

IN THE FAIR WORK COMMISSION

Matter no: C2013/6333

Applicant: Independent Education Union of Australia

Fair Work Act 2009 s.302(3)(b) – Application for Equal Remuneration Order

IEU REPLY SUBMISSIONS

1. These are the IEU's reply submissions to the submissions filed by:
 - a. the Australian Childcare Alliance (**ACA**);
 - b. the Australian Federation of Employers and Industries (**AFEI**);
 - c. the Catholic Commission for Employment Relations (**CCER**); and
 - d. the Commonwealth.

2. In large part the issues between the parties are joined, and there is no utility in repeating the points addressed in the IEU's Opening Submission. There are however some specific points that warrant a response.

ECTs do comparable work to primary school teachers

3. Both the ACA and AFEI contend that the work done by Early Childhood Teachers is not comparable to that of primary school teachers.

4. This is somewhat surprising, given that Early Childhood Teachers:
 - a. hold (and are required to hold) qualifications which permit them without further study or training to teach in Primary Schools;¹
 - b. also use pedagogical skills and training to identify and address the learning needs of individual children;

¹ Statement of James in Reply at [2]-[6]

Lodged by: Applicant	Telephone:	(02) 8202 8900
Address for Service: GPO Box 116, Sydney NSW 2000	Fax:	(02) 9211 1455
	Email:	michael@ieu.asn.au

- c. work in higher intensity environments, with less professional support and non-teaching preparation time;
 - d. have additional supervisory and mentoring responsibilities, in respect of supporting the work of diploma-qualified educators and students on placement; and
 - e. in states where registration is required, are obliged to meet the same Australian Professional Standards as teachers.
5. The CCER, unlike the ACA and AFEI's members, employs both Early Childhood Teachers and Primary School Teachers (often at the same site).² It accepts that:

'the qualifications and professional standards of early learning teachers are equivalent to primary school teachers'

and does not otherwise dispute the equivalence between the two roles (despite paying the former substantially less). This conclusion (but not the wage outcome) should be preferred.

Expert evidence as to work value

6. Further, it is contrary to the conclusions of all three experts as to the relative job size of each role. The Egan Associates report calculates that there is a 3.6% difference between graduate primary school teachers and Early Childhood Teachers. This narrows to 0.9% for Experienced (5 year) primary school teachers and Early Childhood Teachers. Those with expertise in job sizing are trained to conclude that is not a *'perceptible difference'*;³ in other words, ACA's own expert concludes that the work value of the two roles is essentially the same.
7. The Khoury report does not involve an analysis of either role. Instead, a very broad estimate of potential ranges has been provided. Despite this, the ranges remain relatively close together and, at their high points, close enough that no perceptible difference is apparent.

² Statement of Margerison, Statement of Press

³ Report in Reply of Issko, at [13]-[15].

ACA submissions

8. The ACA's analysis to the contrary:
 - a. misunderstands the role and significance of the Early Childhood Learning Framework;
 - b. conflates and mistakes the relative skills of Early Childhood Teachers and diploma-qualified educators;
 - c. downplays the complexity of and skills required to enable play-based learning;and is as such misguided.

9. The Early Childhood Learning Framework, described as an '*approved learning framework*' by ACECQA, is a mandated framework curriculum.⁴ It contains learning outcomes and progress indicators which must be achieved. Unlike a primary school curriculum, which to some extent is 'one size fits all' and can be taught in accordance with policies and plans designed for (rather than by) the teacher, Early Childhood Teachers are required to design and implement specific individual learning programs for each child. They are further required to assess each child against the framework indicators, and keep detailed records of each student's progress.

10. ACA secondly submits, in effect, that there is no significant difference between Early Childhood Teachers and non-degree qualified educators. This misunderstands the nature of the Early Childhood Teacher's role, and the manner in which their professional, degree-trained teaching skills are used.

11. An illustrative example emerges in the evidence of Merrin Toth (an ACA witness). Ms Toth's statement, at MT-9 to MT-12 (p.685-692), annexes examples of Observations completed by educators and Early Childhood Teachers in respect of various activities undertaken with children.

⁴ Report in reply of Press, at [15]; Report in reply of Irvine at [34]-[44]

12. MT-9 and MT-12 were both prepared by Early Childhood Teachers. MT-9 discusses an activity designed to improve the fine motor skills of a child as a step toward developing pre-writing skills. It explains in detail the importance of pre-writing skills and how they are developed, evaluates the child's performance against specific tasks, and describes the next steps in the child's learning development. Similarly, MT-12 provides an assessment of a child's experience using kinetic sand to develop emotional, cognitive and fine motor skills.
13. By contrast, MT-10, prepared by an educator, describes a group trip to the park. It provides a high level explanation of the event, and recites children's reaction to the activity. However, there is no detailed analysis of skills developed or individual learnings, or any plans for any individual child. MT-11 also provides an educator's report of a group activity – mega jenga – and is largely confined to a generalised description of the group's experience. In particular, no individual attention is paid to each child.
14. Lisa James, an experienced Early Childhood Teacher now employed by the IEU, provides a similar example showing the different skills used by educators and Early Childhood Teachers in approaching the same activity. A child was having difficulty learning to complete puzzles (an important developmental step). The educator was simply showing the child where the puzzle pieces went for him to copy, with no success for a number of months. By contrast, Ms James taught the child the skill in an hour:

*'by explicitly expressing the metacognitive processes involved in solving puzzles including: making sense of the picture before emptying the puzzle, building spatial skills, looking for corners and wall pieces, rotating pieces to see if they fit in the spaces, looking for colour cues etc.'*⁵

⁵ Statement in reply of James, at [8]

15. Similarly, the ACA fails to appreciate the significance of play-based education, contrasting it (apparently in support of its contention as to work value) with the classroom focus of primary school teacher's work.
16. Play-based learning is critical at the early childhood level. As the Press Report in Reply sets out at [16]:

Early Childhood Education has been based upon a play-based curriculum (16.2m) since the inception of the kindergarten movement. The importance of play to children's learning and development has been emphasised by a long line of early childhood education philosophers including Froebel and Montessori. Children's play at a high quality early childhood setting is underpinned by informed curriculum decisions based on careful observations of each child's needs, interests and challenges. In contrast, teacher-centred and the overuse of direct instruction are less successful and potentially harmful to young children's learning (Robertson, Morrissey and Rouse, 2018).

17. The Irvine Report in Reply addresses the question as follows:

While play continues to be recognised as a rich context for learning in the early years, emphasis is placed on the teacher's role in facilitating play-based learning and, importantly, challenging and extending children's thinking and learning. It is not simply a matter of providing access to learning resources (e.g., blocks, puzzles, art and craft materials). Drawing on their knowledge of individual children, and the EYLF (or other approved curriculum), teachers plan meaningful learning experiences and select teaching approaches and strategies to promote and extend learning. Recognising children as active learners, Early Childhood Teachers support play-based learning, inquiry learning, project-based learning and undertake intentional teaching. Teachers select from a wide array of age-appropriate 'intentional teaching strategies', that may include: listening to children's ideas; providing for choice; encouraging, modelling and scaffolding

learning; explicit teaching; and challenging thinking and learning
(DEEWR, 2009; QSA, 2010).

18. To say, as ACA does, that ‘*a great deal of this education involves play*’, and thus distinguish it from the work of primary school teachers, misunderstands the nature of teaching and learning at an early childhood level, and the complexity behind it. It also corresponds with too limited a view of primary school teaching: rather than a rigid classroom approach, much primary education is done in agile space⁶ and increasingly play-based learning is being recognised as an important educational tool to be used in a primary school setting.

AFEI submissions

19. AFEI’s submission that Early Childhood Teachers do not perform comparable work to primary school teachers is based on five claims:
- a. the expert evidence shows a difference in the work value;
 - b. Early Childhood Teachers do not necessarily have responsibility for the educational program at a centre; and
 - c. primary school teachers are employed under a different statutory framework;
 - d. primary school teachers have a higher student to teacher ratio; and
 - e. the history of award wages in NSW shows that the work is not of comparable value.
20. The first is addressed at [5]-[6] above; it is not an accurate reading of the expert evidence.
21. As to the second, while it is the case that the Nominated Supervisor and/or Educational Leader at a particular centre may not necessarily be an Early Childhood Teacher, in practice this is usually the case.⁷ In any event, the submission misses the point: the design and implementation of educational

⁶ Statement of Margerison at [8]

⁷ See, e.g. Statement in Reply of Cullen at [2]

programs geared to each student is central to the role and work of Early Childhood Teachers. In that sense – unless their skills are being incorrectly utilised by a particular operator – the Early Childhood Teacher has responsibility for the learning program and teaching outcomes.

22. The third point (as to the regulation of teacher's employment by the Department of Education) is of no assistance in assessing the relative work value of each role.
23. As to staff-student ratios - it is the case that there is a mandated child-to-teacher ratio for early childhood education as opposed to guidelines for primary teachers. It does not follow that primary school teachers as a result have responsibility for more children than an Early Childhood Teacher. An Early Childhood Teacher has an educational leadership role in respect of all the children they teach, working alongside other educator(s) whose presence reduces the ratio. A room might have capacity for 20 or more places per day, but those places are filled by many more than that number per week. The Early Childhood Teacher needs to know all of those children, be capable of creating different teaching activities for each, write reports on each, etc. That usually translates to a responsibility for more children than a primary school teacher has in respect of their class.
24. Even if it were the case that early childhood teachers teach fewer children, AFEI have not produced any evidence demonstrating that this has any consequence for the relative complexity of each role: it is just as capable of being read as an acknowledgement that teaching younger children is more difficult. The very fact that younger children require higher staffing points to the fact that they have higher needs.
25. Finally, AFEI's reliance on the history of award wages for Early Childhood Teachers in NSW is misplaced. At no point did the NSW Industrial Relations Commission make a finding that the work value of an Early Childhood Teacher role was less than that of a Primary School teacher.

26. Instead, the Commission in the *2001 Test Case*⁸ said (at [261]):

‘The difficult question which the Commission must come to grips with here is how the demonstrated undervaluation of this work is to be remedied. I am well satisfied that a case has been made out for significant wage increases and that a clear 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.

27. A 20% increase was awarded. The Full Bench referred to this conclusion and approach in the 2009 case,⁹ and (before awarding a 12% increase) continued:

*‘There was insufficient comparative analysis to allow us to conclude that the work value of preschool teachers is precisely the same as their counterparts in Government schools: it may be less, it may be more, it may be the same. Whatever may be the case in that respect, it is patently apparent that **it is not a fair and reasonable state of affairs, nor in the public interest, to have preschool teachers being paid 21 to 27 percent less in salary.** This is especially so where there is a critical shortage of university trained preschool teachers at a time where a concerted effort is being made by governments to provide universal access to early childhood education. The evidence strongly suggests that unless salary levels are increased teachers will not be attracted to work in preschools and attempts to achieve an exponential improvement in childhood education standards will fail’.*

Early Childhood Teachers do comparable work to engineers

⁸ *Teachers (Non-Government Pre Schools) (State) Award* [2001] NSWIRComm 335

⁹ *Teachers (Non Government Early Childhood Service Centers Other than Preschools) (State) Award 2006* [2009] NSWIRComm 198

28. ACA and AFEI contend on similar grounds that the work of Early Childhood Teachers is not comparable to engineers (either at graduate level or after five years of experience).
29. Again, this is contradicted by the expert evidence as to job size. The Egan Report identifies only:
 - a. a 6.3% difference between a graduate Early Childhood Teacher and Engineer (as opposed to 5.1% in the Issko Report); and
 - b. a 13.5% difference between a 5-year Early Childhood Teacher and Engineer (as opposed to 1.24% in the Issko Report).
30. Both variances are within the 15% range such that there is no perceptible difference between the two roles.
31. The ACA's analysis does not otherwise involve a detailed comparison (beyond listing the different tasks) of the two roles. Its submissions reveal the following similarities between the two roles:
 - a. the need for a four year university qualification;
 - b. the need to use specialised, professional skills;
 - c. the importance of the work (potentially financially significant projects vs. the education of children at critical developmental stage);
 - d. the use of issue identification, problem solving and planning;
 - e. the requirement for an ongoing and up-to-date understanding of professional skills, and legislative and other requirements; and
 - f. the supervision of lesser-qualified staff (contractors vs. educators).
32. In addition, Early Childhood Teachers work with a lower level of day to day support and supervision (particularly at the graduate level) when compared to engineers. In particular, at the graduate level, Early Childhood Teachers are expected to do the full job from the outset, while graduate engineers are given lower level tasks which are supervised and checked.

33. ACA's submission that the above somehow leads to a conclusion that the work value is different is unexplained. To the extent it relies on the relative ATAR of the required university degrees, this is misplaced: ATAR is a measurement of demand, not skill (with demand driven in part by potential future salary outcomes).
34. AFEI similarly fail to establish, beyond assertion, that there is a material difference in the analytical and problem solving skills involved in a mathematical, scientific or technical exercise and those used in the complex pedagogical tasks undertaken by Early Childhood Teachers. Its reliance on the Egan report to justify its claim that the work is of a higher level is undermined by the report's conclusion, correctly interpreted, that there is no perceptible difference between the roles.

The Commonwealth's submissions as to work value

35. The Commonwealth identifies that it is not an affected party in these proceedings, and so, appropriately will not take a role in the proceedings beyond assisting the Commission on questions of law and the approach to be taken to applications of this kind.
36. At [5]-[6] of its submissions the Commonwealth contends that the Commission must take '*actual or hypothetical*' remuneration rates into account and the reasons the payments are made when determining relative work value. It relies on *Application by United Voice and the Australian Education Union*¹⁰ at [48] in support of this contention.
37. All the Full Bench did at [48] was observe that there was no reason why it should assume that the roles being compared in that case (which were based on award descriptors alone) were in fact equivalent, and referred to the potential that any higher rates may be due to factors that were not included in the classification descriptors, such a remote location or unpleasant working

¹⁰ [2018] FWCFB 117 at [48]

conditions. It was not the case that the Bench was suggesting that the fact that one group was paid more than another was itself a matter that was relevant when determining relative work value. As the Bench made clear in the 2005 Decision,¹¹ while actual remuneration rates may be a relevant consideration in the potential exercise of the discretion, it is not a relevant factor for determining work value.

An order should be made

38. The ACA and AFEI submit, in the alternative, that even if the jurisdictional fact is made out, the Commissioner should nevertheless refuse to issue an order on discretionary grounds. The CCER largely confines itself to stressing the importance of an increase in funding if the order is made.

ACA submissions

39. ACA resists the order being made on three discretionary grounds:
- a. that the order would have deleterious impacts on business and the community;
 - b. that a more appropriate course would be for Early Childhood Teachers to pursue enterprise bargaining, either on an individual workplace basis or through a low wage bargaining order; and
 - c. that the difference in pay is a result of factors other than gender inequality, and that the application amounts to bare '*comparative wage justice*'.

Community and business impacts

40. As to the community and business impacts, the ACA's submissions do not go beyond assertion. It has not led serious evidence demonstrating a genuine danger to affordability. In particular, it does not properly consider the recent significant increases to government funding, or the actual impact per child. As set out in the Statement in Reply of Lisa James:

¹¹ Equal Remuneration Decision 2015 [2015] FWCFB 8200 at [280] and following.

- a. the cost of the wage claim translates to between approximately \$1 to \$4 dollars per day at each of the ACA witnesses' operations (depending on how they structure their business);¹² and
 - b. changes to Federal government funding mean that operators will receive extra funding per child which has the capacity to meet some or all of any such increase (and is likely to mean any increase is not one that need be passed on in full, or in some cases at all, to the parents).¹³
41. Similarly, the threat to business appears to be illusory. Many of the figures as to business impact it relies on are exaggerated or miscalculated: see, for example the Statement in Reply of Carol Mathews at [65]-[66]. It is important to note that there are not-for-profit providers with similar or identical daily rates manage to pay wages at or above the IEU's claim.¹⁴

Bargaining as alternative

42. The theoretical availability of enterprise bargaining is no answer. It does not follow that, because bargaining can theoretically result in higher wage outcomes, there is in fact any realistic prospect it can resolve the pay parity issues between Early Childhood Teachers and primary teachers or engineers – particularly when there is no requirement to consider or respond to pay inequity in these processes. As the ACA itself observes at 24.11 there is already '*bargaining inequity*' between Early Childhood Teachers and primary school teachers. The position of the CCER tends to confirm the position – the employer has sympathy for the proposition that Early Childhood Teachers have the same work value as primary teachers, yet that attitude does not manifest in enterprise agreements for those engaged by the Catholic system that bring about that outcome.

¹² Statement in reply of James at [30],[42], [46]

¹³ Statement in reply of James at [43]

¹⁴ Statement in reply of James at [69]

43. It is too glib to say that the answer to this inequality, or the pay disparity, is simply to start bargaining. This is so even if a low income bargaining authorisation is made. Even presuming such an authorisation would be made - which is a complex question, and far from certain – it would not of itself result in any improvement in remuneration: Early Childhood Teachers would still be bargaining with employers who do not recognise the need for pay parity, and could not be compelled to do so in a bargaining process.

Reasons for the wage gap

44. The Commission will have regard to the overall purpose of the provisions to remedy gender wage inequality and promote pay equity. However, it does not follow that where the jurisdictional prerequisite is proved, it can only make an equal remuneration order where the applicant establishes that the disparity is related wholly or substantially due to gender.¹⁵ The gender pay gap in this country is long-standing, significant and stubborn. Only by addressing the rates of pay of undervalued groups of workers who are predominantly women will it be addressed.
45. The ACA's claim that the pay disparity between Early Childhood Teachers and primary school teachers and engineers is driven by factors other than gender takes two forms:
- a. first, a focus on the greater level of enterprise bargaining in the primary school sector, which it notes is female dominated (albeit to a lesser degree); and
 - b. second, a claim that the greater wages for graduate and experienced engineers are a facet of market forces and thus '*proper*'.
46. It is the case that the majority of primary school teachers are female (albeit not to the same extent as Early Childhood Teachers), and that primary school teachers are generally covered by enterprise agreements. It does not follow from either fact that the reason for the pay disparity is not gender related.

¹⁵ 2015 FWCFB 8200 at [212].

47. As the Full Bench said in the *Equal Remuneration Decision 2015*, care needs to be taken before assuming that a failure to be able to obtain outcomes from bargaining means that the difference in pay is not gender related, given that *“the historic existence of lesser bargaining power in areas of employment which are characteristically female-dominated has been identified as a potential element in the gender pay gap.”*¹⁶
48. Early Childhood teaching, particularly in long day care centres, has suffered from a lower status than Primary School teaching, due to a historical view – reflected somewhat in ACA’s submissions - that the task is one of caring rather than teaching, and involves the exercise of an inherent feminine attribute rather than professional skills. The history of pay parity claims set out in the statement of Carol Matthews at annexure B details the slow shift in understanding of the true nature of Early Childhood Teaching, and correspondingly the historic prejudices which continue to contribute to the pay disparity between roles. The historic view of early childhood work being akin to ‘mothering’ work, not involving actual teaching, and requiring duties which women are considered inherently capable of performing (resulting in a view that there is no need to pay a higher level to recognise skills) has led to the current situation where there has been a persistent undervaluation of the work. It is unfortunate that the ACA submissions themselves perpetuate the notion that what Early Childhood Teachers do is not of the same value as the work of teachers in primary schools.
49. The disparity in status and remuneration cannot rationally be said to be solely a feature of relative bargaining power. It is unlikely, in contemporary Australia, that a wage gap between groups of employees performing comparable work will be solely attributable to gender; nevertheless, in the context of Early Childhood Teachers, it was a significant factor in preventing Early Childhood Teachers being given the same status and pay, and that

¹⁶ 2015 FWCFB 8200 at [212].

historic position has led to the situation where such workers remain poorly paid. In other words, their gender was and remains a significant factor.

50. The fact that primary school teachers have succeeded to obtain higher remuneration via enterprise bargaining even though they are female dominated does not mean that gender is not an issue in the pay gap. Their success has occurred in a very different context. First, they have been maintaining by enterprise bargaining the status and rates that they had historically obtained by arbitrated wages cases. Second, they are bargaining with two primary employers, who between them employ almost all teachers, and those employers are non-profit, and employ very large numbers of teachers. This is to be contrasted with Early Childhood Teachers working in long day centres, whose status has not been long-recognised, and who are employed by a myriad of for-profit long day care centres who often employ only small numbers of teachers.
51. The ACA's submissions in respect of engineers purports to assert that pay differentials between these two roles are affected by "*market forces*". Different rates of pay arise for a variety of reasons, and through a variety of mechanisms. The fact that professional engineers are paid more, via individual contract, merely demonstrates the wage disparity. In any event, this is one factor amongst many. It does not address the historical reasons for the undervaluation (including by the market) of professional skills exercised by workers in female-dominated industries. The ACA's evidence as to these factors is extremely limited.

AFEI's submissions

52. The AFEI's submissions traverse substantially the same ground as the ACA's. In essence, it argues that the IEU's claim:
- a. will lead to rate rises of such significance that parents will withdraw their children from childcare; and
 - b. this lower occupancy rate will lead to the further shrinkage of the sector.

53. As AFEI's submissions set out at [81]-[82], the growth in unused capacity (and thus pressures on profit margins) in preschools and long day care centres over the last five year is a feature of supply, rather than cost increases.
54. At [89], AFEI discuss the new Child Care Subsidy. It notes that payment will be linked '*only*' to a daily price cap of \$11.77 for long day care per child. This submission fails to deal with the fact:
- a. that this represents a significant increase in the per-child-per-day funding received directly by the centers; or
 - b. that the IEU claim's per-child-per-day impact will be significantly reduced by the Subsidy.

Conclusions

55. For the reasons set out above, and in the IEU's original submissions, the Commission should conclude that the IEU has demonstrated that female Early Childhood Teachers at a graduate and/or five year experience level perform work of equal or comparable value to male primary school teachers, or alternatively engineers.
56. ACA's claim that there is insufficient evidence before the Commission to make this determination is baseless. Both the IEU and the ACA have filed extensive witness evidence from early childhood teachers, primary school teachers and engineers (including supplementary evidence in reply from the IEU to address this apparent concern). There is sufficient material before the Commission to provide it with a confident understanding of all three roles.
57. There is no contest that the comparator groups are paid substantially more than Early Childhood Teachers. Accordingly, the required jurisdictional fact is made out and the Commission's discretion to make an order is enlivened.
58. As to whether the discretion should be exercised, the fact of the matter is that there is a significant group of workers who:

- a. are qualified professionals;
- b. exercise their professional skills in their work;
- c. are predominantly women;
- d. are paid substantially less than their professional peers; and
- e. whose predominant gender has been a factor in that outcome.

59. The increases in pay being sought are not extraordinary or unjust. They seek increases that do no more than lift Early Childhood Teachers to the same level as primary school teachers, who are hardly well paid themselves. The Commission will have no hesitation in concluding that such rates are appropriate.

60. Making the order sought will address gender wage inequality and promote pay equity. The gender pay gap in this country needs to be addressed. To do that, steps need to be taken to lift the income of those groups of workers who are predominantly women and who are being paid less than their work value justifies.

INGMAR TAYLOR
GREENWAY CHAMBERS
25 JULY 2018

LUCY SAUNDERS
GREENWAY CHAMBERS
25 JULY 2018