Mr Cooper (exhibit 46) describes the impact of the new national curriculum standards on teacher workload at [15]:

Teachers have increasingly been expected to write academic programs for school subjects. Whereas in the earlier part of my teaching career the head of department would ordinarily write the work program for the subject area, this has now been increasingly deputised to the classroom teacher who is increasingly expected to write the work programs themselves. Classroom teachers are expected to write their own assessments and marking schemes which typically used to be done on a department level, usually on a voluntary basis. However, the new national curriculum has seen an increased expectation that classroom teachers would write programs rather than heads of department or subject specialist volunteers. The curriculum writing, assessment writing and reporting writing that used to be allocated to heads of department is increasingly being outsourced or delegated back upon the classroom teachers. It is very exacting and challenging to write valid assessment items and marking rubrics, as proved by the very complex, lengthy and laborious process, involving panels of experts, by which the Queensland Curriculum and Assessment Authority has written, tested, and changed the trial pilot exemplars for the new senior syllabi. Despite this fact, teachers are expected to individually write assessments, with limited time provision, mentoring or training. This expectation constitutes an escalation in work demands upon the teacher, both in quantum and complexity.

204. Teachers in early childhood education, as a result of the unavoidable need to program individually and the increased focus on clear documentation of plans, goals and learning outcomes required by the National Quality Standards, have had a similar if not higher increase. This has been compounded by the sharp increase in the number of children attending pre-school programs (for a range of reasons, including universal access funding). Ms James describes the impact at [29]-[31] of exhibit 27:

[29] As set out above, before Start Strong most children at preschool finished at 3. Teachers would use the time from 3 to 4 to pack up learning environments, hold staff meetings, return calls, give prospective parents a tour, hold meetings with parents, develop and update individual education plans for children with additional

needs or individual behaviour management plans for children with challenging behaviours.

[30] Now, teachers conduct a second round of afternoon learning, which might be a second individual indoor program, for an hour.

[31] After the children have left at 4, teachers then have the opportunity to perform the end-of-day tasks set out above. Some teachers are only officially rostered from 8.30 to 4.06pm, others from 8.15am to 4.15pm, meaning that in practice they have significantly less paid time to do all their previous non-contact work. Many teachers routinely stay back to finish.

Changes in work environment

205. Finally, the work environment in which teachers work has altered significantly over the last twenty years. Rather than the traditional classroom, increasingly teachers are working in:

- a. open plan classrooms;
- b. 'agile space' environments, including with multi-age groupings;
- c. in self-paced learning environments for students, including where they are using their own devices,

with consequent impact on the physical and mental aspects of the work, including an increase on noise, and a higher degree of more difficult supervision required.

206. To some extent, this has always been present in the early childhood setting. However, these workplaces bring additional challenges (which can be understood in part through the inspections conducted) of being noisy, chaotic, not in large part equipped for adults in the main classroom areas, and – necessarily – full of very young children who have difficulty controlling emotion and following instructions.

WORK VALUE CHANGES SPECIFIC TO EARLY CHILDHOOD TEACHERS

Introduction of national quality standards

207. The National Quality Framework was introduced in 2012. It regulates, and sets quality standards for, the early childhood education sector. Its genesis is set out in the first and third reports of Dr Press,¹²⁶ and its impact described in detail in Dr Irvine's first report.¹²⁷ In short, the quality framework has three main aspects:

¹²⁶ Report of Dr Press, Exhibit 9, 1.1; Exhibit 11 at p.4-5

¹²⁷ Report of Dr Irvine, Exhibit 12, [18]-[31].

- a. the legislative framework, being the *Education and Care Services National Law* and the *Education and Care Services Regulations*;
 - b. the introduction of a new regulator (ACECQA) to replace the National Childcare Accreditation Council;
 - c. the development of the National Quality Standard, encompassing seven quality areas, the first of which relating to educational programs and practice (including the introduction of the EYLF).
208. The NQF replaced a collection of different state and territory regulations, and in the long day care sector, the Quality Improvement and Accreditation System (**QIAS**). It emerged out of the 2009 COAG National Partnership Agreement on the National Quality Agenda for Early Childhood Education. It was, as Dr Press puts it, a process designed to '*effectively raise...the bar on ECEC quality*'.¹²⁸
209. That it has done so is shown by a comparison between the NQF requirements and the QIAS (which in any event only applied to long day care). Under the NQF:
- a. Matters which were considered indicators of 'high quality care' as opposed to satisfactory care required for accreditation are now the base standards required by the NQS;
 - b. A uniform approach has been imposed, with superior state-based standards preserved and phased in (e.g. teacher ratio requirements);
 - c. Centres are assessed according to a universal standard, and the resulting rating is publicly available, increasing transparency and driving quality standards through market forces;
 - d. Assessment is wholistic and outcomes focused, rather than a tick-the-box approach;
 - e. All early childhood education and care services are required to have access to teachers, depending on the number of children – a significant change in particular for the for profit long-day-care sector, now employing teachers either for the first time or in greater numbers than ever.
210. The NQF did not come out of nowhere; contrary to ACA's repeated submissions (and late-stage, currently unarticulated reliance on the existence of the QIAS), the IEU has never suggested this. What the NQF is, however, is a significant step forward in an ongoing journey for quality improvement.

¹²⁸ Report of Dr Press, exhibit 9, 2., p.4.

211. In the context of teaching work, as set out above the new national quality standards for the first time mandate a national curriculum. It is the first standard, which identifies and applies the EYLF and teaching outcomes which is most directly relevant. Equivalent provisions in the previous system were the ones most commonly not met by long day care centres; indeed, QA1 remains the greatest challenge for these services.¹²⁹ This demonstrates a continuum of increased professionalism and increased teaching outcomes reflective of increased work value.
212. The QIAS did not apply to preschools, only to long day care centres. The commencement of NQS meant that preschools, which in Victoria and NSW employ the majority of ECTs, were for the first time required to meet the substantial national regulatory requirements.
213. That the NQF has increased workload of all involved cannot be doubted.¹³⁰
214. The previous standards do in fact themselves lead to an increase in work value which has not been recognised, as Schmidt J held in the 2001 Decision at [371]-[375].

ACA POSITION

Early childhood teachers are no different to educators

215. As addressed earlier in this submission, ACA seek to convince the Commission that the work value of early childhood teachers is not significant, in part by submitting that it is in fact no different to that of non-degree qualified educators.
216. As set out above, this is fundamentally based on a misconception, or misunderstanding, of the nature of the work performed. The submission that the same work is done commences from the proposition that teachers and educators are all working with children to achieve the same overall educational program. This is true. What matters, from a work value perspective, is the skill which is utilised by teachers. It appears uncontroversial that:
- a. Early childhood education is skilled work, and a form of teaching;
 - b. A person's level of training affects the level of skill with which they perform the work;
 - c. A degree-qualified teacher has a significantly higher level of training than a person who has completed a diploma-level qualification, particularly in respect of pedagogical theory;

¹²⁹ See, eg exhibit 127.

¹³⁰ Productivity Commission Report October 2014, p322, found at p1476 to the statement of Mr Fraser, exhibit 84

- d. Work experience (i.e. years of teaching practice) significantly affects the skill with which teaching is performed.
217. The ACA relies on what it claims is an absence of any direct distinction in the NQF between the work of educators and teachers. As well as continuing to disregard the reality of different skill levels, this is too narrow a reading – while all teachers are ‘educators’ within the meaning of the national law, not all educators are teachers.
218. The significance of, and value provided by, teachers in the sector is shown by the different way that the national law treats teachers and educators for the purposes of imposing ratio requirements. Notably, while the focus for educators is having a sufficient number of people physically with children at all times,¹³¹ the teacher-child ratios do not: a teacher is ‘in attendance’ at a service when performing a range of activities, most of which do not require hands-on teaching work.¹³² In other words, the national regulations recognise the broader educational planning, programming, leadership and mentoring role that teachers, as a result of their specialist qualifications.
219. This is reflected in the reality of how teachers are employed by early childhood education services. There was no real resistance to the proposition that more is expected of teachers; further, they are usually given roles with greater responsibilities, such as room leader for the room which holds the oldest children (4-5 years), and supervise and mentor other educators.
220. This can be seen from the NQF itself, particularly throughout Standard 1.1, there are requirements which are clearly going to be met at a different and higher level by those who have professional teaching training and experience:

Educators collect information on each child, analyse what that information tells them about how to support the child’s learning further, document, plan experiences to incorporate into the program, implement the program and then reflect on what has been learned. Planning ensures that the educational program and practice responds to children’s strengths, abilities and interests, and scaffolds and extends their learning. ... Critical reflection encourages educators to engage in analytical and diagnostic thinking to honestly and critically reflect in detail on all aspects of the program, their professional practice, and children’s learning and development.¹³³

All educators, the educational leader and co-ordinators are able to explain how their approach to curriculum decision-making connects to:

- the approved learning framework/s and enhances learning and development for each child;

¹³¹ *Education and Care Services National Regulations 2011 (NSW)*, r.13, r.122-123

¹³² *Ibid*, r.11, r.130-135.

¹³³ NQF, p123

- the service philosophy and supports the service’s broader vision for quality.¹³⁴

...

All educators, the educational leader and co-ordinators regularly reflect, individually and with each other on:

...

- how they draw on theoretical and philosophical influences and how they have influenced practice over time.¹³⁵

...

Educator’s professional judgments and curriculum decisions are central to their active role in facilitating children’s learning, development and wellbeing. In making professional judgments educators utilise their:

- professional knowledge, skills and experience,¹³⁶

...

221. The position description for early childhood teacher used by both Fraser and G8, and said by Mr Fraser to be reflective of industry practice, is instructive. It provides:

- a. the objective of the position is to ‘*coordinate the learning activities of the allocated group of children, including the supervision of all assistants*’;
- b. specific key responsibilities include:
 - i. *ensur[ing] that a developmentally and educationally appropriate program is planned and implemented for each child, which takes into consideration the school curriculum; and*
 - ii. ‘*supervise assistants in the group*’.¹³⁷

DISCRETIONARY CONSIDERATIONS

Introduction

222. In this section of the submissions we deal with considerations going to the exercise of the Commission’s discretion to grant the relief sought. We commence by dealing with subject matters which the Commission would consider in respect of both applications. We then consider two particular matters which the employers raise in respect of the application to vary the award.

¹³⁴ NQF, p107

¹³⁵ NQF, p108

¹³⁶ NSF, p110

¹³⁷ Exhibit 92

Shortage / Turnover

223. As ACA conceded in opening submissions at PN781, it is not in issue that there is a shortage of early childhood teachers. The issue of shortage is not new. This has been a persistent problem for the last two decades.¹³⁸ The shortage and related issue of turnover is a significant discretionary matter to be addressed because of the importance of quality early childhood education. It is not in contest that early childhood education is of critical importance to the education and development of children in Australia.
224. ACA points to a cause of shortage being the expansion in number of early childhood teachers who are required, the corollary of the desire of governments to have more highly qualified educators leading to mandatory ratios being imposed on the long day care centre industry.
225. It can be accepted that the increased demand has been a contributing factor. Yet there is no shortage of teachers qualified to teach 0-12 years generally. The reason why it is only the early childhood industry that continues to have a shortage is clearly directly linked to the difference in remuneration and conditions between primary teachers and early childhood teachers. Witness after witness pointed to difficulty in recruiting and retaining early childhood teachers given their capacity to obtain better paid work as primary school teachers. Evidence included the fact that they would meet ratio requirements by employing those who are studying to become teachers, who upon graduation would then leave the early childhood industry in order to become (better paid) primary school teachers. For example:
- a. G8 – a major employer in the sector – has since the proceedings commenced elected to increase teachers’ remuneration by 10% above award rates, expressly for the purposes of retaining them;¹³⁹ and
 - b. Ms Kearney, a small operator, has increased rates of pay to amounts in order retain quality early childhood teachers and compete with other services.¹⁴⁰
226. The net effect of these uncontested facts is this: a significant increase in remuneration of early childhood teachers would make it easier for such teachers to be recruited and retained, having a consequential positive effect on educational outcomes in the early childhood industry.
227. Mr Donnelly makes this clear:

¹³⁸ It was identified as a major issue giving rise to public interest considerations by the NSW IRC in the 2001 and 2009 Decisions; It was extensively analysed by the Productivity Commission in its October 2014, annexed to the statement of Mr Fraser, exhibit 84 from page 1123, particularly in section 8 of that Report.

¹³⁹ Statement of Carroll at [17]

¹⁴⁰ Statement of Kearney, exhibit 83, [36]-[37]

[37] I would never have gone to LDC or preschools because of the pay, and the job prospects. Being a director of an Early Childhood Setting, in those days was less than I was on in the primary setting as an early career teacher. I was concerned of the status of the career as a male. In hindsight, my passion is with teaching younger children. I did not choose to teach older children, I chose to go to a setting that was better for me and my future.

228. Most ACA witnesses accepted the proposition they would pay their teachers more if they could – those that did not usually giving as the only reason the cost of doing so as being one that would make them uncompetitive as against others which they would need to increase fees and lose customers as a result. Of course if the award or ERO required the higher rates to be paid that would be a requirement that would fall across the industry generally and accordingly that reason would fall away.
229. As the NSW IRC found in both 2001 and 2009, given the importance of ensuring the best educational outcomes for children in that stage of education that is said to be the most important, it is in the public interest to take steps to address the shortage of ECTs by removing, or at least substantially removing, the pay gap between ECTs and primary school teachers.

Unfairness / Inequity

230. In its opening oral submission, ACA suggested that the reason why early childhood teachers are paid so much less than other teachers, is one that can be blamed upon the system. It is, it would appear, on their submission, something that the Commission may well deplore but be unable to rectify. Such a submission would be rejected out of hand. If the Commission proceeds from the starting point there is no good reason why early childhood teachers should be paid 30% less than primary school teachers and at such a rate differential is inherently unfair and inequitable, that provides a powerful discretionary reason in favour of granting the applications.
231. In circumstances where the statute requires wages to be fair and relevant, maintaining wages which are so clearly below the relevant rate for teachers is not fair and should be rectified.
232. The fact that at the last Federal election one of the two principal parties took a policy to the election which sought to increase one occupational group's wages by 20% (and only one occupational group) points strongly to a wide community recognition that these workers are not receiving remuneration which is fair and relevant.

Gender pay gap

233. In the Equal Remuneration Decision¹⁴¹ the Commission traced the history and cause of the gender wage gap in this country, and attempts by the Commission (and its predecessors) to address this. Relevantly to this matter, the Commission noted the causes of the gender wage gap (which are multifaceted and complex) at [22] as including:

invisibility of women's skills and status leading to an undervaluation of women's work and the failure to re-assess changing nature of work and skill; unrecognised skills described as creative, nurturing, caring and so forth;

concentrated in award-reliant employment with less opportunity to collectively bargain for higher wages, working in small workplaces and with low union participation; and

poor recognition of qualifications, including vastly different remuneration scales for occupations requiring similar qualifications and the way that 'work' and how we value work is understood and interpreted within the industrial system,

all of which appear to emerge on ACA's case.

234. There is evidence, including expert evidence, in these proceedings that early childhood education has been affected by perceptions that lower the perceived value of the work in the eyes of the community. In particular, perceptions that the work involves caring for children and as such is work that women are "inherently" capable of doing, and that is inherently simple.

235. This was explained by Dr Irvine in her first report, discussing the reason why teachers in early childhood education are not generally paid the same as their counterparts in primary and secondary schools:

[49] Put simply, these differences are rooted in artificial and unhelpful distinctions between care and education that characterise the history of ECEC in Australia and many other OECD nations. In the past, a key consideration has been the age of children being taught, based on the premise that education begins close to or upon entry into school. International research has challenged this view, making clear that learning begins at birth and demonstrating that the significant and ongoing influence of participation in quality early learning programs on achievement in school. These distinctions are also the product of historical administrative, regulatory and funding models that have separated and treated these education contexts differently.

236. Dr Press at 5.2 of her first report explained the gendered basis of this undervaluation:

¹⁴¹ [2015] FWCFB 8200

The ECEC workforce is extremely highly female. Popularly, work in ECEC is closely aligned with discourses of mothering. Rather than regarded as needing specialist knowledge and skill, it can be portrayed as something that comes naturally for young women. In addition, the knowledge and deliberations brought to the play-based curricula are often overlooked, as play is regarded as naturally occurring for children. Although these beliefs have been disabused through research on the types of factors that improve quality in ECEC (Buchinal et al., 200; Peisner-Feinberg and Burchinal, 1997, Sylva et al 2003 (see Bundle b (PP.4911-4918); E4Kids 2016 – see Bundle B (pp.5063-5102)), they remain as popular misconceptions.

237. Ms Toth, giving evidence for ACA, put it thus:

PN6854 ...So people just think that we walk in and chuck a box of Lego on the floor and go 'how about it, kids'. It couldn't be further from that.

238. Ms Hands explained the reality:

PN8622 It's a little different from, for example, primary school where if it's times tables day it doesn't really matter if the kid's not interested, we're learning our times tables as a class? No, our program's play based.

PN8624 That doesn't mean you're just watching children play does it? No, of course not. We're teaching children all the time, every day.

239. It is the case that early childhood teachers have been recognised as professionals for many years. Nevertheless it is also the case that wages for educators both teachers and non-degree qualified, have remained persistently low throughout that whole period. Perceptions about the inherent skills of women are no less acute in respect of the non-teacher qualified educators. These gender based views have led to downward pressure on wages for all educators which includes teachers.

240. In the 2001 Decision Schmidt J noted that the case was not advanced, as perhaps it could have been, under the Equal Remuneration Principle.¹⁴² That was because of the fact that in 1970 it had been agreed to achieve equal pay (a state of affairs that had not lasted). Her Honour noted that it was “troubling” that it is ECTs, “*predominantly women, who are employed to teach the youngest amongst us, who are the lowest paid of any of the teachers covered by the various awards put forward on the evidence.*” This led her Honour to approach that aspect of the case on the basis that the composition of the workforce was one of the features of the industry which must be taken into account, given the Commission’s primary obligation to ensure that the requirements of s23 of the

¹⁴² 2001 Decision at [348].

Act are fulfilled by the awards made.¹⁴³ Section 23 of the NSW Act (“*Whenever the Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.*”) is in similar terms to s134(1)(e) of the Act. Her Honour’s approach is equally applicable here.

241. Granting the applications will, as a result, go some way to addressing the gender pay gap, a powerful discretionary consideration in favour of the applications.

Capacity of employers to pay

242. Various employer witnesses led evidence that they would not be able to afford the increases being sought. This evidence needs to be analysed in some little detail. However, by way of introduction four things should be noted:

- a. first, the evidence of Mr Carroll, to the effect that G8 saw it as beneficial from an economic point of view to increase rates by 10% (which he said would also lead to an increase in quality of teaching);
- b. many employers pay early childhood teachers at above award rates, mainly pre-schools, and Ms Kearney, demonstrating that it is not inherently unaffordable;
- c. the government subsidy scheme introduced effective 1 July 2018 means that increases in rates for parents will, for many children, be funded to some extent (80%) by government subsidy – in particular parents with lower income are more likely to be more heavily subsidised, which means that increases in rates of \$1 to \$5 per child per day to fund a pay rise would not lead to parents being unable to afford child care;
- d. the evidence demonstrates that over recent years childcare centres have increased rates by more than \$5 per child per day and that the maximum increase sought in these proceedings could be fully funded by an increase in most cases of substantially less than \$5 per childcare day, indicating that there is actually no difficulty affording the claim.

243. More generally, the evidence of the employers indicates that the for-profit long day care centre industry is one that is enjoying above-median growth and is expected to do so for the foreseeable future.¹⁴⁴ Much of this growth is expected to be driven by higher quality standards and the added value of preschool services: i.e. as a result of teachers now being present in for-profit long day care.¹⁴⁵ As Mr Carroll put it:

¹⁴³ 2001 Decision at [351].

¹⁴⁴ Statement of Fraser, annexure JF- p.2133.

¹⁴⁵ Statement of Fraser, annexure JF- p.2122.

PN6573...The two critical roles in our organisation are centre manager and ECT, and retaining both roles drives, not only improved financial performance, but improved family engagement, team engagement and safety typically with the latter of those criteria normally driven by the centre manager, the ECT's role is critical in driving occupancy of the kindergarten room, which is the largest room in all our centers, is a key driver of overall occupancy.

244. Schmidt J in the 2001 Decision made the following observations, which remain applicable:

The employee's rates of pay should not be fixed at such a level that they are required to support what, in reality, would be an unviable business, if fair rates had to be paid for the work in question. Nor should rates be fixed on basis, which, in reality, had the effect that teachers were required to subsidise the fees which parents should fairly be paying for the service which they are availing themselves of for their children.¹⁴⁶

245. In any event, the claims of unaffordability should be treated with some caution. The claim that the order sought would cause the sector to experience an 'existential crisis' is a significant one, and the Commission would expect it to be supported with evidence of the actual financial position of each business. No ACA witness did this. It was only by calling for documents that broad assertions as to unaffordability could be tested. Having done so it became clear that, contrary to those broad assertions, the wage increase could be absorbed by minor fee increases (largely subsidised by government funding), and in large part lower than actual fee increases made by the services since the proceedings commenced.

246. Alternatively, services in what is overall a very profitable industry could absorb the claims entirely through a minor reduction in profit (or in Ms Viknarasah's case, perhaps cuts in 'superannuation' paid to retired related persons).¹⁴⁷ Notably, if the claim had been granted in FY2017:

- a. Mr Fraser would have retained \$1,227,918 in net profit;¹⁴⁸
- b. Ms Hands would still have achieved profits of \$265,794 across her two services;¹⁴⁹
- c. Ms Kearney \$201,783;¹⁵⁰ and
- d. Ms Toth could have kept \$68,590 (in addition to the amounts paid by the business to her and her husband as rent, servicing the loan on the land that they, not the business, own).¹⁵¹

¹⁴⁶ 2001 Decision at [406].

¹⁴⁷ Exhibit 132

¹⁴⁸ Exhibit 93

¹⁴⁹ Exhibit 114; MFI 8

¹⁵⁰ MFI 4

¹⁵¹ Exhibit 103,104, MFI 6, PN7545

247. There is no real need to perform calculations in respect of G8: its 12-13% profit margin on its \$857.7 million revenue (itself a low result compared to earlier years) is unlikely to be seriously impacted by the claim.
248. In addition, the IBISWorld report's sunny projections for the industry are confirmed by ACA's witnesses: namely, in the way they have consistently expanded their businesses and acquired new centres. By way of illustration:
- a. Ms Hands sold a centre in 2004 for \$2.2 million, opened another, and built a third in 2016 which she saw as a *'good business decision'*,¹⁵²
 - b. Mr Fraser's highly profitable group has continued to expand, with a new centre opening this year; and
 - c. Ms Prendergast, who has steadily acquired centres, confirmed that her investor saw *'potential for successful and profitable business growing over time'* and had provided capital to fund expansion on this basis.¹⁵³

Comparative wage justice

249. The employers contend that the s 157 application would not be granted because it amounts to a claim for 'comparative wage justice'.
250. The Applicant does point to other existing rates of pay as a basis for the claim. It points to the rates of pay paid to primary and secondary school teachers. It identifies that the rates of pay currently set by the award are so far below actual rates as to indicate that the actual rates are neither fair nor relevant.
251. In the past, under the previous legislative scheme, the Federal Tribunal was concerned not to grant increases in award rates based upon a claim that workers in another award have higher rates of pay. The concern was one such an approach would lead to compounding increases in rates of pay. The principle has no application here. First, this application is not based upon higher rates found in other awards. Second, and more importantly, increasing the rates will not lead to any higher rates of pay for other workers. The amounts being claimed would, in effect, lift the rates of early childhood teachers to rates below that which are being paid to other teachers under the s157 application.
252. The Commission's task under the Act is to set fair and relevant rates pursuant to s131(1). If the rates that currently exist are not fair or relevant the Commission could not refuse to increase them for any reason, including the question that it amounts to 'comparative wage justice'.

¹⁵² PN8653-8660, PN8697

¹⁵³ PN7955

253. As to the related submission, what is being sought is an increase to lift the rate to a “market rate” set by bargaining, three things should be noted:
- a. first, it is not as if this application is based on any outcome achieved by a small selection of teachers who could be said to be industry pay setters – the comparison is to the rates paid to all teachers;
 - b. while the rates paid pursuant to the Enterprise Agreements could perhaps be said to be “market rates”, that is no reason to think that those rates are not properly reflective of the parties recognition of increases in work value. Given they are rates that apply across the industry, nor can they said to be rates which have been fixed in order to try and address particular attraction and retention issues or to seek to be a “market leader”;
 - c. third, it is not as if the rates themselves are particularly high if one considers them against rates actually being paid to professionals. See for example the evidence in respect of market rates paid to professional engineers.

EXTERNAL CONSISTENCY

254. A second argument the employers put in respect to the s157 application should be rejected because the rates sought are not externally consistent with the rates contained in awards applying to other professionals. In short, they contend that the Commission ought to maintain external relativities and so cannot increase the rates in one professional award without considering the rates in all professional awards.
255. Such principles had some force in the past when awards were set in a manner that had an actual effect on rates of pay for professionals.
256. The submission somewhat assumes that the rates set in other professional awards were properly set and have been reviewed in the manner that would allow the conclusion that they remain properly set. There is no reason why the Commission would form that view in respect of the awards relied upon.
257. As to the suggestion nothing can be done in respect of one award applying to professionals until it is done in respect of all such awards (which would mean it would have to be done as part of an annual wage review) two things can be said:
- a. first, the last annual wage review specifically rejected the submission that there should be a broad re-assessment of external relativities by reference to the C10 rate;¹⁵⁴ and

¹⁵⁴ Annual Wage Review 2018/19 – Statement [2019] FWC 3761

b. the Commission must consider the rates as and when a case comes before it. The Commission would not be exercising its statutory obligation if, when a case came before it, it refused to consider an increase in rates unless it was simultaneously considering other awards.

258. As has been submitted above, if the Commission comes to the view that the rates and the award are not fair and relevant, it has a statutory obligation to alter those rates. It would not comply with its statutory obligation, if it formed that view but then determined as a matter of discretion not to increase the rates because of the potential impact on external relativities.

259. The concern about external relativities in any event are of little or no significance. It is not as if by increasing the rates for teachers in the manner sought there would in fact be any practical flow-on to any other professional group. It is a sad fact that outside of a very few areas (ECTs being a notable example) professionals are in fact paid substantially more than award rates. There is no risk that lifting the award rates for teachers to the levels sought will in fact lead to an increase in remuneration for professional engineers, nurses, or university academics (to name those referred to by the ACA).

THE INCREASE IN RATES SOUGHT

260. The IEU seeks increases in accordance with the following table (noting that adjustments have been made to the figures set out in the application made on 18 August 2018 to take into account changes in the Award rates.

Level	2019 Award rate	Current Award relativity	Adjusted award relativity	Adjusted rates	+ 17.5% work value increase	Total increase
1	\$51,518	95%	90%	\$48,610	\$57,117	11%
2	\$52,580	97%	95%	\$51,310	\$60,290	15%
3	\$54,011	100%	100%	\$54,011	\$63,463	18%
4	\$55,959	104%	105%	\$56,712	\$66,636	19%
5	\$57,909	107%	110%	\$59,412	\$69,809	21%
6	\$59,724	111%	115%	\$62,113	\$72,982	22%
7	\$61,538	114%	120%	\$64,813	\$76,156	24%
8	\$63,486	118%	125%	\$67,514	\$79,329	25%
9	\$65,437	121%	130%	\$70,214	\$82,502	26%
10	\$67,386	125%	135%	\$72,915	\$85,675	27%
11	\$69,337	128%	145%	\$78,316	\$92,021	33%

12	\$71,284	132%	150%	\$81,017	\$95,194	34%
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261. It is a long-standing accepted premise of teacher salaries that increases in pay based on years of experience is appropriate, since the services they provide become increasingly valuable because of their added experience, practice, observation and learning. As a 1964 Full Bench held in *In re Crown Employees (Teachers) Award* [1964] AR 463 at 513:

In our opinion the evidence supports the conclusion that, while most four-year trained assistants become competent practitioners after teaching for five or six years, the services they give become increasingly valuable thereafter because of their added experience, practice, observation and learning. We think that, whether or not the teacher has the outstanding qualities necessary for placement on a promotion list, this process may fairly be regarded as continuing during the first nine years of a four-years trained assistant's service.

262. This decision was relied on by Schmidt J in the 2001 Decision at [338]-[339] in concluding, contrary to an employer submission, that the value of teacher's work in the early childhood education sector did increase over their years of experience, noting that this was supported by '*overwhelming evidence*'.

263. The same can be said in this matter. The ACA's witnesses emphasised the value of work experience in early childhood education. Indeed it was the principal justification, as discussed above, for the contention that teachers and diploma-qualified staff performed work of equal value (noting that, as it unfolded, this really referred to comparing the practical skills as opposed to pedagogical knowledge of extremely experienced and particularly talented educators with first year teachers). Notably:

- a. Ms Hands assigned her more experienced teachers to develop and deliver educational programs, and mentor more junior teachers;¹⁵⁵
- b. Ms Prendergast recognised the additional value of a teacher with twelve years experience as contrasted with an entry level teacher, and described the '*significant difference*' in rates as resulting in the more experienced teacher being '*remunerated appropriately*';¹⁵⁶
- c. Ms Toth confirmed that a reason that her teachers had a leadership role in her centers, including mentoring other staff, was their relatively high years of experience;¹⁵⁷

¹⁵⁵ PN8712-8718

¹⁵⁶ PN8145-8147

¹⁵⁷ PN7152

- d. Mr Fraser, albeit decrying it as a mere marketing tool, in reality emphasised the fact that his teachers are both qualified and *experienced* on his website.
264. Ms Viknarasah, self-described industry rogue, cavilled with the proposition that experience mattered. In her view:
- PN9643 ...It could be just someone who is absolutely really passionate about what they're doing as well. They could be really good at it. They don't need to have extensive experience.
265. This, regrettably, reflects the entrenched attitudes undervaluing the skill involved in early childcare education discussed above. Combined with Ms Viknarasah's general disdain for at least her experience of tertiary teacher training, this approach casts real doubt as to whether any weight at all can be placed on her evidence.¹⁵⁸
266. Notably, Mr Egan recognised substantial changes in job size from a graduate teacher to a five-year experienced teacher. This indicates that these workers are correctly understood as undergoing a process of what Mr Khoury described as cumulative experience¹⁵⁹ leading to growth in skills.
267. As such, the Commission would be satisfied that years of experience are, in the context of teachers' work, directly correlated with work value, and that this should be appropriately recognised by the classification structure and pay rates in the Award.
268. As set out in the IEU's submissions of 26 November 2018 at [68]-[69], historical flat rate increases have inappropriately compressed the internal relativities in the Award classification structure. The history of this compression is set out in its submissions in respect of the Pharmacists Decision. In the context of a purely professional award, and in light of the extreme significance of experience to teachers' work value, it has caused an inappropriate undervaluation of the work performed by the most experienced teachers.
269. The IEU's claim broadly replicates the internal relativities in the incremental classification structure provided for in the relevant NSW awards. A variation restoring the Award internal structure to this level, as well as addressing to some extent inappropriately compressed external relativities relative to the C10 scale, is justified on work value reasons and otherwise necessary to ensure the Award provides a fair and relevant safety net.
270. In addition, the IEU seeks a general work value increase of 17.5%. This takes into account the increases for all but two classifications flowing from the adjustment to relativities. In the event that the Commission is not minded to

¹⁵⁸ PNP9460

¹⁵⁹ PN7859

adjust internal relativities, an increase of 25% is sought: this, for the reasons set out above, is a relatively modest increase in light of the overwhelming increases to teachers' work value since 1996 (or indeed 2010).

INGMAR TAYLOR SC

GREENWAY CHAMBERS
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