



BACKGROUND DOCUMENT

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Award stage—Group 4—*Children’s Services Award 2010—Educational Services (Teachers) Award 2010—Substantive claims*

(AM2018/18 AND AM2018/20)

MELBOURNE, 13 JUNE 2019

This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

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ABBREVIATIONS

| | |
|--------------------------------|---|
| ACA | Australian Childcare Alliance |
| ABI | Australian Business Industrial |
| ABS | Australian Bureau of Statistics |
| ACECQA | Australian Children's Education and Care Quality Authority |
| AFEI | Australian Federation of Employers and Industries |
| ANZSIC | Australian and New Zealand Standard Industrial Classification |
| Census | Census of Population and Housing |
| Children's Services Award | Children's Services Award 2010 |
| CoE | Characteristics of Employment |
| ECEC | Early Childhood Education and Care Sector |
| EEH | Survey of Employee Earnings and Hours |
| I and E Arrabalde | Isabelle Arrabalde and Elizabeth Arrabalde (or the Individuals) |
| IEU | Independent Education Union of Australia |
| June 2018 Report | Early Childhood and Childcare in Summary June Quarter 2018 Report |
| National Law | Education and Care Services National Law |
| National Regulations | Education and Care Services National Regulations |
| NOSHSA | National Outside School Hours Care Association |
| NQF | National Quality Framework |
| NQS | National Quality Standard |
| NSWBC | New South Wales Business Chamber |
| Productivity Commission Report | Childcare and Early Childhood Learning – Productivity Commission Inquiry Report 31 October 2014 |
| Teachers Award | Educational Services (Teachers) Award 2010 |
| UV | United Voice |

1. Background

[1] A number of substantive claims that have been made to vary the *Children's Services Award 2010* (Children's Services Award) and the *Educational Services (Teachers) Award 2010* (Teachers Award) as part of the 4 yearly review of modern awards (the Review).

[2] A Mention was held on 22 October 2018 to deal with the programming of a number of substantive claims to vary the Children's Services Award. A [Report](#) was issued following that Mention and a further programming Mention took place on 9 November 2018. A Statement¹ issued on 13 November 2018 highlighted an overlap between a number of the claims in the Children's Services Award and the substantive claims in the Teachers Award. Parties were requested to file short written submissions dealing with the issues, and programming mentions were held on 28 November 2018 and 5 December 2018. [Transcripts](#) of these Mentions are available on the Commission's website.

[3] At the 28 November 2018 Mention, it was agreed that there was an overlap between the substantive claims in the Children's Services Award and the Teachers Award and a further Mention was held on 5 December 2018 to deal with that issue.

[4] Prior to the 5 December 2018 Mention, interested parties filed a joint report setting out their position that all the substantive claims in the Children's Award and in the Teachers Award (apart from the Independent Education Union of Australia (IEU) claims) be heard together. The IEU's claims were omitted from the joint report as the IEU had filed a separate submission indicating they did not agree to the proposal that the claims be heard together. After the 5 December 2018 Mention, the IEU filed a further submission agreeing to have two of their claims, one relating to the definition of teachers and one relating to 'quarter days' heard in conjunction with the claims relating to the Children's Services Award.

[5] As agreed by the interested parties, the substantive claims relating to the Children's Services Award (AM2018/18) and the Teachers Award (AM2018/20) will be heard together by the same Full Bench, with the exception of the IEU's claim regarding teachers in distance education, that will be heard and determined by a separate Full Bench in the second half of 2019. The IEU subsequently wrote to Vice President Hatcher (the presiding Member of that Full Bench) and withdrew its claim related to distance education.² Business SA had initially made a claim relating to casual employees in the Children's Services Award. This claim was subsequently withdrawn.³

[6] The Claims advanced by the UV (in both the Children's Services Award and the Teachers Award) are:

- (i) a claim to introduce a new allowance for employees assigned to be the Educational Leader at a service (**Educational Leader Allowance**); and
- (ii) a claim to introduce a new allowance for employees assigned to be the Responsible Person at a service (**Responsible Person Allowance**); and
- (iii) a claim to increase the time off the floor away from children (non-contact time) for Room Leaders and Educational Leaders (**Non-contact Time Claim**).

[7] The Claims advanced by I. and E. Arrabalde (the Individuals) in this matter are similar to the Responsible Person Allowance and the Educational Leader Allowance sought above.

[8] The other Claims advanced by UV in relation to the Children’s Services Award are:

- (i) a claim seeking the payment of training courses and time worked at those courses (**Training Allowance**);
- (ii) a claim seeking the laundry allowance be paid in circumstances where employees wash their clothes using the on-site facilities at the workplace (**Laundry Allowance**);
- (iii) a claim to include ‘hats and sun protection (including sunscreen)’ in the definition of protective clothing and require the employer to either provide these items or reimburse the employee (**Clothing Allowance**);
- (iv) a claim to vary the exemption in the higher duties clause so that an employee who is required to perform higher duties (to replace a colleague who is attending paid training) is paid higher duties (**Higher Duties Claim**); and
- (v) a claim requiring employers who direct their employees to take leave without pay (annual leave) over Christmas to pay ordinary time to those employees in circumstances where they have no accrued leave (**Annual Leave Claim**).

[9] ACA, ABI and NSWBC advance two claims in respect of the Awards:

- (i) A variation such that ordinary hours may be worked between 6:00 am and 7:30 pm (as opposed to the current spread of hours of 6:00 am to 6:30 pm) (**Ordinary Hours Claim**);
- (ii) A variation to the rostering arrangements in the Awards so that an employer is exempt from having to provide employees with 7 days notice of a roster change in circumstances where:
 - a) Another employee has provided less than 7 days notice of their inability to perform a rostered shift; and
 - b) In order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee’s rostered hours so as to replace the absent employee. (**Rostering Claim**)

[10] The Claims advanced by the IEU in relation to the Teachers Award are:

- (i) a claim to amend award coverage for Directors of childcare centres with teaching degrees, to be covered by the Teachers Award (and not the Children’s Services Award) (**Coverage Claim**); and
- (ii) a claim to confirm the minimum payments of a ‘quarter day’ and ‘half day’ to casual teachers (**Minimum Engagement Claim**).

[11] A Statement and Directions were issued on 11 December 2018.⁴ The following parties filed submissions and witness evidence in response to the Directions:

- UV⁵
- IEU⁶
- I and E Arrabalde⁷

- ACA, ABI and NSW BC⁸
- Australian Children’s Education and Care Quality Authority⁹

[12] The following parties filed submissions in reply:

- ACA, ABI and the NSW BC¹⁰
- UV¹¹
- IEU¹²
- AFEI¹³
- I and E Arrabalde¹⁴

[13] Witness evidence was heard on 6, 7 and 8 May 2019, and after those hearings the parties were directed to file written submissions setting out the findings they seek to have made based on the evidence, by 4.00 pm on Wednesday 29 May 2019. The following parties filed submissions in response to those Directions:

- ACA, ABI and the NSW BC¹⁵
- UV¹⁶
- IEU¹⁷
- Australian Federation of Employers and Industry¹⁸
- I and E Arrabalde¹⁹

[14] The matter is listed for closing submissions on 15 July 2019.

[15] A list of the submissions filed is set out at **Appendix 1** and a list of the witness evidence is set out at **Appendix 2** and a list of Exhibits is set out at **Appendix 3**.

Question for all parties

Q.1 Are the lists at Appendices 1, 2 and 3 accurate?

2. The Children’s Services Award 2010

2.1 Employee characteristics

[16] Using a framework developed by Fair Work Commission staff²⁰ the Children’s Services Award is ‘mapped’ to the following industry classes:

- 8010 Preschool education; and
- 8710 Child Care Services.

[17] The following information presents an employee profile of the Children’s services industry from the Census of Population and Housing (Census). The most recent Census data is from August 2016. The Census is the only data source with information on employment for this industry. The August 2016 Census data show that there were around 139 000 employees in the Children’s services industry. Table 1 compares characteristics of employees in this industry with employees in ‘all industries’.

Table 1: Employee characteristics of Children's services industry, 2016

| | Children's services industry | | All industries | |
|---|------------------------------|-------|----------------|-------|
| | (No.) | (%) | (No.) | (%) |
| Gender | | | | |
| Male | 7027 | 5.0 | 4 438 604 | 50.0 |
| Female | 132 306 | 95.0 | 4 443 125 | 50.0 |
| Total | 139 333 | 100.0 | 8 881 729 | 100.0 |
| Full-time/part-time status | | | | |
| Full-time | 63 861 | 48.2 | 5 543 862 | 65.8 |
| Part-time | 68 661 | 51.8 | 2 875 457 | 34.2 |
| Total | 132 522 | 100.0 | 8 419 319 | 100.0 |
| Highest year of school completed | | | | |
| Year 12 or equivalent | 100 750 | 73.0 | 5 985 652 | 68.1 |
| Year 11 or equivalent | 12 626 | 9.1 | 856 042 | 9.7 |
| Year 10 or equivalent | 20 315 | 14.7 | 1 533 302 | 17.4 |
| Year 9 or equivalent | 2751 | 2.0 | 273 180 | 3.1 |
| Year 8 or below | 1131 | 0.8 | 112 429 | 1.3 |
| Did not go to school | 473 | 0.3 | 26 356 | 0.3 |
| Total | 138 046 | 100.0 | 8 786 961 | 100.0 |
| Student status | | | | |
| Full-time student | 11 929 | 8.6 | 715 436 | 8.1 |
| Part-time student | 19 044 | 13.8 | 491 098 | 5.6 |
| Not attending | 107 326 | 77.6 | 7 618 177 | 86.3 |
| Total | 138 299 | 100.0 | 8 824 711 | 100.0 |
| Age (5 year groups) | | | | |
| 15–19 years | 7685 | 5.5 | 518 263 | 5.8 |
| 20–24 years | 23 661 | 17.0 | 952 161 | 10.7 |
| 25–29 years | 20 706 | 14.9 | 1 096 276 | 12.3 |
| 30–34 years | 18 143 | 13.0 | 1 096 878 | 12.3 |
| 35–39 years | 15 290 | 11.0 | 972 092 | 10.9 |
| 40–44 years | 15 170 | 10.9 | 968 068 | 10.9 |
| 45–49 years | 13 104 | 9.4 | 947 187 | 10.7 |
| 50–54 years | 10 682 | 7.7 | 872 485 | 9.8 |
| 55–59 years | 8355 | 6.0 | 740 822 | 8.3 |
| 60–64 years | 4627 | 3.3 | 469 867 | 5.3 |
| 65 years and over | 1912 | 1.4 | 247 628 | 2.8 |
| Total | 139 335 | 100.0 | 8 881 727 | 100.0 |
| Average age | 36.3 | | 39.3 | |
| Hours worked | | | | |
| 1–15 hours | 19 204 | 14.5 | 977 997 | 11.6 |
| 16–24 hours | 22 977 | 17.3 | 911 318 | 10.8 |
| 25–34 hours | 26 480 | 20.0 | 986 138 | 11.7 |
| 35–39 hours | 39 713 | 30.0 | 1 881 259 | 22.3 |
| 40 hours | 15 474 | 11.7 | 1 683 903 | 20.0 |
| 41–48 hours | 42 49 | 3.2 | 858 120 | 10.2 |
| 49 hours and over | 44 25 | 3.3 | 1 120 577 | 13.3 |
| Total | 132 522 | 100.0 | 8 419 312 | 100.0 |

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[18] Table 1 shows that the profile of Children's services industry employees differs from the profile of employees in 'All industries' in five aspects:

- Children's services industry employees are predominately female (95.0 per cent, compared with 50.0 per cent of all employees);
- slightly more than half (51.8 per cent) of Children's services industry employees are employed on a part-time basis (i.e. less than 35 hours per week), compared with around one in three (34.2 per cent) of all employees;
- three in ten (30.0 per cent) of Children's services industry employees work 35–39 hours per week compared with 22.3 per cent of all employees;
- around half (50.4 per cent) of Children's services industry employees are aged under 34 years, compared with 41.1 per cent of all employees;
- over one in five (22.4 per cent) Children's services industry employees are students, compared with 13.7 per cent of all employees.

2.2 Forms and conditions of employment

[19] Data from the Australian Bureau of Statistics (ABS) provides information on employee characteristics, forms and conditions of employment and a comparison of classifications with low-paid employment.

[20] There are 4 levels within the Australian and New Zealand Standard Industrial Classification (ANZSIC) structure: division, subdivision, group and class. The relevant divisions of ANZSIC for the Children's Services Award are Division P: Education and training and Division Q: Health care and social assistance. The following presents all of the subdivisions, groups and classes within each industry:

Education and Training:

- 80 Preschool and School Education
 - 801 Preschool education
 - 8010 Preschool Education
 - 802 School Education
 - 8021 Primary Education
 - 8022 Secondary Education
 - 8023 Combined Primary and Secondary Education
 - 8024 Special School Education
- 81 Tertiary Education
 - 810 Tertiary Education
 - 8101 Technical and Vocational Education and Training
 - 8102 Higher Education
- 82 Adult, Community and Other Education
 - 821 Adult, Community and Other Education

- 8211 Sports and Physical Recreation Instruction
- 8212 Arts Education
- 8219 Adult, Community and Other Education n.e.c.
- 822 Educational Support Services
 - 8220 Educational Support Services

Health care and social assistance:

- 84 Hospitals
 - 840 Hospitals
 - 8401 Hospitals (except psychiatric hospitals)
 - 8402 Psychiatric hospitals
- 85 Medical and other health care services
 - 851 Medical services
 - 8511 General practice medical services
 - 8512 Specialist medical services
 - 852 Pathology and diagnostic imaging services
 - 8520 Pathology and diagnostic imaging services
 - 853 Allied Health Services
 - 8531 Dental services
 - 8532 Optometry and optical dispensing
 - 8533 Physiotherapy services
 - 8534 Chiropractic and osteopathic services
 - 8539 Other allied health services
 - 859 Other Health Care Services
 - 8591 Ambulance services
 - 8599 Other health care services n.e.c.
- 86 Residential care services
 - 860 Residential care services
 - 8601 Aged care residential services
 - 8609 Other residential care services
- 87 Social assistance services
 - 871 Child care services
 - 8710 Child care services
 - 879 Other social assistance services
 - 8790 Other social assistance services

[21] Data on forms and conditions of employment are not available for the Children’s services industry. The most readily available data are at the division level (or 1-digit level) and hence, data on the forms of employment are presented by the relevant ANZSIC divisions—Division P: Education and training and Division Q: Health care and social assistance.

[22] The ABS defines casual employees as employees without paid leave entitlements.²¹ Around three-quarters of workers in Health care and social assistance and Education and training were employees with paid leave entitlements in February 2019, compared with 63.2 per cent in all industries (Table 2).

Table 2: Employed persons by status of employment in main job, February 2019

| | Education and training | | Health care and social assistance | | All industries |
|---|------------------------|--------------------------|-----------------------------------|--------------------------|--------------------------|
| | No. ('000s) | Percentage of employment | No. ('000s) | Percentage of employment | Percentage of employment |
| Employee | 921.9 | 92.0 | 1537.2 | 90.5 | 83.3 |
| <i>With paid leave entitlements</i> | 764.1 | 76.3 | 1248.0 | 73.5 | 63.2 |
| <i>Without paid leave entitlements</i> | 157.7 | 15.8 | 289.1 | 17.0 | 20.1 |
| Owner manager of enterprise with employees | 15.4 | 1.5 | 55.5 | 3.3 | 6.2 |
| Owner manager of enterprise without employees | 63.4 | 6.3 | 104.6 | 6.2 | 10.3 |
| Contributing family worker | 0.8 | 0.1 | 1.2 | 0.1 | 0.2 |
| Total | 1001.5 | 100.0 | 1698.4 | 100.0 | 100.0 |

Note: All data are expressed in original terms.

Source: ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2019*, Catalogue No. 6291.0.55.003.

[23] Around 19 per cent of employees in Health care and social assistance and around 17 per cent of employees in Education and training were casual employees, lower than the all industries average (24.2 per cent). Both full-time and part-time employees in Health care and social assistance and Education and training were more likely to be employed with paid leave entitlements. In contrast, part-time employees across all industries were more likely to be casual employees (Table 3).

Table 3: Employees with and without paid leave, February 2019

| | Full-time | | Part-time | | All employees | |
|-----------------------------------|---------------------|------------------------|---------------------|------------------------|---------------------|------------------------|
| | With paid leave (%) | Without paid leave (%) | With paid leave (%) | Without paid leave (%) | With paid leave (%) | Without paid leave (%) |
| Education and training | 94.3 | 5.7 | 63.1 | 36.9 | 82.9 | 17.1 |
| Health care and social assistance | 90.9 | 9.1 | 68.9 | 31.1 | 81.2 | 18.8 |
| All industries | 88.1 | 11.9 | 47.6 | 52.4 | 75.8 | 24.2 |

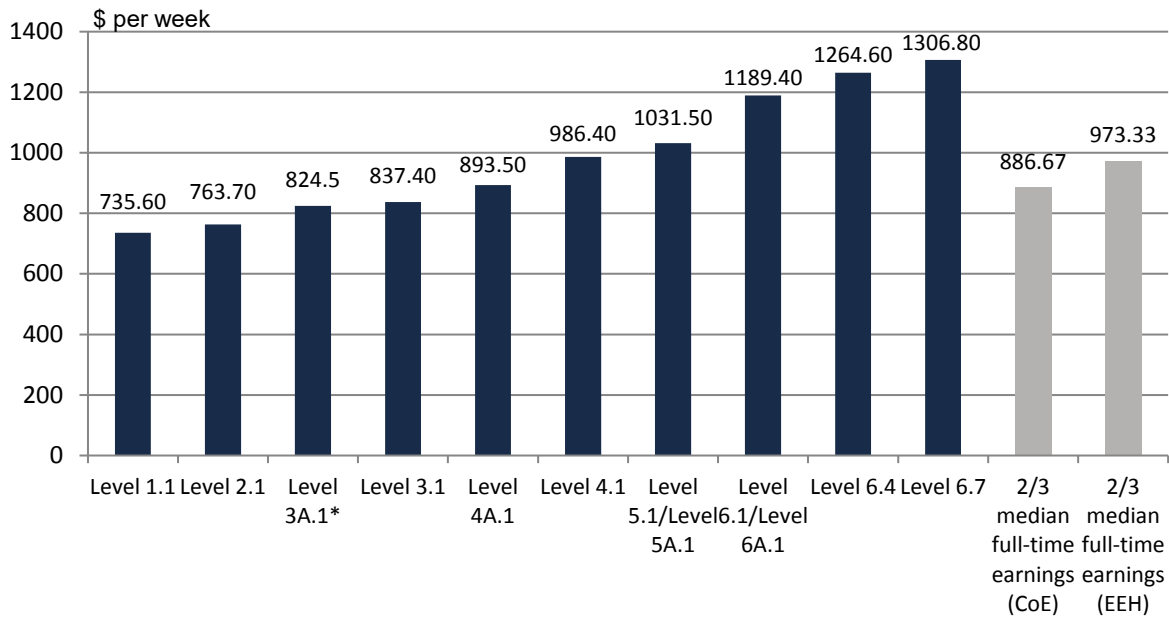
Source: ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2019*, Catalogue No. 6291.0.55.003.

2.3 Low-paid employees in the Children's Services Award 2010

[24] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid',²² within the meaning of s.134(1)(a).

[25] The most recent data for median earnings is for August 2018 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. These are compared to the minimum weekly wages in the Children's Services Award as determined in the *Annual Wage Review 2017–18*, effective 1 July 2018 (Chart 1).

Chart 1: Comparison of minimum full-time weekly wages in the *Children’s Services Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time non-managerial employees paid at the adult rate. Only the classifications on commencement are shown.

* Former Western Australian 'E' worker classification

Source: MA000018; ABS, *Characteristics of Employment, Australia, August 2018*, Catalogue No. 6333.0; ABS, *Employee Earnings and Hours, Australia, May 2018*, Catalogue No. 6306.0.

[26] Chart 1 shows that the full-time weekly wages for all classifications below Level 4A.1 in the Children’s Services Award were below the CoE measure of two-thirds of median full-time earnings. In addition, all classifications below Level 4.1 were below the EEH measure of two-thirds of median full-time earnings.

Question for all parties

Q.2 Is it generally agreed that most award reliant employees covered by the Children’s Services Award are ‘low paid’ within the meaning of s.134(1)(a)?

3. UV Claims

3.1. UV allowance claims

3.1.1 UV submissions

[27] UV contends that while the introduction of the National Quality Framework (NQF) and related matters provide a basis for the variation of the minimum classification rates in the Children's Services and Teachers Awards that is *not* a claim they are agitating in these proceedings. Rather, the present proceedings only address three distinct areas which are said to have changed consequent upon the introduction of the NQF, namely:

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

[28] In short, UV seeks award variations to the two awards to provide an allowance to employees appointed to the roles of 'Educational Leader' and 'Responsible Person' and to increase the non-contact time provisions in clause 21.5 of the Children's Services Award (a similar claim is advanced in respect of the Teachers Award).

[29] The Educational Leader allowance is a weekly allowance as it is submitted that 'there is a level of stability in this appointment across a period of time'. The Responsible Person allowance is an hourly allowance on the basis that a person designated as Responsible Person in a centre may change several times across a working day. As the two Awards contain a different 'standard rate,' there is some variation in the quantum of the allowances in each of the awards.²³

[30] Two individuals, I and E Arrabalde (the Individuals) also seek to vary the award by inserting an Educational Leadership allowance for employees with educational leadership responsibilities in early childhood education and care settings and a Responsible Person allowance for employees with educational leadership responsibilities in early childhood education and care settings.

[31] The Individuals provided a detailed submission about the role of education leader in the early childhood education and care setting²⁴ and submit that the work of educational leaders in early childhood settings is comparable to the work of educational leaders in schools²⁵ and a comparison is provided of the role of an educational leader in an early childhood setting compared with the role in a school. It is submitted that educational leadership requires significant effort and the overwhelming majority of early childhood educational leaders do not receive any remuneration for this job role.²⁶

[32] In their reply submission on 26 April 2019 the Individuals submit 'new evidence in support of the proposed introduction of an Educational Leader allowance and Responsible Person allowance in the Children's Services Award and the Teachers Award to address issues

raised by ACA, ABI and NSWBC,²⁷ including information relating to the history of educational leadership in Australia

[33] In particular it is submitted that it is extremely unlikely that the role of the Educational Leader was considered during the drafting of the Awards in 2009; or that many, if any, Australian early childhood providers had educational leaders prior to the introduction of the Children's Services Award and the Teachers Award, or indeed before the position was mandated in the NQF in 2012.²⁸

[34] In its submission of 15 March 2019, UV contends that its claim in relation to allowances 'is not a matter where s156(3) of the Act is relevant' as the claim 'does not vary minimum rates in awards.'

[35] Schedule 1 to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth) (Amending Act) repealed Division 4 of Part 2-3 of the *Fair Work Act 2009* (Cth) (Act) with effect from 1 January 2018. That division provided for the 4 yearly reviews of modern awards (s.156). Schedule 4 to the Amending Act relevantly inserted transitional provisions into Schedule 1 to the Act. The effect of the transitional provisions is that if a review of a modern award conducted as part of the 4 yearly review commenced before 1 January 2018 and was not completed immediately before that date, Division 4 of part 2-3 continues to apply in relation to the review as if had not been repealed.

[36] The reviews of the Children's Services Award and Teachers Award commenced prior to 1 January 2018 and were not completed immediately before that date. Accordingly, s.156 of the Act continues to apply to these reviews.

[37] Section 156 deals with the conduct of 4 yearly reviews of modern awards. Relevantly ss156(3) and (4) provide:

- (3) In a 4 yearly review of modern award, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.
- (3) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
 - (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.

[38] The expression 'modern award minimum wages' is defined in s.12 by reference to s.284(3) which states:

'Modern award minimum wages are the rates of minimum wages in modern awards, including:

- (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
- (b) casual loadings; and
- (c) piece rates.'

[39] Section 139(1)(g) provides:

‘A modern award may include terms about any of the following matters:

...

(g) allowances, including any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) Disabilities associated with the performance of particular tasks or work in particular locations.’

[40] We note that UV submits that the allowances sought are not reimbursement allowances and should be referable to a percentage of the hourly rate. The disutility sought to be compensated relates to periods of work where additional responsibilities apply.²⁹

Question for UV

Q.3 Are the allowances sought for employees who undertake the roles of Educational Leader or Responsible Person properly characterised as allowances of the type referred to in s139(1)(g)(ii)? If not, what sort of allowances are they?

Questions for all parties

Q.4 Is it common ground that UV: allowance claims do not seek to vary modern award minimum wages such that the limitation in s156(3) does not apply?

Q.5 If s156(3) does not apply, is the relevant test whether it is necessary to vary the awards to include the claimed allowances to achieve the modern awards objective?

Q.6 Is it common ground that the modern awards objective is a composite expression which requires that modern awards, together with the NES, provides ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss134(1)(a) to (h)?

Q.7 In considering whether the claimed allowances are ‘fair’ is it relevant to look at the value of the work being undertaken by employees designated as Education Leaders or Responsible Persons? In particular is it relevant to look at the level of skill or responsibility involved in undertaking those roles?

3.1.1(a) Educational Leader Allowance

[41] UV propose to insert a definition of ‘Educational leader’ at clause 3.1 and a new clause 15.7, as follows:

‘**Educational leader** means a person appointed to lead the development and implementation of educational programs in the service.’

15.7 Educational leader allowance

An employee appointed as educational leader will be paid a weekly allowance, according to the size of the centre, as follows:

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

[42] The claim made by UV in respect of the Educational Leader allowance in the Teachers Award is as follows:

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

[43] The size of the allowance varies depending on the centre size. The proposition being that an employee in the role of Educational Leader at a larger centre will have to lead the programming in respect of a greater number of children (and educators) and on that basis it is appropriate that they receive a higher allowance to compensate for the additional responsibility. The structure of UV's claim is said to be based on the classification structure for Directors under the Children's Services Award (see Schedule B.1.10 (b) – (d) and the allowance structure for Directors in the Teachers Award (see clause 15.1).

[44] Schedule B.1.10(b) – (d) of the Children's Award states:

(b) Director Level 1

A Director Level 1 is an employee appointed as the Director of a service licensed for up to 39 children or a Family Day Care service of no more than 30 family based childcare workers and is paid at the Level 6.1 to 6.3 salary range.

(c) Director Level 2

A Director Level 2 is an employee appointed as the Director of a service licensed for between 40 and 59 children or a Family Day Care service with between 31 and 60 family based childcare workers and is paid at the Level 6.4 to 6.6 salary range.

(d) Director Level 3

A Director Level 3 is an employee appointed as the Director of a service licensed for 60 or more children or a Family Day Care service with more 60 family based childcare workers and is paid at the Level 6.7 to 6.9 salary range.

[45] The salary ranges for these classifications are set out in clause 14.1 of the Children's Services Award.

[46] The allowances structure for Directors in the Teachers Award is in clause 15.6:

15.6 Qualifications allowance

A Director or Assistant Director who holds a Graduate Certificate in Childcare Management or equivalent will be paid an all-purpose allowance, calculated at 5% of the weekly rate for an Assistant Director (Children's Services Employee Level 5.4).

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

[48] UV contends that the leadership and direction provided by the Educational Leader is critical in ensuring that a centre based service is complies with the National Quality Standards (NQS).³⁰ In particular it is submitted that the role is directed to a centre meeting the following areas of the NQS³¹:

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

[49] It is also submitted that the Educational Leader's work is critical in meeting the outcomes of Quality Area 1 of the NQS,³² in particular:

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

Question for all other parties

Q.8 Are the contentions set out at [47] to [49] above contested?

[50] Regulation 118 states that the Educational Leader must be suitably qualified and experienced; UV submits that the role of Educational Leader:

'is generally designated to an employee who is diploma qualified or an early childhood teacher.

It may also be designated to an employee who has a certificate III qualification. This will vary across centres, depending on which employee is most appropriate employee for that role within a particular centre...

At some centres, one employee will be appointed to the role for the length of their employment. Other employers may choose to appoint an Educational Leader on a periodic basis, for example, for a period of one year. In the prolonged absences of the appointed Educational Leader another employee will perform this role.'

Question for all other parties

Q.9 Is the submission set out at [50] above contested?

[51] UV submits that the evidence of Bronwen Hennessy and Preston Warner demonstrates the varied responsibility inherent within this role including responsibility for leading the programming and planning for the centre, supporting other educators, leading critical reflections, and creating specialised programs for children with different needs.³³

[52] UV submits that the evidence of Preston Warner, Bronwen Hennessy and Dr Fenech demonstrates that

‘the Educational Leader role requires employees to take on additional responsibility and demonstrate leadership skills within the workplace. Further, the evidence demonstrates that the Educational Leader has a supervisory role, and must observe the work of other educators, and provide guidance and direction to other educators within the centre.’

[53] It is contended that the role requires additional skills above and beyond that which is required in an employee’s substantive classification within the Children’s Services and Teachers Awards and that neither award recognises the role of the Educational Leader and nor is there any allowance or any other compensation for this role within the Awards.

3.1.1(b) Responsible Person Allowance

[54] UV propose to insert a definition of ‘Responsible person’ at clause 3.1 and a new clause 15.8 as follows:

‘**Responsible person** means the person designated as such for the purposes of section 162 of the Education and Care Services National Law and includes a person in day-to-day charge of a centre and a nominated supervisor.’

15.8 Responsible person allowance

An employee designated as Responsible Person for the purposes of section 162 of the National Law will be paid an hourly allowance, according to the size of the centre, as follows:

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

[55] The claim in respect of the Teachers Award is as follows:

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

[56] As with the Educational Leader allowance, the claim provides that the quantum of the allowance is to increase with the size of the centre. The proposition being that an employee designated as Responsible Person at a larger centre will have responsibility for a greater number of children and staff and on that basis it is appropriate that they receive a higher level of pay.

[57] UV seeks to insert a provision into both Awards that would apply to the person who is the designated Responsible Person on an hourly basis. The hourly nature of the proposed allowance is said to be because a centre cannot lawfully operate without a designated Responsible Person and the claim makes provision for the Nominated Supervisor to receive the allowance when they are the Responsible Person on site.

[58] In support of its claim UV relies on Dr Fenech’s report which it contends highlights the importance of the role of Responsible Person:

‘Paula Jorde Bloom, a seminal scholar on early childhood leadership, described directors as “the gate-keepers of quality. They are responsible for creating the climate that promotes optimal growth and development of children as well as for implementing the systems that ensure quality is maintained” (Bloom & Bella, 2005, p. 32). It is this maintenance of quality that a responsible person, nominated supervisor or otherwise, must ensure and be accountable for.’³⁴

[59] UV submits that in centre based services, the Nominated Supervisor will generally be the Responsible Person for the majority of the time that the centre is open. The Nominated Supervisor is also generally the Director of the centre. UV also contends that:

- (i) The responsibility that the Nominated Supervisor takes on under the National Law and Regulations is significant. The Nominated Supervisor is responsible for ensuring that the centre is managed in accordance with the NQF.
- (ii) A failure on part of the Nominated Supervisor to ensure this could result in the approved provider being fined or facing prosecution for a breach or breaches of the NQF.
- (iii) In addition, the Nominated Supervisor faces personal liability for particular offences under the National Law and Regulations. For example:
 - a Nominated Supervisor can face a penalty of \$10, 000 if they fail to ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service;³⁵
 - a Nominated Supervisor can face a penalty of \$10,000 if they fail to ensure that, whenever children are being educated and cared for by the service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose; and³⁶
 - a Nominated Supervisor can face a penalty of \$2000 if they fail to implement, and ensure, that all staff members and volunteers at the service implement adequate health and hygiene practices and safe practices for handling, preparing and storing food.³⁷
- (iv) The Nominated Supervisor faces personal liability not only for their own actions (or inaction) but is vicariously liable for the acts and omissions of other educators at the service. The personal liability is not restricted to the periods that the nominated supervisor is present at the service. Nominated Supervisors can face penalties for issues that arise even when they are not present at the service.

Question for all other parties

Q.10 Are the assertions set out in [59] generally agreed?

Q.11 What is the distinction between the Nominated Supervisor and the Responsible Person?

[60] UV submits that the role of Nominated Supervisor carries a significant level of responsibility and risk for employees who are on moderate wages. A Director of a service under the Children’s Services Award working full time can earn from \$61,848.80 per annum (Level 6.1, commencement year, service licensed for up to 39 children) to a maximum award rate of \$69,503.20 (Level 6.9, after 2 years of service, service licensed for 60 or more children).

[61] UV states that its claim for a Responsible Person allowance specifically includes Nominated Supervisors whilst they are the Responsible Person on site ‘because of the high level of responsibility and risk that is placed upon these employees under the National Law and Regulation. It is submitted that it is appropriate that these employees receive appropriate compensation for the work they undertake when designated as Responsible Person.’

[62] UV contends that it is common for the employee designated as Responsible Person to be expected to carry out their substantive role in addition to their duties as Responsible Person, without any additional pay. For example, a Children’s Services Award employee who is classified at the Level 3.4 (Diploma) grade may be designated Responsible Person on a shift from 10am to 6.30pm because the Director (the Nominated Supervisor) is off site in training. The employee would be expected to continue to carry out their substantive duties during that period, in addition to the role of Responsible Person. The employee would only be paid their minimum award rate of \$24.81 per hour during that period, even though they are taking on additional responsibility.

Question to all other parties

Q.12 Is the contention at [62] contested?

[63] The essence of the case put by UV is that the role of Responsible Person, for both the Nominated Supervisor and the person in day to day charge, requires additional skills and responsibility above that found in the classification descriptions or indicative duties of classification structures of the Awards.

[64] During the 2012 Transitional Review conducted pursuant to Item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendment) Act 2009* UV made an application to vary clause 14.7 of the Children’s Services Award to insert a footnote in the following terms:

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

[65] In support of that application UV advanced the following submission:

‘6. The National Quality Framework (NQF), comprised of the Education and Care Services National Law and the Education and Care Services National Regulations will apply to most long day care, family day care, outside school hours care and preschools/kindergartens in Australia from 1 January 2012.

7. Sections 5, 44, 56 and 161 of the National Law and regulations 35 and 146 of the National Regulations provides that approved children’s services providers must not operate a service unless there is a nominated supervisor for the approved service.

8. When the nominated supervisor is absent from the service, a person with a supervisor certificate can be placed in charge on an acting basis. This means that there is always someone in charge on the premises who has been assessed as fit and proper by the regulatory authority. The variation proposes that an employee appointed to or acting in this role should be paid no less than Level 6.

9. The relevant regulations applying in Western Australia pending the establishment of the National Law have a similar requirement for an employee to be appointed to act as a supervising officer for the purposes of the regulations at all times.

10. This proposed variation is consistent with the pre-reform award applying in Western Australia immediately prior to 1 January 2010. Schedule A clause 6.1.3 of AP846963 Child Care (Long Day Care) WA Award 2005 provided for employees appointed to act as the

Supervising Officer pursuant to the Community Services (Child Care) Regulations 1988 as amended ...

UV further submitted that there was an inconsistency between clauses 18.1(d) and 14.1 of the award in that the award is silent on the level that an employee acting in this position should be paid, and the variation proposes that the level be no less than level 6.³⁸

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

[67] The application was opposed by AFEI and ABI.

[68] In a decision issued on 2 November 2012 Deputy President Hamilton dismissed the application, as follows:

‘In my view the application made by UV with respect to clause 14.1 is not made out. There is no conflict between clauses 14.1 and 18.1(d). I accept that clause 14.1, 18.1(d) and Schedule B provide an appropriate safety net with respect to persons appointed to act as a Director of a Centre or a Supervising Officer. There are no issues within Schedule 5, Item 6 which I consider appropriate to remedy. I dismiss the application.’³⁹

[69] There has been a change in terminology in respect of the role of Responsible Person within the NQF in the period since the 2012 Transitional Review.

[70] Prior to 1 October 2017, the regulatory authority granted Supervisor Certificates, on application, either by a service or by an individual. Only once the Supervisor Certificate had been obtained could a person (or class of people within a service) be appointed to the role of Responsible Person. Since 1 October 2017 (1 October 2018 in Western Australia) approved providers have been able determine who the Responsible Person in each service is, provided that the person meets the requirements of the relevant regulations.⁴⁰ Approved providers and individual employees are no longer required to go through an application process with the regulatory authority to obtain a Supervisor Certificate.

[71] This variation did not change the substance of the role of the Responsible Person nor the associated responsibilities; rather it was put in place ‘*to reduce red tape for approved providers*’.⁴¹

[72] In the present matter UV submits that:

‘Seven years on, it is apparent that clauses 14.1, 18.1(d) and Schedule B do not operate to provide an appropriate safety net for those employees who are appointed to what is today’s equivalent to ‘Supervising Officer’.

Instead, employees are required to take on the role of Responsible Person without any additional pay.’⁴²

The Modern awards objective

[73] UV submits, in essence, that the two awards do not achieve the modern awards objective because employees are expected to take on the additional duties and responsibilities associated with the roles of Educational leader and Responsible person without compensation. The gravamen of the submission put in encapsulated at [120] to [122] of UV's submission of 15 March 2019, :

‘120. The Awards cannot be said to be fair, as award covered employees are being required to carry out work with complex additional responsibility but with no additional compensation. As noted these responsibilities are not static and are designed to pertain to workplaces and not particular employees.

121. The Awards cannot be said to be ‘*relevant*’ as each award fails to recognise that the National Law and Regulations requires each centre based service to have an employee in the role of Educational Leader and Responsible Person. The NQF is a fixed national requirement imposed on the sector and it is appropriate that the Awards reflect this.

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

[74] As to the s134(1) considerations, UV relies on ss134(1)(a) and (e). In relation to s134(1)(e) UV submits:

‘112. ECEC is a sector that is overwhelmingly female. In long day care, 96.1% of the workforce is female and overall, 91.1% of the workforce is female.⁴³ ...

117. It is useful to bear in mind that the Commission is directed to consider the principles of equal remuneration in the making of modern awards in the modern awards objective, in the minimum wage objective and in Part 2-7 of the Act. The Parliament therefore has expressly directed the Commission to consider as a relevant factor gendered differences in outcome in these 3 distinct processes. Gendered undervaluations do not only concern wages. Our claim concerns a variation to the Awards which are part of the safety-net of fair and relevant terms and conditions which must be varied in accordance with the modern awards objective. The fact that the allowances will be paid to predominantly to women whose work is undervalued is relevant as a consideration.

118. The Commission's comments on the relevance of gender-based undervaluation above are relevant to the modern awards objective. The presence of the paragraph 134(1) (e) consideration within the modern awards objective without any qualification is significant.’

Question for UV

Q.13 UV contends that ‘The fact that the allowances will be paid predominantly to women whose work is undervalued is relevant as a consideration.’ The premise of the submission put is that the work of employees covered by these awards has been undervalued for gender reasons. What evidence has been advanced in support of that proposition?

3.1.2 Allowance claims: Reply submissions of ACA, ABI and NSWBC and AFEI

[75] ACA, ABI and NSWBC oppose the allowance claims and submit that it is ‘simply not the case’ that the National Law and Regulations created new roles with additional skills and responsibilities. Further, ACA, ABI and NSWBC submit:

‘The true position is that the extensive regulatory reform of the ECEC sector has had the purpose and effect of codifying and harmonising (although imperfectly) standards in ECEC and has established a common minimum national standard. As part of this process, some new (harmonised) position titles were inserted into the National Law and Regulations, but new roles were not created by the legislation.’⁴⁴

The ACA/ABI evidence suggests that the relevant duties and roles already existed in different forms on a state by state basis across the country.⁴⁵

In a childcare setting, there has always been educational programs and persons leading the development and implementation those programs (now, these persons are called Educational Leaders).

Similarly, there were always Directors and Assistant Directors in charge of a service who assumed responsibility for the centre (both in a legal and operational sense). The term Responsible Person merely harmonises and codifies the requirement that already existed (that someone be ‘in charge’ and ‘responsible’ at all times).

A new position title does not of itself create additional duties or responsibilities. In that sense the National Law and Regulations do not impose any additional responsibilities on Educational Leaders or Responsible Persons and therefore no additional allowances are warranted as a result.’⁴⁶

[76] In its Reply Submission of 16 April 2019 AFEI advances a similar submission.

[77] ACA, ABI and NSWBC also contend that UV have not demonstrated that that the standards are more demanding than those which applied in the past.⁴⁷

[78] In its Further Submission in Reply dated 29 April 2019 (at [17]-[22]) UV rejects the proposition that the duties and roles of an Educational Leader and Responsible Person existed prior to the introduction of the National Law and Regulations. UV contends that both roles were developed as part of the NQF and submits:

20. Whilst there would have been a Centre Director prior to the NQF, who would have had (and continues to have) management responsibilities for the centre, the introduction of the NQF has created new responsibilities for employees in the sector. Nominated Supervisors (generally the Centre Director) across Australia under the NQF now face personal liability not only for their own actions (or inaction) but are vicariously liable for the acts and omissions of other educators at the service. The personal liability is not restricted to the periods that the nominated supervisor is present at the service. The introduction of this requirement across Australia arises from the NQF and is above and beyond the indicative duties or classification structure for a Director. Our reasons as to why Centre Directors should receive a Responsible Person allowance are outlined in paragraphs [68] to [75] of our submission filed 15 March 2019.

21. Further, whilst the Centre Director is off site, another employee will be the Responsible Person. There would have been employees prior to the introduction of the NQF who would have ‘opened’ or ‘closed’ the centre if the Director was off site. However, this is a different task to the duties of Responsible Person that now apply across Australia under the NQF.

22. Under the NQF, there must be a Responsible Person on site and this person must be able to ensure that the centre is operating, at all opening hours, in accordance with the National Law and Regulations. This means that the Responsible Person must ensure the health and safety of the children on site; that staff to children ratios are being met; that the physical environment is set out appropriately; and that programming and planning is carried out in accordance with the NQF. The Responsible Person must also maintain relationships with parents and families. Essentially, the employee who is the Responsible Person must be able to effectively supervise and manage the centre. This is a significant level of responsibility as the action or inaction of the Responsible Person could have significant ramifications for the operation of the centre, and should thus be compensated with an allowance.

[79] ACA, ABI and NSWBC contend that many of UV's witnesses do not distinguish between the position of Educational Leader/Responsible person and any other position those witnesses hold, such as Director, Assistant Director etc. ACA, ABI and NSWBC accept that Educational Leaders/Responsible Persons commonly provide duties of leaderships, programming or contribute to the operation of a service; but submit that such duties do not arise from an employee's status as an Educational Leader or Responsible Person but rather from their status of holding other positions in the centre. In relation to the 'dual roles' difficulty ACA, ABI and NSWBC submit:

'Educational Leaders or Responsible Persons who are also appointed as Directors are already paid at the highest level of the Children's Services Award (Level 16) and provided with a Director's allowance of between 11.5% and 17.3% of the standard rate in the award to compensate for any additional responsibilities associated with being a person in charge (or responsible) under the National Law. To pay these roles a further allowance in compensation for duties already included in the level to classification would be inappropriate.'⁴⁸

[80] In its Further Submission in Reply dated 29 April 2019 (at [6]-[16]) UV rejects the Employer's submission that it would be inappropriate for an employee to receive both the Educational leader allowance and the Responsible person allowance, arguing that:

- the allowances each compensate for different and discrete responsibilities, it is appropriate that where an employee takes on both roles they are compensated separately for the additional responsibility associated with each role;
- there are no common entitling criteria between the two allowances;
- that the same employee may be paid the two allowances simultaneously is not a merit argument against either allowance; and
- it is common place that entitlement to allowances arises out of the employee possessing the requisite entitling criteria applied to the allowance(s) and there is nothing unusual about an employee being paid two allowances simultaneously if they possess the requisite entitling criteria.

[81] UV also rejects the proposition that Educational leader or Responsible persons who are also appointed as Directors would also receive a Director's allowance of between 11.5 per cent and 17.3 per cent of the standard rate. UV submits that a level 6 Director under the Children's Services Award does not receive a Director's allowance. The Director's Allowance only applies under the Teachers Award (see clause 15.1) to an early childhood preschool teacher who is appointed as a Director.

Question for ACA, ABI and NSWBC

Q.14 Do you accept the proposition advanced by UV at [81] above?

Educational Leader Allowance

[82] ACA, ABI and NSWBC submit that UV has failed to provide probative evidence or a cogent basis for the variation sought and that the claim should be dismissed.⁴⁹ Further, ‘the notion that the duties of an Educational Leader were not considered when the modern award grading system was created is simply incorrect’.⁵⁰ It is submitted that while the exact words ‘Educational leader’ do not appear in the Award (as the term did not exist at the time the Award was made), there was always someone responsible for the education program and mentoring of others. ACA, ABI and NSWBC submit that every duty and responsibility said to justify the introduction of the Educational Leader allowance can be found in the classification descriptions for levels 4-6 in the Children’s Services Award. Schedule A attached to the ACA, ABI and NSWBC Reply Submission matches each of the suggested new or additional duties of an Educational Leader with an already existing duty in the Award. The classification structure in the Children’s Award is set out at **Appendix 6**. Schedule A to ACA, ABI and NSWBC reply submission is set out at **Appendix 7**.

[83] In its Further Submission in Reply dated 29 April 2019 (at [23]-[32]) UV rejects the Employers’ submission that the additional work and responsibility of the Educational Leader roles is covered by the current classifications 4-6.

[84] UV submits that diploma qualified educators who are ‘Room Leaders’ or ‘Lead Educators’ commence at level 4 and that ECEC centres are generally separated into ‘rooms’ (i.e. nursery room, toddler room, preschool or kindergarten) and the Room Leader or Lead Educator for that room will lead the planning and programming developmental activities for children within that room. The level 4 classification is intended to compensate for this level of responsibility.

[85] UV contends that an Educational Leader has a broader responsibility and is required, by Regulation 118, to ‘lead the development and implementation of education programs in the service.’ In other words, the role entails responsibilities and work additional to that of a room leader and includes mentoring and providing guidance to other employees at the centre, including Room Leaders and early childhood teachers. UV relies on various aspects of the Australian Children’s Education and Care Quality Authority (ACECQA) Educational Leader Resource in support of this submission.

[86] UV reject a similar Employers submission in respect of the Teachers Award, submitting (at [32]) that an early childhood teacher is taking on an additional role to their teaching duties and should be appropriately compensated.

Question for ACA, ABI and NSWBC

Q.15 Do you contest the UV submission at [84] above?

[87] ACA, ABI and NSWBC also submit:

‘The ACA/ABI evidence suggests most Educational Leaders will fall into Level 5 or 6. To provide an additional allowance for the performance of duties already forming part of the existing classification would be essentially to ‘double dip’ and be paid twice for the same duties.’⁵¹

[88] Similarly, in its Reply Submission of 16 April 2019 (at [20]-[22]) AFEI submits that the designated responsibilities in Regulation 118 are already included in various classifications and hence already compensated in the existing rates of pay.

Question for ACA, ABI and NSWBC

Q.16 Is there any impediment to a level 3 or level 4 employee being appointed to the role of Educational Leader (noting the evidence of Bronwen Hennessy, a level 3.1 employee and Educational Leader)?

Q.17 Are the Employers suggesting that the duties and responsibilities of an Educational Leader are comprehended in the classification description relating to a level 3 or level 4 employee? If so, please elaborate.

[89] Further, in its Reply Submission of 16 April 2019 (at [173]) AFEI submits that the National Law and Regulations do not place the overall responsibility of program development and delivery with the person designated as the Educational Leader:

‘Rather, it is the centre and its Nominated Supervisor that holds the ultimate responsibility for ensuring the program is based on the learning framework and delivered in a manner consistent with the framework. This is also consistent with the Children’s Services Award classification structure which includes, inter alia, the following responsibility of a Director at B1.10(a)

- Supervise the implementation of developmentally appropriate programs for children;
- Ensure that the centre or service adheres to all relevant regulations and statutory requirements;
- Ensure that the centre or service meets or exceeds quality assurance requirements; and
- Provide professional leadership and development to staff.’

Question for UV

Q.18 UV is invited to respond to the proposition that it is ‘the centre and its Nominated Supervisor that holds the ultimate responsibility’ to ensure compliance with the National Law and Regulations.

[90] In respect of the Teachers Award, ACA, ABI and NSWBC submit that teachers who have coverage under the Teachers Award are classified by the length of their bachelor degree followed by a service based progression method for each year of service and there is no reason why duties for an Educational Leader should be specifically outlined in the classifications in the award given this method.⁵²

[91] As to the Individuals claim that the work of Educational Leaders in ECEC is comparable to the work of Educational Leaders in primary schools, ACA, ABI and NSWBC contend that this issue is currently being explored in the ‘Equal Remuneration Order and work

Value Proceedings' before another Full Bench. The employer position in those proceedings is that the work is of equal or comparable value, by way of example the work of primary school teachers includes:

- much lower adult: child ratios
- teaching in a classroom environment
- programming lessons and teaching according to a comprehensive detailed and prescriptive curriculum dictating content and outcomes (including mathematics, science, health and physical education, history)
- teaching groups of 20 to 30 pupils
- working alone with a class; and
- setting, marking and grading homework and tests and other academic evaluations⁵³

Question for all parties

Q.19 Does the argument advanced by the Individuals overlap with the ERO/work Value proceedings?

Q.20 If so, how should we deal with such overlap?

[92] In reply to the Individuals submission that the existing educational leadership allowance in clause 15.2 of the Teachers Award should be applied to the ECEC sector, ACA, ABI and NSWBC submit this allowance is provided to those nominated for a leadership position who are in charge of 100-600 students at a school and is a very different role to an Educational Leader in long day care or a OSHC centre.

[93] Further, it is submitted that:

‘Anyone performing an equivalent role in the ECEC space would likely be considered a Director or Co-ordinator. These employees are already classified and remunerated at Level 6 of the Children’s Services Award and likely paid a Director’s Allowance.’

[94] Finally, ACA, ABI and NSWBC submit that UV have neglected to consider how the Educational Leader allowance would impact outside of school hours care (OSHC) providers.⁵⁴ The conditions relating to Educational Leaders in OSHC are said to be different from Long Day Care, in two respects:

- an Educational Leader in OSHC will ordinarily oversee *an aspect* of the overall OSHC program (e.g. before school care or after school care) or a particular component (such as a preparatory program, junior or senior program), such that the role of Educational Leader is divided between several (usually casual) employees during the week; and
- ‘caps’ have not applied in OSHC (as they have in long day care) and a centre in the OSHC sector will ‘invariably operate with a relatively large number of children’.⁵⁵

[95] It is submitted that these differences mean that:

- the weekly allowance sought by UV and the Individuals is unworkable in OSHC as centres would be required to pay multiple employees the weekly allowance at the same time; and
- given the size of OSHC centres the highest rate of allowance would apply.

[96] In short, it is submitted that: ‘These two factors mean that, if the claim is accepted, OSHC centres would be paying several Educational Leader allowances at the highest rates at all times’.⁵⁶

[97] In its ‘Outline of Further Submission in Reply’ dated 29 April 2019, UV accepted (at [35]) that ‘OSHC providers had different ratio requirements and that it may be appropriate to structure the allowances on a different scale within OSHC’.⁵⁷ At [37] – [38] of that submission UV states:

‘United Voice is willing to enter discussions with ACA and others regarding an appropriate size scale at which the proposed allowances should be set for OSHC. We dispute that the broad merit basis for the insertion of these allowances in the Awards does not apply to SHC providers.

We continue to maintain that an Educational Leader allowance and a Responsible Person allowance should apply in OSHC.’

[98] During the course of the hearing on 8 May 2019 UV agreed to provide some data on the relative sizes of long day care and OSHC. This data was provided on 24 May 2019 and is set out in the table below.

Table 4: ACECQA National Register Data (as at 8 May 2019))

| Places Category | LDC Services | | OSHC Services | |
|-----------------|--------------|--------|---------------|--------|
| | No. | % | No. | % |
| No more than 39 | 1634 | 21.25 | 932 | 20.43 |
| 40-59 | 1834 | 23.85 | 1127 | 24.71 |
| 60+ | 4223 | 54.91 | 2502 | 54.86 |
| TOTAL | 7691 | 100.00 | 4561 | 100.00 |

[99] In its submission ‘Factual findings’ dated 29 May 2019 UV withdrew its earlier submission that it may be appropriate to structure the allowances on a different size scale within OSHC, having regard to the data in Table 4 above. UV contend that the percentage of services that fit into each size category is broadly equivalent across long day care and OSHC and on that basis submit that the Educational Leader allowance should apply in the same manner in OSHC services.

Question for UV and the Individuals

Q.21 Do you contest that part of the ACA, ABI and NSWBC submission as to what are said to be a difference between the OSHC and Long Day Care sectors set out in the first dot point at [94] above? And if so, how would the Educational Leader allowance work in the OSHC sector.

Question for ACA, ABI and NSWBC

Q.22 Having regard to the data in Table 4 above, do you accept that the percentage of services that fit into each size category is broadly equivalent across long day care and OSHC?

[100] As to the quantum of the allowance sought, AFEI submits, in its Reply Submission of 16 April 2019 (at [28]-[31]), that the amounts sought ‘are significant and disproportionate when compared to the compensation for holding other responsibilities under the Award (including the rate differentials between different classification levels), and when compared to other allowances’. AFEI provides two comparative tables in support of its submission, the first compares the pay rate differential between a level 4 employee and an Assistant director, with the quantum of the proposed Educational Leader allowance, as set out below.

Table 5: Comparison Level 4/Assistant Director differential and the Educational Leader Allowance

| Centres with | Difference between a Level 4.1 and Level 5.1 per annum* | Difference between a Level 4.2 and Level 5.1 per annum* | Difference between a Level 4.3 and Level 5.1 per annum* | Educational leader allowance sought, per annum |
|------------------------|---|---|---|--|
| No more than 39 places | \$2,353 | \$1,565 | \$788 | \$3,277.42 |
| 40-59 places | \$2,353 | \$1,565 | \$788 | \$4,369.55 |
| 69 above about places | \$2,353 | \$1,565 | \$788 | \$5,451.77 |

*Annual rates have been obtained by multiplying the weekly rates by 52.18

[101] In relation to the above table AFEI submits (at [30]):

‘The amounts sought by United Voice are significantly higher than, and entirely disproportionate to, the amount of compensation that would be payable to employees for performing the full role of an employee at Level 5, which includes not only comparable responsibilities that would attach to a designated educational leader, but other leadership and supervisory responsibilities, including those of a Responsible Person. Further, ‘educational program and practice’ is only one of the seven quality areas within the National Quality Standard.1’

[102] The second comparative table compares the proposed Educational Leader allowance with the Director’s allowance, as set out below:

Table 6: Comparison between Director’s Allowance and Educational Allowance

| Centres with | Current Director’s allowance per annum* | Educational leader allowance sought per annum* | Educational leader allowance as a percentage of the Directors allowance |
|------------------------|---|--|---|
| No more than 39 places | \$5,751.96 | \$3,251.35 | 57% |
| 40-59 places | \$7,127.42 | \$4,351.30 | 61% |
| 60 above about places | \$8,652.94 | \$5,451.77 | 63% |

*Annual rates have been obtained by multiplying the weekly rates by 52.18

[103] AFEI submits (at [31]) that the comparison of the allowance sought with the Director’s allowance ‘demonstrates the disproportionate nature of United Voice’s claim’.

Questions for UV and the Individuals

Q.23 UV and the Individuals are invited to respond to AFEI’s submission that the quantum of the proposed Education Leader allowance is disproportionate when compared with the compensation for holding other responsibilities under the award.

Q.24 What is the basis for the quantum of the allowance sought? How did UV and the Individuals come up with the quantum proposed?

Responsible Person Allowance

[104] ACA, ABI and NSWBC submit that the claim for an hourly allowance for a responsible person is a re-agitated claim that was dismissed in the Transitional Review and that UV have failed to outline any new or additional duties that would justify an allowance of the magnitude sought.⁵⁸

[105] Further, ACA, ABI and NSWBC submit that ‘the notion that the duties of a Responsible Person were not considered when the modern award grading system was created is incorrect. While the term ‘responsible person’ does not appear in the award, there has always been someone responsible for the centre.’⁵⁹

[106] ACA, ABI and NSWBC attach a schedule to its reply submission which, it alleges, compares each of the new or additional duties of a responsible person with an existing duty in the Children’s Services Award, and it argues every duty or responsibilities proposed by UV is captured in the classifications for levels 4 - 6 in the Children’s Services Award.⁶⁰ The schedule is set out at **Appendix 8**.

[107] Similar arguments are advanced by AFEI in its Reply Submission of 16 April 2019 (at [34]-[38]), :

‘34. The changes involving a requirement to designate a responsible person for the purposes of the National Law and Regulations, are not substantial. The National Law requires a centre ensures that either: a person with management control; the nominated supervisor; or a person in day-to-day charge must be present at all times.⁶¹ The Director of a service will typically fulfil this requirement, this is not disputed by the United Voice.⁶² However, invariably services will operate for longer hours than a Director is in attendance or the Director may be temporarily absent due to illness or other unforeseen situations. In such circumstances, a responsible person will be required to be the centre’s ‘point of contact’ and provide limited and interim supervision.

35. The responsible person is an employee placed in day-to-day charge,⁶³ in the absence of the Director or nominated supervisor. However, although in charge of a service for that period, the responsible person does not take on the responsibilities of the nominated supervisor and is not acting as a nominated supervisor for that period. The responsibilities of the nominated supervisor remain with the substantive appointment even when they are not physically present at the centre.

36. The overall responsibility for ensuring health and safety of the children on site; ensuring the staff to children ratios are being met; ensuring the physical environment is set out appropriately, and that programming and planning is being carried out in accordance with the NQF are all tasks that are generally determined and arranged in advance, aside from emergency situations. Ensuring these requirements are met is the substantive role of the nominated supervisor/Director. The responsible person does not make such arrangements, but may monitor the service does not divert from the arrangements already in place.

37. The classification structure in the Children’s Services Award already contemplates a higher level of responsibilities and skills than a responsible person at Level 5, Assistant Director, which includes:

“Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues.”

38. In addition to this particular responsibility, however, the Assistant Director is also responsible for, as noted above, the duties of an educational leader, and further, significantly:

- Contribute, through the Director, to the development of the centre or service’s policies;
- Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training; and
- Generally supervise all employees within the service.’

[108] In its Further Submission in Reply dated 29 April 2019 (at [33]) UV rejects the argument that the work of Responsible Persons is covered by the current classifications, for the reasons at [22] of its submissions (and set out in the quote at [78] above).

[109] As to the quantum of the allowance sought, AFEI submits, in its Reply Submission of 16 April 2019 (at [39]-[41]), that the amounts sought ‘are significant and disproportionate when compared to other allowances and pay rates under the Awards’. AFEI provides two comparative tables in support of its submission, the first compares the differential payable to level 4 and 5 employees with the proposed Responsible Person allowance, as set out below.

Table 7: Comparison Level 4/Assistant Director differential and the Responsible Person Allowance

| Centres with | Difference between a Level 4.1 and Level 5.1 per hour | Difference between a Level 4.2 and Level 5.1 per hour | Difference between a Level 4.3 and Level 5.1 per hour | Responsible person allowance sought, per hour |
|------------------------|---|---|---|---|
| No more than 39 places | \$1.18 | \$0.80 | \$0.40 | \$3.31 |
| 40-59 places | \$1.18 | \$0.80 | \$0.40 | \$4.41 |
| 69 above about places | \$1.18 | \$0.80 | \$0.40 | \$5.51 |

[110] The second comparative table compares the annualised amount of the Responsible Person allowance sought for Teachers with the Director’s allowance, as set out below:

Table 8: Comparison of Director’s Allowance and Responsible Person Allowance

| Centres with | Current Director’s allowance per annum* | Responsible person allowance sought, per annum* |
|------------------------|---|---|
| No more than 39 places | \$5,751.96 | \$6,503.70 |
| 40-59 places | \$7,127.42 | \$8,764.15 |
| 69 above about places | \$8,652.94 | \$10,905.62 |

*Annual rates have been obtained by multiplying the weekly rates by 52.18

Questions for UV and the Individuals

Q.25 UV and the Individuals are invited to respond to AFEI’s submission that the quantum of the proposed Responsible Person allowance is disproportionate when compared to other allowances and pay rates under the Awards.

Q.26 What is the basis for the quantum of the allowance sought? How did UV and the Individuals come up with the quantum proposed?

3.2 Non-contact Time Claim

3.2.1 UV submissions

[111] UV contends that the increased programming duties arising out of the NQF requires an increase in non-contact time to allow employees to complete their range of duties within ordinary hours.

[112] UV seeks to vary clause 21.5(a) as follows:

21.5 Non-contact time

(a) Non-contact time will be provided for the purpose of planning, preparing, evaluating and programming activities. During non-contact time, an employee will not be required to supervise children or perform other duties directed by the employer.

(i) An employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children will be entitled to a minimum of ~~two~~ four hours non-contact time per week.

[113] UV also propose to insert a new clause 21.5(a)(ii) as follows:

(ii) The educational leader will be entitled to additional non-contact time per week, according to the size of the centre, as follows:

| Centres with: | Additional non-contact time |
|------------------------|-----------------------------|
| No more than 39 places | 2 hours |
| 40-59 places | 3 hours |
| 60 and above places | 4 hours |

[114] UV contend that there is a significant amount of ‘preparation, implementation and/or evaluation of a developmental program for an individual child or group of children’ that educators are required to complete within non-contact time, and the introduction of the NQF has significantly increased the scope and duration of this work

[115] The non-contact time clauses within the Children’s Services Award and the Teachers Award have not been varied since award modernisation.⁶⁴

[116] UV submit that within the allocated non-contact time educators are expected to complete a wide variety of tasks including preparing programs for educational learning and development; writing up observations of individual children; communicating with parents on their children’s development; undertaking critical reflection on their own programing and practice; researching appropriate resources for programs; assessing the effectiveness of programs; planning inclusive programming for children with diverse needs; making applications for additional inclusion support resources; and liaising with relevant organisations and professionals where necessary (i.e. inclusion support agencies, speech pathologists, psychologist). It is argued that these tasks must be undertaken within the framework of the NQF and that completion of these tasks is critical to ensuring that the centre is complying with obligations under the NQS. UV detail particular quality areas in their submission.⁶⁵

[117] It is argued that two hours of non-contact time per week is not sufficient for educators to complete the required tasks and that the⁶⁶ inadequacy of the current provisions in the Awards for non-contact time force employees to complete the required tasks in their own time or as unpaid overtime.⁶⁷

[118] At [130] – [131] of their submission of 15 March 2019 UV submit:

‘The expectation under the NQS is that the educational program is developed based on the needs of each child. It is not sufficient for an educator to simply use the same programs repeatedly without thought for the individual needs of children in the centre. Educators are expected to be responsive to children, flexible in their programming and able to integrate children’s emerging ideas. This is particularly so with children who are from different cultural backgrounds or have disabilities.

Completion of these tasks is critical to ensuring that the centre is complying with obligations under the NQS, and assessors may sight programming and planning documentation when determining whether the centre is meeting the obligations of the NQS.’ (footnotes omitted)

Questions for all other parties

Q.27 Is the above extract from UV’s submission (at [118]) contested?

[119] UV submit that there is no specific non-contact time for Educational Leaders in the Awards and that the evidence demonstrates a need for specific non-contact time in which to complete Educational Leader duties.⁶⁸ It is argued that effective educational leadership is critical in achieving the NQS and Educational Leaders require specific non-contact time to complete the additional non-contact tasks. They submit that the Children’s Services Award should be amended to ensure Educational Leaders are provided with sufficient non-contact time to complete their work. Further, the claim recognises that providing educational leadership in a larger centre will necessarily require more non-contact time than in a smaller centre and makes provision for the hours of non-contact time to be provided on the basis of size of the centre.

[120] In relation to the modern awards objective, UV contends that in order for the Awards to be ‘*fair and relevant*’, there must be recognition that there are substantial programming requirements within the NQF, and that these programming requirements cannot be adequately completed within 2 hours of non-contact time per week.⁶⁹ In relation to the s.134 considerations UV specifically refers to s.134 (1)(a) and submit that the wages within the ECEC sector are generally low and that it is not appropriate for award-reliant employees on low wages to have to complete programming and related work, or work related to educational leadership, outside of work hours, in their own time, unpaid.⁷⁰

3.2.2 Reply submissions of ACA, ABI and NSWBC and AFEI

[121] In relation to the additional period of non-contact time for educational leaders AFEI submits that if accepted, the variation would provide an employee between six and eight hours of non contact time per week which would have a significant impact on rostering arrangements, and would involve a significant increase in costs for employers.

[122] ACA, ABI and NSWBC oppose the claim and submit that the employer evidence suggests that programming has always been a duty and responsibility of educators, and it has

not increased in skill or difficulty since the introduction of the NQF and they submit that, in fact, technology may have made duties associated with programming easier.⁷¹

[123] ACA, ABI and NSWBC submit that there has not been a sufficient case made out that the 2 hour mandated minimum for non-contact time is insufficient or not working. The Awards provide an appropriate minimum that can be increased by individual centres on a case by case basis for operational reasons.⁷²

[124] ACA, ABI and NSWBC contend that the claim should be dismissed because probative evidence has not been provided in the form or volume required to warrant such a costly increase to overall wages costs. Any claim to mandate time “off-the-floor” must complement the strict ratio requirements imposed by the National Law and Regulations. They submit that the claim does not consider the operational difficulties (and costs) of allowing educators (whose primary job is to care for children) more time away from those children to prepare programs for them.⁷³ It is submitted that it would be difficult to determine a more appropriate minimum than 2 hours given the need to consider:

- the number of children in the room at any given time;⁷⁴
- the nature of that centre’s program (e.g.; is it a template, is it created from scratch);
- the facilities (including technology) available at that centre to make programming
- easier/faster to program (e.g.; Apps and Ipads);
- the age of the children and the complexity of the program for them; and
- which room the room leader is allocated to that day or week.

[125] AFEI opposes the claim and submits that ‘[w]hile the limited evidence might suggest that more non-contact time may be desirable for some employees, the Commission could not be satisfied that a charge of such magnitude is necessary as part of the modern award safety net for all such employees.’⁷⁵

3.3 Training Allowance

3.3.1 UV submissions

[126] UV seeks to vary the Children’s Services Award by introducing a new training allowance clause at 15.9 as follows:

15.9 Training expenses

Where an employee is directed to participate in training, any expenses associated with training incurred by the employee (including course fees) shall be reimbursed by the employer to the employee. The time spent in training will count as time worked.

[127] The new clause is said to be necessary because ‘United Voice members have reported difficulties with getting reimbursed for course fees and time spent in training’.⁷⁶ In particular it is argued that the costs associated with first aid and CPR training is a significant issue in the sector.

[128] It is also contended that the NQF and ‘the evolving standards expected of educators’,⁷⁷ lend support to the claim. In this regard UV refers to Regulation 136:

‘The National Regulations state: 136 First aid qualifications (1) The approved provider of a centre-based service must ensure that each of the following persons are in attendance at any place where children are being educated and cared for by the service, and immediately available in an emergency, at all times that children are being educated and cared for by the service— (a) at least one staff member or one nominated supervisor of the service who holds a current approved first aid qualification; (b) at least one staff member or one nominated supervisor of the service who has undertaken current approved anaphylaxis management training; (c) at least one staff member or one nominated supervisor of the service who has undertaken current approved emergency asthma management training.’⁷⁸

[129] UV acknowledges that it is not ‘a formal requirement’ that all employees have first aid qualifications but assert that ‘it has become a widely expected standard within the ECED sector that employees will have and maintain first aid qualifications’.⁷⁹ Further, it is submitted that since the implementation of the NQF there has been an increased expectation that educators have specialist first-aid qualifications, including anaphylaxis and asthma management and that in order to meet the NQF requirements:

‘some employers will require that all staff have first aid qualifications, whilst others will require that employees in certain positions maintain first aid qualifications.’⁸⁰

Question for UV

Q.28 What evidence is relied on in support of the propositions at [129] above?

[130] In relation to the modern awards objective the essence of UV’s submission appears to be that the insertion of the claimed clause would be ‘fair’ because ‘[e]mployers are provided with a benefit by having a qualified and trained workforce and employees should be supported and reimbursed appropriately to undergo this training’.⁸¹ It is also said that varying the award in the manner sought would be ‘in line with’ s.134(1)(a) in that:

‘the variations ... would improve the living standard and needs of the low paid workers under this Award ... the costs associated with first aid and CPR training for educators is ... high compared to their average wages ... It is onerous to place the burden of these costs on the employees. The time that is taken to undertake this training is related directly to their work and so should be considered time worked and remunerated as such.’⁸²

[131] UV note that 2 modern awards currently contain clauses which are similar to the clause they propose (cl 32.5 of the *Manufacturing and Associated Industries Award 2010* and cl 26.5 of the *Food, Beverage and Tobacco Manufacturing Award 2010*) and submit that:

‘Many awards do not contain a training clause because *as a general principle*, if an employer requires an employee to undertake particular training then the employer must cover the cost or reimburse the employee appropriately. Similarly, time spent in training at the direction of the employer is understood to be time worked.’⁸³

3.3.2 Reply submissions of ACA, ABI and NSWBC and AFEI

[132] ACA, ABI and NSWBC submit the claim is ‘too wide’ in circumstances where the evidence filed by UV is narrowly directed at first aid and CPR courses being paid for and time spent at the courses being counted as time worked. They note that first-aid is included in Certificate III and Diploma courses which are qualifications required to be held by employees working in childcare centres and that at present the award only requires employers to pay

first-aid training courses where an employee is required by an employer to act as a first aid officer but they contend that many employers pay for all employees to obtain first-aid and CPR qualifications.

[133] In its Reply Submission of 15 April 2019 ACA, ABI and NSWBC also submitted (at 7.3):

- The legislative requirement is that at least one staff member or nominated supervisor have a first aid qualification, though many employers pay for all employees first Aid and CPR qualifications.
- Employees engaged at level 4 and above are ‘expected’ to have first aid qualifications but there is a fundamental difference between a recommended qualification versus it being mandatory.
- A nominated supervisor would be classified as at least level 5 or 6 and their base wage already includes this ‘responsibility.’
- The Award already appropriately governs when first aid should be paid and no evidence was filed in relation to other training and development so the claim should be dismissed.
- Granting the claim could have the adverse effect of deterring employees from upskilling the workforce.

[134] Similar submissions are advanced by AFEI and, further, AFEI points to instances where employees with more than one employer could claim reimbursement for their first aid certificate renewal from multiple employers.

Question for UV

Q.29 The first aid allowance in claims 15.4(a) is only payable to employees classified below level 3 who are required to administer first aid to children. What does UV say to the proposition that this suggests that this responsibility forms part of the base wage rate for higher level employees?

3.4 Laundry and Clothing Allowance

3.4.1 UV submissions

[135] Clause 15.2 deals with the circumstances in which a clothing and equipment allowance is payable and the quantum of that allowance.

[136] UV seek to first, add a note about the use of on-site laundry facilities and, second, to vary clause 15.2(c) by inserting the words “hat, sun protection (including sunscreen lotions)”, as follows:

15.2 Clothing and equipment allowance

...

(c) Where an employee is required to wear protective clothing or equipment such as hats, sun protection (including sunscreen lotions), goggles, aprons or gloves, the employer will

either supply such clothing or equipment or reimburse the employee for the cost of their purchase.

Note: The existence of on-site laundry facilities that can be used by employees to launder uniform items does not make this allowance not payable.

[137] In relation to the proposed note, UV submit that the laundry allowance appropriately provides a level of compensation for employees for the costs associated with washing and maintaining their uniforms, but that ‘some employers are refusing to pay the laundry allowance on the basis that there are on-site laundry facilities available at the centre’.⁸⁴

[138] UV submit that on-site laundry facilities are for laundry associated with a centre’s principal activities (e.g. washing bed sheets, towels, bibs and blankets) and employees are not necessarily able to use those facilities.⁸⁵ Further, UV submit:

‘Further, ECEC centres are run to a strict ratio as per the NQF and staff must be ‘on the floor’ and at their allocated place at their allocated time, otherwise the centre runs the risk of being in breach of the NQF. Break time is not sufficient to run a load of laundry and a staff member cannot simply put one or two shirts and run a load when they wish.’⁸⁶

[139] UV submit that their claims to vary clause 15.2 accord with the modern awards objective. In particular, they submit that that the consideration at s.134(1)(a) to the ‘*relative living standards and the needs of the low paid*’ is relevant as award reliant employees on low wages should not have to bear the cost of laundering uniforms. Additionally, they submit that the consideration to ‘*the need to promote social inclusion through increased workforce participation*’ at s.134(1)(c) is relevant as out of pocket costs for low paid employees could discourage workforce participation.⁸⁷

[140] Clause 15.2(c) of the Award provides for the cost of any items of protective clothing or equipment purchased to be reimbursed to the employee. UV contends that hats and sun protection should be considered ‘protective clothing’ for the purposes of this clause, but submits that its members have reported difficulties in getting the cost of hats and sun protection purchased for work purposes reimbursed and on that basis it is submitted that the clause requires clarification.

[141] In support of its claim UV advances the following propositions:

1. Educators spend a significant amount of time outside. Our witness Bronwen Hennessy states that ‘on a sunny day we can spend around 4-5 hours outside with the children’.⁸⁸
2. Each centre based service must have an appropriate area for outdoor play, with at least 7 square metres of unencumbered outdoor space for each child being educated and cared for at the service.⁸⁹ The outdoor space must allow children to explore and experience the natural environment and may include features such as gardens, sandpits, pebble/gravel pits and water play areas.⁹⁰
3. Services are assessed on the extent to which children are engaged in meaningful experiences in outdoor environments.⁹¹
4. The approved provider of a service must ensure that appropriate policies and procedures are in place regarding sun protection.⁹²

5. It is important for educators to teach children about sun safety.

Question for all other parties

Q.30 Are the propositions set out at [141] contested?

[142] As to the cost of hats and sun protection UV submits (at [183] – [186]):

‘The costs of sun hats and sun protection can add up over a period of employment. Sun hats commonly cost from around \$10 - \$80. Depending on the climate, with regular wear, and in the company of children, the hat may require replacement every 6 months - 2 years.

Sunscreen commonly costs around \$15 - \$30 for a 500 ml bottle.

Generally, ECEC centres will provide sunscreen for children. At some centres, employees will also be able to use this sunscreen. However some centres may ration the amount of sunscreen used and employees may need to purchase additional sunscreen to ensure that they are adequately protected from the sun.

Further, some employees with sensitive skin may not be able to use the general sunscreen and may need to purchase their own.’

[143] UV submits that:

‘Outdoor play is an important component of ECEC and that educators may be spending a number of hours each day outside, it is appropriate that sun hats and sunscreen are either provided by the employer or the cost reimbursed.’⁹³

[144] UV submits that the variations it seeks to clause 15 are ‘in line with the modern awards objectives’. As to the s 134 considerations UV relies on s 134(1)(a) and (b). In relation to s 134(1)(a) it is submitted that it is not appropriate that award reliant employees on low wages should have to bear the cost of laundering uniforms or purchasing sun protection themselves. As to s 134(1)(b) it is submitted that:

‘There is a high level of part time and casual employment within this sector. Numerous out of pocket costs for low paid employees in the course of employment could discourage participation in the workplace.’⁹⁴

3.4.2 Reply submissions of ACA, ABI and NSWBC

[145] In relation to the ‘Note’ regarding on site laundry facilities ACA, ABI and NSWBC submit that, based on the evidence it does not make sense to pay employees an allowance to wash their uniforms in situations where:

- the employee is washing their uniform during work time (i.e. at a cost to the employer) or the employees uniform is washed by someone else at the centre; and
- the employer pays for electricity, water, detergent; and
- there is no cost to the employee.

[146] AFEI submit that the existing allowance is an ‘expense related’ allowance and that the variation is unnecessary.

[147] As to the ‘hats and sun protection’ aspect of the claim, ACA, ABI and NSWBC submit that the variation is unnecessary as there is no issue with respect to the provision of sunscreen and hats and that the evidence suggests that employers already provide sunscreen and hats for outdoor play.

[148] ACA, ABI and NSWBC note that as presently drafted the claim places no ‘cap’ on the cost of items purchased by employees and could give rise to employers having to reimburse unreasonable expenses.

[149] ACA, ABI and NSWBC would not oppose a variation to clause 15.2(c) if UV amended the claim to:

- ‘hats’ and ‘sunscreen lotion’ only (and not the generic term ‘sun protection’); and
- reimbursements be ‘reasonable’ and validated by receipts or otherwise.⁹⁵

Question for UV

Q.31 Is UV prepared to amend its claim in the manner proposed by ACA, ABI and NSWBC? If it is then UV and ACA, ABI and NSWBC are asked to jointly draft a proposed variation.

3.5 Higher Duties Claim

3.5.1 UV submissions

[150] UV seek to delete a subclause (e) in the Higher Duties clause as follows:

18.1 An employee engaged in duties carrying a higher rate than their ordinary classification for two or more consecutive hours within any shift or day will be paid for the time so worked at the higher rate provided that:

- (a) the greater part of the time so worked is spent in performing duties carrying the higher rate;
- (b) an employee engaged as a Children’s Services Employee Level 5 (Assistant Director) who is required to undertake the duties of a Director by reason of the Director’s absence will not be entitled to payment under this clause unless the Director’s absence exceeds two complete consecutive working days;
- (c) an employee engaged as a Children’s Services Employee Level 3 who is required to undertake duties of the Director by reason of the Director’s non-attendance outside of core hours will not be entitled to payment under this clause;
- (d) where an employee is appointed to act as the Director of a Centre or a Supervising Officer pursuant to the relevant childcare regulations, they will be paid for the entire period at the rate applicable for a Director or Supervising Officer; or
- (e) ~~an employee who is required to undertake the duties of another employee by reason of the latter employee’s absence for the purpose of attending (with pay) an approved training course (including in-service training) will not be entitled to payment under this clause.~~

18.2 For the purposes of this clause, the duties of an employee will be determined by reference to this award and the employee's job description.

[151] The effect of the variation proposed would be that employees who take on higher duties when a colleague is attending an employer directed training will be paid higher duties in accordance with clause 18.1.

[152] If the proposed deletion of clause 18.1(e) is rejected then UV seeks an alternative amendment to clause 18.1(e), to remove the words "(including in-service training)" as follows:

- (e) An employee who is required to undertake the duties of another employee by reason of the latter employee's absence for the purpose of attending (with pay) an approved training course (~~including in-service training~~) will not be entitled to payment under this clause.

[153] UV submit that there are sufficient qualifications in clause 18.1 that operate to restrict the entitlement to the payment of the higher duties rate and that:

'It is our view that there are more than enough qualifications within clause 18.1 that restrict the occasions on which an employee will be entitled to the higher rate. We see no practical reason why employees should not be paid at a higher rate when their colleagues are absent from the workplace to undertake training and they would otherwise be entitled to the higher rate as per the other clauses in 18.1. If an employee is undertaking duties higher than their usual classification, then it should be irrelevant whether the employee who would normally perform those duties is on leave or on employer directed training or some other activity that takes them away from their usual duties. The employee acting within that role is carrying out the duties and so should be paid at the higher rate, regardless of whether the employee who usually occupies that role is in training or not.'⁹⁶

[154] As to the modern awards objective, UV contends that s 134(1)(c) is relevant:

'When employees *'act up'* into positions that carry higher duties, they are building skills sets that they may otherwise not have the opportunity to develop ... Removing clause 18.1(e) ensures that employees who act up and undertake higher duties in the short to medium term are remunerated appropriately. This in turn will promote social inclusion as employees are able to better progress through and stay in the workforce if they are encouraged to consistently *'skill up'*.'⁹⁷

3.5.2 Reply submissions of ACA, ABI and NSWBC and AFEI

[155] ACA, ABI and NSWBC submit that the existing higher duties clause is 'unique' and that it balances various issues unique to the ECEC industry and that it has , :

'come about by various negotiations between the parties to try and accommodate the payment of higher duties whilst childcare centres comply with onerous legislative requirements (including ratio requirements and health and safety).'⁹⁸

[156] Further, ACA, ABI and NSWBC submit that the clause UV seeks to remove has a purpose , :

‘It allows an employer to pay for any employees first aid training (during the working week including the hours an employee spends at training) whilst another employee to fill in for them. Without this clause employers may be more inclined to schedule training on the weekend or outside of hours. In any other industry, it may be reasonable to pay higher duties. But this clause is holistic and looks at the centres costs as a whole. This clause requires the employer to pay for time spent at training as time worked (for one employee) and as a result does not have to pay the employee filling the higher duties.’⁹⁹

[157] AFEI submits that the Commission should take into account ‘the fact that the higher duties clause has been so drafted to respond to particular nuances of the industry, and no doubt, its particular regulatory requirements’.¹⁰⁰

Questions for ACA, ABI and NSWBC and AFEI

Q.32 *What are the particular regulatory requirements of this sector which are said to support clause 18.1(e)?*

Q.33 *Why would employers be more inclined to schedule training on the weekend or outside of hours (and pay the employee undergoing the training the applicable penalty rates) if clause 18.1(e) was deleted?*

Q.34 *What do employers say about UV’s alternate claims (to delete (including in-service training))? What does ‘in-service’ training encompass?*

3.6 Annual Leave Claim

3.6.1 UV submissions

[158] UV seeks to amend the Annual leave provision in the Children’s Services Award to require employers, who direct their employees to take annual leave without pay over Christmas, to pay ordinary time to those employees in circumstances where they have not accrued any leave.¹⁰¹ In the alternative, UV seek to reduce the maximum amount of leave without pay that an employee can be directed to take to two weeks and to amend clause 24.4(c) so that employees may only be directed to take paid annual leave. Two options are proposed.

Option 1: amend clause 24.4(b) as follows:

‘(b) During the Christmas vacation only, an employee may be directed to take annual leave. ~~An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of four weeks. Where an employee has insufficient accrued leave to maintain their ordinary rate of pay during the vacation period, an employee will be paid the ordinary rate of pay during such a period.~~¹⁰²

[159] UV also seek to delete subclause 24.4(c) which currently provides:

(c) Notwithstanding clause 24.4(a) in establishments which operate for more than 48 weeks per year, an employer may require an employee to take annual leave by giving at least four weeks’ notice as part of a close-down of its operations.

and insert a definition of ‘Christmas vacation’ that limits a Christmas vacation period to a maximum of 4 weeks:

‘**Christmas vacation** means a period of not more than 4 weeks in the months of December and January during which the workplace is closed and no work is available.’

Option 2: amend clause 24.4(b) as follows:

‘(b) During the Christmas vacation only, an employee may be directed to take annual leave. An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of ~~four~~ two weeks.’¹⁰³

[160] UV also seek to amend clause 24.4(c) to ensure that employees may only be directed to take paid annual leave as follows:

‘(c) Notwithstanding clause 24.4(c) in establishments which operate for more than 48 weeks per year, an employer may require an employee to take paid annual leave by giving at least four weeks’ notice as part of a close-down of its operations.’¹⁰⁴

and insert a definition of ‘Christmas vacation’ that limits a Christmas vacation period to a maximum of 4 weeks, as set out above.

[161] The review of clause 24.4 of the Children’s Services Award has been referred to the Plain Language Full Bench.¹⁰⁵ This substantive issues the Full Bench does not propose to deal with this variation unless it is generally agreed that the matter should be dealt with by it and the President refers the matter from the Plain Language Full Bench.

Question for all parties

Q.35 All parties are invited to comment on whether this claim should be dealt with by the Substantive Issues Full Bench or the Plain Language Full Bench?

4. The Employer Claims

4.1 Ordinary Hours Claim

4.1.1 Employer submission in support of the claim

[162] ACA, ABI and NSWBC (in this section, the Applicants) seek to vary the spread of ordinary hours clause under the Children’s Services Award (and the Teachers Award) from 6.00 am and 6.30 pm to 6.00 am and 7.30 pm, as follows:

21.1 The ordinary hours of work of full-time employees will be an average of 38 hours per week over a one, two or four week cycle.

21.2 Ordinary hours will be worked in periods not exceeding eight hours, in unbroken periods save for meal breaks, between Monday and Friday. Subject to the provisions of clause 7—Individual flexibility arrangements, by agreement between an employer and an employee, an employee may be rostered to work up to a maximum of 10 hours in any one day.

21.3 Ordinary hours may be worked between 6.00 am and ~~6.30~~ 7.30 pm. Where broken shifts are worked the spread of hours can be no greater than 12 hours per day.

[163] The Applicants also seek to amend clause 23.4(d)(ii) as follows:

23.4 Shiftwork

(d) definitions

Afternoon shift means any shift finishing after ~~6.30~~ 7.30 pm and at or before midnight.

[164] The National Outside School Hours Care Association (NOSHCA) support the submissions of ACA, ABI and NSWBC.

[165] The issue which is the subject of this claim was raised by the Employers during the award modernisation process and during the Transitional Review. The relevant history is set out at 9.1 to 9.17 and 18.1 to 18.12 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.36 Do you contest any part of the relevant award history set out in the ACA, ABI and NSWBC submission referred to in [165] above?

[166] In summary, ACA, ABI and NSWBC submit that the claim should be granted on the basis of:

- the role and characteristics of the ECEC sector;
- the experience of parents within the ECEC sector;
- the effect of current ordinary hours award conditions; and
- the likely effect of granting the claim.

[167] As to the role and characteristics of the ECEC sector the Applicants submit that:

(a) The primary purpose of childcare is to provide a place for young children to be when their parents are unable to care for them in the home because they are at work.

(b) The ECEC sector supports all Australian families and has the power to facilitate workforce participation leading to better outcomes for the economy and employment growth.

(c) Current government programs, (including the current subsidy arrangements) encourage both parents (and particularly mothers) to work because it is good for the economy.

(d) Childcare is an extremely competitive industry in which affordability, opening hours and compliance with an increasingly complex regulatory regime determine the viability of a business.

[168] The above propositions are expanded upon in Sections 12 and 13 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.37 Do you contest the propositions set out at [167] above, or any of the material set out in Section 12 and 13 of the ACA, ABI and NSWBC submission?

[169] As to the experience of parents within the ECEC sector the Applicants submit that:

(a) Affordability and accessibility of childcare for Australian families are current issues facing the ECEC sector generally.

(b) Childcare needs to accommodate parent (customer) demand at an affordable price or parents will go elsewhere.

(c) Accessibility and affordability of childcare are extremely important factors that, if not provided, can discourage parents, particularly women, from working.

(d) Limited childcare operating hours restrict the working hours of working parents, particularly those with greater caring responsibilities (i.e. women).

(e) Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable childcare.

(f) Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.

(g) The nature of childcare is that working parents must drop off their children before commencing work and pick-up their children following the completion of their work. This pattern suggests that the ordinary hours of the childcare industry should commence earlier and conclude later than other industries.

(h) Parents who utilise childcare services work in all industries.

(i) Parents routinely choose childcare providers close to their homes so that they can drop off children before travelling to work, and pick-up children on the way home from work. This means that parents must finish work with enough time to travel to the childcare centre to pick-up their child 'on time'.

(j) Many parents face increasingly long commuting times due to the distance of their home from work, reliability of public transport and an increase in traffic around major cities.

[170] The above propositions are expanded upon in Section 14 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.38 Do you contest the propositions set out at [169] above?

[171] As to the effect of the current ordinary hours award conditions the Applicants submit that:

- (a) The span of ordinary hours in the Children’s Services Award and Teachers Award currently finish at 6:30pm.
- (b) The cessation of ordinary hours at 6:30 in the childcare industry is identical to or earlier than 46% of modern awards. This means that, at least in respect of modern awards, ‘overtime has begun’ in the childcare industry at a point where many working parents are still completing ‘ordinary hours’ in other industries (or travelling to pick-up their children).
- (c) There is a demand from parents for childcare centres to stay open past 6:30pm due to their own work commitments.
- (d) In order to avoid the payment of overtime, some childcare providers require parents to pick-up their children at 6:30 pm (i.e. the end of ordinary hours).
- (e) Unlike employers in other industries, childcare employers do not have unilateral control on when centres can close. If parents do not attend ‘on time’ to collect children, childcare centres are required to stay open, incurring unplanned overtime liability.
- (f) It is a common experience of childcare centres that, notwithstanding a clearly defined closure time of 6:30pm, parents are often late necessitating the payment of overtime.
- (g) Commuting to and from work and work commitments are the main reasons parents cite to centre operators for why they cannot pick-up their children by 6:30pm.
- (h) Some centres charge late fees as a deterrent to late parents, further exacerbating unaffordability issues within the industry.
- (i) Some centres do not charge late fees, which means, given parents commonly pay a ‘day rate’, those centres are incurring overtime liability without the generation of any additional income to offset this.
- (j) Unplanned overtime caused by parents collecting their children after 6:30pm causes some disability for childcare employees who are unable to identify, with certainty, their finishing time.

[172] The above propositions are expanded upon in Section 16 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.39 Do you contest the propositions set out at [171] above?

[173] As to the likely effect of granting the claim the Applicants submit that:

- (a) Extending ordinary hours until 7:30pm will increase the hours of operation of centres and make childcare more accessible for Australian families.
- (b) Extending ordinary hours until 7:30pm will make childcare more sustainable for ECEC operators who are currently deterred from staying open past 6:30pm due to the significant costs associated with 2 employees being paid at overtime rates, despite demand from parents.
 - (aa) Extending the ordinary hours until 7:30pm will increase workforce participation to benefit Australian families and the Australian economy in that it will allow parents to work longer hours.

(bb) Extending ordinary hours until 7:30pm will make childcare more affordable for parents by pushing back or removing the “late fees” charged to parents when they arrive after 6:30pm.

(cc) Extending the ordinary hours until 7:30pm would serve to remove the ‘unpredictability’ of overtime which will benefit childcare workers who are rostered on the ‘closing shift’ in that those employees could simply be rostered to work the additional time.

[174] The above propositions are expanded upon in Section 17 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.40 Do you contest the propositions set out at [173] above?

Modern awards objective

[175] The Applicants address the modern awards objective and the various s.134 considerations in Part F of the ACA, ABI and NSWBC submission of 15 March 2019. The Applicants contend that the Awards will provide a fair and relevant minimum safety net once varied in accordance with their claims.

[176] As to ‘relative living standards and the needs of the low paid’ (s.134(1)(a)), the Applicants acknowledge that it ‘is an obvious consequence of the Ordinary Hours Claim that the penalties paid to particular employees after 6.30pm may decrease on those days’ but submit that a decrease in the wages payable after 6.30pm does not mean that low paid employees will be worse off on an overall basis. In particular the Applicants submit that the proposed changes will:

- (a) allow employees working on the closing shift to have set, pre-determined hours (and no longer be inconveniently asked to work overtime for a undetermined period of time when parents are running late);
- (b) create structured employment between 6.30pm and 7.30pm where none presently exists; and
- (c) enable employees to (still) be paid overtime after working 8 hours in a day or after 7.30pm.

[177] The Applicants also submit (at 26.3 of the ACA, ABI and NSWBC submission dated 15 March 2019) that:

‘It is also important to look at the relative living standards and the needs of all low paid Australians. Extending the ordinary hours until 7.30pm will:

- (a) increase the access and availability of childcare services to Australian families;
- (b) increase workforce participation of both parents; and
- (c) decrease the cost of childcare for low paid parents who struggle to arrive by 6.30pm due to long commutes and transport issues getting to and from work.’

Question for UV and the IEU

Q.41 What do you say about the proposition set out at [176] above? Does the consideration in s.134(1)(a) extend to all the low paid or is it confined to those covered by the Awards?

[178] As to ‘the need to encourage enterprise bargaining’ (s.134(1)(b)), it is submitted that ‘the changes proposed have the potential to increase the prospect of collective bargaining based on a particular centres needs (eg. 5pm close or 7pm close) and how a centre may arrange operating hours to reflect relevant government finding subsidies, the type of centre they operate and parent demands’.¹⁰⁶

Question for ACA, ABI and NSWBC

Q.42 How would the variation increase the prospect of collective bargaining?

[179] As to the need to ‘promote social inclusion through increase workforce participation’ (s.134(1)(c)), the Applicants submit that:

‘The evidence ... will demonstrate that the Ordinary Hours Claim will generate workforce participation for parents who can utilise childcare services in accordance with their own family and working needs.’¹⁰⁷

[180] As to the need to ‘promote flexible modern work practices and the efficient and productive performance of work’ (s.134(1)(d)), the Applicants submit that (at 29.1 – 29.5 of their 15 March 2019 submission):

‘There is no industrial justification to seek to deter operators from opening their centres past 6.30pm to satisfy the needs of working families. Indeed the primary purpose of childcare is to provide a place for young children to be when their parents are unable to care for them in the home because they are at work.

Ensuring that ordinary hours can be worked over a longer span of hours will facilitate longer operating hours of centres and reflect modern flexible practices, while at the same time ensuring that working parents can utilise childcare services in a manner which is compatible with their own modern working arrangements.

In short, the ordinary hours of childcare centres should reflect the fact that working parents need childcare services to operate both before and after their working day (to accommodate pick-up and drop off). The maintenance of a system which operates under ‘overtime’ conditions during standard (and necessary) hours of operations is not consistent with flexible and modern work practices and the efficient and productive performance of work.

The evidence discloses however that overtime rates are dis-incentivising employers from staying open past 6:30pm. In relation to the reasons why ordinary hours were originally set at 6:30pm, this decision was merely an agreement between parties, without much forensic assessment of the needs of the industry.

It is the submission of the Applicants, that restrictive ordinary hours are hindering employer opening hours (and in turn workforce participation of Australian families) by operating according to historical and no longer relevant principles.’

[181] As to the need to ‘provide additional remuneration for employees working overtime and/or unsociable irregular or unpredictable hours’ (s.134(1)(da)), the Applicants concede that as the Ordinary Hours Claim seeks to vary the definition of ‘overtime’ (at last in respect of the span of hours), this consideration is ‘obviously relevant’,¹⁰⁸ but submit that:

‘6.30pm-7.30pm should not be considered unsociable hours warranting the payment of overtime. This is especially so given the primary purpose of the childcare industry and the requirement that working parents collect their children after the conclusion of their own working hours...

the granting of the Ordinary hours Claim will also facilitate a more regular rostering of employees in the sector, which will remove the current unpredictability of afternoon work which relies on the arrival time of late parents.’¹⁰⁹

[182] It is submitted that the consideration at s.134(1)(e), ‘the principle of equal remuneration for work of equal or comparable value’, is not relevant to the claim.

[183] As to the likely impact on ‘business, including on productivity, employment costs and regulatory burden’ (s.134(1)(f)), the Applicants submit that:

‘the findings demonstrate that overtime rates are disincentivising employers from opening at the times that are likely to be productive and profitable for the employers.

The evidence before the Commission demonstrates that a decision to grant the employer claims will materially benefit business by reducing employment costs and the regulatory burden on business. The evidence discloses that, overtime rates in the Awards are serving in some cases to reduce the hours a centre operates and can provide care for Australian families.’¹¹⁰

[184] It is also submitted that if the claim is granted then it is apparent on the evidence that childcare centres will:

- (a) operate for increased hours or alter their hours to better suit their communities needs;
- (b) provide employees with set finishing hours and decrease the unpredictability of overtime; and
- (c) be able to practically accommodate absences from staff in a way consistent with a complex regulatory arrangements.¹¹¹

[185] As to the need ‘to ensure a simple, easy to understand, stable and sustainable modern award system’ (s.134(1)(g)), the Applicants submit:

‘Given the primary purpose of the childcare industry is to provide a place for children to go while their parents are at work, a simple, easy to understand, stable and sustainable modern award system would include working conditions (and the working of ordinary hours) in the childcare industry which contemplated the fact that working parents need to collect their children following the cessation of their own ordinary hours. Currently, the span of ordinary hours in the Awards does not sufficiently contemplate this.

Further, the business and societal benefits associated with the ACA Claims (which have been addressed in the other limbs of the Modern Awards Objective) will indirectly lead to a sustainable modern award system in the longer term.

The Witness Statements outline that the current modern award system is not easy to understand and does not consider or accommodate the other Childcare Regulations that

businesses must comply with. This is in part due to the current ordinary hours span and rostering conditions.’¹¹²

Question for ACA, ABI and NSWBC

Q.43 What evidence supports the proposition that the current ordinary hours span is not easy to understand?

[186] As to the likely impact on ‘employment growth, inflation and the sustainability performance and competitiveness of the national economy’ (s.134(1)(h)), the Applicants contend that the ECEC sector is ‘a vital part of Australia’s services industry [and that it] ... supports every industry that has working parents wanting to put their children in care and has the power to get more women into work if they have access to childcare’.¹¹³ It is submitted that:

- the nature of the Australian economy has transformed from a 9am – 5pm week day economy to one in which Australians are expected to work longer hours and more irregular hours;
- Australia’s economic performance is substantively influenced by a healthy, appropriately regulated childcare industry to support all Australian families; and
- by amending the ordinary hours clause centres will increase their operating hours, which in turn will generate greater workforce participation and longer working hours, thus ‘boosting Australian employment and Australia’s performance, competitiveness and long term economic sustainability’.¹¹⁴

4.1.2 Reply submissions of UV and the IEU

[187] UV opposes the claim on the basis that ‘it is unnecessary, will have a disruptive impact on the employees covered by the Awards and does not meet the modern awards objective’.¹¹⁵

[188] UV submits that the claim is unnecessary because the vast majority of services in the ECEC sector operate within shorter hours than the current span of hours in the Awards. UV has created the table below using data from the ACECQA national registers, with specific parameters used to give an indication of closing times across the sector. The table shows that 70.9 per cent of services close before or at 6pm, 73.4 per cent close before 6.30pm and 97.8 per cent close by 6.30pm. Only 2.2 per cent of services close after 6.30pm.

| Closing time | Before 6pm | At 6pm | Between 6.01pm and 6.29pm | At 6.30pm | After 6.30pm | Total |
|---------------------|------------|--------|---------------------------|-----------|--------------|-------|
| | 2123 | 4230 | 225 | 2186 | 197 | 8,961 |
| Percentage of total | 23.7 | 47.2 | 2.5 | 24.4 | 2.2 | |

[189] UV submits that:

- where a specific service seeks to open for longer hours, and wishes to pay employees at ordinary hours for those hours, it is open for such a service to engage in collective bargaining with employees with a view to achieving that outcome through an enterprise agreement;
- the fact that some employers within the sector wish to open later is not a cogent basis for extending the ordinary hours of work for all employees covered by the Awards across this sector, especially given employers can already open for longer hours under the current Awards; and
- the overtime rate is time and a half for the first two hours and double time thereafter under the Children's Services Award (clause 23.2(a)) and time and a half for the first three hours and double time thereafter under the Teachers Award (clause B.4.1(a)) and these rates are not excessive and are consistent with industrial norms within the modern award system. It is appropriate that employees working hours after 6.30pm be paid overtime.

[190] UV also submits that the Applicants have ignored the fact that many early childhood educators are also working parents and, in particular, working mothers:

'Many educators have caring responsibilities themselves and extending the ordinary span of hours will create difficulties for these educators to pick up their own children and provide appropriate care to them...

It is apparent from the evidence of our members that educators would experience difficulties managing caring responsibilities if ordinary hours of work within the Awards were extended. Hours after 6.30pm within the context of ECEC are 'unsocial' hours, which are currently paid at the overtime rate in recognition of the disutility associated with work in the evening.'¹¹⁶

[191] As to the proposition that delays in parent pick up provide a rationale for extending the spread of hours, UV submits that:

'Delays in parent pick up would vary across centres, however there is no evidence that it is widespread or that it cannot be managed effectively through the use of appropriate policies.'¹¹⁷

[192] Further, UV submits:

'The most appropriate response is not to vary the ordinary span of hours for all employees within this sector but to appropriately manage late pickups through centre policies and procedures. As noted a significant number of centres have policies by which parents must pay a late fee if they fail to pick up their children by a particular time. It is unrealistic to assume that these policies would change should the span of ordinary hours be extended.

Employees within this sector, who are largely low paid, should not have to bear the cost of late pickups.'¹¹⁸

[193] Finally, UV submits that the ordinary hours clauses in other modern awards is of limited relevance and that the current provisions of the Awards 'provide ways for an employer to manage ordinary hours appropriately'.¹¹⁹

[194] The IEU opposes the Ordinary Hours Claim characterising it as ‘a naked attempt to further reduce the take-home pay of workers in a notoriously low-paid, female dominated industry, in circumstances where there is no evidence that this is necessary or justified’.¹²⁰

[195] The IEU submits that the Applicants have put forward no evidence or submissions:

- demonstrating that these adjustments are necessary;
- beyond broad assertion, showing that the current regime in fact imposes significant – let alone excessive – costs on operators or parents; and
- explaining why the costs of increasing inconvenience for parents and profitability of operators should be borne entirely by low paid early childhood teachers and educators, without any corresponding benefit to them.¹²¹

[196] At [13] – [17] of its Reply Submission of 15 April 2019 the IEU submits:

‘The more significant difficulty with the application is that the claim completely fails to deal with the fact that:

- (a) it is currently possible under both awards to roster workers to work their ordinary hours outside the 6.00am-6.30pm span; and
- (b) this ability, and the associated costs, would not change if ACA’s claim was granted in full.

Clause B.5 of the Teachers Award deals with shiftwork. Relevantly, per B.5.2:

- (a) a. a shift commencing at or after 5.00am and before 6.00am is an early morning shift, and attracts a 10% loading; and
- (b) b. any shift finishing after 6.30pm and at or before midnight is an afternoon shift, and attracts a 15% loading.

This is replicated at cl.23.4 of the Children’s Service Award.

These clauses stand alone, and are not dependent on the set span of hours. A worker rostered to work one of these shifts must be paid the loading for the entire shift. This reflects the unsociability and other detriments of working these hours. The ACA has not made any claim to change these loadings. This would be a significant alteration from its current case.

In other words, even if ACA’s claim was granted in full, it would not have any of the financial benefits it claims. Given there is no other stated purpose, and the variation is only said to be necessary to achieve the modern awards objective on this basis, it necessarily fails.’

Questions for the ACA, ABI and NSWBC

Q.44 Do the Applicants contest the IEU’s characterisation of the relevant award provisions? What do you say about the IEU’s submission that even if the claim was granted it would not have any of the financial benefits it claims?

4.1.3 Reply submission of the Applicants

[197] In their reply submission of 29 April 2019 the Applicant’s submit the Ordinary Hours Claim has the ‘relatively modest aim’ of aligning the span of ordinary hours in the Awards to a range which accommodates the specific needs of the ECEC industry and its role within the wider economy and society.

[198] The Applicants submit it would be a mistake for parties to simply dismiss or disregard the reality that many parents utilise ECEC while they are at work, and the closing time of a ECEC centre will have a direct impact on the working hours of the parent and/or the ability to collect their child. Further, the Applicants submit that it should not be understated that many parents use ECEC services to facilitate (and in effect to make possible) their continued engagement in the workforce, which coexists with the importance of ECEC of providing quality education.

[199] The Applicants also submit that the Commission should exercise caution in relying on UV data on the opening and closing times of centres as the data ‘plainly has a number of significant limitations’, many of which are acknowledged by UV. The Applicants reject any assertion arising from the evidence of UV that there is no real demand for ECEC centres to open later.

Question for the Applicants

Q.45 Are the Applicants able to provide any data on the existing operating hours of services in the ECEC sector?

[200] The Applicants contend that the extension of the span of hours represents an appropriate and contemporary standard having regard to the conditions of ECEC and the modern awards objective and that this pattern does not represent ‘unsocial’ hours or hours which are out of step with contemporary standards or the purposes of ECEC. It is contended that an additional payment for work performed between 6.30pm and 7.30pm does not achieve the modern awards objective because it overcompensates employees for work performed between 6.30pm and 7.30pm.

[201] As to the proposition that the Claim would create difficulties for educators under the Awards to manage their own caring responsibilities the Applicants submit that a balance needs to be struck between the needs and preferences of employees and the needs and preferences of industry, customers/clients and the wider economy.

[202] The Applicants agree with UV’s submission that there is little direct evidence before the Full Bench that the Ordinary Hours Claim would promote the role of full-time working men in picking up children after work and may also have the effect of moving more women from part-time into full-time work, but they submit that the Full Bench could reasonably find that the granting of the claim would have this effect on the basis that :

‘(a) an extension of the span of hours to 7:30pm would make it more likely that ECEC centres would extend operating hours past 6:30pm;

(b) where a centre extended its hours, such extension would make it easier for men whose work currently prevents them from picking up their children before 6:30pm to pick up their children; and

(c) for women, where a requirement to pick-up children before 6:30pm currently prevents them from engaging in certain hours or types of work (or where that requirement subjects them to considerable stress in addition to their work), an extension of the span of hours may enable them to more readily undertake those patterns of work.’¹²²

[203] As to the delay in late parental pick ups, the Applicants submit the Ordinary Hours Claim is not made on the basis that it will eliminate late pickups, but rather that it will calibrate the ordinary hours span under the Awards to a period which better accommodates working parents who, given the work finish time and the time taken to travel to a centre, are more likely to ‘miss’ a 6:30pm pick-up. Contrary to the submission of UV, the Applicants submit that the evidence in these proceedings supports the proposition that ‘late pick-up’ policies would change if the span of ordinary hours was extended.

4.2 The Rostering Claim

4.2.1 *Employer submission in support of the claim*

[204] The Applicants seek to amend clause 10.4(d) of the Children’s Services Award, the rostering clause, to provide employers with greater flexibility to change rosters other than with 7 days’ notice as follows:

10.4 Part-time employment

(d) (i) Changes in the agreed regular pattern of work may only be made by agreement in writing between the employer and employee. Changes in the days to be worked or in starting and/or finishing times (whether on-going or ad hoc) may also be made by agreement in writing.

(ii) Where agreement cannot be reached, the employer may change the days the employee is to work by giving seven days’ notice in advance of the change in accordance with clause 21— Ordinary hours of work and rostering.

(iii) The employer is not required to provide the full seven days’ notice in circumstances where:

(a) another employee has provided less than seven days’ notice of his/her inability to perform a rostered shift; and

(b) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee’s rostered hours so as to replace the absent employee.

(iv) The employer is relieved of the obligation to provide the full seven days’ notice of change of the days an employee is to work where an emergency outside of the employer’s control causes the employer to make the change. In this clause, emergency means any situation or event that poses an imminent or severe risk to the persons at an education and care service premises, or a situation that requires the education and care service premises to be locked-down.

[205] The Applicants also seek to vary clause 21.7(b) of the Children’s Services Award as follows:

21.7 Rostering

(a) An employer will post a legible roster at a place readily accessible to employees indicating the rostered hours of work.

(b) (i) An employer may change an employee's rostered hours, but only by giving the employee seven days' notice. In the absence of such notice overtime will be paid until seven days have elapsed from the date the notice was given. However, an employee and employer may agree to waive or shorten this notice period in a particular case. Such agreement must be recorded in writing and form part of the time and wages records.

(ii) The employer is not required to provide the full seven days' notice in circumstances where:

(a) another employee has provided less than seven days' notice of his/her inability to perform a rostered shift; and

(b) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee's rostered hours so as to replace the absent employee.

(iii) The employer is also relieved of the obligation to provide the full seven days' notice where an emergency outside of the employer's control causes the employer to make the change. In this clause, emergency means any situation or event that poses an imminent or severe risk to the persons at an education and care service premises, or a situation that requires the education and care service premises to be locked-down.

(iv) However, where an employee is required to stay beyond their rostered hours because a parent fails to arrive on time to collect a child, this will not be regarded as an emergency. In this circumstance, the employer must pay the employee at overtime rates for the additional time the employee remains at the workplace.

[206] The Applicants submit that the reason for advancing the claim at this time, is that:

(a) the current rostering clause in the Awards is not sustainable; and

(b) the rostering clause must be updated for the modern awards to be consistent with (or at the very least, considerate of) employee requests for flexibility, ECEC regulations and the practical application of the clause.

[207] In summary, the Applicants submit that the claim should be granted on the basis of:

- the unique rostering requirements which arise in Childcare;
- the unique rostering limitations which arise in Childcare; and
- the operation of the current award conditions and proposed variation.

[208] As to the unique rostering requirements in Childcare the Applicants submit that:

(a) Employees in the childcare industry are routinely unavailable at the last minute due to health and other personal reasons.

(b) Childcare employers are subject to complex regulations that impact their ability to roster employees including:

(i) staff:child ratios - depending on the age and number of children who attend the centre each day;

(ii) qualified teacher:child ratios - depending on the number of children who attend the centre each day;

- (iii) qualification requirements - to ensure at least 50% of the employees in the Centre on any given day are Diploma Qualified (the remaining employees must be at least Certificate III qualified), (collectively the Childcare Regulations).
- (c) Childcare employers are routinely required to replace employees in rosters in situations outside their control and which do not constitute an “emergency”. For example, unwell employees, unavailability, absenteeism and other personal reasons.
- (d) The Childcare Regulations mean that the replacement of an absent employee in a roster is required (as opposed to being optional in many other industries). Further, a replacement employee must have certain qualifications in order to comply with the Childcare Regulations.
- (e) The alternatives to replacing an absent employee in a childcare roster are to:
 - (i) act in breach of the Childcare Regulations with risks of incurring fines, losing a centre’s licence or accreditation status; or
 - (ii) call parents and ask them to pick-up their children from the centre (so the number of children in the centre decreases and as a result the centre returns to being compliant with the Childcare Regulations).

[209] The above propositions are expanded upon in Section 21 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.46 Do you contest the propositions set out [208] above, or any of the material set out in Section 21 of the ACA, ABI and NSWBC submission?

[210] As to the unique rostering limitations in Childcare, the Applicants submit that:

- (a) Generally speaking, using casual employees (or labour hire) to replace absent permanent employees in a roster is to be avoided as:
 - (i) casual employees do not provide ‘consistency of care’ as they are not familiar with the children which is not good for families, the children and the childcare employer’s quality standards;
 - (ii) the likelihood of having an available pool of casuals at short (or immediate) notice is rare;
 - (iii) due to lack of training and familiarity with the centre, casual employees are generally less capable.
- (b) It is preferable that permanent employees replace other employees when absent to ensure:
 - (i) ‘consistency of care’ is provided in accordance with quality standards outlined in the National laws; and
 - (ii) qualification requirements are met so that an employee with a Diploma replaces an employee with a Diploma

[211] The above propositions are expanded upon in Sections 22 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.47 Do you contest the propositions set out [210] above?

[212] As to the operation of the current award conditions and the proposed variation, the Applicants submit that:

- (a) Currently, the Children's Services Award requires the provision of 7 days notice for a change of roster. If notice is not provided or consent to waive notice is not given in writing, overtime is payable.
- (b) It is impractical for centres to provide 7 days notice of a change in roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).
- (c) While there is an ability for permanent employees to waive the 7 day notice requirement in writing and there is some evidence this occurs, the circumstances of this 'consent' appears to be informal (eg; a phone call).
- (d) The particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences and comply with ratio requirements without incurring overtime costs.

[213] The above propositions are expanded upon in Sections 23 of the ACA, ABI and NSWBC submission dated 15 March 2019.

Question for UV, the IEU and the Individuals

Q.48 Do you contest the propositions set out [212] above, or any of the material set out in Sections 23 of the ACA, ABI and NSWBC submission?

Modern awards objective

[214] The Applicants address the modern awards objective and the various s.134 considerations in Part F of the ACA, ABI and NSWBC submission of 15 March 2019. The Applicants contend that the Awards will provide a fair and relevant minimum safety net once varied in accordance with their claims.

[215] As to 'relative living standards and the needs of the low paid' (s.134(1)(a)), the Applicants contend that the particular conditions of the childcare industry warrant flexibility for childcare employers to vary the roster for permanent staff in order to accommodate unplanned absences.

[216] No submission is advanced about 'the need to encourage enterprise bargaining' (s.134(1)(b)) or the need to 'promote social/incusion through increased workforce participation' (s.134(1)(c)) in the context of the Rostering Claim.

[217] As to the need to ‘promote flexible modern work practices and the efficient and productive performance of work’ (s.134(1)(d)), the Applicants submit that (at [29] of their 15 March 2019 submission):

- Childcare employers are routinely required to replace employees in rosters in situations outside of their control and which do not constitute an ‘emergency’.
- It is impractical for centres to provide 7 days notice of a change of roster in circumstances where another employee has provided less than 7 days notice of his/her inability to perform a rostered shift and the employer must comply with Childcare Regulations (such as ratios).

[218] No submission is made about the need to ‘provide additional remuneration for employees working overtime and/or unsociable irregular or unpredictable hours’ (s.134(1)(da)) in the context of the Rostering Claim.

[219] It is submitted that the consideration at s.134(1)(e), ‘the principle of equal remuneration for work of equal or comparable value’, is not relevant to the Rostering Claim.

[220] As to the likely impact on ‘business, including on productivity, employment costs and regulatory burden’ (s.134(1)(f)), the Applicants submit that if the claim is granted then it is apparent on the evidence that childcare centres will ‘be able to practically accommodate absences from staff in a way consistent with a complex regulatory arrangements’.¹²³

[221] As to the need ‘to ensure a simple, easy to understand, stable and sustainable modern award system’ (s.134(1)(g)), the Applicants submit:

‘Given the primary purpose of the childcare industry is to provide a place for children to go while their parents are at work, a simple, easy to understand, stable and sustainable modern award system would include working conditions (and the working of ordinary hours) in the childcare industry which contemplated the fact that working parents need to collect their children following the cessation of their own ordinary hours. Currently, the span of ordinary hours in the Awards does not sufficiently contemplate this.

Further, the business and societal benefits associated with the ACA Claims (which have been addressed in the other limbs of the Modern Awards Objective) will indirectly lead to a sustainable modern award system in the longer term.

The Witness Statements outline that the current modern award system is not easy to understand and does not consider or accommodate the other Childcare Regulations that businesses must comply with. This is in part due to the current ordinary hours span and rostering conditions.’¹²⁴

Question for ACA, ABI and NSWBC

Q.49 What evidence supports the proposition that the current rostering clause is not easy to understand?

[222] As to the likely impact on ‘employment growth, inflation and the sustainability performance and competitiveness of the national economy’ (s.134(1)(h)), the Applicants contend that the ECEC sector is ‘a vital part of Australia’s services industry [and that it] ... supports every industry that has working parents wanting to put their children in care and has the power to get more women into work if they have access to childcare’.¹²⁵ It is submitted

that ‘flexible rostering arrangements that support parents who need to put their children in care last minute and enable services to provide quality care with appropriately regulated staff: child ratios’.¹²⁶

4.2.2 Reply submission of UV and IEU

[223] UV opposes the claim on the basis that it is unnecessary and does not meet the modern awards objective. It is submitted that the existing exceptions to the provision of 7 days notice (see cl 21.7(b)(i) and (ii)) are sufficient for employers to manage rostering issues and further exceptions are not required.

[224] UV submits that roster changes without adequate notice can be disruptive and can have ‘a significant impact on the ability of employees to attend to their family and caring responsibilities’.¹²⁷ Further, UV submits that employees in the ECEC sector generally try and accommodate roster changes where possible and that there is no evidence that employees routinely refuse roster changes for no reason.

[225] UV submits that both Claims are inconsistent with the modern awards objective:

- the variations will create difficulties for employees with caring responsibilities;
- the variations will reduce social inclusion and potentially reduce workforce participation in the sector;
- the effect of the variations will be to remove overtime penalties for hours worked between 6.30pm and 7.30pm and for late roster changes, which is inconsistent with s.134(1)(da);
- the claims would reduce the ‘family friendliness’ of these Awards and ‘could potentially result in increased employment costs if this results in employees leaving the sector, with employers required to rehire and retrain new employees’.¹²⁸
- the Awards already contain sufficient flexibility and the consideration in s.134(1)(g) does not support granting the Claims; and
- no evidence has been filed to support the Applicants’ contention that granting the Claims will boost employment, Australian performance and long term economic sustainability. The consideration in s.134(1)(h) does not support granting the Claims.

[226] The IEU also opposes the Claim and submits that what is sought, properly understood, is:

‘ the right to require its workforce – without any compensation – to be subject to having their ordinary hours of work mandatorily changed with no notice. Although this would only be in limited circumstances, on the ACA’s case these are matters which regularly and unpredictably arise. The proposed variation would in practice require these workers to be permanently on-call.’¹²⁹

[227] The IEU contends that if granted the claim would give permanent employees less control over their hours of work than casuals (who can be offered work at short or no notice, but are under no obligation to accept), who are compensated in part for the unpredictability of work.

[228] The IEU rejects the Applicants assertion that ECEC centres are uniquely vulnerable to staff absences, submitting that most if not all businesses require a minimum level of staff to be operational.

[229] The IEU also address the submission that ECEC workers are ‘routinely’ absent from work due to illness or other personal issues:

‘All national system employees are entitled to personal leave and bereavement leave. This is leave which is almost always taken at little to no notice: that is the nature of illness. The risk of an employee being absent at short notice for these reasons is universal; employers must take this into account when determining appropriate staffing levels. In other words, staffing at above-minimum levels is not ‘overstaffing’, as described by some ACA witnesses: it is appropriate staffing to manage these risks.

What in fact emerges from the ACA evidence is that the alleged difficulties these operators face is not through anything particularly unique to the early childhood industry, but instead as a result of them choosing to staff at levels which preserve minimum compliance with staffing ratios but do not or do not sufficiently take into account normal incidents of employment such as personal leave.’¹³⁰

[230] Further, the IEU submits that these ‘self-created problems’ can be managed in a multiplicity of ways including:

- by agreement with their employees;
- through the use of directly-engaged casual staff;
- alternatively, though the use of qualified agency casual staff; and
- through operators filling the gaps themselves.

[231] The IEU contends that the lack of merit in the claim is even clearer in respect of the Teachers Award:

‘The lack of merit in this claim is even clearer in respect of the Teachers Award, which requires significantly longer notice periods including at least four weeks notice for part-time employees (again, waivable by agreement). This reflects the different role played by teachers as opposed to educators, and in particular the need to plan a long-term educational program for each child rather than varying matters on a day to day basis.’¹³¹

[232] The IEU submits that the Applicants do not deal with these issues at all, but simply seek a general variation if its claim in respect of the Children’s Services Award is granted:

‘It is not sufficient for ACA to justify a major change to the conditions of teachers by simply saying it is justified for educators. No case at all has been made out in respect of the particular circumstances of early childhood teachers.

Accordingly, even if its claim in respect of the Children’s Services Award succeeds – which, for the reasons set out above, it should not – the Teachers Award cannot and should not be so varied.’¹³²

[233] Finally, the IEU submits (in respect of both the Ordinary Hours of Work Claim and the Rostering Claim) that the claims would cause serious detriment to already low paid

employees and, at its highest, the case is one of cost-saving for operators at the expense of their employees, and:

‘Tellingly, no financial information has been provided in support of the repeated claim that the current minimum award costs are ‘unsustainable’.’¹³³

4.2.3 Reply submission of ACA, ABI and NSWBC

[234] The Applicants do not contest that many ECEC employees are accommodating in assisting ECEC operators comply with the relevant regulations by voluntarily agreeing to vary their rosters within 7 days (or 4 weeks, depending on the Award) and submit that absent this accommodation the current award provisions in respect of rostering would be unworkable.

[235] The Applicants submit that:

‘In the submission of ACA/ABI, the maintenance of a fair and relevant minimum safety net should not solely rely on the accommodation of employees, just as it does not solely rely on the accommodation of employers. Contrary to the submission of UV, ACA/ABI submits that the current Awards oppressively burden ECEC employers in light of the complex requirements of the overarching legislation. ACA/ABI’s Rostering Claim aims only to ensure that ECEC employers are able to comply with overarching legislation within the context of the requirements of the Award, and does not seek to derive any ‘advantage’ from the variation, commercial or otherwise. The Rostering Claim does not seek to address any scenario other than when an employee has made themselves unavailable at short notice and the ECEC centre is otherwise unable to comply with the overarching legislative regime.’¹³⁴

[236] The Applicants reply to UV’s submissions regarding the modern awards objective at 2.61 to 2.70 of its Reply Submission of 29 April 2019.

[237] In relation to the IEU’s submission, the Applicants reject the IEU’s comparison of an ECEC centres’ rostering difficulties to those faced by a factory production line:

‘Such submission misunderstands the nature and complexity of the ratios required by the overarching legislation, including that the requisite staff composition is dependent on the numbers and characteristics of children on any particular day as well as the qualifications held by staff. This is not simply a ‘numbers game’, but a complex balance to be undertaken of children, qualifications and staff numbers.

It is also obvious to state that the consequences of a factory production line having the incorrect composition is not analogous to the consequences faced by an ECEC centre, which are:

- (a) acting in breach of the Childcare Regulations with risks of incurring fines, losing a centre’s licence or accreditation status or being ‘shut-down’; or
- (b) calling parents and asking them to pick-up their children from the centre (so the number of children in the centre decreases and as a result the centre returns to being compliant with the Childcare Regulations).

The similar analogy used by the IEU likening the staffing complexities of ECEC operators to those faced by ‘airplane operators’ is certainly novel. ACA/ABI submits that the operations of an airline does not in any meaningful sense compare to that of a childcare centre or preschool.

The IEU submission appears to blame ECEC operators for not staffing ECEC centre in excess of statutory requirements, thereby giving rise to a 'self-created' rostering 'problem'.

These submissions should be rejected outright. It cannot be seriously contended that the complex regulatory regime to which ECEC is subject to creates staffing complexities equivalent to the operation of a production line. Neither can it seriously be suggested that the 'answer' to the difficulties arising from this position is merely to increase staffing levels over and above the already onerous statutory requirements, particularly in circumstances where the cost of childcare is an issue of national importance.¹³⁵

[238] As to the application of the claim to the Teachers Award, the Applicants submit that it is 'entirely unworkable' for different ordinary hours or rostering arrangements to exist for employees subject to the Children's Services Award and the Teachers Award. For that reason the Applicants submit that the merit of their claims should be assessed equally against both awards.

5. Educational Services (Teachers) Award 2010

5.1 Employee characteristics

[239] Using a framework developed by Fair Work Commission staff¹³⁶ the *Educational Services (Teachers) Award 2010* is 'mapped' to the following industry classes:

- 8010 Preschool education;
- 8021 Primary education;
- 8022 Secondary education; and
- 8023 Combined primary and secondary education.

[240] The following information presents an employee profile of the Educational services (Teachers) industry from the Census. The most recent Census data is from August 2016. The Census is the only data source with information on employment for this industry. The August 2016 Census data show that there were around 560 000 employees in the Educational services (Teachers) industry. Table 4 compares characteristics of employees in this industry with employees in 'all industries'.

Table 9: Employee characteristics of Educational services (Teachers) industry, 2016

| | Educational services (Teachers) industry | | All industries | |
|---|---|-------|----------------|-------|
| | (No.) | (%) | (No.) | (%) |
| Gender | | | | |
| Male | 126 824 | 22.5 | 4 438 604 | 50.0 |
| Female | 435 627 | 77.5 | 4 443 125 | 50.0 |
| Total | 562 451 | 100.0 | 8 881 729 | 100.0 |
| Full-time/part-time status | | | | |
| Full-time | 312 077 | 58.2 | 5 543 862 | 65.8 |
| Part-time | 224 317 | 41.8 | 2 875 457 | 34.2 |
| Total | 536 394 | 100.0 | 8 419 319 | 100.0 |
| Highest year of school completed | | | | |
| Year 12 or equivalent | 464 070 | 83.1 | 5 985 652 | 68.1 |
| Year 11 or equivalent | 29 911 | 5.4 | 856 042 | 9.7 |
| Year 10 or equivalent | 55 520 | 9.9 | 1 533 302 | 17.4 |
| Year 9 or equivalent | 6072 | 1.1 | 273 180 | 3.1 |
| Year 8 or below | 2322 | 0.4 | 112 429 | 1.3 |
| Did not go to school | 349 | 0.1 | 26 356 | 0.3 |
| Total | 558 244 | 100.0 | 8 786 961 | 100.0 |
| Student status | | | | |
| Full-time student | 17 853 | 3.2 | 715 436 | 8.1 |
| Part-time student | 32 556 | 5.8 | 491 098 | 5.6 |
| Not attending | 508 910 | 91.0 | 7 618 177 | 86.3 |
| Total | 559 319 | 100.0 | 8 824 711 | 100.0 |
| Age (5 year groups) | | | | |
| 15–19 years | 7 704 | 1.4 | 518 263 | 5.8 |
| 20–24 years | 31 325 | 5.6 | 952 161 | 10.7 |
| 25–29 years | 55 940 | 9.9 | 1 096 276 | 12.3 |
| 30–34 years | 57 960 | 10.3 | 1 096 878 | 12.3 |
| 35–39 years | 60 862 | 10.8 | 972 092 | 10.9 |
| 40–44 years | 70 707 | 12.6 | 968 068 | 10.9 |
| 45–49 years | 75 343 | 13.4 | 947 187 | 10.7 |
| 50–54 years | 69 911 | 12.4 | 872 485 | 9.8 |
| 55–59 years | 67 882 | 12.1 | 740 822 | 8.3 |
| 60–64 years | 44 126 | 7.8 | 469 867 | 5.3 |
| 65 years and over | 20 677 | 3.7 | 247 628 | 2.8 |
| Total | 562 437 | 100.0 | 8 881 727 | 100.0 |
| Average age | 43.8 | | 39.3 | |
| Hours worked | | | | |
| 1–15 hours | 60 932 | 11.4 | 977 997 | 11.6 |
| 16–24 hours | 73 425 | 13.7 | 911 318 | 10.8 |
| 25–34 hours | 89 959 | 16.8 | 986 138 | 11.7 |
| 35–39 hours | 87 324 | 16.3 | 1 881 259 | 22.3 |
| 40 hours | 81 792 | 15.2 | 1 683 903 | 20.0 |
| 41–48 hours | 54 189 | 10.1 | 858 120 | 10.2 |
| 49 hours and over | 88 775 | 16.6 | 1 120 577 | 13.3 |
| Total | 536 396 | 100.0 | 8 419 312 | 100.0 |

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

Source: ABS, *Census of Population and Housing, 2016*.

[241] Table 9 shows that the profile of Educational services (Teachers) industry employees differs from the profile of employees in ‘All industries’ in five aspects:

- Educational services (Teachers) industry employees are predominately female (77.5 per cent, compared with 50.0 per cent of all employees);
- around four in ten (41.8 per cent) Educational services (Teachers) industry employees are employed on a part-time basis (i.e. less than 35 hours per week), compared with around one in three (34.2 per cent) of all employees;
- around three in ten (30.5 per cent) Educational services (Teachers) industry employees work 16–34 hours per week compared with only 22.5 per cent of all employees;
- over six in ten (62.0 per cent) Educational services (Teachers) industry employees are aged 40 years and over compared with less than half (47.8 per cent) of all employees; and
- over eight in ten (83.1 per cent) Educational services (Teachers) industry employees completed Year 12 or equivalent compared with 68.1 per cent of all employees.

5.2 Forms and conditions of employment

[242] Data from the Australian Bureau of Statistics (ABS) provides information on employee characteristics, forms and conditions of employment and a comparison of classifications with low-paid employment.

[243] There are 4 levels within the Australian and New Zealand Standard Industrial Classification (ANZSIC) structure: division, subdivision, group and class. The relevant division of ANZSIC for the *Educational Services (Teachers) Award 2010* is Division P: Education and training. The following presents all of the subdivisions, groups and classes within the Education and training industry:

- 80 Preschool and School Education
 - 801 Preschool education
 - 8010 Preschool Education
 - 802 School Education
 - 8021 Primary Education
 - 8022 Secondary Education
 - 8023 Combined Primary and Secondary Education
 - 8024 Special School Education
- 81 Tertiary Education

- 810 Tertiary Education
 - 8101 Technical and Vocational Education and Training
 - 8102 Higher Education
- 82 Adult, Community and Other Education
 - 821 Adult, Community and Other Education
 - 8211 Sports and Physical Recreation Instruction
 - 8212 Arts Education
 - 8219 Adult, Community and Other Education n.e.c.
 - 822 Educational Support Services
 - 8220 Educational Support Services

[244] Data on forms and conditions of employment are not available for the Educational services (Teachers) industry. The most readily available data are at the division level (or 1-digit level) and hence, data on the forms of employment are presented for the Education and training division.

[245] The ABS defines casual employees as employees without paid leave entitlements.¹³⁷ Just over three-quarters of workers in Education and training were employees with paid leave entitlements in February 2019, compared with 63.2 per cent in all industries (Table 5).

Table 10: Employed persons by status of employment in main job, February 2019

| | Education and training | | All industries |
|---|------------------------|--------------------------|--------------------------|
| | No. ('000s) | Percentage of employment | Percentage of employment |
| Employee | 921.9 | 92.0 | 83.3 |
| <i>With paid leave entitlements</i> | 764.1 | 76.3 | 63.2 |
| <i>Without paid leave entitlements</i> | 157.7 | 15.8 | 20.1 |
| Owner manager of enterprise with employees | 15.4 | 1.5 | 6.2 |
| Owner manager of enterprise without employees | 63.4 | 6.3 | 10.3 |
| Contributing family worker | 0.8 | 0.1 | 0.2 |
| Total | 1001.5 | 100.0 | 100.0 |

Note: All data are expressed in original terms.

Source: ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2019*, Catalogue No. 6291.0.55.003.

[246] Around 17 per cent of employees in Education and training were casual employees, lower than the all industries average (24.2 per cent). Both full-time and part-time employees in Education and training were more likely to be employed with paid leave entitlements. In contrast, part-time employees across all industries were more likely to be casual employees (Table 6).

Table 11: Employees with and without paid leave, February 2019

| | Full-time | | Part-time | | All employees | |
|------------------------|---------------------|------------------------|---------------------|------------------------|---------------------|------------------------|
| | With paid leave (%) | Without paid leave (%) | With paid leave (%) | Without paid leave (%) | With paid leave (%) | Without paid leave (%) |
| Education and training | 94.3 | 5.7 | 63.1 | 36.9 | 82.9 | 17.1 |
| All industries | 88.1 | 11.9 | 47.6 | 52.4 | 75.8 | 24.2 |

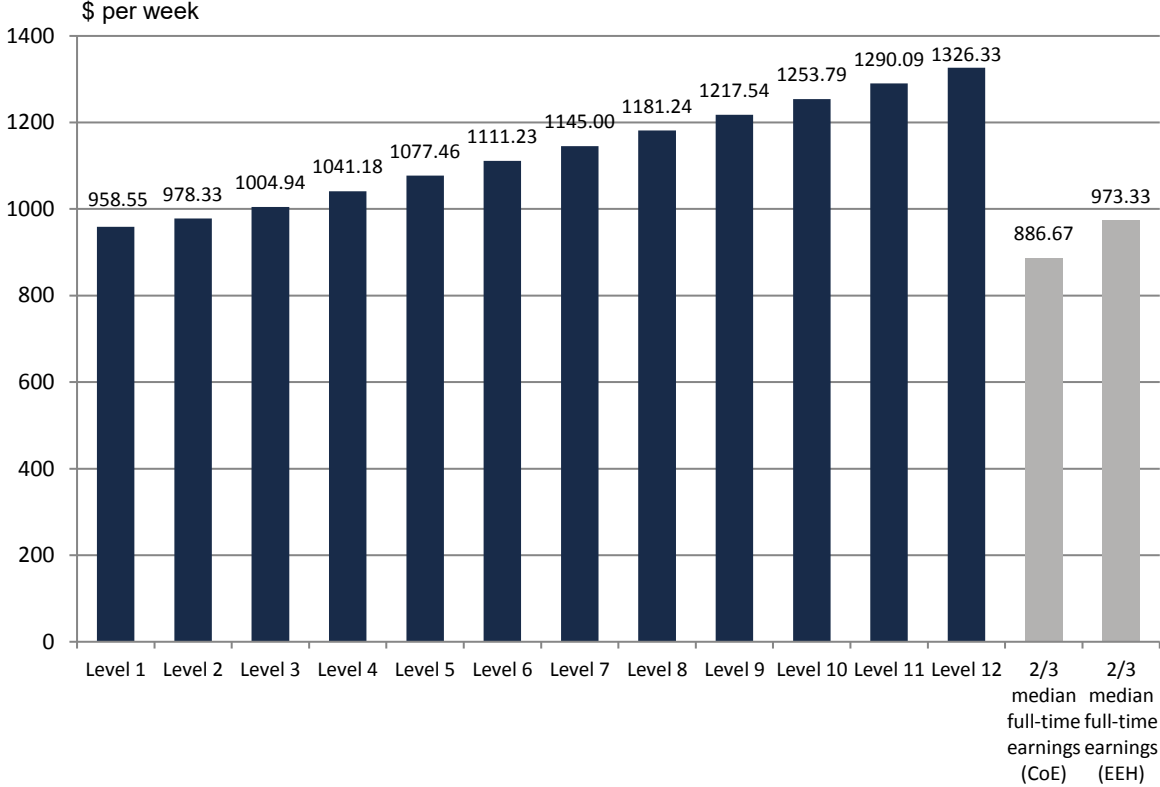
Source: ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2019*, Catalogue No. 6291.0.55.003.

5.3 Low-paid employees in the Educational Services (Teachers) Award 2010

[247] As mentioned earlier, a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’,¹³⁸ within the meaning of s.134(1)(a).

[248] The most recent data for median earnings is for August 2018 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. These are compared to the minimum weekly wages in the *Educational Services (Teachers) Award 2010* as determined in the *Annual Wage Review 2017–18*, effective 1 July 2018 (Chart 2).

Chart 2: Comparison of minimum full-time weekly wages in the *Educational Services (Teachers) Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time non-managerial employees paid at the adult rate. Weekly rate of pay for employees in the *Educational Services (Teachers) Award* is calculated by dividing the annual rate by 52.18.

Source: MA000077; ABS, *Characteristics of Employment, Australia, August 2018*, Catalogue No. 6333.0; ABS, *Employee Earnings and Hours, Australia, May 2018*, Catalogue No. 6306.0.

[249] The data show that all classifications were above the CoE measure of two-thirds of median full-time earnings. The full-time weekly wage for only one classification (Level 1) in the Teachers Award was below the EEH measure of two-thirds of median full-time earnings.

6. The Claims

6.1 UV Claims

6.1.1 Allowance claims

[250] As discussed earlier in section 3.1, UV and the Individuals seek to vary the Teachers Award by inserting an Educational Leadership allowance for employees with educational leadership responsibilities in early childhood education and care settings and a Responsible Person allowance for employees with educational leadership responsibilities in early childhood education and care settings. The submissions in respect of these claims are set out earlier.

6.1.2 *Non-contact time*

[251] UV also seek to amend clause B.3.2 of the Teachers Award. Schedule B of the Teachers Award is titled ‘*Hours of Work and Related Matters — Teachers employed in early childhood services operating for at least 48 weeks per year*’. The variation proposed is for teachers in early childhood services operating for at least 48 weeks per year to receive an increase in the non-contact period from two to four hours, as follows

B.3.2 **Non-contact time**

(a) Non-contact time will be provided for the purpose of planning, preparing, researching and programming activities. During non-contact time, an employee will not be required to teach or perform other duties directed by the employer.

(i) An employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children will be entitled to a minimum of ~~two~~ four hours non-contact time per week.

(ii) The educational leader will be entitled to additional non-contact time per week, according to the size of the centre, as follows:

| Centres with: | Additional non-contact time |
|------------------------|-----------------------------|
| No more than 39 places | 2 hours |
| 40-59 places | 3 hours |
| 60 and above places | 4 hours |

[252] The submissions in relation to this claim are set out earlier in section 3.2.

6.2 **Employer claims**

6.2.1 *The Ordinary Hours Claim*

[253] As noted earlier, ACA, ABI and NSWBC seek to vary the Teachers Award by amending the ordinary hours of work to allow ordinary hours to be worked before 6.00 am or after 6.30 pm. The submissions in relation to this claim are set out in section 4.1 above.

6.2.2 *The Rostering Claim*

[254] As noted earlier, ACA, ABI and NSWBC seek to amend the rostering clause in the Teachers Award to provide employers with greater flexibility to change rosters other than with 7 days’ notice.

[255] ACA, ABI and NSWBC propose to vary clause 10.4(d) as follows:

10.4 Part-time employment

(d) An employer cannot vary a part-time employee’s teaching load or days of attendance unless:

(i) the employee consents; or

(ii) where such a variation is required as a result of a change in funding, enrolment or curriculum, the employer provides seven weeks' notice in writing ~~in the case of a school teacher or four weeks' notice in the case of an early childhood teacher~~, or where the change would result in a reduction in salary, the salary of the teacher is maintained for a period of seven weeks ~~in the case of a school teacher or four weeks in the case of an early childhood teacher~~.

(e) An employer of a part time teacher employed in the children's services and early childhood education industry cannot vary an employee's teaching load or days of attendance unless:

(i) the employee consents and in circumstances consent cannot be obtained, the employer may change the days the employee is to work by giving seven days' notice in advance of the change or where another employee has provided less than seven days' notice of his/her inability to perform a rostered shift, the employer may instead give the same amount of notice as is provided by the employee or a reasonable amount of time so as to make the required change; or

(ii) where such a variation is required as a result of a change in funding, enrolment or curriculum, the employer provides four weeks' notice, or where the change would result in a reduction in salary, the salary of the teacher is maintained for a period of four weeks.

(iii) the change is necessary in order to comply with its statutory obligations in respect of maintaining staff to child ratios in the children's services and early childhood education industry; or

(iv) an emergency outside of the employer's control causes the employer to make the change. In this clause, emergency means any situation or event that poses an imminent or severe risk to the persons at the employer's premises; or a situation that requires the premises to be locked-down.

[256] The submissions in relation to this claim are set out in section 4.2.

6.3 Independent Education Union of Australia claims

6.3.1 Coverage Claim

(a) IEU Submission

[257] The IEU seek to vary the definition of "teacher" in the Teachers Award to ensure the award covers teachers in early childcare centres who are engaged as Directors. The following proposed variation to clause 3.1 as follows:

'teacher means a person employed as such by a school, children's service or early childhood education service and who performs duties which include delivering an educational program, assessing student participation in an education program, administering an education program and performing other duties incidental to the delivery of the education program. So as to remove any doubt, teacher includes a person with teaching qualifications appointed as a Director of an early childhood education service (whether or not that person directly performs day to day teaching activities), teacher in a senior leadership position, but not a principal or deputy principal.'

[258] The IEU also propose an amendment to B.1.10 of the Children’s Services Award:

‘A Director is an employee who holds a relevant Degree (other than a teaching qualification), or an AQF Advanced Diploma, or a Diploma in Children’s Services, or a Diploma in Out-of-Hours Care; or is otherwise a person possessing such experience, or holding such qualifications deemed by the employer or the relevant legislation to be appropriate or required for the position, and who is appointed as the director of a service.¹³⁹

[259] The IEU submits that the variations proposed are consistent with what it claims is the correct interpretation of the Teachers Award as it currently stands and are intended to address an ambiguity in the coverage of the award which has the potential to give rise to disputation.

[260] The IEU contends that all teacher qualified Directors are covered by the Teachers Award. The argument put relies on clauses 3.1 and 4.1 of the Teachers Award. Clause 4.1 (which deals with coverage) provides as follows:

‘This award, subject to clauses 4.2 to 4.6, covers employers throughout Australia in the school education industry, children’s services and early childhood education industry and their employees as defined in clause 3.1 to the exclusion of any other modern award.’

[261] Clause 3.1 currently defines ‘employee’ as follows:

‘**employee** means a person employed as a teacher in the school education industry or children’s services and early childhood education industry who is a national system employee within the meaning of the Act’

[262] Clause 3.1 currently defines ‘teacher’ as follows:

‘**teacher** means a person employed as such by a school, children’s service or early childhood education service and who performs duties which include delivering an educational program, assessing student participation in an education program, administering an education program and performing other duties incidental to the delivery of the education program. So as to remove any doubt, teacher includes a teacher in a senior leadership position, but not a principal or deputy principal’ (emphasis added).

[263] The IEU also contends that its construction is ‘bolstered’ by the pre-modern award history of regulation and the fact that teacher directors in preschools and childcare centres in NSW and ACT have historically been covered by the relevant award for teachers and that there is no indication in decisions leading to the modern award being made that the Commission had any intention of departing from this.¹⁴⁰

[264] In short, the IEU submits that a person employed as a Director by an early childhood centre who:

- has teaching qualifications;
- is engaged in a role which is centrally concerned with the administration of an educational program with ancillary tasks;
- uses the skills learned as part of obtaining that teaching qualification in the performance of the roles; and

- is, or can be, counted towards the services mandatory minimum number of employed teachers

is correctly considered as being ‘employed as a teacher’ within the meaning of clause 3.1 of the Teachers Award, giving those words their ordinary meaning.

[265] The IEU submit that early childhood centres are required to employ a certain number of qualified teachers and to have an employee appointed as Director whose responsibilities include the co-ordination of the centre’s educational program.¹⁴¹ The IEU submit that the evidence shows that, more often than not, the employee who is appointed Director is typically one of the qualified teachers employed by the service. They submit that the Director role may, or may not have direct teaching responsibilities, however, the skills used in the role flow from the individual’s teaching qualifications, therefore the individual is still working as a teacher.¹⁴²

[266] IEU submit that the teacher-qualified Directors are usually paid as teachers, however it submits that it is aware of some ‘isolated instances in for-profit, award-reliant child care centres where teacher qualified Directors are paid under the Children’s Services Award’ and therefore paid less.¹⁴³

[267] It is submitted that the proposed variation is necessary to achieve the modern awards objective,¹⁴⁴ and to make the award ‘simple’ and ‘easy to understand’ within the meaning of s.134(1)(g) of the Act.

(b) Coverage Claim: Reply submissions of ACA, ABI and NSWBC, AFEI and UV

[268] UV oppose the IEU’s claim to vary the definition of teacher and submit that directors of early childhood services with a teaching degree may be covered by either the Children’s Services Award or the Teachers Award depending on the duties performed by the employee. UV submits (at [114] of its Submission in Reply):

‘A teachers is a person employed to deliver, assess and implement an educational program. Such an employee is properly classified under the Teachers Award. A Director who is not delivering, assessing and implementing an educational program is not a teacher, and is properly classified under the Children’s Services Award. Alternatively, a Director who performs a significant teaching role as part of their duties should be classified under the Teachers Award.’

[269] UV note that clause B.1.10 of the Children’s Services Award recognises that directors may hold a relevant degree, including a ‘3 or 4 year *Early Childhood Education qualification*’ and that clause 15 of the Teachers Award provides a specific allowance for early childhood/preschool teachers who are appointed as directors.

[270] ACA, ABI and NSWBC oppose the claim and submit that the variation proposed is a substantive variation that would have the result of:

- inappropriately favouring teaching degrees over any other qualification Directors of childcare centres may hold (for example, accounting degrees or Diplomas of childcare);

- not considering the benefits of other qualifications;
- not understanding the nature and requirements of a Director of a childcare centre; and
- increasing the minimum wages of Directors of childcare who are already remunerated in accordance with the highest level of the Children’s Services Award (level 6) and a Directors Allowance.

[271] ACA, ABI and NSWBC submit (at 12.4 of their Reply Submissions of 16 April 2019) that:

‘it is clear when an employee has a teaching degree and uses that to deliver an educational program that employee is remunerated in accordance with the Teachers Award. However if an employee has a teaching degree but is performing the role of Director (e.g.; overall operations of the centre) they should be remunerated in accordance with the Children’s Services Award.’

[272] AFEI oppose the claim and submit that the evidence filed by the IEU is too limited for the Commission to assess the potential implication of such a significant variation for the industry [and that] ‘the IEU has not demonstrated that it is necessary to disturb the current award coverage of Directors.’¹⁴⁵ Further, AFEI contend that the variation would mean that a Director who holds a teaching qualification (irrespective of whether it is utilised in connection with the Director’s employment or whether the director has or intends to maintain teaching accreditation) could no longer be covered by the Children’s Services Award.

Question for the IEU

Q.50 The IEU is asked to respond to AFEI’s characterisation of the effect of the proposed variation (at [272] above).

(c) Reply submission of IEU

[273] In their submission in reply filed on 26 April 2019, the IEU state that both AFEI and ACA, ABI and NSWBC misstate the nature of the IEU’s claim in that it is not a change in the coverage of either award but a clarification of the current coverage scheme.¹⁴⁶

6.3.2 Minimum Engagement Claim

(a) IEU Submission

[274] The IEU proposes to vary Clause 14.5 of the Teachers Award to correct what is said to be an ambiguity.

[275] Clause 14.5 of the Teachers Award, with the proposed variations highlighted, provides as follows:

‘14.5 Casual employee

(a) The salary payable to a casual employee will be:

- (i) no higher than the salary at Level 8 in clause 14.1 where the employee is engaged for less than five consecutive days; or

(ii) where the employee is engaged for five or more consecutive days the salary will be the appropriate salary for the classification as specified in clause 13 — Classifications;

calculated in accordance with the table below:

| | |
|--------------------|--|
| Full day | Weekly rate calculated in accordance with clause 14.3 divided by 5 plus 25% |
| Half day | Weekly rate calculated in accordance with clause 14.3 divided by 10 plus 25% |
| Quarter day | Weekly rate calculated in accordance with clause 14.3 divided by 20 plus 25% |

(b) Provided that:

(i) a casual employee in a school will be paid for a minimum of half a day; where a day is the usual required attendance time for an employee at that school and a half day is half the usual required attendance time, and the employee is only required to attend for up to a half day; and

(ii) a casual employee in a children's service or early childhood education service may be paid for a minimum of a quarter day, where a day is the usual required attendance time for an employee at that service and a quarter day is half the usual required attendance time at that service, and the employee is only required to attend for up to a quarter day.

(iii) For the avoidance of doubt, an employee who is required to attend for a period of time between a quarter day and a half day will be paid a half day, and between a half day and a full day a full day.

[276] The IEU submits that it is aware that on some occasions (albeit very rarely) award-reliant children's and early childhood education service operators pay casual employees for only a quarter of a day when they work between a quarter and a half a day. The IEU contends that this is an unsustainable interpretation, for the following reasons:

- (i) It is inherently unlikely, in that it countenances employees being required to work for free.
- (ii) The alternative interpretation ignores the word 'minimum.' The clause provides that, regardless of how long they work, an employee must be paid *at least* for a quarter-day, not that work done between the first and second quarter of a day will be unremunerated.
- (iii) The second part of (b)(i) is concerned with actual required attendance time. Given the definitional table already at (a), this only has work to do if it is linking the payment to be made to the attendance required. In other words, a casual employee in a school will be paid a half day *in circumstances where they are only required to work half a day*.

[277] The IEU submit that correcting the ambiguity is necessary to achieve the modern awards objective.¹⁴⁷

[278] UV supports the IEU's claim to vary clause 14.5(b)(ii) of the award.

(b) Minimum Engagement Claim: Reply submissions of ACA, ABI and NSWBC and AFEI

[279] ACA, ABI and NSWBC submit that the variations to the minimum engagement clause proposed by the IEU are ‘unnecessary and should not be made.’¹⁴⁸ It submits that the current minimum engagement clause in the Teachers Award is complex, but self-explanatory.

[280] ACA, ABI and NSWBC submit that the evidence filed by the IEU in support of the claim is insufficient to warrant a change to the award on this basis that there is some ambiguity. Further, the evidence provided by ACA, ABI and NSWBC suggests that many ECEC employers do not engage casual teachers and those that do are aware of clause 14.5 and how to correctly calculate a quarter day/half day for a casual under the award.

[281] AFEI submit that the claim should be rejected:¹⁴⁹

‘The proposed variation is not fair, as it would result in an unwarranted payment for time not worked, and is not necessary. The Commission has not been provided any probative evidence which would demonstrate that the clause is necessary to achieve the modern award objectives.’

(c) Reply submission of IEU

[282] In its submission in reply dated 26 April 2019, the IEU submits that AFEI does not explain how it is said to be fair for an employee to be required to work for free and nor does it put forward any alternative interpretation of the current clause. The IEU contends that the variation proposed should be made given that:

- there is no apparent dispute that the correct interpretation of the clause is in accordance with the IEU’s proposed drafting;
- the IEU, the major union in the sector, states that it is from time to time causing uncertainty and disputation, and has filed evidence in support of this; and
- there is no suggestions that there will be any adverse impact on any employer (aside from those who are not currently complying with the Award).

Questions for ACA, ABI and NSWBC and AFEI

Q.51 Do the Employers contest the IEU’s interpretation of clause 14.5 and, if so, what do they contend is the correct interpretation of the clause?

Q.52 Do the Employers dispute the proposition that the correct interpretation of the clause is in accordance with the IEU’s proposed drafting?

(d) Additional Issue

[283] Clause 14.5(a) states, relevantly:

‘Casual employee

- (a) The salary payable to a casual employee will be:

- (i) no higher than the salary at Level 8 in clause 14.1 where the employee is engaged for less than five consecutive days; or
- (ii) where the employee is engaged for five or more consecutive days the salary will be the appropriate salary for the classification as specified in clause 13-Classifications.

calculated in accordance with the table below: ...'

Questions for all parties

Q.53 Clause 14.5(a) appears to place a cap on the salary payable to a casual employee who is engaged for less than five consecutive days:

- (i) *What is the parties' understanding of how this cap operates?*
- (ii) *What is the rationale for the imposition of such a 'cap'?*
- (iii) *What is the history of this provision and, in particular, has the 'cap' been the subject of an arbitral determination.*

APPENDIX 1—List of submissions

| Party/witness | Submissions |
|--|---|
| <i>Submissions and witness evidence in response to the Directions issued on 11 December 2019</i> | |
| UV | Submission – 15 March 2019 |
| IEU | Submission – 18 March 2019 |
| I and E Arrabalde | Submission – 15 March 2019 |
| ACA, ABI and NSW BC | Submission – 15 March 2019 |
| Australian Children’s Education and Care Quality Authority | Submission – 15 March 2019 |
| <i>Submissions in Reply</i> | |
| ACA, ABI and the NSW BC | Submission in Reply – 16 April 2019 and 29 April 2019 |
| UV | Submission in Reply – 15 April 2019 and 29 April 2019 |
| IEU | Submission in Reply – 15 April 2019 and 29 April 2019 |
| AFEI | Submission in Reply – 17 April 2019 |
| I and E Arrabalde | Submission in Reply – 29 April 2019 |

| Party/witness | Submissions |
|------------------------|---|
| <i>Findings sought</i> | |
| ACA, ABI and NSWBC | <u>Submission – findings sought dated 29 May 2019</u> |
| UV | <u>Submission – findings sought dated 29 May 2019</u> |
| IEU | <u>Submission – findings sought dated 29 May 2019</u> |
| I and E Arrabalde | <u>Submission – findings sought dated 29 May 2019</u> |
| AFEI | <u>Reply Submission – findings sought dated 2 June 2019</u> |

APPENDIX 2—List of the witness evidence

| Party/witness | Exhibit no. | Transcript reference | Notes |
|---|-------------------|----------------------|----------------------------|
| Australian Childcare Alliance, Australian Business Industrial and New South Wales Business Chamber | | | |
| Kathika Viknarash | ACA 13 | PN971-PN1381 | |
| Jae Dean Fraser | ACA 18 | PN1553-PN2028 | |
| Katy Paton | ACA 21 | PN2042-PN2401 | |
| Pam Avril Maclean | ACA 25 | PN2434-PN2625 | |
| Ann Marie Chemello | ACA 27 | PN2641-PN2849 | |
| Kristen McPhail | ACA 28 | PN2863-PN3135 | |
| Kylie Ann Brannelly | ACA 34 | PN3401-PN3522 | |
| Sarah Elizabeth Tullberg | ACA 35 | PN3527-PN3750 | |
| Kerry Joseph Mahony | ACA 38 | PN3893-PN4042 | |
| Nicole Louise Llewellyn | ACA 39 | PN4081-PN4388 | |
| Alexandra Hands | ACA 43 | PN4540-PN4836 | |
| Gary Carroll* | | | Withdrawn from proceedings |
| Katie Ann Gibbs | | | Withdrawn from proceedings |
| Kristel Smylie | | | Withdrawn from proceedings |
| Melinda Ackerman | | | Withdrawn from proceedings |
| Julie Ann White | | | Withdrawn from proceedings |
| Alison Wharton | | | Withdrawn from proceedings |
| Rosina Maree Smith | | | Withdrawn from proceedings |
| Independent Education Union | | | |
| Lindy Farrant | IEU31 | PN3210-PN3372 | |
| Lisa James | IEU 32; IEU 33 | PN3374-PN3379 | |
| Julie Frend | IEU 37 | PN3767-PN3874 | |
| Ana Mravunac | IEU 41; IEU 42 | PN4394-PN4533 | |
| United Voice | | | |
| Bronwen Hennessy | IEU 6; IEU 7 | PN186-PN358 | |
| Pixie Bea | IEU 8; IEU 9 | PN365-PN495 | |
| Dr Marianne Fenech | IEU 10 | PN499-PN686 | |
| Alicia Wade | IEU 11; IEU 12 | PN705-PN964 | |
| Preston Warner | IEU 17 | PN1455-PN1542 | |
| Individuals: Elizabeth and Isabelle Arrabalde | | | |
| Elizabeth Arrabalde | 14; 15 | PN1382-PN1424 | |

* Subject of confidentiality order.

APPENDIX 3—List of exhibits

| Exhibit no. | Date tendered | Tendered by | Description |
|-------------|---------------|-------------|--|
| 1. | 6 May 2019 | UV | ACECQA – Guide to the National Quality Framework, last updated October 2018 (filed 15 March 2019) |
| 2. | 6 May 2019 | UV | ACECQA – National Quality Standard: Information Sheet, The role of educational leader, April 2018 (filed 15 March 2019) |
| 3. | 6 May 2019 | UV | ACECQA – National Quality Standard: Information Sheet, Responsible person requirements for approved providers from 1 Oct 2017, 30 August 2017 (filed 15 March 2019) |
| 4. | 6 May 2019 | UV | Department of Education and Training (for COAG), Belonging, Being and Becoming The Early Years Learning Framework for Australia (filed 15 March 2019) |
| 5. | 6 May 2019 | UV | ACECQA – The Educational Leader Resource (filed 29 April 2019) |
| 6. | 6 May 2019 | UV | First Statement of Ms Bronwen Hennessy dated 11 March 2019 |
| 7. | 6 May 2019 | UV | Supplementary Statement of Ms Bronwen Hennessy dated 10 April 2019 |
| 8. | 6 May 2019 | UV | First Statement of Ms Pixie Bea dated 4 March 2019 (correction to annexure B – replace with “YWCA Canberra Enterprise Agreement 2014-2017”) |
| 9. | 6 May 2019 | UV | Supplementary Statement of Ms Pixie Bea dated 11 March 2019 (correction to paragraph 8 – “husband” to “partner”) |
| 10. | 6 May 2019 | UV | Statement of Dr Marianne Fenech dated 14 March 2019 |
| 11. | 6 May 2019 | UV | Statement of Ms Alicia Ann Wade dated 8 March 2019 |
| 12. | 6 May 2019 | UV | Supplementary Statement of Ms Alicia Ann Wade dated 12 April 2019 |
| 13. | 6 May 2019 | Employers | Statement of Ms Karthika Viknarasah dated 11 April 2019 |
| 14. | 6 May 2019 | UV | Submissions of Isabelle and Elizabeth Arrabalde dated 14 March 2019 |
| 15. | 6 May 2019 | UV | Reply submissions of Isabelle and Elizabeth Arrabalde dated 26 April 2019 |
| 16. | 7 May 2019 | IEU | Choice Preschool Roster |
| 17. | 7 May 2019 | UV | Statement of Ms Preston Warner dated 8 March 2019 |
| 18. | 7 May 2019 | Employers | Statement of Mr Jae Dean Fraser dated 15 April 2019 with corrections to paragraph 23 (“6 centres” not “5 centres”) and to paragraph 135 (“some Directors have had teaching degrees” to replace “some of my Directors have teaching degrees”) |
| 19. | 7 May 2019 | IEU | Seek job advertisement dated 1 April 2019 |

| Exhibit no. | Date tendered | Tendered by | Description |
|--------------------|----------------------|--------------------|--|
| 20. | 7 May 2019 | IEU | Little Scholars – Position Description |
| 21. | 7 May 2019 | Employers | Statement of Ms Katy Paton dated 14 March 2019 |
| 22. | 7 May 2019 | IEU | Employment contract of Amy Shore |
| 23. | 7 May 2019 | IEU | Employment contract of Penny Muller |
| 24. | 7 May 2019 | UV | ACECQA National Quality Standard Assessment and Rating Report for Eastwood Early Education Pty Ltd dated 3 August 2018 |
| 25. | 7 May 2019 | Employers | Statement of Mrs Pamela Avril Maclean dated 15 April 2019 |
| 26. | 7 May 2019 | IEU | Roster/Signing sheet for period 19 to 30 March 2018 |
| 27. | 7 May 2019 | Employers | Statement of Ms Ann Marie Chemello dated 1 March 2019 (with corrections to table contained in paragraph 23) |
| 28. | 7 May 2019 | Employers | Statement of Ms Kristen Carol McPhail dated 12 April 2019 with corrections to paragraph 14 (“2001” not “2002”), paragraph 51 (delete “pre-“ from “pre-kindergarten” in the last row), paragraph 100 (“First Aid certificates must be updated every three years, whereas emergency Asthma and Anaphylaxis must be updated every year.” To “First Aid certificates should be updated every three years, whereas CPR should be updated every year.”) and paragraph 117 (delete “not” from the second sentence). |
| 29. | 7 May 2019 | IEU | Screenshot of text message chain in Pachamama Relief group |
| 30. | 7 May 2019 | UV | ACECQA National Quality Standard Assessment and Rating Report for Pachamama Early Education and Childcare dated 21 May 2018 |
| 31. | 8 May 2019 | IEU | Statement of Ms Lindy Jane Farrant dated 14 March 2019 with correction to paragraph 26 |
| 32. | 8 May 2019 | IEU | Statement of Ms Lisa James dated 15 March 2019 |
| 33. | 8 May 2019 | IEU | Statement in reply of Ms Lisa James dated 15 April 2019 |
| 34. | 8 May 2019 | Employers | Statement of Ms Kylie-Anne Brannelly dated 15 April 2019 with correction to paragraph 29 given in evidence in chief |
| 35. | 8 May 2019 | Employers | Statement of Ms Sarah Elizabeth Tullberg dated 9 April 2019 with correction to paragraph 103 (delete “Wallaby”, should just read “Knox Centre” only) |
| 36. | 8 May 2019 | IEU | Survey results from Knox and Wallaby Childcare Centres |
| 37. | 8 May 2019 | IEU | Statement of Ms Julie Frend dated 15 March 2019 |
| 38. | 8 May 2019 | Employers | Statement of Mr Kerry Joseph Mahony dated 11 April 2019 |
| 39. | 9 May 2019 | Employers | Statement of Ms Nicole Louise Llewellyn dated 9 April 2019 with addition to paragraph 73 (add “73. Although I try to have my management team as a |

| Exhibit no. | Date tendered | Tendered by | Description |
|--------------------|----------------------|--------------------|---|
| | | | backup, if my staff are unavailable it...”) |
| 40. | 9 May 2019 | IEU | Financial report of Llewie Pty Ltd |
| 41. | 9 May 2019 | IEU | Statement of Ms Ana Mravunac 15 March 2019 |
| 42. | 9 May 2019 | IEU | Statement of Ms Ana Mravunac in reply dated 29 April 2019 with corrections (remove first sentence in paragraphs 5, 6 and 9, remove first and third sentences in paragraph 7 and the terms “once again”, and remove paragraph 8 in its entirety) |
| 43. | 9 May 2019 | Employers | Statement of Ms Alexandra Hands dated 12 March 2019 |

APPENDIX 4—ACECQA Information sheet ‘the role of the educational leader’

National Quality Standard | Information sheet



QUALITY AREA 7

THE ROLE OF THE EDUCATIONAL LEADER



The educational leader has an influential role in promoting positive outcomes for children and families. Effective educational leadership builds the capacity of educators by inspiring, motivating, affirming, challenging and extending their practice and pedagogy. This joint endeavour involves inquiry and reflection, and supports ongoing learning and professional development.

Things to consider:

- Is the educational leader role at the service clearly defined?
- How is the approved provider supporting the educational leader?
- What strategies is the educational leader using to support educators to implement the assessment and planning cycle?
- How are educators mentored?
- How are you creating and nurturing a professional learning community?

LINKS TO THE NATIONAL QUALITY STANDARD

The importance of educational leadership is reflected in Quality Area 7 of the National Quality Standard (NQS), in particular:

Standard 7.2: Effective leadership builds and promotes a positive organisational culture and professional learning community.

Element 7.2.2: The educational leader is supported and leads the development and implementation of the educational program and assessment and planning cycle.

Educational leadership is also integral to the outcomes of Quality Area 1:

Standard 1.1: The educational program enhances each child's learning and development.

Standard 1.2: Educators facilitate and extend each child's learning and development.

Standard 1.3: Educators and co-ordinators take a planned and reflective approach to implementing the program for each child.

LEGISLATIVE REQUIREMENTS

Education and Care Services National Regulations

Regulation 118: requires the approved provider to designate, in writing, a suitably qualified and experienced educator, coordinator or other individual as educational leader at the service to lead the development and implementation of educational programs in the service.

Regulation 148: requires the staff record includes the name of the person designated as the educational leader in accordance with Regulation 118.

“...studies show that leadership can positively impact on the quality of the centre as a workplace, the quality of the education provided and the developmental outcomes achieved by children over time.”

Waniganayake et al. (2017)

Quality Area 7 | The role of the educational leader

APPENDIX 5—ACECQA Information sheet ‘Responsible Person Requirements for Approved Providers’



Australian Children's
Education & Care
Quality Authority

The Australian, state and territory education Ministers have agreed to changes to the National Quality Framework (NQF).

This information sheet explains changes and continuing requirements around responsible persons at a service. It also explains the removal of supervisor certificate provisions.

WHEN DO THE CHANGES START?

Most changes will commence 1 October 2017 in all states and territories (except Western Australia which will commence by 1 October 2018).

The revised National Quality Standard (NQS) and some related changes will commence 1 February 2018.

WHERE CAN I GET FURTHER INFORMATION?

Visit acecqa.gov.au/nqf-changes
Visit your regulatory authority website acecqa.gov.au/contact-your-regulatory-authority

National Quality Framework | Information sheet

RESPONSIBLE PERSON REQUIREMENTS FOR APPROVED PROVIDERS

FROM 1 OCT 2017*

*In all states and territories except Western Australia which will commence by 1 Oct 2018

Approved providers must continue to ensure that a responsible person is present at a centre-based service at all times that the service is educating and caring for children (see page 3 for family day care requirements).

Removing supervisor certificates

On 1 October 2017, certified supervisors and supervisor certificates will be removed from the National Law, to reduce red tape for approved providers.

Supervisor certificates continue in Western Australia until these changes are introduced by 1 October 2018.

From 1 October 2017, approved providers will have more autonomy to decide who can be the responsible person in each service.

A responsible person continues to be:

- the approved provider or a person with management or control
- a nominated supervisor
- a person in day-to-day charge of the service.

Appointing a nominated supervisor

Approved providers must continue to nominate a nominated supervisor and, from 1 October 2017, can appoint one or more individuals to be nominated supervisors at the service. The nominated person must give written consent.

You must display the name of each nominated supervisor so that it is visible from the service's main entrance.

Current nominated supervisors, who have previously consented to the role, can continue in this role from 1 October if you consider they continue to be suitable.

Revised minimum requirements for nominated supervisors

From 1 October, approved providers must determine if a person is suitable to be a nominated supervisor before nominating the person. It is important that the approved provider record this information, with sufficient evidence, and keep it on file to demonstrate compliance to the Regulatory Authority. This will help to show that you have taken reasonable steps to comply with your obligations under the National Law.

APPENDIX 6 – classification structure

All employees will be classified by the employer into one of the levels contained in this Schedule in accordance with the employee's skills, responsibilities, qualifications, experience in the industry and duties.

Progression within a level is subject to the provisions of clause 14.2.

Employees moving from one classification level to another will commence on the 1st year of service rate of the higher level.

A.2 Children's Services Employees (CSE)

A.2.1 Level 1

This is an employee who has no formal qualifications but is able to perform work within the scope of this level. The employee will work under direct supervision in a team environment and will receive guidance and direction at all times. The employee will receive structured and regular on-the-job training to perform the duties expected at this level. Normally an employee at this level will not be left alone with a group of children.

(b) Indicative duties

- Learning and implementing the policies, procedures and routines of the service.
- Learning how to establish relationships and interact with children.
- Learning the basic skills required to work in this environment with children.
- Giving each child individual attention and comfort as required.
- Basic duties including food preparation, cleaning and gardening.

(c) Progression

A Level 1 employee will progress to the next level after a period of one year or earlier if the employer considers the employee capable of performing the work at the next level or if the employee actually performs work at the next level.

A.2.2 Level 2

This is an employee who has completed 12 months in Level 1, or a relevant AQF Certificate II, or in the opinion of the employer has sufficient knowledge and experience to perform the work within the scope of this level. An employee at this level has limited knowledge and experience in children's services and is expected to take limited responsibility for their own work.

Indicative duties

- Assist in the implementation of the children's program under supervision.
- Assist in the implementation of daily care routines.

- Develop awareness of and assist in maintenance of the health and safety of the children in care.
- Give each child individual attention and comfort as required.
- Understand and work according to the centre or service's policies and procedures.
- Demonstrate knowledge of hygienic handling of food and equipment.

A.2.3 Level 3A

Such an employee would be an 'E' Worker as previously classified under the *Child Care (Long Day Care) WA Award 2005* as CSE Level 2.

A.2.4 Level 3

This is an employee who has completed AQF Certificate III in Children's Services or an equivalent qualification or, alternatively, this employee will possess, in the opinion of the employer, sufficient knowledge or experience to perform the duties at this level. An employee appointed at this level will also undertake the same duties and perform the same tasks as a CSE Level 2.

(b) Indicative duties

- Assist in the preparation, implementation and evaluation of developmentally appropriate programs for individual children or groups.
- Record observations of individual children or groups for program planning purposes for qualified staff.
- Under direction, work with individual children with particular needs.
- Assist in the direction of untrained staff.
- Undertake and implement the requirements of quality assurance.
- Work in accordance with food safety regulations.

(c) Progression

Subject to this award, an employee at this level is entitled to progression to Level 3.3. An employee at this level who has completed an AQF Diploma in Children's Services or equivalent, and who demonstrates the application of skills and knowledge acquired beyond the competencies required for AQF Certificate III in the ongoing performance of their work, must be paid no less than the rate prescribed for Level 3.4. Such an employee would also include an 'E' Worker as previously classified under the *Child Care (Long Day Care) WA Award 2005* as a CSE Level 3.

Any dispute concerning an employee's entitlement to be paid at Level 3.4 may be dealt with in accordance with clause 9–Dispute resolution, which may require the employee to demonstrate that they utilise skills and knowledge above those prescribed for Level 3 but below those prescribed for Level 4.

A.2.5 Level 4A

This is an employee who has not obtained the qualifications required for a Level 4 employee who performs the same duties as a Level 4 employee.

A.2.6 Level 4

This is an employee who has completed a Diploma in Children's Services or equivalent (e.g. Certificate IV in Out of School Hours Care) as recognised by licensing authorities and is appointed as the person in charge of a group of children in the age range from birth to 12 years or an employee who is appointed as an Authorised Supervisor (as defined in the *Children and Young Persons (Care and Protection) Act 1998* (NSW)).

An employee at this level will also take on the same duties and perform the same tasks as a CSE Level 3.

Indicative duties

- Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups.
- Responsible to the Assistant Director/Director for the supervision of students on placement.
- Responsible for ensuring a safe environment is maintained for both staff and children.
- Responsible for ensuring that records are maintained accurately for each child in their care.
- Develop, implement and evaluate daily care routines.
- Ensure that the centre or service's policies and procedures are adhered to.
- Liaise with families.

A.2.7 Level 5A

This is an employee who has not obtained the qualification required for a Level 5 employee who performs the same duties as a Level 5 employee.

A.2.8 Level 5

This is an employee who has completed an AQF Level V Diploma in Children's Services or equivalent and is appointed as:

- an Assistant Director of a service;
- a Children's Services Co-ordinator;
- a Family Day Care Co-ordinator;
- a Family Day Care Trainee Supervisor; or

- a School Age Care Co-ordinator.

An **Assistant Director** will also take on the same duties and perform the same tasks as a CSE Level 4.

Indicative duties

- Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs.
- Contribute, through the Director, to the development of the centre or service’s policies.
- Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training.
- Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues.
- Generally supervise all employees within the service.

(b) A **Children’s Service Co-ordinator** undertakes additional responsibilities including:

- co-ordinating the activities of more than one group;
- supervising staff, trainees and students on placement; and
- assisting in administrative functions.

[B.1.8(b) varied by [PR530861](#) ppc 02Nov12]

(c) A **Family Day Care Co-ordinator** undertakes the following indicative duties:

- arranges, administers and monitors a number of Family Day Care placements;
- responsible for the direction, supervision and training of a number of family based childcare workers;
- implements licensing regulations and accreditation requirements for family day care;
- assists in recruiting and approving the registration of family based childcare workers in accordance with the scheme’s policies and licensing regulations;
- documents, interprets and uses information about children;
- assists family based childcare workers to develop care routines for children;
- communicates effectively with family based childcare workers, children, parents and families;
- applies well-developed theoretical knowledge to the care situations with respect to cultural diversity, gender issues and scheme philosophy;

- responsible for the quality of their own work and the work of others; and
- ensures that records are maintained and up to date.

[B.1.8(c) varied by [PR530861](#) ppc 02Nov12]

(d) A **Family Day Care Trainee Supervisor** undertakes the following indicative duties:

- provides support and guidance to family based childcare workers undertaking the AQF Certificate III Traineeship;
- undertakes supervision visits for the purpose of on-the-job workplace assessment;
- organises training assistance such as additional resources, in-service sessions and study groups as required; and
- contributes to the development of the scheme's policies.

[B.1.8(d) varied by [PR530861](#) ppc 02Nov12]

(e) An **unqualified Co-ordinator** who co-ordinates and manages a stand alone out-of-school hours care and/or vacation care centre may undertake the following:

- develop and/or oversee programs and ensure they offer a balance of flexibility, variety, safety and fun;
- supervise the programs/activities and ensure each staff member is fulfilling their relevant duties and responsibilities;
- carry out administrative tasks including fee collection and receipting, banking, staff pay, etc;
- administer first aid when appropriate and ensure that injured children receive appropriate medical attention;
- work positively with parents and/or committees; and
- understand and work in accordance with the centre or service's policies.

A.2.9 Level 6A

This is an employee who has not obtained the qualification required for a Level 6 employee who performs the same duties as a Level 6 employee.

A.2.10 Level 6—Director

A Director is an employee who holds a relevant Degree or a 3 or 4 year Early Childhood Education qualification, or an AQF Advanced Diploma, or a Diploma in Children's Services, or a Diploma in Out-of-Hours Care; or is otherwise a person possessing such experience, or holding such qualifications deemed by the employer or the relevant legislation to be appropriate or required for the position, and who is appointed as the director of a service.

(b) Indicative duties

- Responsible for the overall management and administration of the service.
- Supervise the implementation of developmentally appropriate programs for children.
- Recruit staff in accordance with relevant regulations.
- Maintain day-to-day accounts and handle all administrative matters.
- Ensure that the centre or service adheres to all relevant regulations and statutory requirements.
- Ensure that the centre or service meets or exceeds quality assurance requirements.
- Liaise with families and outside agencies.
- Formulate and evaluate annual budgets.
- Liaise with management committees as appropriate.
- Provide professional leadership and development to staff.
- Develop and maintain policies and procedures for the centre or service.

(c) Director Level 1

A Director Level 1 is an employee appointed as the Director of a service licensed for up to 39 children or a Family Day Care service of no more than 30 family based childcare workers and is paid at the Level 6.1 to 6.3 salary range.

(d) Director Level 2

A Director Level 2 is an employee appointed as the Director of a service licensed for between 40 and 59 children or a Family Day Care service with between 31 and 60 family based childcare workers and is paid at the Level 6.4 to 6.6 salary range.

(e) Director Level 3

A Director Level 3 is an employee appointed as the Director of a service licensed for 60 or more children or a Family Day Care service with more 60 family based childcare workers and is paid at the Level 6.7 to 6.9 salary range.

(f) Qualified Co-ordinator

This is also the level for a qualified Co-ordinator who co-ordinates and manages a stand alone out-of-school hours care and/or vacation care centre and has successfully completed a post-secondary course of at least two years in Early Childhood Studies or an equivalent qualification.

A Co-ordinator appointed to co-ordinate the activities of a service licensed to accommodate up to 59 children will be paid at the salary range Level 6.1 to 6.3.

A Co-ordinator appointed to co-ordinate the activities of a service licensed to accommodate 60 or more children will be paid at the salary range Level 6.4 to 6.6.

A.3 Support Worker

A.3.1 Level 1

This is an untrained, unqualified employee. Employees at this level will work under supervision with guidance and direction.

(b) Indicative duties

- Assisting a qualified cook and/or basic food preparation and/or duties of a kitchen hand.
- Laundry work.
- Cleaning.
- Gardening.
- Driving.
- Maintenance (non-trade).
- Administrative duties.

(c) Progression

An employee will progress to Children's Services Support Employee (CSSE) Level 2 after 12 months, or earlier if the employee is performing the duties of a children's Services support employee Level 2.

A.3.2 Level 2

An employee at this level will possess skills, training and experience above that of a CSSE Level 1 and below that of a CSSE level 3. An employee at this level works under routine supervision and exercises discretion consistent with their skills and experience.

Indicative duties

- Assisting a qualified cook and/or basic food preparation and/or duties of a kitchen hand.
- Laundry work.
- Cleaning.
- Gardening.
- Driving.
- Maintenance (non-trade).

- Administrative duties.

A.3.3 Level 3

An employee at this level possesses an AQF Certificate III or equivalent skills and performs work at that level as required by the employer.

APPENDIX 7—Schedule attached to ACA, ABI and NSWBC reply submission

SCHEDULE A

EDUCATIONAL LEADERS

Educational leaders have expertise in

| (i) strong communication and interpersonal skills | | | |
|---|-----------|-------------------------|---|
| 4 | B.1.6 | Indicative Duties | Liaise with families |
| 5 | B.1.8 (d) | Unqualified Coordinator | work positively with parents and/or committees; and |
| 6 - Director | B.1.10 | Indicative Duties | Liaise with families and outside agencies Liaise with management committees as appropriate. |
| (ii) in-depth knowledge of theory relevant to ECEC | | | |
| 1 | B.1.1(a) | Indicative Duties | Learning the basic skills required to work in this environment with children. |
| 2 | B.1.2 | Indicative Duties | Develop awareness of and assist in maintenance of the health and safety of the children in care. Understand and work according to the centre or service’s policies and procedures. Demonstrate knowledge of hygienic handling of food and equipment. |
| 3 | B.1.4 | Indicative Duties | Undertake and implement the requirements of quality assurance. |
| 4 | B.1.6 | Indicative Duties | Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups. Develop, implement and evaluate daily care routines. Ensure that the centre or service’s policies and procedures are adhered to. |

| | | | |
|---|-------------------|-------------------|--|
| 5 | B.1.8(b) B.1.8 | Indicative Duties | <p>Applies well-developed theoretical knowledge to the care situations with respect to cultural diversity, gender issues and scheme philosophy (Co-ordinator)</p> <p>Contribute, through the Director, to the development of the centre or service's policies.</p> <p>Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training.</p> <p>Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues.</p> |
|---|-------------------|-------------------|--|

| | | | |
|---|--------|-------------------|---|
| 6 | B.1.10 | Indicative Duties | Responsible for the overall management and administration of the service. Supervise the implementation of developmentally appropriate programs for children. Recruit staff in accordance with relevant regulations. Ensure that the centre or service adheres to all relevant regulations and statutory requirements. Ensure that the centre or service meets or exceeds quality assurance requirements. Liaise with families and outside agencies. Develop and maintain policies and procedures for the centre or service. |
| (iii) deep knowledge of the NQS and approved learning frameworks | | | |
| 6 - Director | B.1.10 | Indicative Duties | Supervise the implementation of developmentally appropriate programs for children Ensure that the centre or service adheres to all relevant regulations and statutory requirements Ensure that the centre or service meets or exceeds quality assurance requirements. |
| (iv) capacity to build a learning community based on inquiry, action, research and reflection. | | | |
| 5 | B.1.8 | | Work positively with parents and/or committees. Documents, interprets and uses information about children. communicates effectively with family based childcare workers, children, parents and families; Applies well-developed theoretical knowledge to the care situations with respect to cultural diversity, gender issues and scheme philosophy; |
| 6 - Director | B.1.10 | Indicative Duties | Provide professional leadership and development to staff. Liaise with management committees as appropriate. Liaise with families and outside agencies. |

The role of the educational leader is primarily to:

| | | | |
|---|-------|-------------------|--|
| collaborate with educators and provide curriculum direction and guidance | | | |
| 3 | B.1.4 | Indicative Duties | Assist in the direction of untrained staff. |
| 4 | B.1.6 | Indicative Duties | Responsible to the Assistant Director/Director for the supervision of students on placement |
| 5 | B.1.8 | Indicative Duties | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs. |

| | | | |
|---|------------|--------------------------|---|
| | | | Generally supervise all employees within the service |
| 6—Director | B.1.10 | Indicative Duties | Provide professional leadership and development to staff. |
| support educators to effectively implement the cycle of planning to enhance programs and practices | | | |
| 5 | B.1.8 | Indicative Duties | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs. |
| 5 | B.1.8 (d) | unqualified Co-ordinator | develop and/or oversee programs and ensure they offer a balance of flexibility, variety, safety and fun |
| 6—Director | B.1.10 (a) | Indicative Duties | Responsible for the overall management and administration of the service. Supervise the implementation of developmentally appropriate programs for children. |
| Lead the development and implementation of an effective educational program in the service ensure that children’s learning development are guided by the learning outcomes of the approved learning frameworks | | | |
| 5 | B.1.8 | Indicative Duties | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs. |
| 6—Director | B.1.10 (a) | Indicative Duties | Responsible for the overall management and administration of the service. Supervise the implementation of developmentally appropriate programs for children. |

The Educational Leader also has a significant role in:

| Level | Clause | Sub Heading | Content |
|---|---------------|--------------------------|---|
| Guiding and developing educators and families’ understandings about play and leisure-based learning, and the significance of the early years in the education continuum for children | | | |
| 4 | B.1.6 Level 4 | Indicative Duties | Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups. |
| 5 | B.1.8 | Indicative Duties | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs. |
| 5 | B.1.8 (d) | unqualified Co-ordinator | develop and/or oversee programs and ensure they offer a balance of flexibility, variety, safety and fun supervise the programs/activities and ensure each staff member is fulfilling their relevant duties and responsibilities; |
| 6—Director | B.1.10 (a) | Indicative Duties | Responsible for the overall management and administration of the service. |

| | | | |
|---|-----------|--------------------------|--|
| | | | Supervise the implementation of developmentally appropriate programs for children. |
| Building the knowledge, skills and professionalism of educators | | | |
| 4 | B.1.6 | Indicative Duties | Responsible to the Assistant Director/Director for the supervision of students on placement |
| 5 | B.1.8 | Indicative Duties | Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training. |
| 5 | B.1.8 (d) | Unqualified Co-ordinator | supervise the programs/activities and ensure each staff member is fulfilling their relevant duties and responsibilities; |
| 6 - Director | B.1.10 | | Recruit staff in accordance with relevant regulations. Provide professional leadership and development to staff |
| Building a culture of professional inquiry with educators, coordinators and staff members to develop professional knowledge, reflect on practice and generate new ideas. | | | |
| 6 - Director | B.1.10 | | Recruit staff in accordance with relevant regulations. Provide professional leadership and development to staff Ensure that the centre or service adheres to all relevant regulations and statutory requirements. Ensure that the centre or service meets or exceeds quality assurance requirements. Develop and maintain policies and procedures for the centre or service. |

APPENDIX 8—Schedule attached to ACA, ABI and NSWBC reply submission

SCHEDULE B

RESPONSIBLE PERSON

| Level | Clause | Sub Heading | Content |
|---|-------------------|-------------------------|--|
| Health and safety of children | | | |
| 2 | B.1.2 | Indicative Duties | Develop awareness of and assist in maintenance of the health and safety of the children in care |
| 3 | B.1.4 (a) | Indicative Duties | Work in accordance with food safety regulations. |
| 4 | | Indicative Duties | Responsible for ensuring a safe environment is maintained for both staff and children. |
| 5 | B.1.8 Level 5 | Indicative Duties | Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training. |
| 5 | B.1.8 Level 5 (d) | Unqualified coordinator | develop and/or oversee programs and ensure they offer a balance of flexibility, variety, safety and fun |
| Staff to children ratios are being met | | | |
| 5 | B.1.8 | Indicative Duties | Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues |
| 5 | B.1.8 (d) | Unqualified coordinator | Supervise the programs/activities and ensure each staff member is fulfilling their relevant duties and responsibilities |
| 6 - Director | B.1.10 (a) | Indicative Duties | Responsible for the overall management and administration of the service Recruit staff in accordance with relevant regulations. Ensure that the centre or service adheres to all relevant regulations and statutory requirements |
| Physical environment is being set out appropriately | | | |
| 4 | B.1.6 | Indicative Duties | Responsible for ensuring a safe environment is maintained for both staff and children. |
| Programming and planning is being carried out with NQF | | | |
| 2 | B.1.2 | Indicative Duties | Assist in the implementation of the children's program under supervision |

| Level | Clause | Sub Heading | Content |
|---|-----------|--------------------------|--|
| 3 | B.1.4 (a) | Indicative Duties | <p>Assist in the preparation, implementation and evaluation of developmentally appropriate programs for individual children or group</p> <p>Record observations of individual children or groups for program planning purposes for qualified staff</p> <p>Undertake and implement the requirements of quality assurance</p> |
| 4 | B.1.6 | Indicative Duties | <p>Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or group</p> <p>Responsible for ensuring that records are maintained accurately for each child in their care</p> |
| 5 | B.1.8 | Indicative Duties | <p>Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs</p> <p>Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issue</p> |
| 5 | B.1.8 (d) | Unqualified Co-ordinator | <p>develop and/or oversee programs and ensure they offer a balance of flexibility, variety, safety and fun;</p> <p>supervise the programs/activities and ensure each staff member is fulfilling their relevant duties and responsibilities</p> |
| 6 - Director | B.1.10 | Indicative Duties | <p>Supervise the implementation of developmentally appropriate programs for children</p> <p>Ensure that the centre or service adheres to all relevant regulations and statutory requirements.</p> <p>Ensure that the centre or service meets or exceeds quality assurance requirements.</p> |
| Maintain relationships with parents and families | | | |
| 4 | B.1.6 | Indicative Duties | Liaise with families |

| Level | Clause | Sub Heading | Content |
|--------------|-----------|--------------------------|---|
| 5 | B.1.8 (d) | Unqualified Co-ordinator | work positively with parents and/or committees; |
| 6 - Director | B.1.10 | Indicative Duties | Liaise with families and outside agencies |

NOMINATED SUPERVISOR

| (i) Programming; (ii) leading the programming | | | |
|--|------------|-------------------------|---|
| 2 | B.1.2 | Indicative Duties | Assist in the implementation of the children's program under supervision. |
| 3 | B.1.4 | Indicative Duties | Assist in the preparation, implementation and evaluation of developmentally appropriate programs for individual children or groups. Record observations of individual children or groups for program planning purposes for qualified staff. |
| 4 | B.1.6 | Indicative Duties | Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups |
| 5 | B.1.8 | Indicative Duties | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs. Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training |
| 5 | B.1.8 (d) | Unqualified Coordinator | develop and/or oversee programs and ensure they offer a balance of flexibility, variety, safety and fun; supervise the programs/activities and ensure each staff member is fulfilling their relevant duties and responsibilities |
| 6 - Director | b.1.10 (a) | Indicative duties | Supervise the implementation of developmentally appropriate programs for children |
| (iii) Planning for the centre | | | |
| 3 | B.1.4 | Id | Record observations of individual children or groups for program planning purposes for qualified staff |
| 5 | B.1.8 | ID | Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training |
| (iv) mentoring and supporting guiding, other educators; | | | |
| 3 | B.1.4 | Indicative Duties | Assist in the direction of untrained staff. |
| 4 | B.1.6 | Indicative Duties | Responsible to the Assistant Director/Director for the supervision of students on |

| | | | |
|--|------------|--------------------------|--|
| | | | placement |
| 5 | B.1.8 | Indicative duties | Generally supervise all employees within the service |
| 6 - Director | B.1.10 | Indicative duties | Provide professional leadership and development to staff. |
| (v) Supervisory role | | | |
| 4 | B.1.6 | Indicative Duties | This is an employee who has completed a Diploma in Children's Services or equivalent (e.g. Certificate IV in Out of School Hours Care) as recognised by licensing authorities and is appointed as the person in charge of a group of children in the age range from birth to 12 years or an employee who is appointed as an Authorised Supervisor (as defined in the Children and Young Persons (Care and Protection) Act 1998 (NSW)). Responsible to the Assistant Director/Director for the supervision of students on placement. |
| 5 | B.1.8 (a) | Indicative duties | Generally supervise all employees within the service (a) A Children's Service Co-ordinator undertakes additional responsibilities including: - supervising staff, trainees and students on placement; and |
| 5 | B.1.8 (d) | unqualified Co-ordinator | supervise the programs/activities and ensure each staff member is fulfilling their relevant duties and responsibilities |
| 6 - Director | B.1.10 (a) | Indicative duties | Supervise the implementation of developmentally appropriate programs for children |
| (vi) Leadership and Direction | | | |
| 6 - Director | B.1.10 (a) | Indicative duties | Provide professional leadership and development to staff. |
| 3 | B.1.4 | Indicative duties | Assist in the direction of untrained staff |
| (vii) ensuring centres have high standards that are maintained | | | |
| 4 | B.1.4 (a) | Indicative duties | Undertake and implement the requirements of quality assurance. |
| 5 | B.1.8 | Indicative duties | Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues |
| 6 - Director | B.1.10 (a) | Indicative duties | Ensure that the centre or service adheres to all relevant regulations and statutory requirements Ensure that the centre or service meets or exceeds quality assurance requirements |
| (viii) a centres compliance with the NQF in particular ensuring centres meet the outcomes of Quality Area 1 (Educational program and practice); | | | |

| | | | |
|--|------------|-------------------|---|
| 4 | B.1.4 | Indicative duties | Undertake and implement the requirements of quality assurance |
| 6 - Director | B.1.10 (a) | Indicative duties | Ensure that the centre or service adheres to all relevant regulations and statutory requirements Ensure that the centre or service meets or exceeds quality assurance requirements |
| 5 | B.1.8 | Indicative duties | Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues. |
| (ix) leading critical reflections | | | |
| 4 | B.1.6 | ID | Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or group Develop, implement and evaluate daily care routines |
| 5 | B.1.8 | ID | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs |
| 6—Director | B.1.10 | ID | Supervise the implementation of developmentally appropriate programs for children Provide professional leadership and development to staff Develop and maintain policies and procedures for the centre or service |
| (x) creating specialised programs for children with additional needs. | | | |
| 3 | B.1.4 (a) | ID | Under direction, work with individual children with particular needs. |
| 5 | B.1.8 | ID | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs. |
| Level 6— Director | B.1.10 | ID | Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs |

APPENDIX 9 – Schedule B.1.10 – Children’s Award

B.1.10 Level 6—Director

A Director is an employee who holds a relevant Degree or a 3 or 4 year Early Childhood Education qualification, or an AQF Advanced Diploma, or a Diploma in Children’s Services, or a Diploma in Out-of-Hours Care; or is otherwise a person possessing such experience, or holding such qualifications deemed by the employer or the relevant legislation to be appropriate or required for the position, and who is appointed as the director of a service.

(b) Indicative duties

- Responsible for the overall management and administration of the service.
- Supervise the implementation of developmentally appropriate programs for children.
- Recruit staff in accordance with relevant regulations.
- Maintain day-to-day accounts and handle all administrative matters.
- Ensure that the centre or service adheres to all relevant regulations and statutory requirements.
- Ensure that the centre or service meets or exceeds quality assurance requirements.
- Liaise with families and outside agencies.
- Formulate and evaluate annual budgets.
- Liaise with management committees as appropriate.
- Provide professional leadership and development to staff.
- Develop and maintain policies and procedures for the centre or service.

(c) Director Level 1

A Director Level 1 is an employee appointed as the Director of a service licensed for up to 39 children or a Family Day Care service of no more than 30 family based childcare workers and is paid at the Level 6.1 to 6.3 salary range.

(d) Director Level 2

A Director Level 2 is an employee appointed as the Director of a service licensed for between 40 and 59 children or a Family Day Care service with between 31 and 60 family based childcare workers and is paid at the Level 6.4 to 6.6 salary range.

(e) Director Level 3

A Director Level 3 is an employee appointed as the Director of a service licensed for 60 or more children or a Family Day Care service with more 60 family based childcare workers and is paid at the Level 6.7 to 6.9 salary range.

(f) Qualified Co-ordinator

This is also the level for a qualified Co-ordinator who co-ordinates and manages a stand alone out-of-school hours care and/or vacation care centre and has successfully completed a post-secondary course of at least two years in Early Childhood Studies or an equivalent qualification.

A Co-ordinator appointed to co-ordinate the activities of a service licensed to accommodate up to 59 children will be paid at the salary range Level 6.1 to 6.3.

A Co-ordinator appointed to co-ordinate the activities of a service licensed to accommodate 60 or more children will be paid at the salary range Level 6.4 to 6.6.

Allowance structure for Directors

15.6 Qualifications allowance

A Director or Assistant Director who holds a Graduate Certificate in Childcare Management or equivalent will be paid an all-purpose allowance, calculated at 5% of the weekly rate for an Assistant Director (Children's Services Employee Level 5.4).

¹ [\[2018\] FWC 6953](#)

² IEU correspondence, 26 April 2019

³ Business SA [correspondence](#), 7 May 2019

⁴ See [2018] FWC 7505. The Directions were subsequently amended on 7 March 2019

⁵ United Voice submission, 15 March 2019

⁶ IEU submission, 18 March 2019

⁷ I and E Arrabalde submission, 15 March 2019

⁸ ACA, ABI and NSWBC submission, 15 March 2019

⁹ Australian Children's Education and Care Quality Authority, 15 March 2019

¹⁰ ACA, ABI and NSWBC submission in reply, 16 April 2019 and 29 April 2019

¹¹ United Voice submission in reply, 15 April 2019 and 29 April 2019

¹² IEU submission in reply, 15 April 2019 and 29 April 2019

¹³ AFEI submission in reply, 17 April 2019

¹⁴ I and E Arrabalde submission in reply, 29 April 2019

¹⁵ ACA, ABI and NSWBC submission in reply, 16 April 2019 and 29 April 2019

¹⁶ United Voice submission in reply, 15 April 2019 and 29 April 2019

¹⁷ IEU submission in reply, 15 April 2019 and 29 April 2019

¹⁸ AFEI submission in reply, 17 April 2019

¹⁹ I and E Arrabalde submission in reply, 29 April 2019

²⁰ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*', Research Report 2/2012, Fair Work Australia

²¹ ABS, '*Characteristics of Employment, Aug 2018*,' Catalogue No. 6333.0, Explanatory notes

²² [\[2017\] FWC 1001](#) at [166].

²³ United Voice submission 15 March 2019 at [103]-[104]

²⁴ I and E Arrabalde [submission](#), 14 March 2019 at paras 12 - 16

²⁵ *Ibid*, at paras 17-22

²⁶ *Ibid*, at para 23

²⁷ *Ibid*, at para 2

²⁸ *Ibid*, at para 6

²⁹ United Voice submission 15 March 2019 at [105]

³⁰ National Quality Standard Information sheet: '*The role of the educational leader*,' page 1

³¹ *Ibid*

³² *Ibid*

³³ Statement of Warner, paragraphs 19 and 22, Statement of Hennessy paragraph 17- 20

³⁴ Fenech report, page 11

³⁵ *National Law*, s165(2)

³⁶ *Ibid*, s169 (3)

³⁷ Regulation 77(2)

³⁸ See [2012] FWA 9296 at [16]-[17]

³⁹ *Ibid*, at [19]

⁴⁰ 'National Quality Standard Information sheet: '*Responsible Person Requirements for Approved Providers from 1 Oct 2017*', ACECQA, 30 August 2017, page 1

⁴¹ *Ibid*

⁴² United Voice submission 15 March 2019 at [94]-[95]

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- ⁴³ Social Research Centre, 2016, 'Early Childhood Education and Care National Workforce Census,' September 2017, page 16, downloaded at https://docs.education.gov.au/system/files/doc/other/2016_ecec_nwc_national_report_sep_2017_0.pdf
- ⁴⁴ Tullberg Statement at [94]
- ⁴⁵ Fraser Statement at [114]; Viknarash Statement at [116] and [119]; Tullberg Statement at [90]-[98] and Brannelly Statement [47]-[49]
- ⁴⁶ ACA, ABI and NSWBC reply submission 16 April 2019
- ⁴⁷ Ibid, at paras 2.12-2.14
- ⁴⁸ Ibid, at para 2.17
- ⁴⁹ Ibid, at para 3.26
- ⁵⁰ Ibid, at para 3.8
- ⁵¹ Ibid, at para 3.13
- ⁵² Ibid, at para 3.14
- ⁵³ Ibid, at para 3.18
- ⁵⁴ Ibid, at para 3.19
- ⁵⁵ Ibid, at paras 3.22-3.23
- ⁵⁶ Ibid, at para 3.24
- ⁵⁷ United Voice Outline of Further Submission in Reply, 29 April 2019 at [35]
- ⁵⁸ ACA, ABI and NSWBC submission in reply, 16 April 2019 at para 4.2
- ⁵⁹ Ibid, at para 4.13
- ⁶⁰ ACA, ABI and NSWBC submission in reply, 16 April 2019 at para 4.14
- ⁶¹ *National Laws* 162; please note the Laws refer to a person in day-to-day charge, which is the same as a responsible person. For clarity, we refer to a responsible person in these submissions
- ⁶² United Voice Submissions 15 March 2019 at [58]-[59]
- ⁶³ National Regulations reg. 117A
- ⁶⁴ Ibid, at para 125
- ⁶⁵ Ibid, at paras 132 – 150.
- ⁶⁶ Ibid, at para 151
- ⁶⁷ Ibid, at para 152
- ⁶⁸ Ibid, at paras 158-159
- ⁶⁹ Ibid, at para 165
- ⁷⁰ Ibid, at para 164
- ⁷¹ ACA, ABI and NSW BC submission 16 April 2019 at para 6.4
- ⁷² Ibid at para 6.11
- ⁷³ Ibid, at paras 6.12-6.13
- ⁷⁴ As stated by Ms Wade, '*some lead educators are responsible for programming for 4 children and some are responsible for 36 children*'
- ⁷⁵ AFEI Reply Submission 16 April 2019 at [46]
- ⁷⁶ UV submission at [191]
- ⁷⁷ Ibid
- ⁷⁸ Ibid, at para [193]
- ⁷⁹ Ibid, at para [196]
- ⁸⁰ Ibid, at para [195]
- ⁸¹ Ibid, at para [207]
- ⁸² Ibid, at para [206]
- ⁸³ Ibid, at para [200]
- ⁸⁴ UV submission 15 March 2019 at [169]-[170]

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- ⁸⁵ Ibid, at para [171]
- ⁸⁶ Ibid, at para [172]
- ⁸⁷ Ibid, at para [189]
- ⁸⁸ Statement of Bronwen Hennessy, para 38
- ⁸⁹ Guide to National Quality Framework, page 390
- ⁹⁰ Ibid, at page 392
- ⁹¹ Ibid, at page 192
- ⁹² Ibid, at page 393
- ⁹³ UV submission 15 March 2019 at [187]
- ⁹⁴ Ibid, at [189]
- ⁹⁵ ACA, ABI and NSWBC Reply Submissions 19 April 2019 at 9.5
- ⁹⁶ UV submission 15 March 2019 at [210]
- ⁹⁷ Ibid, at para [212]
- ⁹⁸ ACA, ABI and NSWBC Reply Submission 19 April 2019 at 10.2
- ⁹⁹ Ibid, at para 10.3
- ¹⁰⁰ AFEI Reply Submission 16 April 2019 at [61]
- ¹⁰¹ UV [submission](#), 2 May 2019, p.1
- ¹⁰² Ibid, at para 222
- ¹⁰³ Ibid, at para 216
- ¹⁰⁴ Ibid, at para 216
- ¹⁰⁵ See [2017] FWC 5861 and [2019] FWC 2869
- ¹⁰⁶ ACA, ABI and NSWBC submission 15 March 2019 at 27.1
- ¹⁰⁷ Ibid, at para 28.1
- ¹⁰⁸ Ibid, at para 30.1
- ¹⁰⁹ Ibid, at paras 30.2 – 30.3
- ¹¹⁰ Ibid, at paras 32.1 and 32.2
- ¹¹¹ Ibid, at para 32.3
- ¹¹² Ibid, at paras 33.1 – 33.3
- ¹¹³ Ibid, at para 34.1
- ¹¹⁴ Ibid, at paras 34.2 – 34.5
- ¹¹⁵ UV submission in Reply 12 April 2019 at [26]
- ¹¹⁶ Ibid, at paras [38]-[41]
- ¹¹⁷ Ibid, at para [49]
- ¹¹⁸ Ibid, at paras [54]-[55]
- ¹¹⁹ Ibid, at paras [56]-[68]
- ¹²⁰ IEU submission in Reply 15 April 2019
- ¹²¹ Ibid, at para [11]
- ¹²² ACA, ABI and NSWBC Reply Submission 29 April 2019 at 2.39
- ¹²³ Ibid, at para 32.3
- ¹²⁴ Ibid, at paras 33.1 – 33.3
- ¹²⁵ Ibid, at para 34.1
- ¹²⁶ Ibid, at para 34.4(b)
- ¹²⁷ UV submission in Reply 12 April 2019 at [78]
- ¹²⁸ Ibid, at para [105]
- ¹²⁹ IEU submission in Reply 15 April 2019
- ¹³⁰ Ibid, at paras [26]-[27]

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- ¹³¹ Ibid, at para [30]
- ¹³² Ibid, at paras [33]-[34]
- ¹³³ Ibid, at para [36]
- ¹³⁴ ACA, ABI and NSWBC submission in Reply 29 April 2019 at 2.58
- ¹³⁵ Ibid, at paras 3.16 – 3.20
- ¹³⁶ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012, Fair Work Australia.
- ¹³⁷ ABS, ‘*Characteristics of Employment, Aug 2018*,’ Catalogue No. 6333.0, Explanatory notes.
- ¹³⁸ [\[2017\] FWCFB 1001](#) at [166].
- ¹³⁹ IEU [submission](#), 15 March 2019 at 17
- ¹⁴⁰ Ibid, at para 13
- ¹⁴¹ Ibid, at para 5
- ¹⁴² Ibid, at para 6
- ¹⁴³ Ibid, at para 7
- ¹⁴⁴ Ibid, at para 16
- ¹⁴⁵ AFEI [submission in reply](#), 16 April 2019 at paras 73-76
- ¹⁴⁶ IEU [submission in reply](#), 26 April 2019 at para 2
- ¹⁴⁷ Ibid, at para 25
- ¹⁴⁸ ACA, ABI and NSWBC [submission in reply](#), 16 April 2019 at para 13.4
- ¹⁴⁹ AFEI [submission in reply](#), 16 April 2019 at paras 79-80