

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: Application to vary the *Educational Services (Teachers) Award 2020*

Matter Number: AM2018/9

Document: Further reply submissions pursuant to Amended Directions dated 9 July 2021

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Background

1. For the purposes of these submissions, the abbreviations at **Appendix A** apply.
2. AFEI relies on its written submission dated 30 July 2021 ('AFEI July Submissions').
3. These submissions are filed pursuant to paragraph 3 of the Commission's Amended Directions dated 9 July 2021 and respond to the submissions filed by various parties on 30 July 2021.

Operative date

4. AFEI notes the submissions of the CER that the operative date for implementation of the proposed structure should be 1 July 2022.¹
5. In support of the 1 July 2022 operative date, CER relies on section 166(1) of the Act and submits that *"the onus is on the parties seeking an operative date other than 1 July 2022 to provide evidence and/or submissions as to why the alternative operative date is appropriate."*²
6. AFEI:
 - a. supports the CER's submissions on the relevance of s.166(1) of the Act in relation to the operative date for implementation of the proposed structure;
 - b. reiterates its support for an operative date of 1 July 2022 for implementation of the proposed structure;³ and
 - c. notes and support CER's submission that the onus is on parties who support an alternate date other than 1 July 2022 to demonstrate why such alternate operative date would be appropriate, and that the Commission must not specify another day unless it is satisfied that it is appropriate to do so.⁴
7. The 1 January 2022 operative date proposed by ABL and the IEU is their consent position.⁵ That is insufficient, in our submission, for the Commission to be satisfied that the operative date should be other than 1 July 2022.

¹ Submissions of CER dated 30 July 2021 at para [1].

² Submissions of CER dated 30 July 2021 at para [1], [3].

³ AFEI July Submissions at paragraph [14].

⁴ Section 166(2) Fair Work Act 2009 (Cth).

⁵ ABL submissions dated 14 July 2021 states, at paragraph [31], "the ACA and IEU have agreed to an operative date of 1 January 2022. It would be uncontroversial that a date beyond this would have been preferable to the ACA but on balance and the interest of resolving the implementation issues in an orderly basis this date is tolerable".

8. The following considerations demonstrate why a date other than 1 July 2022 would be inappropriate:
- a. paragraphs 15 – 19 of AFEI July Submissions, taking into account:
 - i. the significant increases to wage costs;⁶
 - ii. there is precedent for the phasing-in of significant wage increases;⁷
 - iii. in all likelihood, the wage increases are unbudgeted for the 2021-22 financial year;⁸ and
 - iv. an appropriate timeframe is required for transition from service based to accreditation status.⁹
 - b. the submissions of ABL¹⁰ consider the consent position date of 1 January 2022 as “less than ideal”. Indeed, ABL states “it would be uncontroversial that a date beyond this would have been preferable to the ACA”¹¹ but that 1 January 2022 is “tolerable”.¹²
 - c. ABL further considers the impact of the proposed structure, more specifically, the increase to labour costs and the 1 January 2022 operative date. ABL states “it is clear that the Commonwealth Government have not provided any direct funding to...pay for the new classification structure and minimum rates...this largely means that employers will...absorb the cost...”.¹³ Consequently, implementation of the proposed structure on 1 January 2021 will result in an increase on employment costs, a relevant factor the Commission must consider pursuant to section 134(f) of the Act.
 - d. while teachers in an early childhood service may rarely exceed 25% of the service’s staff, even in NSW, as noted by the CCSA’s submission,¹⁴ teachers award salaries are currently significantly higher than wages for ‘educators’ in the Children’s Services Award 2010 (‘CSA’). Consequently, the proportion of a service’s teachers’ wages costs are typically significantly higher than teachers as a proportion of staff. For example, the EST salary for an experienced teacher at the year 12 level in the EST Award is approximately 36% higher than the maximum CSA wage for an educator.¹⁵
 - e. Currently there is significant uncertainty concerning the impact of Covid-19 on early childhood services, their occupancy rates and their financial position. Generally, 70% —80% occupancy have been the sector benchmark for long day care centres to be profitable.¹⁶ AFEI observes as follows:
 - i. according to the Australian Government Department of Education, Skills and Employment, there was an annual decrease of 5.5% (or 73,100 children) who attended an approved child care centre and who were eligible for Child Care Subsidy between the December 2019 quarter and December 2020 quarter.

⁶ AFEI July Submissions at paragraph [15].

⁷ AFEI July Submissions at paragraph [16].

⁸ AFEI July Submissions at paragraph [18].

⁹ AFEI July Submissions at paragraph [18].

¹⁰ Dated 14 July 2021.

¹¹ ABL Submissions dated 14 July 2021 at paragraph [31].

¹² ABL Submissions dated 14 July 2021 at paragraph [31].

¹³ ABL Submissions dated 14 July 2021 at paragraph [28] – [29].

¹⁴ CCSA Submissions dated 30 July 2021 at paragraph [9].

¹⁵ Comparison is based on EST Level 12 compared with CSA Level 4.3

¹⁶ [Appendix H Costs and viability - Childcare and early childhood learning \(pc.gov.au\)](#) (section H.8)

The number of children attending outside school hours care also decreased significantly by 12.3% over the same period. This was a result of the impact of the COVID-19 pandemic on the child care sector.¹⁷

- ii. the projected duration of the current Government public health orders in response to the Delta COVID-19 outbreak,¹⁸ and their impact on occupancy rates, and operating restrictions, remains highly uncertain.
- iii. In relation to ABL's analysis of the likely cost impact of "\$2.30 per child per day",¹⁹ AFEI notes the following:
 - a. ABL acknowledges it would be difficult to provide more than an estimate of this type;²⁰
 - b. the estimate is variable depending on a number of factors;²¹
 - c. the cost "may be material for some centres and parents";²²
 - d. the estimate is made on the assumption that an employer does not absorb the cost;²³
 - e. if this cost per day cannot be passed onto the parent, the employer would be required to absorb the cost, and this would not be \$2.30 per day. In a centre of 100 children, the cost for the provider would be \$230 per day.
- f. in all of the circumstances, no interested parties have put forward compelling arguments that a date other than 1 July 2020 is appropriate. In regard to the consent position in particular, there is less justification for the proposed date where the proposed wage increases are not in recognition of the essential tenets of the Decision, that being *accreditation* and *satisfactory service*.

Satisfactory service

9. AFEI relies upon paragraphs 27 – 38 AFEI July Submissions.
10. Save for the CER and AFEI, submissions of other parties support the full implementation of the proposed structure without the need for accreditation²⁴ or for satisfactory service to be demonstrated in any meaningful way.²⁵
11. The position of these parties is to render the word satisfactory, contained in the proposed structure, as effectively meaningless where *all* teachers are *deemed* satisfactory.²⁶

¹⁷ [Child Care in Australia report December quarter 2020 - Department of Education, Skills and Employment, Australian Government \(dese.gov.au\)](https://www.health.nsw.gov.au/Infectious/covid-19/Pages/public-health-orders.aspx)

¹⁸ <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/public-health-orders.aspx>;
[https://legislation.nsw.gov.au/file/Public%20Health%20\(COVID-19%20Additional%20Restrictions%20for%20Delta%20Outbreak\)%20Order%202021_210811_8.05pm.pdf](https://legislation.nsw.gov.au/file/Public%20Health%20(COVID-19%20Additional%20Restrictions%20for%20Delta%20Outbreak)%20Order%202021_210811_8.05pm.pdf)

¹⁹ ABL Submissions dated 14 July 2021 at paragraph [21].

²⁰ ABL submissions dated 14 July 2021 at paragraph [22].

²¹ ABL submissions dated 14 July 2021 at paragraph [23].

²² ABL submissions dated 14 July 2021 at paragraph [24].

²³ ABL submissions dated 14 July 2021 at paragraph [21].

²⁴ AFEI July Submissions at paragraphs [40] – [42].

²⁵ Consent Position between ABL and the IEU – clause 14.3 in the draft determination filed on 14 July 2021; IEU Submissions dated 30 July 2021 at paragraph [22]; Submissions of Isabelle Arrabalde and Elizabeth Arrabalde dated 30 July 2021.

²⁶ Consent Position between ABL and the IEU – clause 14.3 in the draft determination filed on 14 July 2021.

12. AFEI supports the CER that the onus should not rest with the employer to bring a dispute to the Commission where it is not satisfied that an employee's performance is satisfactory.²⁷
13. CER's submission that it accepts an 'alignment' between satisfactory service and the APST²⁸ is unclear. However, for reasons of clarity, AFEI do not agree that satisfactory service is necessarily demonstrated by meeting the requirements of the APST. To this end, AFEI refers the Commission to paragraphs 27 – 38 of AFEI July Submissions.
14. AFEI maintains that 'satisfactory service' should mean:²⁹
 - a. the maintenance of proficient accreditation; *and*
 - b. as assessed in accordance with a staff development and performance appraisal scheme; or
 - c. where an employer has not adopted a staff performance appraisal scheme, the employer otherwise determines that the employee's performance has been satisfactory.
15. There is nothing remarkable about workplace performance assessments undertaken by an employer. For example, see clause 13.3 of the Social, Community, Home Care and Disability Services Industry Award 2010.
16. Finally, in response to the IEU's further submission³⁰ that small operators are unlikely to have formal annual performance reviews, AFEI notes the following:
 - i. the observation is unsupported by evidence;
 - ii. where an employer has not implemented a formal performance review this should not mean that an employer assessment of an employee's performance should be excluded and or disregarded. It is appropriate for the employer to determine whether an employee's performance is satisfactory based on its observations of the employee's performance. AFEI's position at [14] above addresses the situation where an employer has not adopted a staff performance appraisal scheme; and
 - iii. while the requirement for an employee to obtain and maintain proficiency should be the minimum standard for an employee, it is not the only determinant of satisfactory service.
17. The IEU submit that it is necessary to have an objective method to determine whether past service was satisfactory.³¹ AFEI have addressed the point concerning transition from current to proposed structure at paragraph 46(c) of AFEI July submissions.

²⁷ Consent Position between ABL and the IEU – clause 14.3(a) in the draft determination filed on 14 July 2021.

²⁸ CER Submissions dated 30 July 2021 at [8].

²⁹ AFEI July Submissions at paragraph [36].

³⁰ IEU Submissions dated 30 July 2021 at paragraphs [23] – [25].

³¹ Submissions of the IEU dated 30 July 2021 at paragraph [24].

Mentoring

18. In AFEI July submissions,³² AFEI responded to proposed clause 14.11 (Support for new teachers) in the consent position.
19. The AEU submits that proposed clause 14.11 as set out in the consent position ought to be modified so that there is reasonable release from ordinary duties where operationally practicable for mentors who provide the means of support for a PRT (provisionally registered teacher) to achieve full registration.³³
20. The position of the AEU is that both the Level 1 teacher and the person providing the support to the Level 1 teacher, namely a mentor, requires the reasonable release for both employees from duties.³⁴
21. *First*, AFEI opposes the position of the AEU above, for the same reasons at set out at paragraphs 59 – 61 of AFEI July Submissions including that this would create a new obligation on employers and a new entitlement for employees covered by the EST Award. Such an entitlement/obligation does not arise from the Decision.
22. *Second*, AFEI supports the submissions of ABL at paragraphs [18-22].³⁵
23. *Third*, the proposed entitlement does not fall within section 136 of the Act, as a term that may or must be included in modern awards. Accordingly, the AEU's proposal must be rejected.

Conclusion

24. The Commission found that a classification structure that is based on years of service rather than the essential elements of 'qualifications, displayed competence and acquired experience and responsibility' to be inappropriate,³⁶ and considered that a new classification structure should be established which is anchored upon the professional career standards established by the APST.³⁷
25. The Commission considered that the current classification structure with its annual increments is anachronistic and does not properly relate to the work value of teachers.³⁸
26. The Commission decided upon a new wage and classification structure that is based on work value. Yet the Commission is being urged to disregard the very element that it has found justifying the new wage and classification structure and its substantially higher wages.

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³² Paragraphs [56] – [61].

³³ Submissions of the AEU at paragraph [18].

³⁴ Submissions of the AEU at paragraph [20].

³⁵ Submissions of ABL dated 30 July 2021.

³⁶ [2021] FWCFB 2051 at [647].

³⁷ [2021] FWCFB 2051 at [653].

³⁸ [2021] FWCFB 2051 at [653].

Appendix A: Abbreviations applicable to AFEI submissions dated 13 August 2021

Australian Business Lawyers & Advisers on behalf of Australian Childcare Alliance and Australian Business Industrial	ABL
Australian Education Union	AEU
Australian Federation of Employers and Industries	AFEI
Australian Professional Standards for Teachers	APST
Catholic Employment Relations Limited	CER
Classification and pay structure at [657] of the Decision	The proposed structure
Community Connections Solutions Australia	CCSA
Consent Position between ABL and IEU filed with the Fair Work Commission on 14 July 2021	Consent Position
Decision of the Full Bench of the Fair Work Commission [2021] FWCFB 2051	The Decision
Early Childhood Education and Care	ECEC
Educational Services (Teachers) Award 2020	EST Award
Fair Work Act 2009 (Cth)	The Act
Fair Work Commission	The Commission
Independent Education Union of Australia	IEU