

## **BEFORE THE FAIR WORK COMMISSION**

*Fair Work Act 2009 (Cth)*

**Title of matter:** 4 yearly review of modern awards—Award Stage — *Children’s Services Award 2010* and *Educational Services (Teachers) Award 2010*

**Section:** s.156 *Fair Work Act 2009 (Cth)*

**Matter Number:** AM2018/18, AM2018/20

**Document:** Submissions pursuant to Statement dated 26 November 2020

**Date:** 11 December 2020

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## Background

1. On 10 June 2020, the Fair Work Commission (the 'Commission') issued a decision in relation to the 4 Yearly Review of the *Children's Services Award 2010* and *Educational Services (Teachers) Award 2020* (the 'June decision').
2. The Commission issued determinations on 19 October 2020 and 28 October 2020 giving effect to the June decision.
3. On 4 November 2020, the United Workers Union (the 'UWU') wrote to the Commission asserting the following:
  - a. the Children's Services Award had not been varied to delete clause 18.1(e)<sup>1</sup> as set out in the June decision; and
  - b. the variation to clause 21.5 of the Children's Services Award (the provision of an additional 2 hours non-contact time for persons appointed as the educational leader) creates an "*unintended inconsistency*" with clause A.3.2 of Schedule A of the Teachers Award (non-contact time for teachers employed in early childhood services operating for at least 48 weeks per year). The UWU states that "*the result of these omissions is to not give full effect to the previous Decisions of the Commission. As such we (the UWU) suggest it may be appropriate for further amendments to be issued*".
4. On 26 November 2020, the Commission issued a Statement (the 'Statement').<sup>2</sup> A draft determination was issued with the Statement (the 'draft determination'). The draft determination addresses 3(a) above. The Statement invites interested parties to:
  - a. comment on the draft determination; and
  - b. file submissions in response to the UWU's submission concerning non-contact time at clause A.3.2 of the Teachers Award.
5. These submissions are filed in response to the Statement.

### Removal of Clause 18.1(e) Children's Services Award

6. AFEI observe that, in the June decision, the Commission expressly determined to vary Clause 18.1 of the Children's Services Award by deleting clause 18.1(e).<sup>3</sup>
7. In the light of the above, AFEI do not oppose the draft determination.

### Clause A.3.2 Teachers Award: Non-Contact Time

8. Variation to clause A.3.2 in Schedule A of the Teachers Award to align with clause 21.5 of the Children's Services Award is opposed.

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<sup>1</sup> Clause 18.1(e) of the Children's Services Award currently states "*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...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.*";

<sup>2</sup> [2020] FWCFB 6341.

<sup>3</sup> [2020] FWCFB 3011 at [445].

9. The Commission's determination to vary the Children's Services Award is not a sufficient basis to vary the Teachers Award to include additional non-contact time for educational leaders. The Commission's conclusion in the Children's Services Award does not disturb the fact that the Teachers Award already achieves the modern awards objective and thus any variation to the Teachers Award is not necessary.
- a. **Firstly**, the nature of employees covered by the Children's Services Award and Teachers Award are different, and the terms that flow from each award are also different. For example:
- i. Employees may work as an educator covered by the Children's Services Award while actively working towards a relevant certificate III qualification (6 months full-time course). Whereas the classifications under the Teachers Award apply to employees recognised as an 'early childhood teacher' by the relevant State or Territory licensing accreditation authority. In NSW for example, this requires at least four years of tertiary study in an accredited teacher education program, such as a Bachelor of Teaching (Early Childhood and Primary).<sup>4</sup>
  - ii. We note that a Certificate III qualified employee (covered by the Children's Services Award) can be elected by the employer as the educational leader (and evidence to this effect was led by the UWU in these proceedings).<sup>5</sup> Thus the qualifications of an educational leader could range from Certificate III to a 4/5-year degree-trained Teacher.
  - iii. We observe that the Bachelor of Education (Early Childhood) course at the University of Sydney<sup>6</sup> includes the following as part of a sample study plan:
    - Learning through play in early childhood
    - History and philosophy of early childhood education
    - language and communication in early childhood
    - professional experience EC1
    - infant-toddler learning and development
    - leading and managing quality EC services
    - language and literacies
    - early childhood internship
  - iv. We further observe that the above correlates with a number of key elements outlined by the Australian Children's Education and Care Quality Authority ('ACECQA') to assist approved providers when selecting an educational leader.<sup>7</sup> For information, ACECQA provides when selecting an educational leader, the skills, knowledge and attributes that might be considered include communication and interpersonal skills, knowledge of leadership theory and the use of a range of leadership styles, professional standards and approved learning framework, contemporary understanding of evidence-based best practice approaches to teaching and learning.

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<sup>4</sup> <https://www.teach.nsw.edu.au/exploreteaching/types-of-teachers/early-childhood-teachers>

<sup>5</sup> Statement of Bronwen Hennessy dated 11 March 2019 at [5].

<sup>6</sup> [Bachelor of Education \(Early Childhood\) - The University of Sydney](#)

<sup>7</sup> [QA7\\_TheRoleOfTheEducationalLeader.pdf \(acecqa.gov.au\)](#)

- v. As such, employees covered by the Teachers Award should already have (by virtue of their qualifications) certain knowledge and skills to enable them to perform educational leader functions more efficiently (than what may be reasonably expected of educational leader counterparts covered by the Children’s Services Award) without the need for additional non-contact time.
- b. **Secondly**, the minimum rates of pay under the two awards are substantially different and the Teachers’ Award minimum rates already include compensation for a person who ‘...performs duties which include...administering an educational program.’<sup>8</sup> This is also reflected by the higher rates of pay in the Teachers Award. For example:

**Children’s Services Award**

<b>Classification</b>	<b>Pay Range under Award (minimum weekly rate)</b>
Level 3A	\$864.10 — \$877.60
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.	\$877.60 — \$988.20
Level 4A  *an employee who has not obtained the qualifications required for a Level 4 employee who performs the same duties as a Level 4 employee	\$936.40 — \$989.00
Level 4	\$1033.80 — \$1065.20
Level 5A  *an employee who has not obtained the qualifications required for a Level 5 employee who performs the same duties as a Level 5 employee	\$1081.00 — \$1112.20
Level 5	\$1081.00 — \$1116.20

**Teachers Award**

<b>Classification</b>	<b>Pay Range under Award (minimum weekly rate)</b>  *Inclusive of the additional 4% on the rates in clause 17.1 for full-time employee who works in a children’s or early childhood service pursuant to clause 17.2 Teachers Award
Level 4 (an employee who is 5 years trained will commence on Level 4) <sup>9</sup>	\$1,134.83
Level 5	\$1,174.37
Level 6	\$1,211.19
Level 12	\$1,445.62

<sup>8</sup> See definition of a ‘teacher’ in Clause 3.1 of the Award

<sup>9</sup> Clause 14.4 Teachers Award.

- c. **Thirdly**, variations to modern awards must be justified on its merits, including where feasible, probative evidence.<sup>10</sup> We observe that the UWU did not rely on witness evidence from employees covered by the Teachers Award in these proceedings.
  
- d. **Fourthly**, any variation to clause A.3.2 of the Teachers Award to replicate clause 21.5 Children's Services Award will inevitably compound existing issues for employers in meeting minimum ratio requirements for educators to children, in circumstances where the National Quality Framework requires that educators be working directly with children at the service to be counted in the educator to child ratios.<sup>11</sup> Any additional requirement for non-contact time can increase costs for employers where replacement staff need to be employed in order to ensure ratios are met in accordance with Regulation 123 of the National Regulations. That result is inconsistent with s.134(f), Fair Work Act 2009 (Cth)

Such increase to costs are further compounded by the fact that multiple employees could be in receipt of non-contact time, at the very same time. For example, an employee who is responsible for programming and planning for a group of children but who is not an educational leader is entitled to at least 2 hours non-contact time per week.

This additional cost would be inconsistent with s.134(f), *Fair Work Act 2009*.

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<sup>10</sup> [2017]FWCFC 1001 at [52].

<sup>11</sup> See p429, Guide to the National Quality Framework, September 2020

<https://www.acecqa.gov.au/sites/default/files/2020-09/Guide-to-the-NQF-September-2020.pdf>