
Fair Work Commission: 4 yearly Review of modern awards

RESPONSE TO FWC BACKGROUND DOCUMENT

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/18 &
AM2018/20)**

**CHILDREN'S SERVICES AWARD 2010
AND EDUCATIONAL SERVICES (TEACHERS) AWARD 2010 -
SUBSTANTIVE ISSUES**

ACA, ABI, NSWBC, NOSHSA and JAG

10 JULY 2019

BACKGROUND

1. This response to the Fair Work Commission Background Paper issued on 13 June 2019¹ is on behalf of the:
 - (a) Australian Childcare Alliance Inc. (ACA);²
 - (b) Australian Business Industrial (ABI);
 - (c) New South Wales Business Chamber (NSWBC);
 - (d) National Outside School Hours Care Services (NOSHSA); and
 - (e) Junior Adventure Group (JAG)(ACA/ABI).
2. ACA/ABI has identified that of the 53 questions in total, 31 relate either directly or indirectly to ACA/ABI. ACA/ABI respond to the Commission's questions as follows.³

Question One

Are the lists in Appendices 1, 2, and 3 Accurate?

3. Save for the misspelling of Ms Viknarah's name, yes.

Question Two

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)?

4. This is not conceded by ACA/ABI.
5. The data available does not clearly identify the numbers of employees in each relevant classification and so notwithstanding that an assessment can be made as to which classifications are 'low paid' (applying the metrics identified in the Discussion Paper), a determination as to the proportion of employees who are 'low paid' is not possible.

Question Four

Is it common ground that UV allowance claims do not seek to vary modern award minimum wages such that the limitation in s 156(3) does not apply?

6. As a technical question, ACA/ABI concedes that s 156(3) does not appear to apply to the UV allowance claims on the basis that the claims do not seek to directly vary modern award wages (assuming such allowances constitute 'minimum award wages', no such allowances currently exist and therefore cannot be varied).
7. As a matter of substance however, and with respect, ACA/ABI notes that the UV allowance claims are clearly aimed at increasing minimum wages on the basis of work value. The relevance of this position is expanded upon later.

Question Five

If s 156(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?

8. Yes. In undertaking this assessment, we note the particular relevance of the matters outlined at Question Seven.

¹ See [2019] FWCFB 4062

² Association of Quality Childcare Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare Queensland Inc; Childcare South Australia; Childcare Association of Western Australia.

³ NB: question number is kept consistent with the Background Document published on 13 June 2019.

Question Six

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 ss 134(1)(a)-(h)

9. Yes.

Question Seven

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?

10. The answer to these questions is yes.
11. The assessment of work value reasons to determine a standard of ‘fairness’ within the context of s 134 of the FW Act has previously been considered in a Decision⁴ concerning the Pastoral Award 2010.
12. In that case, the Full Bench held that:

[46] For completeness we would observe that even if s.156(3) did not apply to the current claim that would not necessarily mean that work value considerations were irrelevant to our consideration of the claim. It seems to us that such matters may well be relevant to the establishment of ‘a safety net of fair minimum wages’, as required by the minimum wages objective (s.284(1)). But it is unnecessary for us to express a concluded view on that issue and we do not propose to do so.

....

[48] As s.156(4) makes clear, work value reasons are ‘reasons justifying the amount that employees should be paid or doing a particular kind of work’. Work value reasons are 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.’*

13. The Full Bench held that double rates for the crutching of rams and ram stags ‘*is appropriate having regard to the nature of the work, the level of skill and responsibility and the conditions under which the work is done*’⁵ and were therefore satisfied that the variation proposed was ‘*justified to work value reasons*’.⁶
14. Critically and contrary to the present proceedings, the position advanced in the Pastoral Decision was not opposed.
15. Notwithstanding the factual contest in these proceedings, regard to ‘*the nature of the work, the level of skill and responsibility and the conditions under which the work is done*’ appears to be appropriate when assessing the allowances claimed, regardless of whether s 156(3) is technically applied or not. Clearly the allowance claims do not constitute reimbursement allowances and so would need to be justified on some other basis.
16. It should be uncontroversial that this is a not a case where the proposed changes to the

⁴ [2015] FWCFB 8810

⁵ Ibid at [50]

⁶ Ibid at [51]

relevant awards are 'self-evident' and that as such UV is seeking to bring about a '*significant change*' which must be supported by submissions which addresses the relevant legislative provisions and must be accompanied by '*probative evidence properly directed to demonstrating the facts supporting the proposed variation*'.

17. In short, UV needed to advance a probative case and bears an onus to satisfy the Commission that these allowances are 'fair'.
18. A number of aspects of the evidence are particularly relevant to this assessment.
19. Firstly, in assessing the 'fairness' of both the Educational Leader and Responsible Person allowance, regard needs to be had to the fact that the duties and obligations which are said to arise in relation to an employee's 'status' as Responsible Person or Education Leader in many circumstances arise independently from one's status as Educational Leader or Responsible Person.
20. This will depend on the centre and individual appointed.
21. To take the most obvious example, it should be uncontroversial that an employee's responsibility as a Responsible Person is entirely encompassed or 'subsumed' within a Level 6 employee's duties as Director under the Children's Services Award.⁷
22. By way of further example, as stated in the evidence of Ms Viknarasah, Educational Leaders generally have a diploma or degree and are therefore already paid at a higher classification level (Levels 4-6) under the Children's Services Award under classifications inclusive of obligations relating to educational programming.
23. Given the above, an assessment of '*the nature of the work, the level of skill and responsibility and the conditions under which the work is done*' needs to take into account the fact that employees are already compensated (on any view in part) for the relevant work by the Awards themselves.
24. Secondly, in assessing the 'fairness' of the educational leader allowance, regard must be had to the fact that the evidence in these proceedings disclosed that the 'duties' of an Educational Leader are performed 'in lieu' rather than 'in addition' to an employees' ordinary work⁸. Given that employees are provided 'time off the floor' to perform educational leader duties, any assessment of '*the nature of the work, the level of skill and responsibility and the conditions under which the work is done*' relating to the role of educational leader needs to be balanced against the fact that while actually performing the role of educational leader, an employee will be being compensated under the relevant Award notwithstanding that they are only performing the duties of an educational leader at that time.

Question Eight

[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).

⁷ This specific contention was accepted by Ms Mravunac at PN4511

⁸ As explained by Ms Viknarasah Transcript 6 May 2019 PN1289, 1327

In particular it is submitted that the role is directed to a centre meeting the following areas of the NQS:

• 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, 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.

Are the contentions set out at [47] to [49] contested?

25. Yes.
26. The Macquarie Dictionary Seventh Edition defines 'critical' as of '*decisive importance with respect to the outcome*'.
27. The evidence heard in these proceedings suggests that the importance of Educational Leader in the ensuring NQS compliance will vary from centre to centre and is not 'critical' in every case.⁹
28. Even on the face of the above UV submissions, ACA/ABI notes that Standard 7.2 applies generally to leadership¹⁰, not just Educational Leaders, with only Element 7.2.2 referring specifically to the Educational Leader, with even that element firstly identifying the requirement to support the Educational Leader as opposed to identifying or specifying the role of the educational leader themselves.
29. In the submission of ACA/ABI, the ACECQA (and other 'guidance') materials filed in these proceedings outline, with some degree of variation, an 'aspirational' model of educational leadership in what is clearly a developing area of the ECEC industry. It is not the case however that the educational leader has the determinative or 'critical' role suggested by UV in every case.
30. The characterisation of educational leadership advocated by UV and as advanced in its written statements was significantly qualified following cross-examination. As the evidence disclosed:
 - (a) Legally, the responsibility for meeting the areas of the NQS and programming services is the Nominated Supervisor and not the Educational Leader.¹¹
 - (b) Dr Fenech was unaware of *any* example of an ECEC centre not meeting the relevant

⁹ Obviously the **designation** of an employee as Educational Leader is critical in order to comply with the relevant statutory framework, what is being contested is the critical importance, with respect to statutory compliance, of the specific work performed by an Educational Leader

¹⁰ As acknowledged by Dr Fenech - see Transcript 6 May 2019 at PN571

¹¹ Viknarasah Statement at [120]

quality standards due to the insufficiency of its Educational Leader.¹² This was despite the fact that Dr Fenech was of the view that not all Educational Leaders possessed the 'requisite skill-set'¹³ which was required (in Dr Fenech's view) under the regulatory framework.¹⁴

- (c) The notion that the Educational Leader is somehow solely or even primarily responsible for the matters outlined in the above question is vastly overstated and in any case dependent on the particular centre:
- (i) Dr Fenech stated this when she said in cross examination that '*every centre is different. And it depends too whether the nominated supervisor is also the educational leader or whether the educational leader has a separate role.*'¹⁵
 - (ii) Bronwen Hennessy acknowledged that notwithstanding that she had the role as Educational Leader at her centre, she reported to a lead educator in her room.¹⁶ Ms Hennessy also acknowledged that her Centre Manager was 'ultimately responsible' for making sure policies dictated by the National Quality Framework were considered and integrated into programming and curriculum and that she was not ultimately responsible.¹⁷ Ms Hennessey also acknowledged she did not develop the program or curriculum at the centre¹⁸ and was not responsible for developing and implementing specialised learning plans to support students of different educational needs.¹⁹
 - (iii) Ms Hennessy acknowledged 'almost anyone' provided feedback to one another within her centre about interactions between educators and children and this was not limited to her as Educational Leader²⁰. It was/is '*a team effort*'. Similarly Ms Hennessy acknowledged the responsibility of monitoring special needs children fell to the Lead Educator, not the Educational Leader.²¹
 - (iv) Ms Warner accepted that preparing observations and photos for each child is completed by the lead educators²², that '*assisting educators with reflection on their educational practice*' is something that she would already do as 2IC of her centre '*to a degree*'.²³
 - (v) Ana Mravunac, who is not an Educational Leader, stated that she is the '*driving force*' behind the delivery of the educational programs at her service²⁴, that she developed the programming for her service, was ultimately responsible for educational programming²⁵ and that her role as

¹² Transcript 6 May 2019 at PN567

¹³ Transcript 6 May 2019 at PN557

¹⁴ Transcript 6 May 2019 at PN538

¹⁵ Transcript 6 May 2019 at PN633

¹⁶ Transcript 6 May 2019 at PN215

¹⁷ Transcript 6 May 2019 at PN 285-286

¹⁸ Transcript 6 May 2019 at PN 288-9

¹⁹ Transcript 6 May 2019 at PN 296

²⁰ Transcript 6 May 2019 at PN 307

²¹ Transcript 6 May 2019 at PN 317

²² Transcript 7 May 2019 at PN 1488

²³ Transcript 7 May 2019 at PN 1493

²⁴ Transcript at 9 May 2019 at PN4483

²⁵ Transcript at 9 May 2019 at PN4482

Director required her to build a professional learning community and promote a positive organisational culture²⁶ (see Standard 7.2).

31. In light of the above, ACA/ABI submits that there is no consistency between the Educational Leader role across services and that Educational Leaders, while their designation is absolutely necessary at law, do not *necessarily* fill a ‘critical’ role in a service. Further, to the extent that an Educational Leader did fill a ‘critical’ role in ensuring regulatory compliance, this is just as likely to arise from that employee’s seniority in respect of the current classification structure of the Awards as from their role as Educational Leader.

Question Nine

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

32. No.

Question Ten

Are the assertions set out in [59] general agreed?

33. Yes.

Question Eleven

What is the distinction between the Nominated Supervisor and the Responsible Person?

34. The critical point of clarification to make at the outset is that the Nominated Supervisor and the Responsible Person are different roles but usually not different persons.
35. As noted by UV in its submissions, 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.
36. The role of Responsible Person is therefore an aspect of the role of Nominated Supervisor. When the Nominated Supervisor is not onsite, the role of Responsible Person ‘detaches’ from the Nominated Supervisor and is undertaken by someone else.
37. For these people, the primary distinction between the Nominated Supervisor and the Responsible Person is that a Nominated Supervisor is a role with legal and legislative responsibilities whereas the Responsible Person is simply the designated ‘responsible’ person at the service when the Nominated Supervisor is not at the service for a short period of time. Unlike the Responsible Person, the Nominated Supervisor has legislated legal responsibilities it must comply and there are penalties that apply to the Nominated Supervisor. The Responsible Person has no penalties for non-compliance.
38. The difference in legal duties under the National Law between the Responsible Person and Nominated Supervisor can be seen below.

Responsible Person	Nominated Supervisor
National Law- Definitions Person in day-to-day charge , in relation to an education and care service, means a person who is placed in day-to-day charge of the service in accordance with the national regulations;	National Law- Definitions nominated supervisor , in relation to an education and care service, means an individual who— (a) is nominated by the approved provider of the service under Part 3 to be a nominated supervisor of that service; and (b) unless the individual is the approved provider, has provided written consent to that nomination;

²⁶ Transcript at 9 May 2019 at PN4475-4477

NA	<p>National Law s 161 Offence to operate education and care service without nominated supervisor The approved provider of an education and care service must not operate the service unless there is at least one nominated supervisor for that service.</p>
NA	<p>165 Offence to inadequately supervise children (1) The approved provider of an education and care service must 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. Penalty: \$10 000, in the case of an individual. \$50 000, in any other case. (2) A nominated supervisor of an education and care service must 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. Penalty: \$10 000.</p>
NA	<p>166 Offence to use inappropriate discipline (1) The approved provider of an education and care service must ensure that no child being educated and cared for by the service is subjected to— (a) any form of corporal punishment; or (b) any discipline that is unreasonable in the circumstances. Penalty: \$10 000, in the case of an individual. \$50 000, in any other case. (2) A nominated supervisor of an education and care service must ensure that no child being educated and cared for by the service is subjected to— (a) any form of corporal punishment; or (b) any discipline that is unreasonable in the circumstances. Penalty: \$10 000.</p>
NA	<p>167 Offence relating to protection of children from harm and hazards. (2) A nominated supervisor of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and cared for by the service from harm and from any hazard likely to cause injury. Penalty: \$10 000.</p>
NA	<p>168 Offence relating to required programs</p> <p>A nominated supervisor of an education and care service must ensure that a program is delivered to all children being educated and cared for by the service that— (a) is based on an approved learning framework; and (b) is delivered in a manner that accords with the approved learning framework; and (c) is based on the developmental needs, interests and experiences of each child; and (d) is designed to take into account the individual differences of each child. Penalty: \$4000.</p>

NA	<p>169 Offence relating to staffing arrangements (3) A nominated supervisor of an education and care service must 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. Penalty: \$10 000. (4) A nominated supervisor of an education and care service must ensure that each educator educating and caring for children for the service meets the qualification requirements relevant to the educator's role as prescribed by the national regulations. Penalty: \$10 000.</p>
	<p>170 Offence relating to unauthorised persons on education and care service premises</p> <p>(3) A nominated supervisor of the education and care service must ensure that a person does not remain at the education and care service premises while children are being educated and cared for at the premises, unless— (a) the person is an authorised person; or (b) the person is under the direct supervision of an educator or other staff member of the service</p>
NA	<p>172 Offence to fail to display prescribed information</p> <p>An approved provider of an education and care service must ensure that the prescribed information about the following is positioned so that it is clearly visible to anyone from the main entrance to the education and care service premises— (a) the provider approval; (b) the service approval; (c) each nominated supervisor of the service;</p>
NA	<p>173 Offence to fail to notify certain circumstances to Regulatory Authority</p> <p>(2) An approved provider must notify the Regulatory Authority of the following in relation to an approved education and care service operated by the approved provider—</p> <p>(b) if a nominated supervisor of an approved education and care service— (i) ceases to be employed or engaged by the service; or (ii) is removed from the role of nominated supervisor; or (iii) withdraws consent to the nomination;</p>

39. In addition to the legal difference between the two roles, the evidence disclosed that the practical difference between the obligations exercised by a Nominated Supervisor (inclusive of Responsible Person responsibility) in comparison to a 'mere' Responsible Person (educator allocated as person in charge) was substantial. By way of example:

- (a) Responsible persons (educator allocated as person in charge) exercise limited autonomy when the Nominated Supervisor or 2IC is absent:
- (i) Ms Wade, Director, acknowledged receiving calls for instructions while offsite²⁷;
 - (ii) Ms Warner acknowledged that as 'Responsible Person', she would call her Director to obtain instructions in respect of any incidents, any staffing issues, any parent inquiries that she may not have the answer to;²⁸
 - (iii) Ms Farrant gave evidence that 'Responsible Persons' (person in charge) did not make 'big decisions'²⁹ and that should the Responsible Person have 'any difficulties' they were to call the Director or Assistant Director³⁰; and
 - (iv) Ms Mravunac identified that her Responsible Persons while she was away from the centre would inform her should anything happen at the centre, would not make any decisions about the centre, would not deal with complaints, change policies or conduct a formal meeting with parents.
40. It is significant that the one aspect of the Responsible Person role which Dr Fenech identified as being different since the introduction of the National Framework was the requirement to oversee educational programs.³¹ As previously submitted, it is contested by ACA/ABI that such a responsibility falls within the scope of a Responsible Person in any event.

Question Twelve

[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.

Is the contention at [62] contested?

41. UV's contention at [62] is not contested, however ACA/ABI notes that the evidence discloses that designation as Responsible person has limited practical effect in respect of the requirement to perform extra duties, and certainly not such an effect so as to warrant the allowance sought.
42. As is outlined in the evidence:
- (a) Responsible persons who are educators allocated as person in charge exercise limited autonomy when the Nominated Supervisor or 2IC is absent. We refer to the evidence identified at 39(a) above.
 - (b) All educators, not just Responsible Persons, are responsible for safety of children and safety incidents.³²
 - (c) All or most educators have discussions with parents, not just Responsible Persons.³³
43. Status as a Responsible Person requires no practical additional work such as creating rosters

²⁷ See Transcript 6 May 2019 PN724

²⁸ See Transcript 7 May 2019 from PN1519

²⁹ See Transcript 8 May 2019 from PN3360

³⁰ See Transcript 8 May 2019 from PN3361

³¹ See Transcript 6 May 2019 PN653

³² See Transcript 7 May 2019 from PN1523 per Ms Warner Transcript 9 May 2019 from PN14505 per Ms Mravunac also provisions of Award

³³ See Transcript at PN291-292

or programming or conveys any further legal responsibility for the children, other educators or staff member as this is still the ultimate responsibility of the Nominated Supervisor.

Question Fourteen

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.

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

44. ACA/ABI accepts the proposition that directors under the Children's Services Award do not receive a specific directors allowance. ACA/ABI's previous submission on this point (which was inadvertently in error) should be corrected in this respect.
45. Notwithstanding this appropriate clarification, in the respectful submission of ACA/ABI, whether directors currently receive a specific allowance under the Children's Services Award for being director as opposed to merely receiving an 'all-up' director rate (which they do) is not the relevant assessment.
46. The relevant assessment is whether directors are currently compensated for the role which they undertake which is a role which includes responsibility as Responsible Person and in some cases Educational Leader.
47. The clarified position of ACA/ABI is that directors under the relevant awards are already remunerated for duties that would be performed by Educational leaders or Responsible Persons regardless of award coverage and whether the 'additional amount' is expressed as an allowance or a higher classification level.

Question Fifteen

[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

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

48. ACA/ABI accepts the UV submission at [84] above. However, Certificate III workers who are Room Leaders would also be paid at Level 4A as this level is also for an employee who has not obtained the qualifications required for a Level 4 employee but who performs the same duties as a Level 4 employee. E.g. 'is appointed as the person in charge of a group of children in the age range from birth to 12 years'.³⁴

Question Sixteen

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)?

49. No, there is no impediment. The requirement of the National Regulations (s. 118) is for the approved provider to designate a 'suitably qualified and experienced educator', 'co-ordinator' (e.g. director) or 'other individual' to the role.
50. A suitably qualified and experienced educator could be at any level with a certificate III or above. The evidence of ACA/ABI suggests that the role is usually allocated to an employee in

³⁴ See Clause B.1.5 of the Children's Services Award 2010

an existing senior position or an educator that is 'suitably qualified and experienced'.

Question Seventeen

Is ACA/ABI 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.

51. Regulation 118 of the National Regulations requires the designation of a suitably qualified and experienced educator, co-ordinator or other individual as educational leader at the service to lead the development and implementation of educational programs in the service. Whether an employee is suitably qualified and experienced for the purposes of the regulations will not necessarily be determined by the classification under the Award.
52. This being said, it should not be in contest that elements of the Level 3 and 4 classifications make up (at least part of) what an educational leader is required to do and what the evidence suggested educational leaders actually do.
53. The classification descriptor for Level 3 under the Children's Services Award includes:
Level 3
 - *Assist in the preparation, implementation and evaluation of developmentally appropriate programs for individual children or groups*
54. The Level 3 classification also includes duties which the evidence discloses educational leaders actually undertake:
 - *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*
55. Level 4 is even clearer, with the first classification descriptor outlining that Level 4s are:
Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups
56. This, in the view of ACA/ABI, clearly comprehends the role of Educational Leader leading the development and implementation of educational programs in a service.
57. The additional classification descriptors in Level 4 also align with evidence of what Educational Leaders do:
 - *Responsible to the Assistant Director/Director for the supervision of students on placement.*
 - *Responsible for ensuring that records are maintained accurately for each child in their care.*
 - *Ensure that the centre or service's policies and procedures are adhered to.*
 - *Liaise with families*

Question Nineteen

Does the argument advanced by the Individuals overlap with ERO/work value proceedings?

58. ACA/ABI's respectful position is that the argument advanced by the Individuals does overlap with the ERO/work value proceedings which ACA are involved in. This is because the Individuals' claim is aiming at extending the Leadership allowance to teachers with educational leadership responsibilities in early childhood education and care settings on the basis that the work of primary school teachers is comparable to that of early childhood teachers.

Question Twenty

If so, how should we deal with such overlap?

59. As previously suggested in our Joint Report³⁵ published on the Fair Work Commission website on 5 December 2018, ACA/ABI confirms that the parties wish to have the substantive award matters heard separately and in advance of any ERO/Work Value proceeding.
60. Awarding an educational leader allowance to teachers in long-day centres should be determined prior to any finding in the ERO/work value case because the ERO/work value case requires an appropriately set 'minimum wage' that has had regard to the duties and value of the work performed.
61. It is not appropriate to have two different separately constituted Full Benches determine whether educational leaders who are covered by the Teachers Award should:
- (a) receive an effective wage increase for duties associated with being an educational leader; and
 - (b) receive a effective wage increase for alleged increases in responsibilities of an educational leader associated with changing regulations (NQF).
62. Given the overlap, and the fact that educational leaders can be both teachers (Teachers Award), educators (Children's Services Award) and Directors (either award), we submit that it is most appropriate for this Full Bench to make a finding in relation to the role of the Educational Leader.
63. It is then open to the ERO/work value Full Bench to determine the value and responsibilities of the work performed by the remaining Teachers who are not educational leaders in those proceedings.
64. The ERO/work value Full Bench has been notified on multiple occasions that the work of Educational Leaders was being dealt with by this Bench.
65. The preference therefore is for this Full Bench to hand down its findings prior to the ERO Full Bench.

Question Twenty

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?

66. The direct answer to this question is yes.
67. Notwithstanding this answer, we are also instructed by NOSHA and JAG that Table 4 presents an incomplete picture in understanding long day-care services and the OSHC

³⁵ [Joint Report](#) on 5 December 2018

sector. UV has only used the size of a centre/service upon which to differentiate their allowance claim which is an oversimplification of OSHC services and paints an incorrect picture that the OSHC services are the same as long day-care. We note by way of context that there is current discussion within the National Quality Agenda for Early Childhood Education and Care as to the separation of these services further.

68. NOSHA and JAG submit that there is no consideration with respect to the operating hours of a service, the different types of employment engaged and the difference in the program approach used by OSHC services as opposed to long-day care services.

Different operating hours of service

69. As stated in Kylie Brannelly's witness statement dated 15 April 2019, the hours of operation of OSHC provisions is relatively similar across OSHC providers, though this is completely different to long day-care services. OSHC services have two sessions, one in the morning and one in the evening and based on the 2013 census, OSHC services operate on average for 23 hours and 24 minutes per week which averages to only 4 hours and 45 minutes per day across a week. The Educational Leader weekly allowance is therefore entirely different when comparing a service that is open for 12 hours 5 days a week and one that is only open for under 5 hours 5 days a week and will be much more expensive for OSHC providers.

Different Educational Framework

70. As previously stated in this response, UV has only used the size of the service to differentiate for an Educational Leader Allowance. Notwithstanding this similarity, there is an entirely different framework for learning and development for school aged children. The Educational Leader allowance which United Voice has stated is the same amongst the two sectors is an incredibly different educational learning sphere for the OSHC services.
71. We are instructed that the NQF Review 2019 itself is currently being consulted upon to determine whether OSHC should be operated as a separate service type from centre based early childhood services under the National Law.
72. NOSHSA and JAG supports OSHC's inclusion within the NQF, however NOSHSA and JAG promote that OSHC is unique and complex and being regulated, assessed and rated in the same way as an 'early childhood' service is not appropriate or effective. NOSHSA and JAG strongly supports the opportunity for the OSHC sector to be recognised within the National Law as its own service type as well as in the broader NQF and all its component parts. This would enable aspects of the NQF to be contextualised for the sector to improve relevance. Some of the contexts requiring consideration include (but are not limited to): being hosted by schools (physical environment, facilities and premises); age and developmental appropriateness of regulations and standards for school age children; educator qualifications; service sizes and establishing relevant standards for expansion; program requirements; the role of the educational leader and the ability for large OSHC services to appoint multiple educational leaders.
73. Due to the significance of this review which will ultimately lead to a consultation regulatory impact statement in 2020, NOSHSA and JAG feel that it is premature to include OSHC in the proposed United Voice changes to the award. United Voice claims are largely based on the impact of the NQF on early childhood educators since its implementation in 2012. As identified above, OSHC was not fully transitioned to the NQF as was early childhood and specific regulatory requirements for OSHC services still apply at the jurisdictional level for programs, qualifications and ratios as well as physical environments.

Question Twenty-Seven

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.

Is the above extract from UV's submissions (at [118]) contested?

74. While these submissions are generally not contested, ACA/ABI submits that no inference should be accepted that the requirement to develop an educational program based on the needs of each child was created by the NQS.
75. It should also be noted that any characterisation of educational programming in ECEC which suggests that entirely 'bespoke' programs are developed for each and every child in every centre is not correct (or likely realistic).
76. As the evidence disclosed, centres use different forms of template programs which are sufficient for catering to the needs of a majority of children. It is not contested that these programs are adapted to varying extents in certain circumstances and in certain centres depending on the needs of the relevant children.

Question Thirty

Are the propositions set out at [141] contested?

77. No.

Question Thirty-Two

18.1(e)

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.

What are the particular regulatory requirements of this sector which are said to support clause 18.1(e)

78. Simplistically, the regulatory requirements on ECEC operators require 'like for like' replacement of employees in the roster to ensure regulatory compliance. This means that it is not an option for ECEC operations, unlike other businesses, to simply 'continue on' in the absence of a staff member who is being trained.
79. In addition to an inability to simply 'work with less staff' while a staff member is being trained, the industry itself is subject to regulatory requirements which require more regular training than in other industries including child protection training as required in each state and territory, various training requirements to become and maintain an ECT qualification, first aid qualifications, anaphylaxis management training, emergency asthma management training and CPR renewal training.

Question Thirty-Three

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

80. We are instructed that employers are on balance more likely to schedule training on the weekend or outside of operating hours (and pay the employee undergoing the training the applicable penalty rates) if clause 18.1(e) was deleted, because even with penalty rates, the cost for replacing and paying higher duties for another staff member while paying the staff member being trained is still more expensive and difficult to organise than holding training on the weekend or after hours.

Question Thirty-Four

What do employers say to UV's alternate claims (to delete (including in-service training))? What does "in-service" training encompass?

81. ACA/ABI opposes the alternative claim.
82. This opposition is on the basis that UV has not specified what scope of 'in-service' training would be excluded from the clause.
83. 'In service training' is all training that does not go to a formal qualification as such. The term 'in service' is meant to convey the fact that the employee undertaking training is working in a service and is undertaking training to professionally develop (or maintain accreditations/licenses necessary to remain 'in service').

Question Thirty-Five

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?

84. ACA/ABI is content for this claim to be dealt with by the Plain Language Full Bench.

Question Forty-Two

How would the variation increase the prospect of collective bargaining?

85. The broader the span of hours, the greater scope there may be for employees to seek to bargain for their own specific needs, particularly in relation to centres which may have different parental demand.

Question Forty-Three -

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

86. In isolation, the current ordinary hours span of 6.00am to 6.30pm is **not** difficult to understand.
87. By way of clarification, ACA/ABI's proposition is not that the current ordinary hours span is not easy to understand but rather that the interrelationship between modern awards and the National Framework is difficult to understand, making rostering within ordinary hours difficult to apply.

Question Forty-Four

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 its claims?

88. In short, the Applicant's contest the IEU's characterisation of the relevant award provisions

and disagree with the IEU's submission that even if the claim was granted it would not have any of the financial benefits it claims.

89. This is dealt with at Section 3 of the Applicants' reply submissions filed 29 April 2019 as follows:

90. The IEU Response makes note of the shiftwork provisions of the Awards. These provisions relevantly state:

Children's Services Award

23.4 Shiftwork

(a) Despite the provisions of clauses 21.1, 21.2 and 21.3, employees may be employed as shiftworkers.

...

(c) The following allowances will be paid for shiftwork:

Shift	% loading
Afternoon	15

(d) Definitions

..

*(ii) **Afternoon shift** means any shift finishing after 6.30 pm and at or before midnight.*

Teachers Award

B.5 Shiftwork

B.5.1 For the purposes only of calculating the loadings provided for this clause:

(a) a weekly rate of pay is calculated by dividing the employee's annual salary, including applicable allowances, by 52.18;

(b) a daily rate of pay is calculated by dividing the weekly rate as provided for in clause B.5.1(a) by 5; and

(c) the rate of pay for a casual is first calculated in accordance with the provisions of clause 14.5.

B.5.2 A loading is payable to employees required to perform shiftwork in accordance with the following:

Shift	% of Ordinary Rate
Afternoon shift (any shift finishing after 6.30 pm and at or before midnight)	15

91. ACA/ABI understands that utilisation of shiftworker provisions in the ECEC sector is extremely low.

92. As is obvious from all of the materials filed by ACA/ABI, it is not the intention of ACA/ABI to pursue the Ordinary Hours Claim in order to create a new group of afternoon shiftworkers working shifts ending between 6:30pm-7:30pm. As is identified by the IEU, by and large the benefits of the Ordinary Hours Claim would only be realised should it make opening after 6:30pm more sustainable for ECEC operators.

93. It is not clear to ACA/ABI that, should the Ordinary Hours Claim be granted, the rostering of an ECEC employee to finish between 6:30pm-7:30pm would necessarily turn that employee into a shiftworker entitled to an afternoon shift penalty.

94. Such an employee would not presumably be characterised as a 'shiftworker' given the employee was working hours in the relevant span of hours for a day worker. Equally, the logic of the IEU may also serve to turn employees who work overtime under the current

conditions of the Awards into shiftworkers (as they would be finishing a shift after 6:30pm).

95. This interpretation appears to be consistent with a previous decision of the Commission in relation to the Clerks—Private Sector Award 2010 (Clerks Award) in *Motor Traders' Association of New South Wales and others* [2012] FWA 9731³⁶. In those proceedings, several employer parties sought a variation of the afternoon shift definition in the Clerks Award to align the commencement of the Afternoon Shift with the cessation of ordinary time for day workers. At that time, the Monday-Friday day worker ordinary hours span in the Clerks Award finished at 7pm while the Afternoon Shift commenced at 6pm.
96. The Applicant parties sought an amendment to the definition of Afternoon Shift on the basis that an employee working a day shift finishing after 6.00 pm and at or before 7.00 pm, could be deemed to be an afternoon shift worker and thereby entitled to the afternoon shift loading for the entire shift.
97. The Australian Services Union (**ASU**) opposed the variation on the basis that: *'the proposed variation confuses the separate and distinct definition of shift work and ordinary day work within the ordinary span of hours. It contends that definitions of shift work and ordinary hours for day workers should remain separate arrangements of work and should not be confused or conflated so as unsociable hours are increasingly treated like ordinary hours.'*
98. At [149], Senior Deputy Kaufman stated in response to this submission:
- 'I am attracted towards the ASU submissions on this matter. In my view clauses 25 and 28 have different work to do as they operate in respect of different types of employees; day workers and shiftworkers respectively.'*
99. Notwithstanding this finding, Senior Deputy Kaufman at [153] further found that:
- It is inherently desirable, to avoid uncertainty and for administrative convenience, that the latest time to end the afternoon shift and/or to commence the night shift should be consistent with the end of the span of hours of the day shift for day workers.*
100. As such, notwithstanding the above, ACA/ABI acknowledges that variation between the day worker span of hours and the span of shift definitions is less than desirable.
101. In that light, should the Full Bench be minded to, it would be open for the Full Bench, as a consequence of the Ordinary Hours Claim to amend the definition of Afternoon Shift in the Awards to a shift finishing after 7:30pm. If that course was adopted, there would be no further controversy as to whether the granting of the claim would result in the financial benefits claimed.

Question Forty-Five

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

102. ACA/ABI is unaware of any data more reliable than that identified in the materials of the IEU and UV. As noted in our submissions, this data is subject to some limitations, however at this stage we are regrettably unable to identify any alternative sources.

Question Forty-Nine

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

103. Evidence of the difficulty of employers to understand the current rostering clause identified

³⁶ See from [143]

by the IEU in its submissions relating to proposed findings filed 29 May 2019 at [32]. That paragraph identifies the number of employer witnesses who had difficulty under cross-examination in identifying what the current provisions of the Award allowed an employer to do in respect of rostering and how this related to the claims of the employer parties.

104. Separate to this evidence, Kerry Mahony also gave evidence in his witness statement that the Awards *'require significant legalistic interpretation and consideration to understand and contain some requirements such as fixed rostering which are self defeating and are difficult for even experienced managers to understand without legal advice.'*³⁷
105. Karthiga Viknarasah gave evidence that she finds rostering difficult and it is hard to accommodate her staffs needs as well as ratios in the rosters.³⁸
106. Jae Fraser in his amended statement dated 12 April 2019 that rostering in the awards is not easy to understand in the Awards as it fails to understand that *'rosters revolve around regulatory requirements.'* He stated that the ratio requirements from the National Law and National Regulations must be complied with at all times. He explained the complex methodology to determine a roster as follows:
- (a) *Each room contains a different age group of children. Firstly, I ensure each room has a diploma qualified leader.*
 - (b) *I need to ensure my 50% qualification requirement is met. I start by looking at my room staff, and ensuring there is an appropriately qualified person in each room.*
 - (c) *I look at the people I need to employ to relieve the other staff for their lunch breaks, tea breaks, off the floor programming time etc (required by the relevant award) to ensure that all times of day the 50% qualification requirement is satisfied. Centres are required to replace staff over lunch with employees of the same status (i.e. diploma for diploma, cert III for cert III) to ensure compliance.*
 - (d) *I ensure that there are adequate staff in each room and consider how many staff may be required depending on the room, the age of the children and the regulated ratio requirements.*
 - (e) *Most of the roles referred to above are permanent staff members to provide consistency and continuity for the children, the employees and the rostering requirements.*
 - (f) *I consider whether I have any additional needs children³⁹ which will require my ratios to be increased. In each of the centres, it is likely that there will be at least one child with additional needs.*
 - (g) *I must estimate how many children will arrive each day and what times of day will have peak periods. I will then ensure the regulatory ratios of staff to children are*

³⁷ Statement of Kerry Mahony at [36]

³⁸ Ms Viknararash at [92]

³⁹ 'Additional needs' defines and categorises a range of conditions and circumstances that can result in children requiring specialist support relating to their learning and physical development and wellbeing. This may include physical disabilities, intellectual disabilities or developmental delay, communication problems or disorders, challenging behaviours or diagnosed conditions.

satisfied during these times. This is site-specific.

- (h) *I consider the consistency of rostering so the same educators are working with the same children.*
- (i) *Casual staff will be rostered last and as a response to (or an educated prediction that one of the following factors may occur):*
 - (i) *peak periods;*
 - (ii) *permanent staff taking personal/carer's leave or annual leave;*
 - (iii) *permanent staff taking extended leave without pay or parental leave;*
 - (iv) *permanent staff being relieved of their duties for breaks or reaching the end of shift before the centre closes;*
 - (v) *diploma and Traineeship regulation study periods (2-3 hours);*
 - (vi) *the site's diploma requirements not being met;*
 - (vii) *the site's ratio requirements not being met;*
 - (viii) *the site's inclusion support requirements not being met.*⁴⁰

Question Fifty-One

Does ACA/ABI contest the IEU's interpretation of clause 14.5 and, if so, what do they contend is the correct interpretation of the clause?

107. ACA/ABI agrees with the IEU's interpretation of the clause regarding the payment of casual teachers by way of quarter day, half day and full day.

Question Fifty-Two

Does ACA/ABI dispute the proposition that the correct interpretation of the clause is in accordance with the IEU's proposed drafting?

108. ACA/ABI acknowledges that the IEU's drafting simply confirms how the clause should be interpreted. However, ACA/ABI has concerns that the issue the IEU has raised is not actually remedied by the proposed drafting.
109. The IEU alleges that some employers do not pay teachers who work 'more than a quarter day' for a half day in accordance with the current award clause.
110. While ACA/ABI is unaware of this ever occurring, it is ACA/ABI's view that it would be preferable for employees to receive payment for time worked, as opposed for receiving payment for time not worked (or for that matter not receiving payment for time worked).
111. The Children's Services Award provides hourly rates and a minimum engagement of two hours pay for each engagement. By way of suggestion (as opposed to a formal claim), the concept of a quarter day and a half day in the Teachers Award may be assisted by inserting hourly figures or better clarifying whether a quarter day is.

⁴⁰ Amended Statement of Jae Fraser on 12 April 2019 at [79]

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

On behalf of Australian Childcare Alliance Inc, Junior Adventure Group, National Outside School Hours Care Services, Australian Business Industrial and the New South Wales Business Chamber Ltd

10 July 2019



as per

Julian Arndt

Associate Director

Australian Business Lawyers &
Advisors Pty Ltd

(02) 9458 7565

julian.arndt@ablawyers.com.au

Sophie Whish

Senior Associate

Australian Business Lawyers &
Advisors Pty Ltd

(02) 9458 7431

sophie.whish@ablawyers.com.au

Helen Hamberger

Associate

Australian Business Lawyers &
Advisors Pty Ltd

(02) 9458 7307

helen.hamberger@ablawyers.com.au