

**IN THE FAIR WORK COMMISSION
AT SYDNEY**

MATTER: AM2014/263; 2014/266

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

Application by the Independent Education Union of Australia

IEU AND PARKES EARLY CHILDHOOD CENTRE OUTLINE OF SUBMISSIONS

INTRODUCTION

1. These are the IEU and Parkes Early Childhood Centre's response to the production orders sought by ABL on behalf of the Australian Childcare Alliance.

THE IEU'S POSITION

2. The IEU opposes the issuing of the orders in their current form as:
 - a. the practice of immediately seeking onerous production orders targeting the employers of persons who seek to give evidence in award modernization has an obvious chilling effect on employee participation, and should be discouraged unless absolutely necessary to inform the Commission;
 - b. many of the documents sought have no apparent relevance to any fact in issue; and
 - c. their extraordinary breadth makes them inherently oppressive..
3. It is significant that ABL has taken no apparent steps to resolve these issues on an *inter partes* or other informal basis, and has instead taken this heavy-handed approach. There is no standing right for parties to proceedings to seek discovery under the *Fair Work Act 2009* (Cth);

instead, the power is exercised to assist the Commission in informing itself. Consistently with the pursuit of an efficient, fair and cost-effective regime, the Commission should be reluctant to issue orders – particularly those imposing heavy burdens on third parties – unless satisfied that the orders are:

- a. appropriate, in that the documents are directly relevant and are likely to assist the Commission’s resolution of a matter in issue (rather than ‘informing the inquiries’ of a party);
 - b. necessary, in that the documents could not otherwise have been obtained.
4. Neither criteria has been satisfied in this matter. The orders should not be made at all.
 5. In the alternative, the orders should not be made in their current form. Part of the problem is the manner in which the orders are drafted. Rather than seeking specific documents or even specific classes of document, broad and ill-defined categories are put forward. This is buttressed with a remarkably broad (and likely unnecessary) definition of what is a ‘document’. This is oppressive because:
 - a. it unnecessarily and unreasonably widens the amount of documents that are responsive or potentially responsive, increasing compliance costs for the subjects of the orders and the amount of material that the parties will need to deal with; and
 - b. it dramatically increases the risk of inadvertent non-compliance.
 6. The ACA is represented by legal practitioners with extensive experience in this jurisdiction. A high degree of precision in the drafting of coercive orders can be expected and should be required of them.

PARKES EARLY CHILDHOOD CENTRE'S POSITION

7. Parkes Early Childhood Center supports the IEU's submissions. Its specific objections to the proposed order directed at it are set out in the table below.

Order	Basis of objection
2 – any document recording the identification of each member/person of the committee	Breadth (i.e. 'any document'), relevance. There is no objection to providing a list of committee members.
3 – all documents recording planning for bargaining process	Breadth, uncertainty, relevance
4 – all documents recording planning for meetings in the bargaining process	Breadth, uncertainty, relevance
5 - all documents recording planning 'broad strategy' for bargaining process	Breadth, uncertainty, relevance
6 – all documents recording nature of work performed by each employee	Breadth, uncertainty. There is no objection to providing position descriptions or similar documents.

LUCY SAUNDERS

GREENWAY CHAMBERS

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