



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT SAUNDERS**

C2013/6333 AM2018/9

s.302 - Application for an equal remuneration order

**Application by the Independent Education Union of Australia
(C2013/6333) (AM2018/9)**

Sydney

10.01 AM, MONDAY, 17 JUNE 2019

Continued from 13/06/2019

PN1511

VICE PRESIDENT HATCHER: Yes, Mr Taylor.

PN1512

MR TAYLOR: Yes. Could I hand to the Bench a proposed revised witness schedule.

PN1513

VICE PRESIDENT HATCHER: So is this different from Friday's one?

PN1514

MR TAYLOR: It is but only very marginally and I explain how it is different. The only difference to the one that was provided by email to your Honour's Associate on Friday is that a couple of the names that were in red meaning that they were - had been moved and were subject to confirmation, have now been confirmed. So there's no change in the order, and as the Bench might have picked up, what we've done is that where we have added a witness to a day that they're previously originally scheduled their name appears in italics and so one sees, for example, today we have two witnesses who were originally scheduled for today, Christopher White and Lisa James and a further witness has been added James Jenkins-Flint, who was otherwise going to be called on a later day. That's the current proposal.

PN1515

This proposal doesn't attempt to move any of the employer witnesses from the schedule as previously drafted. This has been provided to ACA and we understand that they are looking at to what extent there is capacity for changes to be made to the timing of their witnesses being called, and no doubt they'll advise us of that when they are able to do so.

PN1516

The second thing I wanted to raise by way of procedural matters arises from the leave that the Commission gave my client last Wednesday to file further statements within seven days. My client has spoken to some of the witnesses who are otherwise being called in addition to Professor Irvine, who may be able to give evidence or will be able to give evidence as to early childhood teachers and what they do on a typical day. That evidence is being prepared on the basis that it explains in effect on an hour by hour basis what they do. I'm told that as at this morning, there are five of the witnesses to be called who will be able to give that evidence. One of them is Ms James and I have a supplementary statement from Ms James that was provided to Mr Fagir and his instructors only yesterday late. If I could hand that supplementary statement to the Commission.

PN1517

VICE PRESIDENT HATCHER: I have that statement.

PN1518

MR TAYLOR: At the same - I'll hand two bundles. So there's two different documents that I'm handing the Bench now. In effective order, one is Ms James' reply statement that is dated July 2018. It's exactly the same as the statement that

was filed but looking at it overnight the paragraph numbering has unfortunately gone awry and so what we've done, we haven't changed the paragraph numbering but we've added page numbers that weren't there, so that it's easier to identify when cross-examining and also when making submissions which paragraph is being referred to. So we'd ask if that version with the page numbers at the point that Ms James gives evidence, we would seek to tender that version.

PN1519

The second document that I've handed the Bench is a supplementary statement of Ms James. It does two things. At the outset it provides some updating information that we suspect is not particularly controversial or in fact at all controversial as to the way the child subsidies scheme operates, and then secondly it deals with the day to day work of a childcare teacher. It commences under the heading day to day work of early childhood teachers, paragraph 5. Paragraphs 6 to 8 are somewhat repetitious of the evidence that Ms James gives in earlier statements as to her background and experience, in effect providing a basis of knowledge for what follows, and then what follows goes from paragraph 10 onwards and deals with the activities of an early childhood teacher and does include some comment about where there has been changes to the work that has occurred.

PN1520

We're not in a position yet to hand up the other statements but can I indicate for the benefit of the Commission but also ACA what we anticipate they will be. Firstly, Ms Connell, who is due to give evidence on Thursday morning, Gabrielle Connell. I understand that her supplementary statement will do two things. Firstly, there is one aspect of her evidence which needs to be updated to take into accounts events that occurred since she made that statement. Second, she will deal with the issue of the day to day work of an ECT.

PN1521

Then the other three, in the afternoon of Thursday the 20th Amanda Sri Hilaire and Emma Cullen are to be called, both of them are in the process of preparing short supplementary statements dealing with the day to day work of an ECT and the other witness on Wednesday of this week is Lily Ames - A-m-e-s. Ms Connell's statement which I mentioned first, we are hoping to be able to provide to the ACA by the end of today. The other three statements we anticipate will be finalised during the course of tomorrow. So that's from the lay witnesses; 1, 2, 3, 4, 5. Then the other statements, Professor Irvine when the professor was here I indicated to her there were two subject matters that she might deal with. She has said that she will be able to provide something short on that within the seven days that the Commission has given us, and we are anticipating that she will be able to do that.

PN1522

So that takes us to where we are. We're in a position today to call Christopher Watt. We understand that Mr Jenkins Flint who is here already and is allocated this afternoon is likely to be relatively short, as is Mr Watt, and as a consequence we're minded if it's not inconvenient to deal with his evidence after Christopher Watt, so that Lisa James who's got a more substantive cross-examination we understand will come as the third witness of the day.

PN1523

VICE PRESIDENT HATCHER: So is there going to be an issue about firstly the admission and secondly the cross-examination in relation to the supplementary statement of Ms James?

PN1524

MR TAYLOR: Yes, there will be and Mr Fagir indicated to me before we started that he was keen for this issue to be dealt with first, hence that's what I'd be doing because he had some things he wanted to say to the Commission about that. I'm not sure what they are but he did say he wanted that to be dealt with at the outset.

PN1525

VICE PRESIDENT HATCHER: Well, it might be convenient to deal with that now, Mr Fagir.

PN1526

MR FAGIR: Thank you, your Honour. Could I provide a bit more of a chronology of what's occurred since we were last before the Commission. On Friday, my client wrote to the IEU referring to the grant of leave and expressing its view which I repeat today, that it's not reasonable for my client to be expected to conduct its case and to cross-examine witnesses without knowing the evidentiary case which it will ultimately be asked to meet, and inviting the IEU to identify those witnesses from whom further evidence will be proposed to be led, and the content of the evidence.

PN1527

We received a reply on the same day to the effect that Professor Irvine would provide a short further report and that it was anticipated that there would be evidence of up to five other witnesses called as to day to day activities. We were told if a witness needed to update their evidence the union would endeavour to provide that in the form of a short statement in advance of giving them evidence, as the union said that it had done, and that otherwise the union pointed out that it had been given seven days to file additional material and it expected to meet that timetable. My client responded yesterday effectively saying that that threw up more questions than it answered and that taking that approach was apt to maximise the prejudice occasioned to my client.

PN1528

At 5.50 pm yesterday I received the supplementary statement of Ms James, the statement is obviously an attempt to deal with the issue with the outlook in this case which was identified by us no later than 2 April this year in our written submissions. The statement adopts the form taken in the other statements of Ms James and of the union officials generally, in the sense that it's given in a kind of stream of consciousness style that involves a series of assertions about the way that things are set to happen in the industry, with no indication other than statement of the fact of experience and attendances at services. No other attempt to identify with any kind of specificity who is said to be doing these things where and when.

PN1529

The evidence - and could I interpolate - - -

PN1530

VICE PRESIDENT HATCHER: So is that comment made by reference to the part of the statement which goes to the day to day activities of the teacher?

PN1531

MR FAGIR: Yes, but there are some other - a couple of other features. One is, for example, an assertion in this statement that the introduction of technology has made teachers more accessible to parents. To give one example there's now some suggestion that approaches to sleep patterns have changed and that has some consequences for what seems to be some kind of work intensification point. It's not simply the matter of the description of the daily timetable, that's at the centre of it but there are other matters. There are then assertions, for example, that teachers are usually appointed as educational leaders but there are a range of issues.

PN1532

From my client's point of view I make that point about the nature of the evidence because it makes the task of responding to it more difficult. If there was some assertion about a particular service or a particular place where something was being done, perhaps one might say all that's needed is to find the person who works at that service and respond to it. But that's not the evidence. This again are broad assertions about the way the whole of the industry is said to operate. For that and for other reasons, responding to this evidence, apart from obtaining instructions necessary to cross-examine which I do not have, in terms of requiring in evidence we now have to go off, find as many witnesses as we can, given that this is said to be an industry wide issue, who can deal with these matters. Unless there's an adjournment or the hearing's derailed in some other way, that's something that we're apparently expected to do while cross-examining the 20 or so remaining witnesses over the next two weeks. Now - - -

PN1533

VICE PRESIDENT HATCHER: I would have thought that leaving aside questions of timing, that the witnesses for whom you've currently filed statements would be in a perfect capacity to respond to statements like that, as they have to similar statements and material that was filed in accordance with the timetable.

PN1534

MR FAGIR: That might be right and that will be the first point of call but we don't know if they're available. We don't know what time they have. We don't know what time we're going to have to start taking statements from these people when we're going to be here from 10 am to 4 pm each day for the next two weeks. It puts us in a position that we should not be placed in.

PN1535

Now I will come back to these difficulties in a moment if I could but my primary submission is that in the absence of some explanation as to why this evidence did not come at any point before 5.50 pm on a Sunday before we are due to cross-examine Ms James, the evidence should just be rejected. Unless there's some explanation it's impossible to think what it might be but in the absence of some explanation the evidence should simply be rejected out of hand.

PN1536

If the Commission Bench is not inclined to do that, we would ask for an adjournment, at least 24 hours, to allow us to put on evidence dealing with the implications of the admission of the evidence and in particular the implications of any adjournment of this hearing to allow my client or properly deal with what was provided to us yesterday, and what we're told is to come over the next few days. That is because we will say that it is inevitable that if this evidence is admitted, if my client's to be allowed a fair opportunity to deal with it, an adjournment will be required and if an adjournment will be required it will have very, very serious consequences from my client's point of view, financially and otherwise. But this is not a matter that I want to deal with purely by way of submission or purely by way of making assertions from the Bar table, as I did the last time the case was adjourned. We want to deal with it properly and we want to make sure that the Full Bench understands properly what the consequences of the admission of this evidence is.

PN1537

The submission of my application is twofold. Firstly, we'd ask the Commission to reject the statement now on the basis of absence of explanation. If not we'd ask that the hearing be adjourned until no early than 10 am tomorrow perhaps midday tomorrow to allow us to prepare the evidence that I have referred to. We should not, we say, be required to take any other steps. I'm not talking only about the cross-examination of Ms James but the cross-examination of anyone until this matter is resolved, so my client can understand the case that it's expected to fight and so that it is not prejudiced, bearing in mind that it's completely the innocent party in all of this. So it's not put to the task of either scrambling to prepare evidence as best as it can within the existing timetable, to have to deal with the fallout of a further adjournment. Commission please.

PN1538

VICE PRESIDENT HATCHER: Anything you want to respond to, Mr Taylor?

PN1539

MR TAYLOR: There's a few things. Firstly, the submission that's been made would suggest that what's being filed is some fundamentally new and devastatingly different evidentiary case. Mr Fagir, himself, I think, said that a number of his witnesses deal with what child care teachers do day to day. This is a very small part of the overall case but it's a part of the case, which the Bench itself, identify would be useful to properly understand. We don't believe that there will be any difficulty in Mr Fagir's clients reading very short statements which explain what witnesses do day to day and identify to what extent that accords with their understanding or doesn't. And to the extent to which there's any prejudice that's a reason from this material coming late the thought that that can't be cured by then giving some evidence about that, seems respectfully difficult to accept.

PN1540

But certainly the notion that this is all terribly, terribly difficult and fundamentally going to require an adjournment is a submission which really is somewhat premature seeing as we haven't seen the balance of this material yet. We don't anticipate that it's going to cause the sort of difficulties that Mr Fagir is identifying.

PN1541

So we think for the best course is for us to proceed today. Mr Fagir, I think, is amongst other things identifying that if he is to proceed on the basis of the supplementary statement if Ms James goes into evidence that he would want time to consider that evidence before he cross-examines her. If that's the case then that's the case. Ms James can, if necessary, come back on another day but the other two witness's evidence is entirely unaffected by this issue. They are here - they can be dealt with. They can be dealt with relatively quickly as I understand it. So that if that's all that's going to happen today this matter will adjourn, I suspect, certainly before lunch and so the better course we say is to proceed on that basis, for Mr Fagir and the Commission to see the balance of this material before any further concern is raised or the Commission needs to consider this matter further. That, I think, was originally what the Bench had in mind when it said, "Grant you leave. File it. And then once we've had a look at it we'll then consider this question of whether you should be permitted to rely on it or not."

PN1542

You can certainly take if from our point of view that we're not, of course, minded to be any more enthusiastic about an adjournment that Mr Fagir's client is, as in adjourning the proceedings, generally. If there are some short adjournments that need to be dealt with, given, to the extent to which this - prejudice - that's another thing. But we don't, for our part, see that these are major issues that are going to cause the sorts of concerns that Mr Fagir has in mind and that view, we think, will be confirmed once this material is provided to the Commission. And we're trying to do that as quickly as we can. These are not, with the exception of Ms James who's engaged by us, none of these witnesses are our employees. They are all people who work in other jobs. Some of them out of Sydney. So we will need - it's taken a little longer than we would have liked but we still intend to do it within the seven days that we were given to do. And hopefully I think all of it - either later today or during the course of tomorrow. That's all we have to say.

PN1543

VICE PRESIDENT HATCHER: The course we've decided to take for this morning is simply at this stage to hear the evidence of Christopher Watt and James Jenkins Flint and then once that evidence is completed the Full Bench will adjourn and consider what's been put in relation to the supplementary statement of Lisa James and further evidence of that type which may emerge.

PN1544

MR FAGIR: If the Commission pleases. Without cavilling with what the Full Bench has decided given one iota - could I just make one part of my submission clear because I'm not sure I put it as clearly as I could but cross-examination of all of the witnesses is influenced by the whole of the evidence. And we've taken a particular approach which as the Full Bench has seen is to be fairly narrow in cross-examination with all of the witnesses - not just Ms James but everyone - and that is a forensic decision which is influenced by the whole of the case that's put against us - not only the particular content of the statement of each witness being cross-examined.

PN1545

VICE PRESIDENT HATCHER: Yes. That's noted. All right. So, Mr Watt is first, Mr Taylor?

PN1546

MR TAYLOR: Yes, he is. If Mr Watt could come to the witness box?

PN1547

THE ASSOCIATE: Could you please state your full name and address for the record?

PN1548

MR WATT: Christopher Gerard Watt, (address supplied).

<CHRISTOPHER GERARD WATT, AFFIRMED [10.25 AM]

EXAMINATION-IN-CHIEF BY MR TAYLOR [10.25 AM]

PN1549

MR TAYLOR: Your name is Christopher Gerard Watt?---Correct.

PN1550

And you are the Federal Secretary of the Independent Education Union of Australia?---Correct.

PN1551

A position you've held since April 2009?---Correct.

PN1552

You have prepared for the purpose of these proceedings a statement dated 22 November 2018?---Correct.

PN1553

And you have a copy of that statement with you?---Correct.

PN1554

It has one annexure which you refer to in paragraph 11 listing Australian Government Enquiries into School Education and Early Childhood Education since 2014?---Correct.

PN1555

Do you say that the contents of your statement are true and correct to the best of your knowledge and belief?---I do.

PN1556

I tender the statement.

PN1557

VICE PRESIDENT HATCHER: Yes. The statement of Christopher Watt dated 22 November 2018 will be marked Exhibit 22.

*** CHRISTOPHER GERARD WATT

XN MR TAYLOR

**EXHIBIT #22 WITNESS STATEMENT OF CHRISTOPHER WATT
DATED 22/11/2018**

PN1558

MR TAYLOR: Thank you. No further questions.

CROSS-EXAMINATION BY MR FAGIR

[10.26 AM]

PN1559

MR FAGIR: Mr Watt, you've worked for the union for 23 years now?---Correct.

PN1560

Before that you were a high school teacher?---Correct.

PN1561

But you've never worked in an early childhood service?---Correct.

PN1562

Or in a primary school?---Correct.

PN1563

Could I ask you some questions about your evidence at paragraphs 58 and following?---Yes.

PN1564

You there deal with the question of children with disabilities?---Yes.

PN1565

Your paragraph 58 you cite a particular statistic, 18 per cent of enrolments in Australian schools are students with a disability and you refer to a document that provides the basis for that statement?---Yes.

PN1566

Now, the 18 per cent figure is actually the number of students who are receiving assistance of some kind or another in respect of a special need or a learning difficulty?---Not quite because there is a category under the new nationally consistent collection of data and the new funding arrangements where some students actually aren't receiving assistance because the deemed educational adjustments that are required are regarded as nil. And so the figure includes all students who are recognised with a disability. So it may well be a disability that doesn't require a learning adjustment.

PN1567

I see. But the category of students who have something between a learning adjustment all the way up to - for example - a full time teacher's assistant is a subset of the 80 per cent?---Correct.

*** CHRISTOPHER GERARD WATT

XXN MR FAGIR

PN1568

That you referred to there. And the document that you referred to - Improving Educational Outcomes Emergent Data on the Students with Disability - that's not

a longitudinal review of the statistics. It deals with the figures at a point in time. Is that right?---Correct.

PN1569

Now, paragraph 49 you say a couple of things. Firstly, that students are increasingly presenting to schools with multiple disabilities. Do you see that in the second sentence there?---So just - so you're referring to 59? Not 49?

PN1570

I'm sorry. Did I say 49 - 59. Yes, the second sentence at 59 you say that students are increasingly presenting with multiple disabilities?---Yes.

PN1571

Do you see that? In the next sentence you say, "There is an increasing number of students with more complex needs being integrated into mainstream schools." That's the second proposition in that paragraph?---Correct.

PN1572

Now, is the basis for those assertions anecdotal or is there some statistical information that provides the basis for them?---From our - my perspective it's anecdotal based upon what our members have been talking about and the information we've received from members when we've made submissions in relation to the new data collection regime, and responses we receive from organisers through our federal education committee.

PN1573

Thank you, Mr Watt, they're my questions.

PN1574

MR TAYLOR: Nothing arising.

PN1575

VICE PRESIDENT HATCHER: Right, thank you for your evidence, Mr Watt. You're excused.

<THE WITNESS WITHDREW

[10.29 AM]

PN1576

MR TAYLOR: If we could get Mr Jenkins-Flint. While Mr Jenkins-Flint is coming to the witness box, the Commission should have two statements of Mr Jenkins-Flint. The first statement of 20 December 2017 and the second short reply statement of 19 July 2018.

<JAMES JENKINS-FLINT, SWORN

[10.30 AM]

EXAMINATION-IN-CHIEF BY MR TAYLOR

[10.30 AM]

PN1577

MR TAYLOR: Your name is James Jenkins-Flint?---Yes.

*** JAMES JENKINS-FLINT

XN MR TAYLOR

PN1578

You are employed by the applicant, the Independent Education Union of Australia, as an organiser?---Yes.

PN1579

That's a position you've held since April 2017?---Yes.

PN1580

Before then you were a permanent full-time teacher in a number of primary schools in Sydney over an 11 year period?---Yes.

PN1581

You have for the purposes of these proceedings prepared two statements, is that right?---Yes.

PN1582

Do you have them with you?---I do.

PN1583

The first statement of 38 paragraphs signed on 20 December 2017, do you have that in front of you?---I do.

PN1584

Is there one minor correction that needs to be made to paragraph 4 in the third sentence, which starts:

PN1585

The school enrolled children from kindergarten to Year 6 and I taught classes across -

PN1586

it currently says "Year 3, 4 and 6"?---Yes, it should say year 3, 5 and 6.

PN1587

Yes. With that correction do you say that the contents of this, your first statement, are true and correct to the best of your knowledge and belief?---Yes, they are.

PN1588

I tender that statement.

PN1589

VICE PRESIDENT HATCHER: The statement of James Jenkins-Flint dated 20 December 2017 will be marked exhibit 23.

**EXHIBIT #23 WITNESS STATEMENT OF JAMES JENKINS-FLINT
DATED 20/12/2017**

*** JAMES JENKINS-FLINT

XN MR TAYLOR

PN1590

MR TAYLOR: Now turning to your second statement, Mr Jenkins-Flint, a two page statement bearing a date of 19 July 2018. Do you have that there in front of you?---Yes.

PN1591

Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes.

PN1592

I tender that statement.

PN1593

VICE PRESIDENT HATCHER: Statement in reply of James Jenkins-Flint dated 19 July 2018 will be marked exhibit 24.

EXHIBIT #24 WITNESS STATEMENT IN REPLY OF JAMES JENKINS-FLINT DATED 19/07/2018

PN1594

MR TAYLOR: I just note for the record that that statement was filed with an annexure JJF-01, a three page annexure. Mr Jenkins-Flint, do you have a copy of the annexure with you in the witness box?---Yes.

PN1595

Thank you, they are the questions.

CROSS-EXAMINATION BY MR FAGIR

[10.33 AM]

PN1596

MR FAGIR: Mr Jenkins-Flint, you deal with the Australian curriculum at paragraph 8 of your first statement. Do you see that there?---Yes.

PN1597

The Australian curriculum at least to the novice appears to be broken down firstly by levels, Year 1, Year 2 et cetera?---Yes, stages.

PN1598

Stages are they?---Yes.

PN1599

There is then a breakdown of subject matter for each subject whether it's English or Mathematics or whatever it might be?---Yes.

PN1600

There are then a variety of activities and other items which are provided for under the particular subheading?---Yes, outcomes.

PN1601

It looks again, at least to the novice like it's pretty granular. It's broken down into fairly small portions?---Yes, one could say that.

*** JAMES JENKINS-FLINT

XXN MR FAGIR

PN1602

Even so, you say that one can't simply stand up and read out the curriculum?---Yes.

PN1603

That there's some level of interpretation involved?---Yes.

PN1604

Why is that?---Well, the curriculum is set up with outcomes and indicators that would sort of guide the teacher to know that a particular student has reached that outcome, and the curriculum is not a script so it is really outlaying what the teacher needs to teach.

PN1605

Without necessarily identifying exactly how that is to be done?---Not exactly done.

PN1606

You at paragraph 13 of your statement discuss the implementation of policies in the classroom?---Yes.

PN1607

Can you just tell me what sort of policies apply to you - or are applied to your work in classrooms?---School policies about how to conduct oneself in the classroom. NESA has certain policies in that area as well. They would be the main two.

PN1608

Are there policies dealing with reportable matters and those types of things?---Yes. Yes.

PN1609

Work health and safety?---Not from memory that I deal with.

PN1610

Child safety medical procedures, that type of thing?---Yes.

PN1611

Dealing with cases of anaphylactic shock or allergies and so on?---Yes, how to correctly deal with those situations if they arise, yes.

PN1612

Mr Jenkins-Flint, in your reply statement you say something about the comparison between the work of teachers in early childhood and in primary schooling, is that right?---Which paragraph in particular are we referring?

PN1613

Paragraph 4, for example. You explain that the play based pedagogical strategies that are used in early childhood centres are also used in primary school teaching?---Yes.

PN1614

Do you see that?---Yes.

PN1615

You explain that at St Bridget's where you worked there was a constructive play based program instigated for the break periods?---Yes.

PN1616

That program, that play based program you say was linked to the students' lesson time activities?---Yes.

PN1617

You don't suggest that the lesson time teaching was itself was play based?---There maybe - there may have been parts of their lesson time - actually there was at Marrickville. Parts of the students' lesson time that were play based activities, but I did not witness those because I was not a kindergarten teacher but I knew that they were taking place.

PN1618

I see. You think perhaps based on something someone told you that there was an element of played based activity for kindergarten?---No, how I knew is because they were discussed in staff meetings and so when the staff met, we would talk about what's going on in the classrooms so we knew what was going on in the kindergarten and the Year 1 classrooms and those teachers would share what's going on there with the rest of the staff, as would Year 6 teachers with the staff as well.

PN1619

I see. But certainly that's not something - play based activity during lesson time was not something that you would ever do teaching Years 3, 5 or 6?---No.

PN1620

Now you set out as an annexure to the statement as series of comparisons between Early Years Learning Framework outcomes and outcomes under the Australian curriculum. You prepared this table, did you?---Yes.

PN1621

Some of these comparisons are fairly tenuous don't you think?---No, I wouldn't agree with that.

PN1622

Let me give you an example. If you don't mind turning to the second page of the annexure. In about the fourth row you say that:

PN1623

The outcome of demonstrating an increasing capacity for self-regulation is equivalent to an outcome from a Phys Ed curriculum refers to a sense of their own worth and dignity.

*** JAMES JENKINS-FLINT

XXN MR FAGIR

PN1624

?---Yes.

PN1625

Then in the next row:

PN1626

Approach new safe situations with confidence -

PN1627

you say:

PN1628

is equivalent to a Phys Ed outcome, demonstrates an emerging awareness of the concepts of safe and unsafe living

PN1629

?---Yes, I think there'd be quite a link there.

PN1630

Equivalence do you think?---For the different and age appropriate equivalence - a developmental level equivalence. Yes. Most certainly.

PN1631

About halfway down the page "Use their home language to construct meaning." You regard as being equivalent to the English curriculum?---Part of. Not the entirety of.

PN1632

Yes. In the sense that it's concerned with the use of language to communicate?---Yes.

PN1633

All right. And then perhaps another four or five rows down. Show interest in other children in being part of a group from the EYLF you regard as equivalent again in the Phys Ed Curriculum 2. Respects the right of others to hold different values and attitudes. Appreciates similarities and differences between themselves and others. Shows sensitivity to the needs et cetera of others, shows concerns for welfare, questions discrimination and values fair play?---Yes, I'd say there'd be on an age level - age-appropriate level - they'd be equivalent.

PN1634

Two, "Shows interest in other children being part of a group"?---Yes. That would be the beginning.

PN1635

Thank you, Mr Jenkins. They're my questions.

PN1636

VICE PRESIDENT HATCHER: Is there any re-examination?

*** JAMES JENKINS-FLINT

XXN MR FAGIR

PN1637

MR TAYLOR: No, thank you, your Honour. Nothing arising.

PN1638

VICE PRESIDENT HATCHER: All right. Thank you for your evidence, Mr Jenkins. You're excused?---Thank you.

PN1639

You may go.

<THE WITNESS WITHDREW [10.40 AM]

PN1640

VICE PRESIDENT HATCHER: All right. As previously foreshadowed we will now adjourn and we will resume - not before 11.30.

SHORT ADJOURNMENT [10.40 AM]

RESUMED [11.33 AM]

PN1641

VICE PRESIDENT HATCHER: The Full Bench has decided that it will admitted the supplementary statement of Lisa James. We do so on the basis that we consider it contains evidentiary material which is likely to be of utility in the Commission's decision making process. That leaves the question of how any prejudice the admission of that statement which was obviously filed extremely late might be remedied.

PN1642

Mr Fagir, in respect of cross-examination with this witness, we are prepared to allow either part or if necessary the whole of the cross-examination of this witness to be deferred until such time or such reasonable time as the ACA is ready to cross-examine upon the statement and Ms James is in a position to return. We envisage that that might occur at some mutually convenient time towards the end of the timetabled period before the IEU's evidentiary case.

PN1643

We also will grant leave to the ACA to call evidence in response to the supplementary statement and that may be done either by filing additional witness statements or insofar as evidence in reply might be adduced from a witness who has already filed a statement, that might be done simply by calling additional oral evidence from that witness when the witness is due to be called.

*** JAMES JENKINS-FLINT

XXN MR FAGIR

PN1644

I don't know whether you want to have a short break, Mr Fagir, to consider what course to take with the cross-examination of Lisa James but what we propose to do is to have her come into the witness box, take the oath or affirmation, admit the statements. I think there's one matter that Dean DP wishes to raise with the witness about one aspect of the supplementary statement, and then it's a matter for

you as to whether you wish to at least start cross-examination or defer the whole of the cross-examination to another day.

PN1645

MR FAGIR: Do I take it from what your Honour said that the Bench doesn't propose to receive any evidence about the effects of the admission of the statement in terms of prejudice even in responding or in terms of the consequences of any adjournment that - - -

PN1646

VICE PRESIDENT HATCHER: Well, we'll see what the consequences of that are but if you wish to file that evidence you may, but I think a perusal of the supplementary statement suggests it raises matters which at least primary facie would not appear to be such as to derail the whole of the program for the hearing. But if you wish to persuade us otherwise you may try to do so.

PN1647

MR FAGIR: If I could have a short period of time and I only mean five minutes I'd be grateful.

PN1648

VICE PRESIDENT HATCHER: All right, thank you. We'll now adjourn.

SHORT ADJOURNMENT [11.37 AM]

RESUMED [11.46 AM]

PN1649

VICE PRESIDENT HATCHER: Mr Fagir?

PN1650

MR FAGIR: We would not propose to begin the cross-examination of Ms James today if the Commission pleases.

PN1651

VICE PRESIDENT HATCHER: All right. Well, in those circumstances I'll expect the parties will have a sensible discussion about a mutually convenient time at which Ms James could return for cross-examination and to the extent that the IU has foreshadowed an intention to file some additional witness statements from other witnesses. To the extent those statements might be admitted, again, we would expect that counsel might having regard to this morning's ruling discuss a mutually convenient way in which the timetable might accommodate those events. All right. Is Ms James present, Mr Taylor?

PN1652

MR TAYLOR: She is. She is present and she could now come to the witness box.

PN1653

THE ASSOCIATE: Can you please state your full name and address for the record?

PN1654

MS JAMES: Lisa James (address supplied).

<LISA JAMES, AFFIRMED

[11.47 AM]

EXAMINATION-IN-CHIEF BY MR TAYLOR

[11.47 AM]

PN1655

MR TAYLOR: Your name is Lisa James. And you are employed by the applicant, the Independent Education Union of Australia as an Early Childhood organiser?---I am.

PN1656

You have prepared for the purpose of these proceedings three statements. I want to take you to each of them. First, do you have with you in the witness box what I will call your first statement, the statement dated 20 December 2017?---Yes.

PN1657

Now, I understand that there are a couple of paragraphs you wish to correct and a couple of paragraphs you wish to update with the latest information. Can I firstly take you to paragraph 59 of the statement?---Mm-hm.

PN1658

At this part of the statement you are giving evidence about bargaining in the early childhood sector and you say in paragraph 59 the IEU has only negotiated an enterprise agreement with above award rates of pay with three full profit employers and then you name three entities?---Mm-hm.

PN1659

Is the position that it shouldn't say three - it should say two?---Yes.

PN1660

And that the one that should be deleted is Guardian Early Learning Group?---That is correct.

PN1661

And you deal with Guardian Early Learning at paragraph 61 and there's a correction that you wish to make there as well?---Mm.

PN1662

So it currently reads in paragraph 61, "The Guardian Early Learning Enterprise Agreement was agreed by Guardian in order to access the funding from the Early Years Quality fund established in 2013." And then do you wish to delete these words then, "And it contains the Modern Award rates of pay"?---Yes, that's correct.

PN1663

And should instead of those words - so instead of the words, "And it contains the Modern Award rates of pay", should it read, "Does not specify above award rates"?---Yes, that's right.

*** LISA JAMES

XN MR TAYLOR

PN1664

Can you just explain what was the nature of the wage rates for the extent to which that enterprise agreement dealt at all with wage rates what did it say?---There is a schedule for the Early Use Quality Fund money they were expecting to receive and how that would be passed on to employees. So the - it's got increases of between say three to \$5.00 an hour but it was - they're only applicable if the Early Years Quality Fund money was received by Guardian for employees and they did not receive any money under that scheme.

PN1665

So just to clarify the enterprise agreement didn't have rates of pay in it?---No. It just had a schedule - - -

PN1666

But what it did have is that if they got this funding then whatever rates they were paying teachers would receive an additional amount per hour that corresponded with the funded amount?---Yes, teachers and educators, yes.

PN1667

Teachers and Educators. Yes, thank you. Now, can I take you to paragraph 62? Do you wish to update the information in paragraph 62? In particular the second sentence says, "GA has approximately 400 early childhood services." Do you wish to update that information with what you understand to be the current position?---Yes, I'd believe they have 519 last time I read their annual general reports.

PN1668

Yes. And then in paragraph 64 you give some dollar amounts comparing what graduate teachers are paid in government and catholic schools in New South Wales and what teachers get paid firstly in community based preschools and secondly in long day care centres. Now, do I understand that you'd like to update those figures referable to what you understand the rates to be as at today prior to the changes that are going to occur in the Modern Award effective the 1 July?---That is correct.

PN1669

So as I understand it is this the position that you wish to do? So I'm going to take each of these dollar figures. So the first one which is - so reading it - "Graduate teachers in government and catholic schools in New South Wales commence on" - it currently says 65608 - is that - to update it, that would be 68929?---Yes.

PN1670

And progress to and to give the updated figure - that is 102,806 - \$102,806, at the top of the scale?---Yes, that's correct. And then it goes on "Teachers working in community based preschools commence on a rate as low as" is the figure to be updated? Instead of 50,665 - the current figure is 52,438?---Yes.

PN1671

And progress to - and is the updated figure 69,208 on the Modern Award?---Yes.

*** LISA JAMES

XN MR TAYLOR

PN1672

And then to the next sentence it says, "Four-year qualified teachers working in long day care centres commence on" - and is the figure that would be - that is the current figure - updated figure, 54,536?---Yes.

PN1673

And progress to and the updated figure is 71,977?---Correct.

PN1674

And then the next sentence says, "This is a difference of up to" is the updated figure the difference is up to 33,598 per year?---That's right.

PN1675

Yes. Ms James, having made those corrections and having updated those paragraphs that I've taken you to, do you say that with those corrections and updated evidence - your statement - your first statement is true and correct to the best of your knowledge and belief?---Yes, it is.

PN1676

I tender that statement.

PN1677

VICE PRESIDENT HATCHER: So the statement of Lisa James dated 20 December 2017 will be marked Exhibit 25.

**EXHIBIT #25 WITNESS STATEMENT OF LISA JAMES DATED
20/12/2017**

PN1678

MR TAYLOR: Ms James, can I now take you to the second statement? It's titled statement in reply of Lisa James and is signed on 19 July 2018. Do you have a copy of that with you?---I do.

PN1679

Now there are, I understand, some corrections, you'd like to make to this statement. Firstly, you have in the witness box, do you, the version of that statement that's had page numbering added to it?---I do.

PN1680

Yes. Can I take you to page two, as numbered, and paragraph (e) - at the top of the page there's a heading "University of New England". Do you see that?---Mm-hm.

PN1681

And (i) says "Bachelor of Education Early Childhood Teaching one to two years' full time depending on experience plus diploma qualification zero dash" - and there's a blank. Should the number '5' be there?---That's correct.

*** LISA JAMES

XN MR TAYLOR

PN1682

So it should be 0-5. On page three paragraph seven at the bottom of the page I think there's a word missing. Can I just read that sentence and identify the additional word. "Based on my experience in the industry there's a shortage of people who want to work" - as - the word 'as' should be added - before "Early Childhood Teachers"?---Yes.

PN1683

Just pausing for a moment, Ms James. I'll come back to that. Let me just make a note. At page 26 you were looking at a page - if you have page 26 - with a series of text in boxes - on the left-hand column the third box commences with the words "Use language skills including". Do you see that?---Mm-hm.

PN1684

And is there an error that you wish to correct? It should read, "Use interaction skills"?---That's correct.

PN1685

Including "listening"?---Yes.

PN1686

And then, finally, at page 29 paragraph 53 after - in the middle line - after "MT-11", currently it reads, "which were prepared by Early Childhood Teachers" - that you wish to correct that. So it reads, "Which were prepared by qualified teachers"?---Yes, I do.

PN1687

Deleting the words "Early Childhood" and replacing them with the word "qualified"?---Yes.

PN1688

With those corrections do you say that the contents of this - your second statement - true and correct to the best of your knowledge and belief?---Yes.

PN1689

I tender that statement.

PN1690

VICE PRESIDENT HATCHER: So the statement in reply of Lisa James dated 19 July 2018 will be marked Exhibit 26.

**EXHIBIT #26 WITNESS STATEMENT OF LISA JAMES DATED
19/07/2018**

*** LISA JAMES

XN MR TAYLOR

PN1691

MR TAYLOR: And can I just note for the record if the Bench has pages 14 and 15 the Bench will see that certain text has been highlighted in yellow. That text is the subject to an existing confidentiality order and that is true of that page but there's also a later page - pages 19 and 20 and 21 - which similarly has text highlighted in yellow which - wherein the witness is reproducing material from

employer statements over which the employers have claimed confidentiality and that is why it is marked in that manner.

PN1692

VICE PRESIDENT HATCHER: Right, thank you.

PN1693

MR TAYLOR: Then finally, Ms James, there is a supplementary statement dated yesterday, 16 June 2019. Do you have a copy of that statement with you?---I do.

PN1694

Do you say the contents of that statement are true and correct to the best of your knowledge and belief?---Yes.

PN1695

I tender that statement.

PN1696

VICE PRESIDENT HATCHER: Yes, the supplementary statement of Lisa James dated 16 June 2019 will be marked exhibit 27.

**EXHIBIT #27 SUPPLEMENTARY WITNESS STATEMENT OF
LISA JAMES DATED 16/06/2019**

PN1697

MR TAYLOR: Thank you, they're our questions.

PN1698

VICE PRESIDENT HATCHER: Right. Ms James, Dean DP to my right is going to ask you something about one aspect of your statement.

PN1699

DEPUTY PRESIDENT DEAN: Ms James, do you have your supplementary statement there?---I do.

PN1700

Paragraph 11. It may well be that my understanding about this is wrong, that's why I wanted to explore it with you. You say in the second sentence that the funding system requires children to attend 15 hours a week?---Yes.

PN1701

My understanding is that the system doesn't actually require 15 hours of attendance. That's just what you need to do if you want to maximise - obtain the maximum funding?---The funding, yes. So services are penalised if children are enrolled for less than that 15 hour hours if they're funded.

PN1702

Yes, so the funding is different based on the number of hours?---That's right.

*** LISA JAMES

XN MR TAYLOR

PN1703

So likewise then with the rest of that sentence it says:

PN1704

Funded children must be enrolled for 7.5 hours a day.

PN1705

Now my understanding is there's no requirement for them to be enrolled 7.5 hours a day. That that's - - -?---Once again that's to maximum funding. So what preschools have done is instead of having a three day and a two days pattern as they previous did, they're enrolling children for 7.5 hours a day, two days a week, so they can put one child on Monday, Tuesday, another child Tuesday, Wednesday, another child Monday, Wednesday. So in that - out of that 20 places they can actually get 30 children in in that part of the week and then the second part of the week on Thursdays and Fridays, children will attend 7.5 hours.

PN1706

I understand they might schedule it a particular way but it's not actually an enrolment - a requirement is it?---No, they don't have to be enrolled for that but once again to maximum funding, if they're enrolled for less than that 7.5 hours the preschool will be penalised in terms of their funding.

PN1707

Right, thank you.

PN1708

VICE PRESIDENT HATCHER: Well, I think that's as far as we can take it today.

PN1709

MR TAYLOR: I think if it's not inconvenient, could I take the opportunity to tender three statements in respect of witnesses who are not required for cross-examination.

PN1710

VICE PRESIDENT HATCHER: Well, let's just finish with Ms James first.

PN1711

MR TAYLOR: Of course.

PN1712

VICE PRESIDENT HATCHER: Ms James, we're going to have to ask you to come back for cross-examination by the Australian Childcare Alliance on a different day?---Mm-hm.

PN1713

So you'll no doubt liaise with IEU's lawyers about when that is likely to occur?---Sure.

PN1714

So we'll stand down with your evidence until that further date is arranged.

*** LISA JAMES

XN MR TAYLOR

PN1715

VICE PRESIDENT HATCHER: Just hold on a second, Mr Taylor.

PN1716

MR TAYLOR: If it's more convenient we can sent your Honour's Associate a note prior to tomorrow as to the nature of the statements so that I can have them to hand at the time of the marking.

PN1717

VICE PRESIDENT HATCHER: Yes, that might be more convenient, Mr Taylor.

PN1718

MR TAYLOR: We'll do that, thank you.

PN1719

VICE PRESIDENT HATCHER: Mr Fagir.

PN1720

MR FAGIR: Can I just check that I'm understanding the lay of the land and just raise an issue. Our application this morning was that the supplementary statement be rejected on the basis that there was no explanation for its lateness or alternatively that the question be adjourned until tomorrow so that we could put on some evidence relevant to the question of its admission. Both limbs of that application, as I understand it, were rejected but your Honour's now invited us to put on evidence relevant to that issue if we wish, notwithstanding the admission of the - - -

PN1721

VICE PRESIDENT HATCHER: If the position is maintained that the prejudice caused by the admission of the statement can't be cured by the steps that we have identified, which I hope would be - they would be practically worked out in a sensible discussion between counsel, then you're not foreclosed from making some further application supported by evidence.

PN1722

MR FAGIR: Thank you, your Honour. Relevant to the point your Honour's just said can I just point out, it seems to us there'll be an inescapable practical problem which arises from all of this, which is that Wednesday there are four early childhood teachers scheduled to be cross-examined and three on Thursday. If I've understood the somewhat cryptic indications that have come from the applicant, some or all of those early childhood teachers will be putting on further evidence which we'll get sometime between now and midnight on Wednesday, in circumstances where they're to be cross-examined the next day.

*** LISA JAMES

XN MR TAYLOR

PN1723

Can I just say this so it's clear, that that is going to create a difficulty. If I need to get instructions about it, that's not something that can happen quickly. The people that I need to speak to the one and the witnesses who have already given evidence

frankly are not disposed to invest even more time into this process. We'll do our best to persuade them but speaking perfectly frankly, their enthusiasm varies but for some it's at a low ebb. Secondly, these are people who are running services, a number of them do a whole variety of things, so the idea that the statements received in 24 hours can be responded to is not likely, in my respectful submission. That's perhaps unsurprising in circumstances where Ms James who works for the union, who is obviously someone who can produce a statement largely under her own motion, took her five days to put on the statement. For the early childhood teachers it's going to take anything up to a week, a proposition that we'll have real difficulty in responding within or even obtaining instructions sufficient to allow cross-examination within a day or two. That seems self-evident.

PN1724

I'm not saying that to continue to whinge or to test the Bench's patience. I just want to say it lest it be thought that the practical issues are insignificant, or that everything's likely as we see it to continue smoothly from hereon now.

PN1725

VICE PRESIDENT HATCHER: Mr Taylor.

PN1726

MR TAYLOR: Yes.

PN1727

VICE PRESIDENT HATCHER: It's only Monday morning, I can't remember whether you actually identified the names of the persons for whom it is foreshadowed there will be additional statements.

PN1728

MR TAYLOR: I did.

PN1729

VICE PRESIDENT HATCHER: Well, can I ask you to do that again?

PN1730

MR TAYLOR: Yes, of course. If your Honour has the proposed witness schedule. The witnesses in question are Wednesday morning, Lily Ames, A-m-e-s. Thursday morning the first two Allyshia Connellan and Gabrielle - Allyshia Connellan and Gabrielle Connell. My apologise, let me start that again. Thursday morning it is Gabrielle Connell but not Allyshia Connellan. Thursday afternoon it is the two witnesses Amanda Sri Hilaire and Emma Cullen. So they are the witnesses, the four of them, and I also identify Associate Professor Irvine, Dr Irvine as the other witness. I'm told by Ms Saunders that during the course of this morning further communications with the witnesses have occurred, so what I'm hoping to be able to do is be able to provide Mr Fagir with these short statements later today with the possible exception of one of them, which might not occur until tomorrow morning and then have that conversation that your Honour has suggested that we have as to how best we can ensure that he's not put in the position which causes prejudice to his client. It might mean trying to rearrange the timetable again, but we'll have that conversation with him.

PN1731

VICE PRESIDENT HATCHER: Yes. Well, I mean I think it should have been apparent from their comments that in respect of these identified witnesses, it's not particularly useful to have them being called according to the timetable very shortly after they've had a supplementary statement filed, because it'll just lead to a repetition of today's events.

PN1732

MR TAYLOR: Yes.

PN1733

VICE PRESIDENT HATCHER: So I hope you and Mr Fagir can have a sensible discussion as to how those identified witnesses might be dealt with in a manner that's fair to him and his client in a reconstructed timetable.

PN1734

MR TAYLOR: Thank you.

PN1735

VICE PRESIDENT HATCHER: I can indicate that if it requires some adjustment to the sitting hours to - either by way of earlier start on any day or an earlier finish Monday to Wednesday, then the Full Bench will be able to accommodate if that's necessary to deal with the difficulty.

PN1736

MR TAYLOR: Thank you. I will sit down and try and see what can be done to reduce that prejudice as far as we can.

PN1737

VICE PRESIDENT HATCHER: Right, thank you. We'll now adjourn.

ADJOURNED UNTIL TUESDAY, 18 JUNE 2019

[12.08 PM]

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