



16 November 2018

Our Ref: AM2018/18, AM2014/263, AM2014/266

BY EMAIL chambers.ross.j@fwc.gov.au; amod@fwc.gov.au

Associate to the Hon. Justice Ross AO.
President
Fair Work Commission
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Dear Associate

**CHILDREN'S SERVICES AWARD 2010 & EDUCATIONAL SERVICES (TEACHERS) AWARD 2010:
SUBSTANTIVE ISSUES**

We act for the Australian Childcare Alliance, Australian Business Industrial and NSW Business Chamber in relation to the *Children's Services Award 2010 (Children's Services Award)* and the *Educational Services (Teachers) Award 2010 (Teachers Award)*.

1. DRAFT DETERMINATIONS

- 1.1 In the Statement¹ made on 13 November 2018 (**Statement**), the President asked the above organisations to re-file any draft determinations to ensure all parties to the proceedings have access to the draft determinations.
- 1.2 Accordingly, please find **enclosed** copies of:
 - (a) the draft determination filed on 30 September 2016, outlining our clients' two claims in the Children's Services Award; and
 - (b) the draft determination filed on 23 February 2017, outlining our clients' two claims in the Teachers Award.
- 1.3 The Statement also asked parties to confirm the accuracy of the claims in each award and any common claims. We confirm that Attachments A, B and C in the Statement accurately reflect our clients claims.

¹ [2018] FWC 6953

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2. OVERLAPPING CLAIMS

- 2.1 As foreshadowed at the Mention before the President on Friday 9 November 2018, our clients seek draft directions in the **enclosed** form.
- 2.2 The draft directions are intended to apply to all substantive claims in both the Children's Services Award and Teachers Award. To be clear, that is all the claims outlined in Attachment A and all claims in Attachment B to the Statement.
- 2.3 Our clients submit that, it is cost effective and efficient to have all the Children's Services and Teachers Award substantive matters heard at the same time (and by the same Bench) as:
- (a) all substantive claims in both awards impact the Early Childhood Education and Care sector (**Childcare Industry**);
 - (b) we assume all parties to the Children's Services Award will be attending the Teachers Award proceedings (if they were held separately) because every substantive claim in the Teachers Award impacts the Childcare Industry;
 - (c) my clients, United Voice and the individuals² have identical claims across both awards. If the matters are joined, the parties will only have to file evidence (and reply evidence) once dealing with all the substantive issues across the two awards; and
 - (d) only two claims³ (brought by the Independent Education Union(**IEU**)) potentially involve parties that have no interest in the Childcare Industry (such as schools without a preschool). However, these claims also need to be addressed by all the parties that have an interest in the Childcare Industry. It would seem appropriate to schedule the hearing of these two claims for the beginning or the end of the hearing to assist those parties with an interest only in the Teachers Award (and not in the Children's Services Award) such that they only need to attend the hearing for a brief period.

3. CONSENT FROM OTHER PARTIES

- 3.1 The enclosed draft directions and proposal to hear all the substantive claims together was circulated to the parties earlier this week.
- 3.2 The two individuals (Ms Isabelle Arrabalde and Elizabeth Arrabalde) and the Junior Adventures Group consent to our proposed timetable and hearing all the substantive claims across both awards in one sitting.

² Ms Isabelle Arrabalde and Ms Elizabeth Arrabalde

³ A variation to the award to ensure teachers are only paid the quarter day rate when employed for less than two hours and, correspondingly, paid the half day rate when employed for less than 3.8 hours; a variation to the award to cap, at 205, the number of days teachers in distance education can be required to teach.

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- 3.3 United Voice has filed separate submissions regarding its position to hear all claims (apart from the IEU's claims in the Teachers Award) in the same proceedings.
- 3.4 In addition to the reasons provided at paragraph 2.3, we submit that it would be appropriate to hear the IEU's claims in the same hearing as all the other substantive claims as one of the claims impacts whether directors of childcare centres (who hold a teaching degree) are covered by the Children's Services Award or the Teachers Award and thus, it seems entirely appropriate that both unions and all parties with an interest in both awards address these matters simultaneously.

4. ERO/WORK VALUE PROCEEDINGS

- 4.1 By way of confirmation, my clients' position is to have the substantive award matters heard separately and in advance of any ERO/Work Value proceeding. The draft directions enclosed with this submission has been prepared on this basis.

Yours sincerely



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DRAFT DIRECTIONS

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards–Award stage–Group 4 awards–

Substantive Issues

(AM2018/18 - AM2014/266)

JUSTICE ROSS, PRESIDENT

SYDNEY, 16 NOVEMBER 2018

*4 yearly review of modern awards – award stage – group 4 awards – substantive issues –
Children’s Services Award 2010 - Educational Services (Teachers) Award 2010*

It is directed that:

1. Interested parties are to file in the Commission evidence and submissions in support of their claims on or before **4.00 pm on Friday 15 February 2019**.
2. Interested parties are to file in the Commission evidence and submissions in reply on or before **4.00pm on Friday 22 March 2019**.
3. All submissions must be sent to AMOD@fwc.gov.au.
4. The matter will be heard on Friday 26, Monday 29 and Tuesday 30 April 2019, in Sydney.

PRESIDENT



30 September 2016

Our Ref: 20160096

Your Ref: AM2014/263

BY EMAIL

amod@fwc.gov.au

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Dear Sir / Madam

**4 YEARLY REVIEW OF MODERN AWARDS - GROUP 4 AWARDS - AM2014/263 -
CHILDREN'S SERVICES AWARD 2010**

- 1.1 We refer to the abovementioned proceedings and to the Fair Work Commission's Statement and Directions [2016] FWC 6062 issued on 26 August 2016 (**Statement**).
- 1.2 We represent the Australian Childcare Alliance (**ACA**), Australian Business Industrial (**ABI**) and the NSW Business Chamber (**NSWBC**).
- 1.3 At [5]-[6] the Statement provides as follows:

[5] The parties are requested to file a short submission confirming the substantive claims being pursued. This is not expected to be a full submission, but should include the following

- (i) the nature of the change sought;*
- (ii) a draft variation determination;*
- (iii) the type of case to be run (merits or evidentiary based); and*
- (iv) if the case is evidence-based, how many witnesses will be called?*

*[6] This process will give parties the opportunity to reframe existing claims or to raise additional substantive claims. Parties are also requested to advise the Commission if they are no longer pursuing any of their earlier claims. The filing date for this submission is on or before **4pm on Friday 30 September 2016**.*

- 1.4 By letter filed 2 March 2015, our clients indicated that they wished to pursue a number of variations to the Children's Services Award 2010 (**Award**). In accordance with the Statement, we provide confirmation of those proposed variations as follows.

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2. THE NATURE OF THE CHANGES SOUGHT

2.1 Our clients intend to pursue two variations to the Award:

Variation One: to provide employers with greater flexibility to change rosters other than with 7 days notice

2.2 This variation is pursued on the basis that the current rostering arrangements at clause 21.7 of the Award do not provide a fair and reasonable safety net having regard to:

- (a) the legislative obligations in relation to rostering faced by employers in the children's services industry; and
- (b) the inevitability that circumstances will arise where employees will be unavailable at short notice and employers will be required to "call-in" replacement employees to satisfy legislative obligations.

2.3 The variation seeks to expand the circumstances where an employer is relieved of the obligation to provide the full seven days' notice for a change of employee's rostered hours.

Variation Two: to allow ordinary hours to be worked before 6.00am or after 6.30pm

2.4 This variation is pursued so as to allow ordinary hours to be worked up until 7.30 pm instead of the current 6.30 pm.

2.5 This variation is pursued on the basis that requiring an employer to pay overtime between 6.30 and 7.30 pm is inconsistent with the Modern Awards objective and a fair and reasonable safety net.

3. DRAFT VARIATION DETERMINATION

3.1 A draft determination giving effect to the two proposed variations is annexed to this submission.

4. THE TYPE OF CASE TO BE RUN (MERITS OR EVIDENTIARY BASED)

4.1 Our clients propose to run an evidentiary case and intend to file witness statements outlining the position of employers and efficacy of the proposed variations at both an industry and individual operator level.

5. IF THE CASE IS EVIDENCE-BASED, HOW MANY WITNESSES WILL BE CALLED?

5.1 It is proposed that 2-4 witnesses will be called in support of the proposed variations.

If you have any questions, please contact Julian Arndt on (02) 9458 7565.

Yours faithfully



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FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Children's Services Award 2010

[MA000120]

Children's services industry

COMMISSION MEMBER

SYDNEY, XX YYY 2016

Review of modern awards to be conducted.

Further to the Decision and Reasons for Decision <<DecisionRef>> in AM2014/263, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Children's Services Award 2010* be varied as follows:

[1] By renumbering existing clause 10.4(d)(iii) as 10.4(d)(iv), and inserting a new 10.4(d)(iii) as follows:

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.

[2] By amending clause 21.3 as follows:

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.

- [3] By renumbering existing clause 21.7(b)(ii) as 21.7(b)(iii), renumbering 21.7(b)(iii) as 21.7(b)(iv) and inserting a new 21.7(b)(ii) as follows:

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.

- [4] By amending clause 23.4(d)(ii) as follows:

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

- [5] The determination shall operate on and from XX YYY 2016.

BY THE COMMISSION



23 February 2017

Our Ref: 20160096

Your Ref: AM2014/266

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Award Modernisation Team
Fair Work Commission

Dear Sir / Madam

**4 YEARLY REVIEW OF MODERN AWARDS - GROUP 4 AWARDS - AM2014/266 -
EDUCATIONAL SERVICES (TEACHERS) AWARD 2010**

- 5.1 We refer to the abovementioned proceedings and to the Fair Work Commission's Statement and Directions [2016] FWC 6062 issued on 26 August 2016 (**Statement**).
- 5.2 We represent the Australian Childcare Alliance (**ACA**), Australian Business Industrial (**ABI**) and the NSW Business Chamber (**NSWBC**).
- 5.3 At [5]-[6] the Statement provides as follows:

[5] The parties are requested to file a short submission confirming the substantive claims being pursued. This is not expected to be a full submission, but should include the following

- (i) the nature of the change sought;*
- (ii) a draft variation determination;*
- (iii) the type of case to be run (merits or evidentiary based); and*
- (iv) if the case is evidence-based, how many witnesses will be called?*

*[6] This process will give parties the opportunity to reframe existing claims or to raise additional substantive claims. Parties are also requested to advise the Commission if they are no longer pursuing any of their earlier claims. The filing date for this submission is on or before **4pm on Friday 30 September 2016**.*

- 5.4 In accordance with the Statement, we provide confirmation of the proposed variations as follows.

6. THE NATURE OF THE CHANGES SOUGHT

- 6.1 Our clients intend to pursue two variations to the Award:

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Variation One: to provide employers with greater flexibility to change rosters;

- 6.2 This variation is pursued on the basis that the current arrangements set out in the Award do not provide a fair and reasonable safety net having regard to:
- (a) the legislative obligations in relation to rostering faced by employers in the children's services and early childhood education industry; and
 - (b) the inevitability that circumstances will arise where employees will be unavailable at short notice and employers will be required to "call-in" replacement employees to satisfy legislative obligations.

Variation Two: to allow ordinary hours in the children's services and early childhood industry to be worked after 6.30pm

- 6.3 This variation is pursued so as to allow ordinary hours to be worked up until 7.30 pm instead of the current 6.30pm.
- 6.4 This variation is pursued on the basis that requiring an employer to pay overtime between 6.30pm and 7.30pm is inconsistent with the Modern Awards objective and a fair and reasonable safety net.

7. DRAFT VARIATION DETERMINATION

- 7.1 A draft determination giving effect to the two proposed variations is annexed to this submission.

8. THE TYPE OF CASE TO BE RUN (MERITS OR EVIDENTIARY BASED)

- 8.1 Our clients propose to run an evidentiary case and intend to file witness statements outlining the position of employers and efficacy of the proposed variations at both an industry and individual operator level.

9. IF THE CASE IS EVIDENCE-BASED, HOW MANY WITNESSES WILL BE CALLED?

- 9.1 It is proposed that 2-4 witnesses will be called in support of the proposed variations.

If you have any questions, please contact Michal Roucek on (02) 9458 7018.

Yours faithfully


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FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Children’s Services Award 2010

[MA000120]

Children’s services industry

COMMISSION MEMBER

SYDNEY, XX YYY 2017

Review of modern awards to be conducted.

Further to the Decision and Reasons for Decision <<DecisionRef>> in AM2014/266, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Educational Services (Teachers) Award 2010* be varied as follows:

[1] By amending clause 10.4(d) and inserting a new clause 10.4(e) such that it appears in the following form:

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

(i) ___
 ___ ~~(i)~~ the employee consents; or

(ii) ___
 ___ ~~(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~~.



- (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 a school teacher 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 in the case of an,
 - (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 —teacher 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.

[2] By amending Schedule B.1.3 as follows:

The ordinary hours of work will be worked between the hours of 6.00am and 7.30pm on any five days between Monday and Friday and will not exceed eight hours in duration. Subject to the provisions of clause 7 - Award flexibility, 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.

[3] The determination shall operate on and from XX YYY 2017.

BY THE COMMISSION