

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

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

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

Matter Number: AM2018/18, AM2018/20

Document: Submissions pursuant to Decision dated 29 September 2020

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Background

1. On 29 September 2020, the Fair Work Commission issued a Decision¹ in relation to the proposed finalisation of outstanding issues in the 4 Yearly Review of the *Children's Services Award 2010* and *Educational Services (Teachers) Award 2020* ("Decision").
2. The Decision² invited interested parties to file a written submission addressing the following matters:
 - a. Part-time employment: the plain language redraft set out at [13] and the draft determination at attachment A of the Decision;
 - b. Educational Leaders, non contact time: the draft variation determination at Attachment A of the Decision;
 - c. Clothing Allowance: the draft variation determination at attachment A of the Decision;
 - d. Minimum engagement: the provisional view at [61] of the Decision;
 - e. Award coverage: the proposal at [78] and Item 11 of the draft variation determination at attachment A of the Decision.
3. These submissions are filed in response to the Decision.

Part-time employment

4. The Commission proposes to vary clauses 10.4 (part-time employment) and 21.7 (rostering) of the *Children's Services Award*. Proposed variations include:
 - a. Where the exception to provide 7 days' notice to change an employee's days of work applies, an employer must pay the employee at overtime rates for the additional time the employee remains at the workplace;
 - b. Where the exception to provide 7 days' notice to change a roster applies, the employer must pay the employee at overtime rates for the additional time the employee remains at the workplace;
 - c. an employer would be able to make changes to an employee's agreed pattern of work/days to be worked/an employee's starting and finishing times by electronic means of communication in writing;
 - d. an employer would be able to agree with the employee, by electronic means of communication in writing, to waive or shorten the 7 days' notice period where changes are made to rostered hours.
5. The obligation to make overtime payment in the circumstances as set out at 4(a) and 4(b) above is opposed on the ground that the proposed variations amount to a substantive variation of the award. Current clauses 10.4 and 21.7 do not require the payment of overtime in the circumstances as set out in 4(a) and 4(b) above. The payment of overtime amounts to a new financial obligation on employers that is inconsistent with section 134(f) *Fair Work Act 2009* (Cth).
6. Further, current clauses 10.4(f) and 23.1(b) prescribe when overtime rates apply for part-time employees performing additional hours. Clause 10.4(f) provides "*a part-time employee who agrees to work in excess of their normal hours will be paid at ordinary time for up to eight hours provided that the additional time worked is during ordinary hours of operation of the early childhood service. No part-time employee may work in excess of eight hours in any day without the payment of overtime*". The proposed variation is therefore unnecessary.

¹ [2020] FWCFB 5176.

² Paragraph [79] of the Decision.

7. Whilst AFEI do not oppose the principle of the proposed variations as set out at 4(c) and 4(d) above, AFEI notes that the Commission gave consideration to similar provisions in the *Aged Care Award 2010*, which provide that changes to roster may be communicated by telephone.³ AFEI also note that the Commission highlighted that certain witness evidence in the proceedings suggested that ‘consent’ can occur informally such as by way of a phone call.⁴ As such, the proposed variations ought to include the option for changes and agreements to be made by telephone, consistent with the realities of the way the childcare industry operates.

Educational Leaders: Non Contact Time

8. In relation to the proposed variation to clause 21.5(a) of the Children’s Services Award, AFEI do not oppose the draft variation determination at Attachment A of the Decision. To provide certainty to employers and employees, the definition of ‘Educational Leader’ (currently set out in the draft variation determination) should be included in Clause 2 of the Award, so that it is a term of the Award.

Clothing Allowance

9. In relation to the proposed variation to clause 15.2(c) of the Children’s Services Award, AFEI do not oppose the draft variation determination at Attachment A of the Decision.

Minimum Engagement – Teachers Award

10. AFEI do not oppose the Commission’s provisional view at [61] of the Decision, that casual early childhood teachers working in early childhood services be subject to a two hour minimum engagement period, subject to the provision replacing the existing Clause 17.5(c)(ii), and instead of J.1.5(b)(ii) in the Commission’s draft variation determination at Attachment A of the Decision.

Coverage

11. **First**, AFEI seek to address the characterisation of our 30 June 2020 submission at [72] of the Decision. In particular, the IEU submission that *‘it appears this [AFEI’s position not opposing transfer of the relevant parts of the Teachers Award to the Children’s Services Award]...is on the basis that classifications, pay and conditions for teachers in early childhood settings would be brought into line with educators covered by the Children’s Services Award. This would result in a sharp diminution in the conditions of employment of these teachers.’* This characterisation of our submission appears to have been accepted by the Commission at [73]. AFEI in fact made no submissions about *how* discrepancies between the Teachers Award provisions and Children’s Award provisions would be reconciled. As set out in our 30 June 2020 submission, our position was advanced on the basis that witness evidence in these proceedings showed that having two Awards in one centre was confusing, difficult and inefficient,⁵ consistent with member feedback received by AFEI. Notwithstanding this, AFEI does not propose consolidation of the two Awards at this time.
12. **Second**, AFEI do not support the Commission’s proposal at [78] of the Decision on the basis that the proposed Schedule J in the draft determination and cross-references within Schedule J would not eliminate the *“administrative issues for ECEC employers arising from multiple award coverage”*,⁶ it could have the potential to cause further confusion whilst causing the award to become unnecessarily lengthy inconsistent with section 134(g) of the *Fair Work Act 2009* (Cth).

³ Aged Care Award 2010, clause 22.6(f).

⁴ [2020] FWCFB 3011 at [249].

⁵ AFEI submissions dated 30 June 2020 at paragraph [2].

⁶ Paragraph [62] of the Decision.