

**IN THE FAIR WORK COMMISSION
AT SYDNEY**

MATTER: AM2014/263; 2014/266

**REVIEW OF MODERN AWARDS – STAGE 4
EDUCATIONAL SERVICES (TEACHERS) AWARD 2010
CHILDREN’S SERVICES AWARD 2010**

IEU RESPONSE TO QUESTIONS IN BACKGROUND DOCUMENT 1

INTRODUCTION

1. These are the IEU’s responses to the questions posed in the background documents issued by the Full Bench on 13 June 2019, in respect of the parties’ submissions (**the First Background Document**).
2. Many of the matters raised are canvassed in the IEU’s four sets of submissions already filed in the proceedings. The submissions below endeavour to expand on the points identified without repeating what has already been set out.

FIRST BACKGROUND DOCUMENT

UV Claims generally

3. The IEU does not, as a general proposition, wish to be heard on the United Voice claims. As such, with one or two exceptions these submissions do not respond to the questions relating to those claims.
4. Although the transcript of hearing on one occasion records the IEU’s stating its position as ‘*support[ing]*’ the claims,¹ this was a slip on Counsel’s part which misstates the position: in reality, it is one of non-opposition.

Question 1

5. Appendix 1 under IEU Submission – 18 March 2019 should have the date amended to 15 March 2019. Otherwise, Appendices 1, 2 and 3 are accurate.

¹ Transcript, 6 May 2019, PN47

Questions 19-20 – overlap with ERO

6. The ACA, in the Equal Remuneration Order/Work Value proceedings (**the ERO proceedings**), has repeatedly suggested that the United Voice claims, which are functionally identical to the Individual Claims, and the fact that they are currently being dealt with by this Full Bench, present an obstacle of some kind to the resolution of those proceedings. Although ACA has not explained exactly *why* this is so, the objection was made repeatedly and in strong terms throughout the four-week evidence hearing, and is expected to recur in final submissions. This is of some concern given that:
 - a. when the issue of overlap was raised at a directions hearing on 9 November 2018 raised, United Voice asserted that there was no overlap, and ACA not only did not cavil with the proposition but expressly confirmed its agreement with United Voice that the claims should be heard separately;²
 - b. ACA, presumably on this basis, subsequently pressed (with the agreement of United Voice, but not the IEU) for the matters to be heard separately and before the ERO proceedings;³ and
 - c. ACA separately indicated that they would not seek to use these proceedings to delay the ERO.⁴
7. Nothing has happened between the programming of these matters and the ERO proceedings being heard that would justify ACA's apparent about-face. Had ACA made its position – i.e. its intention to use the United Voice claims to, in some ill-defined way, obstruct the ERO proceedings – the IEU would have made an application for the programming of these matters to be varied to avoid any such issue.
8. Assuming that the ACA's position is now that the matters are so intertwined that these proceedings will cause difficulties for the ERO proceedings, the IEU submits that the correct course is to delay the resolution of the United

² Transcript, 9 November 2019, PN167-177

³ Joint Report, 5 December 2018

⁴ Transcript, 5 December 2019, PN28

Voice claims until the ERO proceedings are finalized. To do otherwise would cause unfair prejudice to the IEU in both proceedings.

Question 36 – history of attempted variations to the span of hours

9. The ECEC Employer submissions setting out the history of attempts to expand the span of hours in the Children’s Services award is correct. The IEU notes that the ECEC Employers have not made any serious attempt to deal with the history of the Teachers Award or, indeed, explain why it should be similarly varied (particularly in circumstances where teachers are more usually engaged during ‘core hours’).

Question 37

10. The IEU contests the propositions set out in [167], in that:
 - a. at (a), the description of early childhood education and care as, firstly, being ‘childcare’ only and secondly being simply about a place for children to go misunderstands the educational focus of the sector: ECEC services provide vital early learning for children to prepare them for school. This is why services are required to engage qualified teachers and educators: to dismiss the work as merely looking after children dramatically downplays the importance of the work and fundamentally misunderstands the nature and purpose of the sector.
 - b. (b) and (c) are not contested but can be taken as no more than broad motherhood statements which provide no support for the ECEC Employer’s claim to degrade working conditions;
 - c. as to (d), the assertions therein are not supported by any evidence – notably, there is no economic or other expert evidence relied on by the ECEC Employers as to the actual state of the industry or (discussed further) the effect of its claim.

Question 38

11. The IEU contests the propositions set out at [169], and relies on its submissions in respect of factual findings. In particular:

- a. again, none of the statements are supported by expert or useful lay evidence – at its highest all ACA relies on is broad assertion by its unqualified witnesses, none of whom have performed any market testing or provided any financial information; and
- b. the propositions reiterate the foundational error of describing ECEC Services as being merely ‘childcare’, which appears to be an attempt to downplay its important economic and social role in favour of a focus on user convenience.

Question 39

- 12. The IEU contests the propositions at [171] to the extent that:
 - a. in respect of (b), not all (indeed not even most) employees work to the full span of hours permitted by an award; it is too much of a leap to say that just because longer spans of hours exist in other awards that all or even a significant percentage of parents working in those industries using ECEC services work later than 6.30;
 - b. the disability caused by unplanned overtime is compensated for by penalty payments; further, the submissions do not address the disability caused by being required to work to 7.30 at night without compensation; and
 - c. the actual extent of late pickups is, on the ECEC Employer’s evidence, significantly lower than what is set out at [171].

Question 40

- 13. The IEU contests the propositions at [173], for the reasons set out in its previous submissions. In particular:
 - a. no witness has given evidence that they would in fact extend their opening hours if the span of hours has changed, and none are in fact using the full span at present;
 - b. there is no evidence that the claim will make childcare ‘more sustainable’, noting the failure of any ACA witness to bring actual

financial information in respect of current business costs and the obvious marginality of current overtime costs;

- c. there is no evidence to support the proposition that the claim will increase workforce participation; as a matter of common sense this would not seem to flow from permitting childcare centres to remain open longer at slightly less expense;
- d. extending the opening hours does not mean parents will never be late; given that no witness has said they would roster staff past closing time to cover for unexpected late pickups; both the 'unpredictability' for staff and the late fee cost for parents would remain.

Question 41

- 14. The ECEC Employer's submission, summarised at [176]:
 - a. does not deal with the fact that employees, as set out in Lisa James statement dated 15 April 2019 would greatly prefer to have occasional access to overtime payments than to be required to work to 7.30pm as part of their ordinary hours;
 - b. asserts without basis that 'structured employment' would be created between 6.30 and 7.30pm – rationally, the claim will not lead to any additional *jobs*, but will simply make the existing positions less desirable;
 - c. although acknowledging that overtime will still be accessible in some circumstances, does not address the fact that this will be greatly reduced,

and does not meet the modern awards objective in that it fails to provide fair compensation for employees working unsocial hours.

- 15. The question in respect of whether s.134(1)(a) applies to only award covered employees or all low paid workers does not appear to arise in this

matter as there is no rational connection between the propositions advanced in [176] and that principle.

Paragraph 195

16. At the third dot point, the word ‘inconvenience’ should read ‘convenience’.

Question 46

17. The IEU does not contest the propositions set out at [208], although as set out in its earlier submissions takes issue with the suggestion that there is anything unusual about employees taking personal leave at short notice.
18. As to teacher:child ratios, the IEU observes that the ECEC employer submissions appear to misunderstand the nature of the ratios. Tables explaining the system are set out below.

REG	NUMBER OF CHILDREN	TEACHER REQUIREMENT
r.130	Fewer than 25 approved places	‘access to’ teacher for 20% of time education and care is provided (incl. by ICT), calculated quarterly
r.131	More than 25 approved places, but fewer than 25 children in attendance on a given day	‘access to’ teacher for 20% of time education and care is provided (incl. by ICT), calculated quarterly. Time a teacher is ‘in attendance’ counts as access
r.132	Between 25 and 59 children in attendance on a given day	OPTION A: r.132(1)(a) If the centre operates more than 50 hours a week, a teacher must be ‘in attendance’ for at least 6 hours on that day. r.132(1)(b) If the centre operates less than 50 hours per week, a teacher must be ‘in attendance’ for 60% of that day’s operating hours.

		<p>OPTION B</p> <p>Per r.132(2), if the approved number of places is less than 60 and more than 24, and the centre engages a full time (or FTE) teacher, the centre is not required to comply with r.133(1). i.e. the fact of employing a full time teacher to work at the service is sufficient, regardless of whether they are there on that particular day.</p>
r.133	Between 60 to 79 children in attendance on a given day	<p>OPTION A:</p> <p>r.133(1)(a)(i) and (b)(i) If the centre operates more than 50 hours a week, one a teacher must be 'in attendance' for at least 6 hours, and a second for at least 3 hours, on that day.</p> <p>r.133(1)(a)(ii) and (b)(ii) If the centre operates less than 50 hours per week, one teacher must be 'in attendance' for 60% of that day's operating hours, and a second for at least 30%, on that day.</p> <p>OPTION B</p> <p>Per r.133(2), if the approved number of places is less than 80 and more than 60, and the centre engages: one full time (or FTE) teacher, a second 0.5FTE teacher, the centre is not required to comply with r.133(1). i.e. the fact of employing 1.5 FTE teachers to work at the service is sufficient,</p>

		regardless of whether they are there on that particular day.
r.134	More than 80 children on a given day	<p>OPTION A:</p> <p>r.133(1)(a)(i) and (b)(i) If the centre operates more than 50 hours a week, 2 teachers must be 'in attendance' for at least 6 hours each on that day.</p> <p>r.133(1)(a)(ii) and (b)(ii) If the centre operates less than 50 hours per week, 2 teachers must be 'in attendance' for 60% of that day's operating hours each on that day.</p> <p>OPTION B</p> <p>Per r.133(2), if the approved number of places is more than 80, and the centre engages two full time or FTE teachers, the centre is not required to comply with r.133(1). i.e. the fact of employing 1.5 FTE teachers to work at the service is sufficient, regardless of whether they are there on that particular day.</p>

19. In other words, in states other than NSW services who employ the required number of full time or FTE teachers comply with these ratios *even if the teacher is absent*. Note also r.135 – where an teacher is absent due to illness or other leave, for up to 60 days of the year either a diploma-qualified worker or a primary school teacher can count for the purposes of r.132(1), 133(1) and 134(1). This is not necessary where the relevant number of FTE teachers are employed.

20. The NSW ratio requirements, which are slightly different, are set out below.

REG	Number of children present	Teachers required
r.130-131	0-24	Per r.130-131 above
r.132	25-29	Per r.132 above
r.272(2)	30-39	1 teacher in attendance at all times
r.272(3)	40-59	2 teachers in attendance at all times
r.272(4)	60-79	3 teachers in attendance at all times
r.272(5)	80+	4 teachers in attendance at all times

21. 'In attendance' is defined at r.11; in short, the teacher must be physically present at the service and carrying out education and care activities including:

- a. working directly with children;
- b. planning programs;
- c. mentoring, coaching, or supporting educators (a term which is *not* used in the act to encompass teachers by default, as r.126(3) above demonstrates);
- d. facilitating education and care research; or
- e. performing the role of educational leader per r.118.

22. Although physical attendance is required, it is much easier to replace a teacher via senior management than an educator for ratio purposes: a teacher-qualified director, for example, satisfies ratio requirements even when not working directly with children.

23. As such, the ECEC Employers submission that they need to be able to require teachers to change their rostered days and hours of work to meet teacher:child ratio requirements:
- a. is simply not true in states other than NSW; and
 - b. is of very little force in NSW.

Question 50

24. The AFEI's characterization of the effect of the proposed variation misses the point. The question is whether the director is employed 'as a teacher' – a qualification and participation in the activities described in r.11 – would all seem sensibly to be requirements. Given that the role of a Director expressly requires, among other things, involvement in the oversight and administration of an educational program, it is unclear how a director with a teaching qualification could sensibly said *not* to be using that qualification in connection with their employment.
25. Notably, none of the ECEC witnesses adhered to an alternative view under cross-examination.

Question 53

26. The IEU is conducting research into these matters and will provide further submissions as soon as possible.

LUCY SAUNDERS

GREENWAY CHAMBERS

10 JULY 2019