Document containing questions and responses to Background Document 1 and 2

Background Document 1

We received responses from:

- I and E Arrabalde on 5 July 2019;
- United Voice on 9 July 2019;
- Australian Childcare Alliance and others on 10 July 2019;
- Australian Federation of Employers and Industries on 10 July 2019; and
- Independent Education Union of Australia on 10 July 2019.

Question for all parties
Q.1 Are the lists at Appendices 1, 2 and 3 accurate?

Australian Childcare Alliance and others[1]

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

Australian Federation of Employers and Industries

The only issue with the Appendices identified by AFEI is the reference to transcript for Ms James, on page 79. The reference should be PN3374 – PN3382.

I and E Arrabalde

Yes, to the best of our knowledge.

Independent Education Union

Appendix 1 under IEU Submission – 18 March 2019 should have the date amended to 15 March 2019. Otherwise, Appendices 1, 2 and 3 are accurate.

United Voice

Appendix 1 is correct.

Appendix 2 is correct insofar as the 5 United Voice witnesses are listed accurately with accurate transcript references. However in the column titled 'Exhibit no.' our witness statements (exhibits 6 to 12 and 17) are incorrectly labelled with the prefix 'IEU'.

Appendix 3 is correct.

Question for all parties
Q.2 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)?

[1] Australian Childcare Alliance, Australian Business Industrial and New South Wales Business Chamber, National Outside School Hours Care Services and Junior Adventure Group

Australian Childcare Alliance and others

This is not conceded by ACA/ABI.

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.

Australian Federation of Employers and Industries

For its part, AFEI is not in a position to accept the proposition that most award reliant employees covered by the Children's Services Award are low paid.

This is because none of the data represented in Chart 1[2] is directed at the incidence (i.e. frequency) of employment at any of the classification levels in the award and therefore the Chart does not show (or even purport to show) the classification level(s) at which 'most' employees are employed.

To the extent that the Chart represents award derived data, that data is confined to the minimum weekly wages in the award effective 1 July 2018 – it does not represent actual amounts that are paid. As one example, it does not include pay point progression within classification levels based on service within the industry,[3] noting that a Level 3 employee will progress after two years, to Level 3.3, the same wage rate as applicable to Level 4A.1.

Consequently, even if it were the case that full time weekly wages for classifications below Level 4A.1, and Level 3.3 were below the CoE and the EEH measures,[4] that comparison is incapable of providing any reasonable platform to support the proposition that 'most' award reliant employees are 'low paid'.

I and E Arrabalde

Yes. This is well-documented. The *ECEC Workforce Study* was a three year mixed-methods research study with 1,200 participants from all over Australia:

> The study findings highlight the personal cost of choosing to work in ECEC, especially in long day care settings. For many, these costs included: financial hardship; less favourable working conditions, including long and sometimes unpaid work hours; challenging work contexts causing stress and impacting on educator's mental health and general wellbeing; and a public image that fails to acknowledge the professional and educational nature of the work and thereby devalues those who choose to work in this sector.
>
> …the study also highlighted the challenge of surviving on current wages and revealed cases of extreme financial hardship. An unexpected finding was that many educators said they were only able to work in ECEC because their partner or family financially supported them. The

[2] See Background Document at p.12, Chart 1: Comparison of minimum full-time weekly wages in the Children's Services Award 2010 and two-thirds of median full –time earnings

[3] Clause 14.1

[4] See Background Document at [26]

> majority of educators in long day care centres felt their wages didn't reflect their professional work, and the desire for better wages and/or wage parity with colleagues in other education contexts were the most common reasons given for leaving their current centre.[5] (Emphasis added)

United Voice

Paragraph [26] of the Background Document states '*Chart 1 shows that the full-time weekly wages for all classifications below Level 4A.1 in the Children's Services Award were below the CoE measure of two-thirds of median fulltime earnings. In addition, all classifications below Level 4.1 were below the EEH measure of two-thirds of median full-time earnings.*'

United Voice agrees that most award-reliant employees covered by the Children's Services Award are '*low paid'* within the meaning of s.134 (1)(a) of the *Fair Work Act 2009* ('the Act').

Most employees in the sector would be classified lower than Level 4. Only the Director, Assistant Director (if a service had such a role, some smaller services do not have an Assistant Director) and Room Leaders would be classified at Level 4.1 and above. In addition, the Director position, as the most senior position, is most likely to be paid above award wages.

The characterisation of award reliant employees covered by the Children's Services Award as '*low paid'* within the meaning of paragraph 134(1) (a) is appropriate.

Question for UV

Q.3 Are the allowances sought for employees who undertake the roles of Educational Leader or Responsible Person properly characterised as allowances of the type referred to in s139(1)(g)(ii)? If not, what sort of allowances are they?

The allowances sought for employees who undertake the roles of Educational Leader or Responsible Person are properly characterised as allowances of the type referred to in s139 (1)(g)(ii) of the Act.

Questions for all parties

Q.4 Is it common ground that UV: allowance claims do not seek to vary modern award minimum wages such that the limitation in s156(3) does not apply?

Australian Childcare Alliance and others

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).

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[5] Irvine, S., Thorpe, K., McDonald, P., Lunn, J., & Sumsion, J. (2016, May). *Money, Love and Identity: Initial findings from the National ECEC Workforce Study*. Summary report from the national ECEC Workforce Development Policy Workshop, Brisbane, Queensland: QUT. p. 5
https://eprints.qut.edu.au/101622/1/Brief_report_ECEC_Workforce_Development_Policy_Workshop_final.pdf

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

Australian Federation of Employers and Industries

For its part, AFEI accepts that s. 156(3) does not apply to the allowance claims pursued by United Voice. The limitation at s. 156(3) is directed to the variation of 'modern award minimum wages'; having regard to the meaning of that expression at s. 284(3) and the meaning of 'varying modern award minimum wages' at s. 284(4), neither of the United Voice allowance claims represents a proposal for 'a determination varying modern award minimum wages'.

I and E Arrabalde

We do not have sufficient knowledge to comment on s156(3).

United Voice

It is our position that our allowance claims do not seek to vary modern award minimum wages, therefore s156 (3) is not relevant.

Q.5 If s156(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?

Australian Childcare Alliance and others

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

Australian Federation of Employers and Industries

Section 138 represents the boundary within which the Commission exercises its statutory task. The relevant test in s138 is however, two-fold. The Commission must be satisfied that the claimed allowance is a term that is permitted or required to be included in a modern award; and in respect of the modern awards objective, the Full Federal Court has explained the task of the Commission as follows:

> Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.[6] (AFEI underlining)

In addressing whether the term is permitted to be included in an Award, s139(g)(ii) provides that a modern award may include terms about allowances for responsibilities or skills that are

[6] *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 (per Allsop CJ, Norther and O'Callaghan JJ) at [29]

not taken into account in rates of pay. To the extent that United Voice relies on s139(g)(ii), the Commission must also be satisfied that the responsibilities or skills associated with the claimed allowances are not taken into account in rates of pay. In this instance, however, the skill/responsibility associated with the claimed allowances are already taken into account in rates of pay. This has been addressed in our previous submissions, and also in response to Question 7 below.

I and E Arrabalde

We do not have sufficient knowledge to comment on s156(3).

United Voice

Yes. The insertion of the allowances as proposed would ensure that employees who are required to perform the functions covered are provided with a fair and relevant safety net of terms and conditions.

Q.6 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 ss134(1)(a) to (h)?

Australian Childcare Alliance and others

Yes.

Australian Federation of Employers and Industries

For its part, AFEI accepts that the question captures the modern awards objective insofar as the objective is a composite expression and does express a positive requirement to consider the matters in s. 134(1)(a)-(h). Relevantly, the Full Bench has described the modern awards objective in the terms described in the question,[7] and that approach was confirmed by the Full Court of the Federal Court of Australia.[8] That said, the Full Court has explained that the considerations at (a)-(h) 'do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard'[9] and the subject matter, scope and purpose of the Fair Work Act will determine the range of matters that may be taken into account.[10]

I and E Arrabalde

This was our understanding.

United Voice

[7] Re 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001; (2017) 265 IR 1 at [128]

[8] Shop, Distributive and Allied Employees Association and Anor v AIG and Others [2017] FCAFC 161; (2017) 253 FCR 368 at [42]-[43], [48]-[49]

[9] Shop, Distributive and Allied Employees Association and Anor v AIG and Others [2017] FCAFC 161; (2017) 253 FCR 368 at [48]

[10] Shop, Distributive and Allied Employees Association and Anor v AIG and Others [2017] FCAFC 161; (2017) 253 FCR 368 at [48], citing Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40

Yes.

Q.7 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?

Australian Childcare Alliance and others

The answer to these questions is yes.

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 Decision[11] concerning the Pastoral Award 2010.

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.'*

The Full Bench held that double rates for the crutching of rams and ram stags *'is appropriate having regarding to the nature of the work, the level of skill and responsibility and the conditions under which the work is done*'[12] and were therefore satisfied that the variation proposed was '*justified to work value reasons'*.[13]

Critically and contrary to the present proceedings, the position advanced in the Pastoral Decision was not opposed.

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.

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[11] [2015] FWCFB 8810

[12] Ibid at [50]

[13] Ibid at [51]

It should be uncontroversial that this is a not a case where the proposed changes to the 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*'.

In short, UV needed to advance a probative case and bears an onus to satisfy the Commission that these allowances are 'fair'.

A number of aspects of the evidence are particularly relevant to this assessment.

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.

This will depend on the centre and individual appointed.

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. [14]

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.

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.

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 work[15] . 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.

Australian Federation of Employers and Industries

The level of skill or responsibility are unavoidable matters for consideration. That said, it is submitted there are two important qualifications to this. *First*, primary attention should be given to establishing proof of the existence of identifiable skill or responsibility. *Second*, the Commission should approach a consideration of the relative worth (value) of the skill or responsibility only where it is satisfied that identifiable skill or responsibility has not been taken into account in the current award.

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[14] This specific contention was accepted by Ms Mravunac at PN4511

[15] As explained by Ms Vikanarasah Transcript 6 May 2019 PN1289, 1327

With respect to the second condition, any fair deliberation will take notice of the significance of skill and responsibility to the current classification structure. And it will assist to note the matters that an employer must take into account in classifying employees under the award. These are disclosed in the introductory paragraph of Schedule B – Classification Structure which reads:

> *All employees will be classified by the employer into one of the levels contained in this Schedule in accordance with the employee's skills, responsibilities, qualifications, experience in the industry and duties.*

From this introductory paragraph, it can be seen that the classification exercise is informed by five matters: skills, responsibilities, qualifications, industry experience, and duties. Each of these is taken into account in the definitions for the individual classification levels which characterise the classification structure. Because the classification levels align with minimum weekly rates and minimum hourly rates,[16] it follows that skills and responsibilities (and the other considerations such as qualifications and experience) are taken into account in the rates of pay in the current award.

It is also relevant that the classification levels in the structure at Schedule B typically describe duties in wide, not narrow terms. The listed duties are presented as '**Indicative**' duties. Therefore, the classification structure serves to indicate what may be required/ expected from an employee at the level; however, the lists are not exhaustive. Thus an employee can be classified at a particular level as long as the employee's actual duties correspond with, or are comparable to, those indicated and it is not essential that the employee's actual duties fall within the exact terminology of the indicative duties. Thus, the range of duties that can be accommodate by the structure is wider than the listed indicative duties. It is submitted that the classification structure is designed to suit contemporary circumstances of the industry and it can accommodate change in those circumstances from time to time. That quality ensures that the award is relevant.[17]

With regard to educational leader and responsible person, the current classification structure of the award is fair and relevant because it responds adequately to the skill or responsibility that may be expected from a person designated as an educational leader or from a person who is present at the times that the service is educating and caring for children. This is demonstrated in the terminology of the indicative duties for classification level 6 - Director:[18]

- Responsible for the overall management and administration of the service.
- Supervise the implementation of developmentally appropriate programs for children.
- Recruit staff in accordance with relevant regulations.
- Maintain day-to-day accounts and handle all administrative matters.
- Ensure that the centre or service adheres to all relevant regulations and statutory requirements.
- Ensure that the centre or service meets or exceeds quality assurance requirements.
- Liaise with families and outside agencies.

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[16] See award at clause 14.1

[17] In Re 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001, the Full Bench said this at [120]: "*In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances"*

[18] See Indicative Duties at B.1.10 Level 6 – Director

- Formulate and evaluate annual budgets.
- Liaise with management committees as appropriate.
- Provide professional leadership and development to staff.
- Develop and maintain policies and procedures for the centre or service.

It is demonstrated in the terminology of the indicative duties for classification level 5 (which includes, in its scope, Assistant Director):[19]

- Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs.
- Contribute, through the Director, to the development of the centre or service's policies.
- Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training.
- Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues.
- Generally supervise all employees within the service.

It is demonstrated in the terminology of the classification level 4 description:[20]

- Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups.
- Responsible to the Assistant Director/Director for the supervision of students on placement.
- Responsible for ensuring a safe environment is maintained for both staff and children.
- Responsible for ensuring that records are maintained accurately for each child in their care.
- Develop, implement and evaluate daily care routines.
- Ensure that the centre or service's policies and procedures are adhered to.
- Liaise with families.

As noted above, an employee's qualification(s) are directly relevant to the exercise of classifying under the award. It is relevant to take into account that the award classification structure references a wide range of contemporary qualifications which are significant to the classification exercise including:

- University degree in early childhood education,[21]
- AQF advanced Diploma,[22]
- AQF Level V Diploma in Children's Services or equivalent,[23]
- Diploma in Children's Services or equivalent,[24]
- AQF Certificate III in Children's Services or an equivalent qualification.[25]

[19] See Indicative Duties at B.1.8 Level 5

[20] See Indicative Duties at B.1.6 Level 4

[21] See description at B.1.10 Level 6 – Director

[22] See description at B.1.10 Level 6 – Director

[23] See description at B.1.8 Level 5

[24] See description at B.1.6 Level 4

[25] See description at B.1.4 Level 3

Having regard to these matters of skill, responsibility and qualifications, it is submitted that the rates of pay in the current award already take into account the responsibilities or skills that could be expected from an employee designated as an Educational Leader, and the expectations associated with being present at the service as a responsible person.

I and E Arrabalde

Yes. We believe it is relevant to look at the value of the work and the level of skill and responsibilities involved in undertaking the role of Educational Leader or Responsible Person when considering whether or not the allowances are fair. This is because the persons designated in these roles are most likely to be the most qualified, capable and experienced members of a staff team.[26] Not only is the role of the Educational Leader and the Responsible Person significant, impacting upon the overall quality of an early childhood education and care setting, these roles are mandated by law.

Educational Leaders and Responsible Persons have responsibilities that are in addition to the duties within their Award classification. The evidence before the Full Bench confirms that employees who are designated as the Educational Leader or the Responsible Person are being paid the same as employees within the same classification who are not.[27] The proposed allowances would ensure that all employees covered by the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2010* who are designated as the Educational Leader or Responsible Person would be paid consistently for their work in keeping with the modern award objective "to provide fair and relevant minimum safety net of terms and conditions."[28]

United Voice

Yes, it is relevant to look at the value of the work being undertaken by employees designated as Educational Leader and Responsible Person, and regard must be given to the responsibility and skill involved in undertaking those roles. The use of the term '*value*' does not conflate the claim with what the Act deems to be *'work value*.' The Commission is commonly required to consider work in terms of disutility[29], cost[30] and responsibility.[31] These evaluations do not equate to the Act's concept of work value. As indicated in our submission of 15 March 2019, the responsibilities which are the subject of our allowance claims are not attached to classifications under the Awards.[32] This was clearly confirmed by the evidence

[26] See Arrabalde submission (27 May 2019) at [31]-[34]

[27] See for example, Arrabalde submission (26 April 2019) at [45]

[28] *Fair Work Act 2009*, Section 134(1)

[29] The payment of some premium for unsocial hours of work (weekend penalty rates generally) or long durations of work (intra-day or weekly overtime entitlements generally).

[30] Where an employee is required to wear a uniform maintained to a certain standard (uniform and laundry allowances generally) or possess a particular tool of trade for work (reimbursement allowances for tools of trade generally).

[31] For example, the award term requiring a minor covered by the *Restaurant Industry Award 2010* to serve alcohol being paid the adult rate: see: *4 yearly review of modern awards – Restaurant Industry Award* 2010 – *Hospitality Industry (General) Award 2010 – substantive issues* [2018] FWCFB7263 at [145] to [165].

[32] Submission of 15 March 2019 at [30].

that the Commission has heard that the roles of Responsible Person and Educational Leader can and will be performed by a wide variety of persons at different classifications.

Question for all other parties
Q.8 Are the contentions set out at [47] to [49] above contested?

Australian Childcare Alliance and others

Yes.

The Macquarie Dictionary Seventh Edition defines 'critical' as of '*decisive importance with respect to the outcome*'.

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.[33]

Even on the face of the above UV submissions, ACA/ABI notes that Standard 7.2 applies generally to leadership[34], 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.

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.

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.[35]

(b) Dr Fenech was unaware of any example of an ECEC centre not meeting the relevant quality standards due to the insufficiency of its Educational Leader.[36] This was despite the fact that Dr Fenech was of the view that not all Educational Leaders possessed the 'requisite skill-set'[37] which was required (in Dr Fenech's view) under the regulatory framework.[38]

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[33] 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

[34] As acknowledge by Dr Fenech - see Transcript 6 May 2019 at PN571

[35] Viknarasah Statement at [120]

[36] Transcript 6 May 2019 at PN567

[37] Transcript 6 May 2019 at PN557

[38] Transcript 6 May 2019 at PN538

(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*.'[39]

(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.[40] 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.[41] Ms Hennessey also acknowledged she did not develop the program or curriculum at the Centre[42] and was not responsible for developing and implementing specialised learning plans to support students of different educational needs.[43]

(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 Leader[44]. 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.[45]

(iv) Ms Warner accepted that preparing observations and photos for each child is completed by the lead educators[46], that '*assisting educators with reflection on their educational practice*' is something that she would already do as 2IC of her centre '*to a degree'*.[47]

(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 service[48], that she developed the programming for her service, was ultimately responsible for educational programming[49] and that her role as Director required her to build a professional learning community and promote a positive organisational culture[50] (see Standard 7.2).

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[39] Transcript 6 May 2019 at PN633

[40] Transcript 6 May 2019 at PN215

[41] Transcript 6 May 2019 at PN 285-286

[42] Transcript 6 May 2019 at PN 288-9

[43] Transcript 6 May 2019 at PN 296

[44] Transcript 6 May 2019 at PN 307

[45] Transcript 6 May 2019 at PN 317

[46] Transcript 7 May 2019 at PN 1488

[47] Transcript 7 May 2019 at PN 1493

[48] Transcript at 9 May 2019 at PN4483

[49] Transcript at 9 May 2019 at PN4482

[50] Transcript at 9 May 2019 at PN4475-4477

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.

Australian Federation of Employers and Industries

In responding to this question, it will assist to revisit the form of the obligation at Regulation 118 of the Education and Care Services National Regulations. This regulation reads:

> The approved provider of an education and care service must designate, in writing, 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.

The Regulation is brief in terms and does not comprehensively describe the expectations of the person so designated, but at least it conveys that the judgment of who is designated is informed by the suitability of the individual's qualifications and experience. However, as the role is within the scope of the individual's qualifications and experience, the Regulation itself does not require more from the designated individual than what can be expected from the person in their usual or normal role. It is submitted that the classification descriptions of the current award reflect contemporary circumstances and are capable of accommodating skills or responsibilities associated with educational leader (particularly at classification levels 4 to 6 as shown above).

Further, within the context of the industry of children's services and early childhood education, it would be reasonable to expect that there are many individuals who are, by virtue of their industry specific qualifications and experience, able to lead the implementation and development of educational programs in the service.

I and E Arrabalde

No. We agree with these contentions.

United Voice (responses to questions 8-11 together)

3.1.1(A) Educational Leader Allowance

In paragraph [46] of the Background Document, there is a reference to the allowance structure for Directors in the Teachers Award, however what is replicated is clause 15.6 of the Children's Services Award (which is a qualifications allowance for certain employees who hold a Graduate Certificate in Childcare Management). The qualifications allowance in clause 15.6 of the Children's Services Award has no relevance to our claim.

The structure of our claim is based on the Director's allowance in clause 15.1 of the Teachers' Award, which posits three levels for the allowance: namely a centre with no more than 39 places, a centre with 40-59 places and a centre with 60 or more places.

Question for all other parties
Q.9 Is the submission set out at [50] above contested?

Australian Childcare Alliance and others

No.

Australian Federation of Employers and Industries

For its part, AFEI considers the submission supportive of the position which AFEI has put above in response to question 8 insofar as the qualifications that may inform the decision to designate an educational leader correspond with qualifications which are already taken into account in the current award e.g. diploma qualification, early childhood teacher qualification, certificate III.

I and E Arrabalde

No. We agree with these contentions.

United Voice (responses to questions 8-11 together)

3.1.1(A) Educational Leader Allowance

In paragraph [46] of the Background Document, there is a reference to the allowance structure for Directors in the Teachers Award, however what is replicated is clause 15.6 of the Children's Services Award (which is a qualifications allowance for certain employees who hold a Graduate Certificate in Childcare Management). The qualifications allowance in clause 15.6 of the Children's Services Award has no relevance to our claim.

The structure of our claim is based on the Director's allowance in clause 15.1 of the Teachers' Award, which posits three levels for the allowance: namely a centre with no more than 39 places, a centre with 40-59 places and a centre with 60 or more places.

Question for all other parties
Q.10 Are the assertions set out in [59] generally agreed?

Australian Childcare Alliance and others

Yes.

Australian Federation of Employers and Industries

Insofar as United Voice asserts that the nominated supervisor is generally the Director of the centre, that assertion is not disputed by AFEI. However, the assertion is supportive of the AFEI position that the responsibility of a nominated supervisor is a matter that has been taken into account in the classification structure, notably at level 6 where the indicative duties of a Director reflect a level of overarching responsibility. With respect to the responsibilities, these are essentially responsibilities to educate and care for children and to supervise children when in the care of the service. Those responsibilities reflect the essential nature of the

industry to which the award applies[51] and are responsibilities addressed in the award's classification structure.

In respect to the further contentions at paragraph [59], A person's exposure to penalty under statute is not a consideration which should inform questions of remuneration under modern awards - such a proposition finds no support in the Fair Work Act, nor any historical support. In any event, the responsibilities which United Voice put in support of the allowances are responsibilities which are already recognised by the award and are taken into account in the rates of pay.

I and E Arrabalde

Yes. However, there is no requirement for a Nominated Supervisor to be a Responsible Person or the Director. It is agreed that Nominated Supervisors have significant responsibilities.

United Voice (responses to questions 8-11 together)

3.1.1(A) Educational Leader Allowance

In paragraph [46] of the Background Document, there is a reference to the allowance structure for Directors in the Teachers Award, however what is replicated is clause 15.6 of the Children's Services Award (which is a qualifications allowance for certain employees who hold a Graduate Certificate in Childcare Management). The qualifications allowance in clause 15.6 of the Children's Services Award has no relevance to our claim.

The structure of our claim is based on the Director's allowance in clause 15.1 of the Teachers' Award, which posits three levels for the allowance: namely a centre with no more than 39 places, a centre with 40-59 places and a centre with 60 or more places.

Q.11 What is the distinction between the Nominated Supervisor and the Responsible Person?

Australian Childcare Alliance and others

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.

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.

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.

[51] The definition of the industry at clause 3 reads*: **children's services and early childhood education industry** means the industry of long day care, occasional care (including those occasional care services not licensed), nurseries, childcare centres, day care facilities, family based childcare, out-of-school hours care, vacation care, adjunct care, in-home care, kindergartens and preschools, mobile centres and early childhood intervention programs*

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.

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;
NA	**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.
NA	**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.
NA	**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.
NA	**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.
NA	**168 Offence relating to required programs** 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.
NA	**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.
NA	**170 Offence relating to unauthorised persons on education and care service premises** (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
NA	**172 Offence to fail to display prescribed information** 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;
NA	**173 Offence to fail to notify certain circumstances to Regulatory Authority** (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— (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;

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 offsite[52];
> (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;[53]
> (iii) Ms Farrant gave evidence that 'Responsible Persons' (person in charge) did not make 'big decisions'[54] and that should the Responsible Person have 'any difficulties' they were to call the Director or Assistant Director[55]; 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.

[52] See Transcript 6 May 2019 PN724

[53] See Transcript 7 May 2019 from PN1519

[54] See Transcript 8 May 2019 from PN3360

[55] See Transcript 8 May 2019 from PN3361

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.[56] As previously submitted, it is contested by ACA/ABI that such a responsibility falls within the scope of a Responsible Person in any event.

Australian Federation of Employers and Industries

A requirement of the national law is that there must be present at a service at all times one of the following persons:[57]

- An approved provider (or person with management of conduct of the service operated by the provider);
- A nominated supervisor;
- A person in day to day charge of the service.

Each of these is a responsible person. A nominated supervisor is an individual who is nominated (and has accepted nomination) by the service provider to be a nominated supervisor.[58] Nomination is significant for the purposes of service approval as an application for service approval must include the nominated supervisor(s).[59] Thus, the individuals who are capable of being a responsible person includes nominated supervisor but is wider than that group.

I and E Arrabalde

Q.11 What is the distinction between the Nominated Supervisor and the Responsible Person? Nominated Supervisor[60]	**Responsible Person**
Must consent to the position in writing. This consent must be submitted to the regulatory authority in the form of a notification in a timely manner.	Must consent to the position in writing.
Is responsible for the day-to-day management of a centre.	Is in day-to-day charge of a centre.
Can be but is not necessarily the Director.	Can be but is not necessarily the Director.
Does not have to be present at all times.	Must be present in order to be classified as the Responsible Person.
Has legal responsibility for compliance with components of the National Law and National Regulations.	The role itself does not attract additional legal responsibilities.
May be more than one at one time.	May only be one at one time.

[56] See Transcript 6 May 2019 PN653

[57] Children (Education and Care Services) National Law (NSW), s. 162(1)

[58] Children (Education and Care Services) National Law (NSW, s.5

[59] Children (Education and Care Services) National Law (NSW), s.44(1)(d)

[60] For more information see, Australian Children's Education and Care Quality Authority (ACECQA). *National Quality Agenda Review: Nominated Supervisors.* https://www.acecqa.gov.au/sites/default/files/2018-03/InformationSheetNominatedSupervisor.pdf

United Voice (responses to questions 8-11 together)

3.1.1(A) Educational Leader Allowance

In paragraph [46] of the Background Document, there is a reference to the allowance structure for Directors in the Teachers Award, however what is replicated is clause 15.6 of the Children's Services Award (which is a qualifications allowance for certain employees who hold a Graduate Certificate in Childcare Management). The qualifications allowance in clause 15.6 of the Children's Services Award has no relevance to our claim.

The structure of our claim is based on the Director's allowance in clause 15.1 of the Teachers' Award, which posits three levels for the allowance: namely a centre with no more than 39 places, a centre with 40-59 places and a centre with 60 or more places.

Question to all other parties
Q.12 Is the contention at [62] contested?

Australian Childcare Alliance and others

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.

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.[61]

(c) All or most educators have discussions with parents, not just Responsible Persons.[62]

Status as a Responsible Person requires no practical additional work such as creating rosters 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.

Australian Federation of Employers and Industries

Yes, AFEI contests the contention at [62] of the Background Paper.

At [62] it states '*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….*'

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

[62] See Transcript at PN291-292

We have already addressed above at Question 7, the duties associated with being designated as responsible person are taken into account in the Award's classification structure.

A suggested example is given at [62] of '*a…Level 3.4 (Diploma) grade may be designated Responsible Person on a shift from 10am to 6.30pm because the Director (the Nominated Supervisor) is off site in training…' where it is contended that 'the employee would be expected to continue to carry out their substantive duties during that period, in addition to the role of Responsible Person.*' This example is of limited relevance, as there is no basis to conclude that it involves a realistic arrangement. There is notably, no evidence before the Commission that an employee classified at a level below Associate Director will perform the role of 'responsible person' for an entire shift.

Even the case of an employee designated as responsible person at a classification below Level 4, they may not, during the period of their designation, perform any additional duties.[63]

I and E Arrabalde

No. We agree with this contention.

United Voice

No response.

Question for UV

Q.13 UV contends that 'The fact that the allowances will be paid predominantly to women whose work is undervalued is relevant as a consideration.' The premise of the submission put is that the work of employees covered by these awards has been undervalued for gender reasons. What evidence has been advanced in support of that proposition?

It is uncontested that this is a sector that is predominantly female and largely low paid. A further '*fact*' in support of an undervaluation is that the current terms and conditions of the safety-net for the sector do not recognise or compensate the predominantly female workforce for the functions covered by our allowance claims. These circumstances or indicia are evidence of a gendered undervaluation. There is no requirement for the Commission to consider a comparator when evaluating the principle of equal remuneration for work of equal or comparable value in the context of the modern awards objective.[64] The modern awards objective is broadly expressed[65] and as such it is open for the Commission to regard this consideration as a relevant one.

Question for ACA, ABI and NSWBC

Q.14 Do you accept the proposition advanced by UV at [81] above?

Australian Childcare Alliance and others

[63] Evidence of Ms Llewellyn at PN4365

[64] *2015 Equal Remuneration Decision* [2015] FWCFB 8200 at [292].

[65] As above, at [35]-[36].

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.

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.

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.

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.

United Voice

With respect to paragraph [81], our proposition was in direct response to an ACA submission dated 16 April 2019 that stated: *'2.17 The difficultly with dual roles is educational leaders or responsible persons who are also appointed as directors are already paid at the highest level of the Children's Services Award (Level 6) and provided with a directors allowance of between 11.5% and 17.3% of the standard rate in the award to compensate for any additional responsibilities associated with being a person in charge (or responsible) under the National Law. To pay these roles a further allowance in compensation for duties already included in the Level 6 classification would be inappropriate*.'

Paragraph [81] of the Background Document states: *'UV also rejects the proposition that educational leader or responsible persons who are also appointed as directors would also receive a director's allowance of between 11.5 per cent and 17.3 per cent of the standard rate. 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*.'

The first sentence of paragraph [81] correctly reflects our position insofar as the Children's Services Award is concerned. The second sentence of paragraph [81] is also an accurate reflection of our position.

Question for ACA, ABI and NSWBC
Q.15 Do you contest the UV submission at [84] above?

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'*. [66]

Question for ACA, ABI and NSWBC

Q.16 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)?

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', 'coordinator' (e.g. director) or 'other individual' to the role.

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

Question for ACA, ABI and NSWBC

Q.17 Are the Employers 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.

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.

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.

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*

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*

Level 4 is even clearer, with the first classification descriptor outlining that Level 4s are:

[66] See Clause B.1.5 of the Children's Services Award 2010

Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups

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.

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 for UV

Q.18 UV is invited to respond to the proposition that it is 'the centre and its Nominated Supervisor that holds the ultimate responsibility' to ensure compliance with the National Law and Regulations.

Under the National Law, both the approved provider and the nominated supervisor can face civil penalties for failing to ensure that a required program is delivered to all children being educated and cared for by the service (s168). We do not dispute this, and this fact is not inconsistent with our claim.

The approved provider and the nominated supervisor (generally the centre director) have management responsibility for ensuring that a required program is delivered under s168, and the Educational Leader *leads* the development and the implementation of the educational programs within the service in accordance with Regulation 118.

Our claim for an allowance for the employee in the role of Educational Leader is based upon the additional responsibility and work such an employee has *within* the workplace. That the approved provider and the nominated supervisor must manage appropriately to ensure that a program is delivered within the service does not detract from the responsibilities or the work of the Educational Leader is required to do.

The approved provider can be and is not infrequently a body corporation.[67]

Question for all parties

Q.19 Does the argument advanced by the Individuals overlap with the ERO/work Value proceedings?

Australian Childcare Alliance and others

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

[67] Submission on findings at [33], paragraph 162(1) (a) of the National Law permits the approved provider being a body corporate.

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.

Australian Federation of Employers and Industries

The question of comparability between educational leaders in ECEC and primary school teachers has been a subject of the ERO/Work Value proceedings in C2013/6333 and AM2018/9.

In C2013/6333 and AM2018/9, the IEU have not sought to distinguish an early childhood teacher from an early childhood teacher designated as educational leader, because it is their evidence that early childhood teachers are the educational leader in ECEC. As such, the IEU have relied on evidence of early childhood teachers designated as educational leader in seeking a comparison between early childhood teachers and male primary teachers in the NSW public sector.

In respect to educational leaders in ECEC, AFEI submissions in C2013/6333 have drawn attention to the absence of any requirement that the designated educational leader is an early childhood teacher.

It is relevant to the ERO/Work Value proceedings that there is further evidence (and argument) in these proceedings (AM2018/18) of the designated educational leader in an ECEC not requiring teacher degree qualifications, or even diploma qualifications in some instances. This is consistent with AFEI's submission in those proceedings.

Whilst not raised as a question in the Background Document, there is also the issue of more apparent overlap between the United Voice claim for an educational leader allowance in the Teacher's Award, and the ERO/Work Value proceedings.

There is the apparent risk of double-counting of remuneration for skill/responsibility associated with being designated as educational leader, to the extent that it has been contended (albeit by different unions) that such skill/responsibility should be taken into account in the Teacher's Award rates of pay (in the ERO/Work Value proceedings), and in an allowance (in these proceedings). It is critical that the skills/responsibilities of designation as educational leader are not double-counted by being remunerated in both an allowance and in the rate of pay for Award classifications.

I and E Arrabalde

No. We do not believe there is any overlap. In the transcript for C2013/6333 AM2018/9 from 12 June 2019, the proposed educational leadership allowance was mentioned and identified as a matter for "a different Full Bench":

> PN801
>
> That state of the evidence creates what we would regard as a practical difficulty from the applicant's point of view because it's quite unclear from the evidence which responsibilities the teachers say they have pursuant to each pattern or which function. That is a particularly

> acute difficulty because it is essential, in my respectful submission, that this Full Bench clearly disaggregate the work value of the teacher position from that of educational leaders and directors. Apart from anything else that is necessary because there is an allowance currently paid to directors - a reasonably substantial allowance - and there is an application reserved, part-heard or reserved, before a different Full Bench for an educational leader allowance. (Emphasis added)
>
> PN802
>
> The other proceeding, the United Voice with the support of the IEUA, is applying for an educational leaders' allowance and lead evidence relevant to that question. That is why we say it is essential that this Full Bench clearly distinguish between the work value attaching to the different positions. That would be true in any case but it's certainly true given the existence of one allowance and the application for another. Given the fact of the other application, this hasn't happened yet but I say this quite (indistinct), but, your Honour, you couldn't be heard to say that the evidence suggests that ECTs are often educational leaders and on that basis the responsibilities of an educational leader should be taken to be the typical responsibilities of an early childhood teacher. We couldn't accept that the evidence makes that out but even if it did, that's a mater to be dealt with by a different Full Bench in the context of an application for an allowance. (Emphasis added)

Independent Education Union (in response to questions 19 and 20)

The ACA, in the Equal Remuneration Order/Work Value proceedings (**the ERO proceedings**), has repeatedly suggested that the United Voice claims, which are functionally identical to the Individual Claims, and the fact that they are currently being dealt with by this Full Bench, present an obstacle of some kind to the resolution of those proceedings. Although ACA has not explained exactly *why* this is so, the objection was made repeatedly and in strong terms throughout the four-week evidence hearing, and is expected to recur in final submissions. This is of some concern given that:

a. when the issue of overlap was raised at a directions hearing on 9 November 2018 raised, United Voice asserted that there was no overlap, and ACA not only did not cavil with the proposition but expressly confirmed its agreement with United Voice that the claims should be heard separately;[68]
b. ACA, presumably on this basis, subsequently pressed (with the agreement of United Voice, but not the IEU) for the matters to be heard separately and before the ERO proceedings;[69] and
c. ACA separately indicated that they would not seek to use these proceedings to delay the ERO.[70]

Nothing has happened between the programming of these matters and the ERO proceedings being heard that would justify ACA's apparent about-face. Had ACA made its position – i.e. its intention to use the United Voice claims to, in some ill-defined way, obstruct the ERO proceedings – the IEU would have made an application for the programming of these matters to be varied to avoid any such issue.

[68] Transcript, 9 November 2019, PN167-177

[69] Joint Report, 5 December 2018

[70] Transcript, 5 December 2019, PN28

Assuming that the ACA's position is now that the matters are so intertwined that these proceedings will cause difficulties for the ERO proceedings, the IEU submits that the correct course is to delay the resolution of the United Voice claims until the ERO proceedings are finalized. To do otherwise would cause unfair prejudice to the IEU in both proceedings

United Voice

The argument advanced by the Individuals does not overlap with the ERO/work value proceedings. The argument advanced by the Individuals does not seek to vary minimum wages in the Teachers' Award; rather they seek to insert an allowance in both awards in similar terms to the United Voice allowance claims.

Q.20 If so, how should we deal with such overlap?

Australian Childcare Alliance and others

As previously suggested in our Joint Report[71] 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.

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.

It is not appropriate to have two different separately constituted Full Benchs 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).

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.

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.

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.

The preference therefore is for this Full Bench to hand down its findings prior to the ERO Full Bench.

[71] Joint Report on 5 December 2018

Australian Federation of Employers and Industries

Designation as educational leader is an issue that is more focal to these proceedings than the ERO/Work Value proceedings (which are much broader, and involve consideration of an application that seeks to avoid disaggregation of designation as an educational leader in an ECEC). These 4-yearly review proceedings also address designation as an educational leader in ECEC without limitation to only one Award or another, noting that a single ECEC is likely to employ staff under both Awards.

To deal with overlap, the Commission should therefore reserve its judgement in the ERO/Work Value proceedings, until a decision is handed down in these proceedings. There should then be an opportunity for parties to make submissions on the relevance (including potential implications) of the decision to the ERO/Work Value proceedings.

I and E Arrabalde

It does not appear that there is any overlap between the substantive claims and the ERO/work value case. While not opposing the proposed educational leadership allowance, the IEU has not actively supported its introduction. The ERO/work value case also does not consider the work of non-teacher educators who are paid under the *Children's Services Award 2010*.

During cross examination on 27 June 2019, Lisa James, an IEU witness (and employee of the union) arguably provided confirmation of the distinct nature of the two cases:

> PN4354
>
> If the claim that's brought in the award review proceedings for an educational leader allowance succeeds, there'll be a pay rise for what proportion of ECTs on your assessment?---We didn't actually apply for that, that was United Voice applying for the allowance because in our opinion we believe teachers are the educational leader, and they're degree qualifies them for that. So we didn't seek a separate allowance. But I imagine it will affect - - -
>
> PN4355
>
> I'm sorry, can I just - Ms James, can I just deal with that. Are you seeking to disassociate yourself from the claim for educational leaders - - -?---We did not make - we did not make a claim for that. That was another union. I'm not saying that I have an opinion about whether they should get it or not. What I'm saying is we didn't pursue that ourselves because we consider it part of a teacher's role.

Independent Education Union (in response to questions 19 and 20)

The ACA, in the Equal Remuneration Order/Work Value proceedings (**the ERO proceedings**), has repeatedly suggested that the United Voice claims, which are functionally identical to the Individual Claims, and the fact that they are currently being dealt with by this Full Bench, present an obstacle of some kind to the resolution of those proceedings. Although ACA has not explained exactly *why* this is so, the objection was made repeatedly and in

strong terms throughout the four-week evidence hearing, and is expected to recur in final submissions. This is of some concern given that:

a. when the issue of overlap was raised at a directions hearing on 9 November 2018 raised, United Voice asserted that there was no overlap, and ACA not only did not cavil with the proposition but expressly confirmed its agreement with United Voice that the claims should be heard separately;[72]
b. ACA, presumably on this basis, subsequently pressed (with the agreement of United Voice, but not the IEU) for the matters to be heard separately and before the ERO proceedings;[73] and
c. ACA separately indicated that they would not seek to use these proceedings to delay the ERO.[74]

Nothing has happened between the programming of these matters and the ERO proceedings being heard that would justify ACA's apparent about-face. Had ACA made its position – i.e. its intention to use the United Voice claims to, in some ill-defined way, obstruct the ERO proceedings – the IEU would have made an application for the programming of these matters to be varied to avoid any such issue.

Assuming that the ACA's position is now that the matters are so intertwined that these proceedings will cause difficulties for the ERO proceedings, the IEU submits that the correct course is to delay the resolution of the United Voice claims until the ERO proceedings are finalized. To do otherwise would cause unfair prejudice to the IEU in both proceedings

United Voice

As arguments do not '*overlap*' there is no need for the Commission to deal with the issue. The task of the Commission in this review is to address whether the Awards provide a fair and relevant safety net of terms and conditions and make any relevant adjustments in the safety-net to ensure this objective is reflected in the terms and conditions of the Awards.

Question for UV and the Individuals

Q.21 Do you contest that part of the ACA, ABI and NSWBC submission as to what are said to be a difference between the OSHC and Long Day Care sectors set out in the first dot point at [94] above? And if so, how would the Educational Leader allowance work in the OSHC sector.

I and E Arrabalde

Yes. The requirement for one person to be designated as the Educational Leader in Regulation 118 equally applies to both OSHC and long day care. A casualised workforce has no bearing on the operation of this Regulation. The allowance would only be payable to the employee designated in writing for the purposes of Regulation 118. Data compiled by United Voice and set out in Table 4 of the Background Document highlights the relevance of using the same centre size categories for the proposed allowances in both OSHC and long day care.

[72] Transcript, 9 November 2019, PN167-177

[73] Joint Report, 5 December 2018

[74] Transcript, 5 December 2019, PN28

It is acknowledged that there are differences and similarities between OSHC and long day care with respect to programming and planning:

> The National Quality Standard acknowledges middle childhood and recreational programs for school age children as distinct from early childhood programs. School age education and care programs supplement children's formal schooling. The educational program is focused on active learning, social development and wellbeing, and recreational or leisure activities to support continuity of learning.[75]
>
> Services are still required to understand all children and their strengths, ideas, abilities and interests and their progress across the learning outcomes as part of the planning cycle. This can be reflected in documenting how and why the education program has been developed to support all children to participate in the program.[76]

However, the requirement to have an educational leader and the significant and complex nature of this role is universal. Therefore, the proposed allowances should apply equally to *all* early childhood settings.

United Voice

We contest the notion that a weekly allowance would be unworkable in OSHC centres.

Regulation 118 only requires that one Educational Leader is designated per service, and as such it is appropriate to structure the allowance in OSHC in the same manner as for long day care.

The evidence did not establish that most (or a significant number of) OSHC services have split the Educational Leader role in the manner suggested by ACA and others at [94]. The oral evidence given by Ms Brannelly (CEO of the Queensland Children's Activities Network) during the hearing was that *large* OSHC services may designate more than one Educational Leader, such as a service with in excess of 150 licensed places for children.[77]

The largest service size in the proposed allowance structure for our Educational Leader claim is a service with '*60 or more children'*. Where a large OSHC service (with 120-150 places or more) has decided to designate more than one employee as an Educational Leader, it is appropriate and fair for that employer to pay both employees the allowance. The empirical evidence which we have supplied and which is quoted at [98] of the Background Document does not support the contention that the OSHC sector can be differentiated from long day care centres on the basis of the scale of OSHC centres operations. The empirical data indicates broad equivalency in scale.

Question for ACA, ABI and NSWBC

Q.22 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?

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[75] Australian Children's Education and Care Quality Authority (ACECQA). 2017. *National Quality Agenda Review: Documenting programs for school age children*. p.1 http://files.acecqa.gov.au/files/NQF/DocumentingPrograms.pdf

[76] Australian Children's Education and Care Quality Authority (ACECQA). 2017. *National Quality Agenda Review: Documenting programs for school age children*. p.3 http://files.acecqa.gov.au/files/NQF/DocumentingPrograms.pdf

[77] PN3481-3485.

The direct answer to this question is yes.

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 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.

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

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

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.

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.

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.

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.

Questions for UV and the Individuals

Q.23 UV and the Individuals are invited to respond to AFEI's submission that the quantum of the proposed Education Leader allowance is disproportionate when compared with the compensation for holding other responsibilities under the award.

I and E Arrabalde

An educational leader has responsibility for the educational program of all of the children attending a centre and the educational practice of the entire team of educators.[78] These responsibilities are additional to those usually required of educators and teachers. The allowance sought is not disproportionate nor excessive and is a rather conservative proposition upon reflection of the evidence presented during the hearing. The proposed educational leadership allowance is consistent with the leadership allowance for teachers working in schools.

United Voice

We dispute that the amount sought is disproportionate. That the amount claimed may be greater than the difference between certain classifications within the Awards should not be determinative. What the Commission must determine is the appropriate amount for the additional responsibility and duties carried out by an employee in the Educational Leader role. The employees undertaking this role will be at different classifications.

The role of Educational Leader has significant responsibility, as demonstrated by the evidence, for leading programming and planning within a service, mentoring other educators, leading critical reflection and undertaking research. These additional responsibilities are not reflected in the current classifications of the Awards. The amount sought by United Voice reflects appropriate compensation for the role.

The concept of relativities between classifications applies to the base rates of award classifications.

Q.24 What is the basis for the quantum of the allowance sought? How did UV and the Individuals come up with the quantum proposed?

I and E Arrabalde

The proposed educational leadership allowance is based on the structure of the leadership allowance in clause 15.2 of the *Educational Services (Teachers) Award 2010* that is currently only applicable to a teacher working in a school. We chose to structure the allowance in this way based on the Modern Awards Objective 1(e) "the principle of equal remuneration for work of equal or comparable value". This is because the role of an educational leader in a

[78] Arrabalde submission (27 May 2019) at [10]

school as described in the *Australian Professional Standards for Teachers* directly aligns with the role of an educational leader in an early childhood education and care setting.[79] The suggestion here is that there is equivalency in the role of educational leaders in schools and early childhood settings, not that schools and early childhood settings are similar.

In our submission dated 18 April 2018, we proposed the insertion of Level 4: Position of educational leader in an early childhood education and care setting in clause 15.2.

Category % of standard rate			
	A	**B**	**C**
Level 1	8.00	7.00	6.30
Level 2	5.50	4.75	4.00
Level 3	2.75	2.35	1.60
Level 4	3.00	2.50	2.00

We proposed a rate that is between Level 2 and Level 3 responsibilities of an educational leader in a school. This is because the role and responsibilities of an educational leader in an early childhood education and care setting is a position of leadership that carries additional responsibilities (Level 2) but as established in the evidence,[80] these responsibilities are more complex than "co-ordination of a school publication, sports co-ordinator or similar responsibilities" (Level 3).

Being an educational leader permeates every aspect of an educator's practice when engaged in this role and therefore a percentage amount of the standard or ordinary rate should be paid as an allowance. This extra payment would be commensurate with the employee's qualification, skill level and experience.

While the leadership allowance in clause 15.2 is based on the number of students in a school, the proposed educational leadership allowance is based on the number of places in the early childhood setting. For consistency, the categories we used are the same categories used in the director's allowance in clause 15.1.

Following is a reworked version of Table 6 which uses the current rates as at 1 July 2019 and the proposed allowance:

Comparison between current director's allowance in the *Educational Services (Teachers) Award 2010* and proposed educational leader allowance

Centres with	Current Director's allowance per annum (as at 1 July 2019)	Educational leader allowance sought per annum	Educational leader allowance as a percentage of the Director's allowance
No more than 39 places	$5,751.96	$1,030.36 (2.00% of the standard rate)	18%
40-59 places	$7,127.42	$1,287.95 (2.50% of the standard rate)	18%

[79] See for example, Arrabalde submission (14 March 2019) at [21]

[80] See for example, Arrabalde submission (27 May 2019) at [6]

60 and above places	$8,652.94	$1,545.54 (3.00% of the standard rate)	18%

The wage-related allowances in the *Educational Services (Teachers) Award 2010* are based on the standard rate as defined in clause 3.1 as the minimum annual rate for Level 1 in clause 14.1 which is $51,518 from 1 July 2019.

For fairness and consistency, we proposed that the same percentages apply to educational leaders covered by the *Children's Services Award 2010*. As the role and duties of an educational leader is not adequately captured by any classification of the Award,[81] we are uncertain of the relevance in comparing the pay differential of Diploma educators with varying experience and Assistant Directors with the quantum of the allowance sought. However, for comparative purposes following is a revised version of Table 5.

Centres with	Difference between a Level 4.1 and Level 5.1 per annum*	Difference between a Level 4.2 and Level 5.1 per annum*	Difference between a Level 4.3 and Level 5.1 per annum*	Educational leader allowance sought per annum* for an employee classified as Level 4.1
No more than 39 places	$2,421.15	$1,612.36	$808.79	$1,060.30 (2.00%)
40-59 places	$2,421.15	$1,612.36	$808.79	$1,325.37 (2.50%)
60 and above places	$2,421.15	$1,612.36	$808.79	$1,590.45 (3.00%)

*Annual rates have been obtained by multiplying the weekly rates by 52.18

Please note, there is no minimum engagement for an educational leader in terms of paid hours. The educational leader may not be employed full-time so a per annum calculation may overstate (yet never exceed) the actual allowance payable.

We acknowledge that United Voice has proposed weekly educational leadership allowances in both the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2010* with different percentage rates. The reason for the variance between our proposed allowance and the allowance sought by United Voice is that our applications were formulated independent of each other.

United Voice

United Voice gave consideration to the significant responsibility within the role of Educational Leader and proposed an amount that appropriately reflects that responsibility. The allowance does not compensate for an expense occurred, the precise quantification of the amount of the allowance is not referrable to money expended by the employee. What is sought here is a change in the safety-net which involves the balancing of a number of

[81] See Arrabalde submission (26 April 2019) at [29]-[30]

considerations and not simply a consideration of reimbursing the employee for an expense incurred. Appropriate compensation involves a broad range of considerations.[82]

The setting of the amount is not a matter of simply placing a '*value*' on the task and then compensating the employee for what has been a previously uncompensated aspect of the work. The setting of the amount concerns the application of the modern awards objective which will necessarily involve applying a number of considerations some of which will compete with each other. Some of these considerations have nothing to do with the employee being compensated but the desirability of the recognition of the responsibilities within the modern award safety-net of terms and conditions.[83] As we indicate in our outline submission made on 15 March 2019:

> *The Awards cannot be said to be fair, as award covered employees are being required to carry out work with complex additional responsibility but with no additional compensation. As noted these responsibilities are not static and are designed to pertain to workplaces and not particular employees.*
>
> *The Awards cannot be said to be 'relevant' as each award fails to recognise that the National Law and Regulations requires each centre based service to have an employee in the role of Educational Leader and Responsible Person. The NQF is a fixed national requirement imposed on the sector and it is appropriate that the Awards reflect this*.[84]

In the Penalty Rates Review, the so called '*employment effect'*, namely the effect that setting week end rates at a particular level would have on employment generally was a consideration.[85] The claimed allowances for Responsible Person and Educational Leader will reinforce good practise and compliance with the National Law and also function as reference points for agreement making.

The quantification of amounts of money within the context of what is a fair and relevant safety-net is evaluative. A similar criticism can be levelled against the quantum of a large number of non-reimbursement allowances, loadings and penalty rates that are commonplace and seen as a critical part of the modern award safety net. The characterisation of the amount of this allowance as necessarily a *quid pro quo* for something applies an inappropriate transactional analysis to the task that confronts the Commission. The suggestion that the amount claimed is '*disproportionate*' to something asks the wrong question, the amount claim needs to be appropriate within the broader context of what is a fair and relevant safety-net of terms and conditions.

The National Law demands that centres have an Educational Leader. Attaching an allowance to the role will not provide an incentive for employers not to appoint an Educational Leader.

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[82] For a recent statement of the difference between modern awards and other industrial instruments see in *4 Yearly Review of Modern Awards –Penalty Rates* [2017] FWCFB 1001 ('Penalty Rates Case') at [129] to [132]

[83] Submission of 15 March 2019 at [106] and [122]

[84] [120] to [121].

[85] Penalty Rates Case as above and at [611] to [688].

Questions for UV and the Individuals

Q.25 UV and the Individuals are invited to respond to AFEI's submission that the quantum of the proposed Responsible Person allowance is disproportionate when compared to other allowances and pay rates under the Awards.

I and E Arrabalde

The *Educational Services (Teachers) Award 2010* identifies the duties of employees covered by the Award:[86]

> **Duties of an employee**
>
> The duties of a teacher may include in addition to teaching, activities associated with administration, review, development and delivery of educational programs and co-curricular activities.

These duties do not include (or allude to) being placed in day-to-day charge of a service which is instead captured within the definition of a director. The proposed allowance is equal to the director's allowance in 15.1.

Revised version of Table 8: Comparison of Director's Allowance and Responsible Person Allowance, using current rates as at 1 July 2019.

Centres with	Current Director's allowance, per annum	Responsible person allowance sought, per annum	Current Director's allowance per hour	Responsible Person allowance sought per hour
No more than 39 places	$5,924.57	$5,924.57	$2.99 per hour	$2.99 per hour
40-59 places	$7,341.32	$7,341.32	$3.70 per hour	$3.70 per hour
69 above about places	$8,912.61	$8,912.61	$4.50 per hour	$4.50 per hour

The wage-related allowances in the *Educational Services (Teachers) Award 2010* are based on the standard rate as defined in clause 3.1 as the minimum annual rate for Level 1 in clause 14.1 which is $51,518 from 1 July 2019.

With reference to Table 8, comparing and calculating the proposed Responsible Person allowance on a yearly basis has potentially limited utility. This is because:

1. Early childhood education and care settings are required to have a Responsible Person present at all times when children are present.

a) Staff may work hours in excess of this requirement. For example, for setting up and packing up. The allowance would not be payable for this time.
b) A centre may operate for longer hours than a full-time employee works.

[86] *Educational Services (Teachers) Award 2010* clause 13.1

2. The Responsible Person may change several times over the course of the day. Each Responsible Person may have a different qualification and associated pay rate.

It is perhaps more appropriate to compare the proposed allowance on an hourly basis. This is why this comparison has been added to Table 8.

In its Reply Submission of 16 April 2019 at [37] AFEI argues that:

> The classification structure in the Children's Services Award already contemplates a higher level of responsibilities and skills than a responsible person at Level 5, Assistant Director, which includes:
>
> "Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues."

If a Level 5 classification captures the role of the Responsible Person (while lower classifications do not), this would mean that all employees covered by the *Children's Services Award 2010* who are designated as the Responsible Person at any time should be classified as a Level 5. This would mean instead of paying the proposed allowance to the one person designated as the Responsible Person capped by the number of operating hours of a centre, employers would instead potentially pay several employees per day at a Level 5 rate for every hour worked regardless of if they were the current Responsible Person or not. The cost of this would conceivably exceed the proposed allowance.

For the purposes of comparison, following is a revised version of Table 7 which takes into account current rates as at 1 July 2019 and the proposed allowance:

Table 7: Comparison Level 4/Assistant Director differential and the Responsible Person Allowance

Centres with	**Difference between a Level 4.1 and Level 5.1 per hour**	**Difference between a Level 4.2 and Level 5.1 per hour**	**Difference between a Level 4.3 and Level 5.1 per hour**	**Responsible person allowance sought, per hour for Level 4.1**
No more than 39 places	$1.22	$0.82	$0.41	$3.08 per hour
40-59 places	$1.22	$0.82	$0.41	$3.81 per hour
60 and above places	$1.22	$0.82	$0.41	$4.62 per hour

United Voice

The general comments made above apply here. Again, we dispute that the amount sought is disproportionate. That the amount claimed may be greater than *some* other allowances and pay rates under the Awards should not be determinative, rather the consideration should be the question of what is the appropriate amount for the additional responsibility and work carried out by an employee in the Responsible Person role.

The role of Responsible Person has significant responsibility and a critical role in ensuring the safety and well-being of children in care. This role is also a mandatory requirement of the National Law. As indicated in our submission on findings, there are likely some system benefits in having an allowance attached to the role. The evidence showed that existing practise was to have the role performed by more senior and frequently employees paid above the award.[87]

Q.26 What is the basis for the quantum of the allowance sought? How did UV and the Individuals come up with the quantum proposed?

I and E Arrabalde

The proposed Responsible Person allowance is equal to the Director's allowance in the *Educational Services (Teachers) Award 2010*:

Level	**% of standard rate per hour**
1	11.50
2	14.25
3	17.30

This is because the roles of both the Responsible Person and the director involve an employee taking responsibility for the day-to-day operations of the service. Similar to a director, the role of the Responsible Person is a position of leadership which has duties and responsibilities.[88] The Responsible Person must have sufficient knowledge, skills and understandings and an "ability to effectively supervise and manage an education and care service".[89] The quantum of the allowance sought is consistent with Modern Awards Objective 1(e) "the principle of equal remuneration for work of equal or comparable value".

A director is not necessarily the Responsible Person and may not be the Responsible Person at all times. In the event that a director or assistant director is performing multiple roles and working as the Responsible Person, the Educational Leader or both, the proposed allowances should still be payable given the well-documented additional administration and compliance burdens imposed since these roles were introduced with the *National Quality Framework*.[90]

United Voice

We note our general comments made in answer to question 24 above. United Voice gave consideration to the significant responsibility within the role of Responsible Person and proposed an amount that appropriately reflects that responsibility and the desirability of

[87] Submission on findings at [21] to [25] and [44] to [48].

[88] See Arrabalde submission (27 May 2019) at [25]

[89] Australian Children's Education and Care Quality Authority (ACECQA). *Responsible Person Requirements for Approved Providers from October 2017*. https://www.acecqa.gov.au/sites/default/files/2018-09/ResponsiblePersonRequirements.pdf

[90] In 2018, only 3% of services did not perceive the National Quality Framework 'not at all burdensome'. See p. 51, Australian Children's Education and Care Quality Authority (ACECQA). 2018. *National Quality Agenda National Partnership Annual Performance Report.* https://www.acecqa.gov.au/sites/default/files/2018-12/NationalPartnershipAnnualPerformanceReport2018.PDF

having such an allowance within the context a fair and relevant safety net of terms and conditions.

Having an allowance attached to being a Responsible Person would reinforce these good existing practises and mandatory requirement that a centre when operating has a Responsible Person on the premises. This consideration is not about the disutility experienced by the employee who is the Responsible Person. These '*system benefits'* equate to broader considerations relevant to the setting of the allowance as part of the modern award safety-net.

Questions for all other parties

Q.27 Is the above extract from UV's submission (at [118]) contested?

Australian Childcare Alliance and others

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.

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).

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.

Australian Federation of Employers and Industries

The essential underlying proposition in this submission is that the work of employees contributes to the service provider's ability to comply with obligations. That proposition is not controversial and finds support in the current classification structure. In this regard, it will assist to note several indicative duties from which it can be said that employees can be expected to contribute to educational program development and implementation.

From Level 4 there are these particular indicative duties:

- Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups.
- Responsible to the Assistant Director/Director for the supervision of students on placement.

From Level 5, there are these particular indicative duties:

- Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs.
- Contribute, through the Director, to the development of the centre or service's policies.

And from Level 6, there are these particular indicative duties:

- Responsible for the overall management and administration of the service.
- Supervise the implementation of developmentally appropriate programs for children.

- Ensure that the centre or service adheres to all relevant regulations and statutory requirements.
- Ensure that the centre or service meets or exceeds quality assurance requirements.
- Develop and maintain policies and procedures for the centre or service.

I and E Arrabalde

No, we are in general agreement with these statements.

Question for UV
Q.28 What evidence is relied on in support of the propositions at [129] above?

The evidence we rely upon in support of the proposition in paragraph [129] is as follows:

Some employees are required to have a first aid certificate. As we noted in paragraphs [97] and [98] of our submission on the findings filed 29 May 2019, Ms Preston Warner is required to have a First Aid Certificate and CPR Certificate, and employees at Ms Alicia Wade's centre who take on the role of Responsible Person are required to have both certificates as well.

Similarly, Ms Pixie Bea was required to have a First Aid Certificate and CPR training when she worked as an award reliant worker at Mornington Street Early Learning and Kinder.[91]

In respect of our proposition that it is an expected standard across the sector that employees will have and maintain first aid qualifications, this is based on a reasonable interpretation of how Regulation 136 operates in practice, and on the basis of the evidence of Ms Bronwen Hennessy.

> ***Regulation 136 First aid qualifications***
>
> *(1)The approved provider of a centre-based service must ensure that each of the following persons are in attendance at any place where children are being educated and cared for by the service, and immediately available in an emergency, at all times that children are being educated and cared for by the service—*
> *(a) at least one staff member or one nominated supervisor of the service who holds a current approved first aid qualification;*
> *(b) at least one staff member or one nominated supervisor of the service who has undertaken current approved anaphylaxis management training;*
> *(c) at least one staff member or one nominated supervisor of the service who has undertaken current approved emergency asthma management training.*
>
> *Penalty: $2000.*

An explanation is provided in page 437 of the Guide to the NQF (Exhibit 1):

Centre-based services

[91] Witness statement of Pixie Bea dated 4 March 2019, Exhibit 8, and paragraph 36.

At all times and at any place that children are being educated and cared for by the service, the following person(s) must be in attendance and immediately available in an emergency:

- *at least one staff member or one nominated supervisor of the service who holds a current approved first aid qualification, and*
- *at least one staff member or one nominated supervisor of the service who has undertaken current approved anaphylaxis management training, and*
- *at least one staff member or one nominated supervisor of the service who has undertaken current approved emergency asthma management training.*

The same person may hold one or more of these qualifications.

If the approved service is operating on a school site (for example, a government kindergarten or preschool), the requirements for regulation 136(2) can be met if one or more staff members of the school holding the relevant qualifications are in attendance at the school site and immediately available during the emergency.

The approved provider should consider how it will meet this requirement during all parts of the day, including breaks, and have contingency plans in place for an educator on leave.

As noted within the Guide to the NQF, the approved provider must ensure that this Regulation is met during all parts of the day. There is no exception for '*contingency events'*, such as the employee with first aid qualifications running late, leaving the premises for a lunch break, leaving work early because they are sick, or taking annual leave. The practical effect of this Regulation is that at the very least, a number of employees within a centre based service must have the relevant qualifications. In smaller services, in practice, it is likely to be that all employees will need to have the relevant qualifications in order to ensure compliance with the Regulation.

In respect of evidence of the situation within workplaces, the evidence by Ms Bronwen Hennessy during the course of the proceedings is relevant:

Arndt: Almost finished Ms Hennessy. At 31, you say it's not a formal requirement that you have first aid or CPR? Sorry, I misspoke. You say it's not a formal requirement that all educators have first aid and CPR?

Hennessy: Yes.

Arndt: Do you mean by that, that no one from your employer requires you to have one?

Hennessy: My understanding is there has to be a certain number of people on site that have CPR. I don't know what the number is; what sort of percentage it is.

Arndt: I might just ask the question again. Perhaps I wasn't clear. When you say it's not a formal requirement that all educators have these certificates, are you saying that no one from your employer has ever asked you to - has ever required you to have one these certificates. Or, are you saying something different?

Hennessy: In my Centre, we are all expected to have one. I'm not sure how that differs from a requirement, but it is an expectation that everyone in my Centre - I'm not sure about the company, I'm afraid, sorry.

Arndt: At 34, when you say it's a requirement that the CPR course is refreshed every 12 months and first aid refreshed every three years, whose requirement is that?

Hennessy: I would say that that is a Centre requirement rather than the company requirement. That is - that is how often a CPR course should be refreshed as opposed to - like I said, I'm not sure, I'm sorry.

Arndt: That's okay. If you're no sure it's fine, but just so that I'm clear, in 31 you say it's not a formal requirement for all educators to have these certificates. How could it be the case that it's the Centre's requirements? Sorry, I think I'm confused with your answer?

Hennessy: I think I maybe got my language a little confused when I was going through this. So, I think that it's a requirement that the CPR course is refreshed. I think that's maybe just a misspoke on my part and it may not be an actual requirement, but a strong expectation.[92]

Notably, Ms Hennessy states above that '*in my Centre, we are all expected to have one. I'm not sure how that differs from a requirement, but it is an expectation that everyone in my Centre…*'[93] Whilst Ms Hennessy may not be formally required to hold a First Aid Certificate or a CPR certificate, there is an expectation that employees at her centre hold and maintain those qualifications. The reality is that in practice, for many employees a '*strong expectation*' will differ little from a formal requirement.

On the basis of the above, we say it is reasonable to conclude that there is an expectation across the ECEC sector that employees hold first aid qualifications and CPR qualifications.

Question for UV

Q.29 The first aid allowance in claims 15.4(a) is only payable to employees classified below level 3 who are required to administer first aid to children. What does UV say to the proposition that this suggests that this responsibility forms part of the base wage rate for higher level employees?

The first aid allowance in clause 15.4(a) of the Children's Services Award appears to be based in part on the structure of the first aid allowances in the pre-modern awards, the *Children's Services (Victoria) Award 2005* and the *Children's Services (Australian Capital Territory) Award 2005*. Both awards provided a first allowance for employees appointed to act as a first aid person and a per day allowance for employees at below Level 3 who were required to administer first aid (see clause 19.5 in the former, and clause 5.5.2 in the latter).

Clause 15.4 of the Children's Services Award does not contain an allowance for employees appointed to act as the first aid person, but does retain an allowance for employees below Level 3 who are required to administer first aid.

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[92] PN333-337.

[93] PN335.

In our research, we have been unable to find a Decision within the award modernisation period on this matter. It is unclear whether the removal of the allowance for the 'first aid person' was an oversight or intentional.

On that basis, we say it is not possible to conclude that the responsibility to administer first aid forms part of the base wage rate for higher positions.

In any case, the lack of such an allowance should not act as a factor against the granting of a claim for a training clause.

Question for all other parties
Q.30 Are the propositions set out at [141] contested?

Australian Childcare Alliance and others

No.

Australian Federation of Employers and Industries

Proposition 1 includes 'Educators spend a significant amount of time outside.' United Voice refer to the evidence of a single witness. AFEI do not accept that this proposition is accurate for all educators covered by the Award, on the basis of a single witness.

Whilst proposition 2 is cited from the Guide to the NQF, it excludes additional relevant information, including that '*an area of unencumbered indoor space may be included in calculating the outdoor space of a service that provides education and care to children over preschool age if the regulatory authority has given written approval and this space has not already been included in calculating the indoor space – that is, it cannot be counted twice.*'[94]

Whilst the Guide to the NQF is cited by the United Voice in support of proposition 3, the reference cited does not does not support the proposition that a service is assessed on the 'extent' to which children are engaged in meaningful experiences in outdoor environments.

AFEI does not contest proposition 4 or 5.

I and E Arrabalde

No. This is an accurate proposition.

Question for UV
Q.31 Is UV prepared to amend its claim in the manner proposed by ACA, ABI and NSWBC? If it is then UV and ACA, ABI and NSWBC are asked to jointly draft a proposed variation.

We are prepared to amend our claim to limit it to '*hats*' and '*sunscreen lotion'*, however we do not believe the other amendments suggested by ACA and others are necessary.

[94] Guide to the NQF, page 390

The proposed addition of the requirement that the expense incurred is '*reasonable*' and only paid when validated by receipts is a substantive variation to clause 15.2(c). No evidence was adduced that such a variation is necessary. There is no evidence that employees are making unreasonable claims under the current clause. The evidence generally was supportive of our variation. Many centres provide hats and sunscreen. It would be entirely inappropriate in the context of potentially accepting our claim to in effect substantively vary and make more restrictive the scope of clause 15.2(c) for the matters claimed and also the existing items covered by the clause. This clause does not permit and will not permit uncapped claims as it is phrased in terms of the employee being '*required*' to wear or use the thing for which reimbursement is sought.

Questions for ACA, ABI and NSWBC and AFEI

Q.32 What are the particular regulatory requirements of this sector which are said to support clause 18.1(e)?

Australian Childcare Alliance and others

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.

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.

Australian Federation of Employers and Industries

Clause 18.1(e) of the Award replicates Clause 17.4 of the Children's Services (Victoria) Award 2005 (AT840807CRV), and was proposed for inclusion in the Children's Services Award 2010 by the United Voice in Part 10A Award Modernisation proceedings, following initial discussions with other unions and with registered associations of children's service industry employers concerning the proposed award.[95]

AFEI is not in a position to state exhaustively all the regulatory requirements which may have been taken into account in the drafting of Clause 17.4 of the Children's Services (Victoria) Award 2005. It is notable however that there currently exists regulatory requirements to maintain ratios of educators to children in an ECEC, which will be a relevant consideration to staffing arrangements when another staff member is attending training, and are particular to this industry.

[95] LHMU Pre-draft consultation, 6 March 2009

Q.33 Why would employers be more inclined to schedule training on the weekend or outside of hours (and pay the employee undergoing the training the applicable penalty rates) if clause 18.1(e) was deleted?

Australian Childcare Alliance and others

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.

Australian Federation of Employers and Industries

No response.

Q.34 What do employers say about UV's alternate claims (to delete (including in-service training))? What does 'in-service' training encompass?

Australian Childcare Alliance and others

ACA/ABI opposes the alternative claim.

This opposition is on the basis that UV has not specified what scope of 'in-service' training would be excluded from the clause.

'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').

Australian Federation of Employers and Industries

The term 'in-service' training may be distinguished from 'pre-service' training. That is, a reference to continuing/ongoing training undertaken by staff as distinct from training which may be associated with a traineeship or other training course that is undertaken as a pathway to employment in a particular substantive role.

AFEI opposes the United Voice alternative claim. There is no probative evidence to satisfy the Commission that such variations to the modern award safety net are necessary.

Question for all parties

Q.35 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?

Australian Childcare Alliance and others

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

Australian Federation of Employers and Industries

AFEI agrees with ABL's 1 April 2019 submissions in the Plain language proceedings (AM2016/15) concerning Shutdown Provisions from paragraph [6]. In particular, AFEI agrees with the submission at 6.14 that substantive changes to shutdown provisions should only be made if there is a cogent basis to do so (which would likely include evidence supporting the merit for such changes). This is consistent with AFEI's previous submissions in these proceedings.

The changes to annual leave provisions in the Award proposed by the United Voice in these proceedings, and by the Commission in the plain language proceedings, are un-controversially substantive changes to the current Award provisions.

In both these proceedings, and in the Plain Language proceedings, there is a lack of evidence currently before the Commission for substantive change to the annual leave provisions in the Children's Services industry, in the Children's Services Award.

I and E Arrabalde

We do not have an informed opinion on this matter.

United Voice

The annual leave claim should be dealt with by the Substantive Issues Full Bench. There is a substantive merit issue which needs to be resolved and the appropriate place for this to be resolved is in the substantive review of the award. We would also observe that the issue is relatively straightforward in light of the evidence concerning close downs and the Christmas vacation which has been heard. We refer to our submission on findings made on 29 May 2019:

> *[118] The Commission is entitled to find that the current provisions of the Children's Services Award at clauses 24.4(a), (b) and (c) which allow for lengthy unspecified close downs over the Christmas/New Year period where an employee can be directed to take leave without pay and an open ended capacity to direct an employee to take annual leave or be paid at the ordinary rate at other 'vacation periods' are anachronistic. There was no evidence from an employer that the problem which the current clause 24.4(b) is directed towards is real. The evidence indicates that employers responsibly manage the leave entitlements of their employees to accommodate foreseeable seasonal changes in the need for labour. The variation proposed will reinforce the current practise.*
>
> *[119] It is not necessary for the Commission to engage in any consideration of legal issues associated with these provisions raised in our submission as there is a clear merit case that the provisions are obsolete and unnecessary. Our variations as proposed should be made.*

Question for UV, the IEU and the Individuals

Q.36 Do you contest any part of the relevant award history set out in the ACA, ABI and NSWBC submission referred to in [165] above?

I and E Arrabalde

We do not have sufficient knowledge to comment on the award history.

United Voice

The award history set out in the submission of ACA and others in 9.1 to 9.17 and 18.1 to 18.12 of their submission dated 15 March 2019 is interspersed with statements in support of their claims.

We contest 9.3(a) and (b) as this is a submission in support of ACA and others' claim, rather than the award history. We do not dispute that some pre-reform awards and NAPSAs had an ordinary span of hours that ended at 7pm; however other pre-modern awards had a finishing time of 6pm (such as the *Child Care (Long Day Care) WA Award 2005* and *Children's Services (Private) Award*). Two of the pre-modern awards that had a finishing time of 7pm also had a later start time than the current modern award. The *Children's Services (Northern Territory) Award 2005* and the *Children's Services (Australian Capital Territory) Award 2005* had an ordinary span of hours of 7am to 7pm.

We do not dispute 9.5 to 9.8 insofar as these paragraphs describe the position of some of the employer parties at the time. We do not accept the propositions made by the employer parties at the time as fact.

With respect to 9.11, ACA have not presented data to support their statement that the working hours and workforce participation of parents increased between award modernisation in 2009 and the transitional review in 2012. We do not take a position on whether there was an increase in that specific period. We dispute the proposition that *'the unworkability of a 6:30pm close started to become apparent*' but not the remainder of the sentence.

We contest 9.16 and 9.17, as these paragraphs are a statement of ACA and others' position rather than the award history.

We do not dispute 18.8 insofar as this paragraph describes the position of one employer group, as referenced in the submission of ACA and others.

With respect to 18.9 we note that the '*interested parties'* who came to a consent position on the rostering clause included a number of groups including United Voice, the IEU, the AEU, Community Connections Solutions Australia, the ACCA (Australian Childcare Centres Association, the predecessor organisation to the ACA) and ABI. We do not concede that the existing clause was '*already impractical*' or that the agreed changes in the 2012 transitional review made the clause impractical.

We contest 18.11 and 18.12, as these paragraphs are a statement of ACA and others' position rather than the award history.

Question for UV, the IEU and the Individuals

Q.37 Do you contest the propositions set out at [167] above, or any of the material set out in Section 12 and 13 of the ACA, ABI and NSWBC submission?

I and E Arrabalde

No. We generally agree with these propositions and the material contained in Sections 12 and 13.

Independent Education Union

The IEU contests the propositions set out in [167], in that:

a. at (a), the description of early childhood education and care as, firstly, being 'childcare' only and secondly being simply about a place for children to go misunderstands the educational focus of the sector: ECEC services provide vital early learning for children to prepare them for school. This is why services are required to engage qualified teachers and educators: to dismiss the work as merely looking after children dramatically downplays the importance of the work and fundamentally misunderstands the nature and purpose of the sector.

b. (b) and (c) are not contested but can be taken as no more than broad motherhood statements which provide no support for the ECEC Employer's claim to degrade working conditions;

c. as to (d), the assertions therein are not supported by any evidence – notably, there is no economic or other expert evidence relied on by the ECEC Employers as to the actual state of the industry or (discussed further) the effect of its claim.

United Voice

We contest the propositions in [167] (a) and (d) of the Background Document. We also contest a number of matters in paragraphs 12 and 13 of the ACA and others' submission.

With respect to (a), we have addressed this in our submission in reply filed 15 April 2019. We refer specifically to paragraphs [61]- [64]:

> *[61] We oppose ACA and others' proposition that ordinary hours in ECEC should commence earlier and conclude later than other industries. This is tied to their characterisation of the primary purpose of this industry as being 'to provide a place for young children to be when their parents are unable to care for them in the home because they are at work.'*
>
> *[62] We disagree with this characterisation. ECEC is not a baby sitting or child minding service. The primary purpose within the ECEC sector is to provide quality education and care for children. The National Quality Standards emphasise the delivery of educational program and practice that enhances children's learning and development and helps children to build life skills.*

[63] Ordinary hours of work within this sector need to be understood in this context, and set in accordance with industry needs and the modern awards objective. It is not appropriate to set the ordinary hours of work for educators based around the span of hours within other industries.

[64] There is a further general merit consideration that ECEC should not be considered a sector where the aspiration of continuous or extended service delivery, a 24/7 service, is necessarily desirable. The Awards deal with the care and education of children from birth to 6 years of age. An ECEC centre is not a medical, correctional, industrial or hospitality enterprise where there are defensible, social, economic or scientific justifications for extended or continuous service delivery. Extending the normal hours of operation of ECEC is potentially problematic for broad social and health reasons. For children and their parents, the normalisation of absences well into the early evening is inappropriate.

With respect to (d), no evidence has been presented by ACA and others to justify the statement that '*childcare is an extremely competitive industry in which affordability, opening hours and compliance with an increasingly complex regulatory regime determines the viability of a business*.' ACA and others did not establish that opening hours have any significant impact on the viability of operators of childcare centres, let alone that it was one of three key factors in their viability. It emerged during the hearing that most ACA witnesses had done no costing or planning on what impact longer opening hours might have on their business.[96]

We contest paragraph 12.2 of the ACA submission which states that the role of ECEC Services is predominantly to provide parents with '*peace of mind ... knowing that their children are safe while they work*.' We refer to our response to paragraph [167] (a) of the Background Document above. This characterisation of the ECEC sector that it is driven by the needs of parents is problematic and contrary to the current regulatory framework. This is because the well-being and education of the children is the predominate concern.

We contest paragraph 12.4, the submission made by ACA and others is unsupported to the extent that no probative evidence has been provided in support of the contention that hours after 6.30pm are '*standard (and necessary)*.' We also disagree with the characterisation of ECEC as primarily about '*caring for children during the time that their parents are at work*.' As we put in our submission in reply filed on 15 April 2019 *'the primary purpose within the ECEC sector is to provide quality education and care for children*.'[97] This is not simply a rhetorical difference. It informs our position that the ordinary span of hours in these Awards should not be set with reference to the ordinary hours of work in other industries, in an attempt to '*catch*' all the hours that parents may be at work. Further, it is relevant to note that both Awards already contain shift work provisions (as well as time in lieu provisions) that could be utilised by employers.

We make no comment on paragraph 12.15.

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[96] See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

[97] See oral evidence of Brannelly PN3423-PN3424, Mahony PN3991-3993, Llewellyn PN4250-4253, and Hands PN4758-4767.

With respect to paragraph 12.16, this statement is inaccurate in relation to (d) '*not-for-profit long day care providers*'. The ACA and others has provided no evidence from not-for-profit day care providers. We also note that large providers have not been represented in the witnesses from the ACA and others. Namely, there is no evidence in this review from larger employers and not-for-profit employers.

With respect to paragraph 13.1, there is comprehensive scheme of regulation of ECEC services. The main regulation is the National Law and regulation that is broadly consistent nationally. We make no comment on which of the regulations may or may not be the most difficult to comply with. The pattern of utilisation of ECEC services is not highly variable and some of the regulations that are cited as difficult to comply with have been a feature of the sector for some time. Parents are required to book a place well in advance and pay a fee if their child is unable to attend at late notice.[98] For example, Ms Llewellyn explained that at her service, if a parent provided two weeks' notice of an annual leave absence, they would be charged 50% of the fee whereas if the parent provided less than two weeks' notice, they would be charged 100% of the fee.[99]

We do not contest paragraph 13.2 insofar as it is ACA's characterisation of their own witness statements. We do not agree that the current Awards are not easy to understand or sustainable. There is no evidence that there is any suggestion that the sector is seeking to have the current framework of regulation reviewed or changed because it is in any sense problematic. The NQF has applied generally uniformly to the sector since 2012. No witness said there should be substantial change to the National Law.

We contest paragraph 13.3, award compliance is not a balancing act. Employers are required to comply with modern awards. No concrete examples are given of how compliance with the '*Childcare regulations*' must be balanced against the requirements of the Awards. In a number of respects our claims would ensure that the Awards are consistent with the National Law and this was agreed by some of the employer witnesses as desirable.[100]

We contest paragraph 13.4, we agree that there was significant regulatory change in the ECEC sector with the introduction of the NQF in 2012, however the evidence presented by ACA and others has not indicated that the industry is '*susceptible to a high degree of regulatory change*.' The current system has been stable since 2012.

We do not agree with paragraphs 13.5-13.7. These paragraphs are ACA's submissions on how their evidence should be interpreted. We say the following:

> (a) With respect to paragraph 13.5, it is unclear what is meant by '*owners tend to prioritise all the regulations by what is best for the children'*. No genuine argument can be made that complying with the Awards with respect to the ordinary span of hours and the rostering clause is '*bad for children'*. Award compliance is not optional. It is also unclear what legislation ACA and others are alleging is not workable; whether it is the Awards, the *Fair Work Act 2009*, or the National Law and Regulations.

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[98] PN4253.

[99] PN4253.

[100] United Voice submission on findings, 29 May 2019, at [19] to [20] where the evidence of Llewellyn and McPhail is summarised who both broadly said the Awards were out of 'sync' with regulation and it would be desirable if this were not the case.

(b) With respect to paragraph 13.6, ACA and others appear to be asserting that there is non-compliance with award conditions within the industry. It is unclear which award conditions are being referred to; some concrete examples should be able to be indicated. In any case a failure to comply with award conditions should not be taken as an argument in favour of disregarding award conditions. Again, ACA and others make a statement that '*owners are prioritising all the regulations by what is best for the children*' but it is unclear what this means and how it is relevant in the context of this review.

Question for UV, the IEU and the Individuals

Q.38 Do you contest the propositions set out at [169] above?

I and E Arrabalde

These propositions provide a very business-oriented view of early childhood education and care, diminishing it to an "industry" where money can be made and saved.

Independent Education Union

The IEU contests the propositions set out at [169], and relies on its submissions in respect of factual findings. In particular:

a. again, none of the statements are supported by expert or useful lay evidence – at its highest all ACA relies on is broad assertion by its unqualified witnesses, none of whom have performed any market testing or provided any financial information; and

b. the propositions reiterate the foundational error of describing ECEC Services as being merely 'childcare', which appears to be an attempt to downplay its important economic and social role in favour of a focus on user convenience.

United Voice

We would note that ACA and others have not presented any evidence from working parents within the ECEC sector. No explanation has been provided as to why there is a complete absence of this evidence when the needs of parents is presented as a critical reason for the claim seeking to alter the ordinary hours of work. We contest [169](b), (d) and (g). We do not contest (c) as a general proposition, but we do not agree that the ACA claims would improve accessibility or affordability of ECEC services.

With respect to (b), we agree that affordable ECEC is important. However, we do not agree that cost is the only or the deciding factor in why parents may choose a particular ECEC service. There was evidence that the quality rating of a service could influence parental decision making.[101] It may also be that location is an important factor in decision making. Further, it is unclear to United Voice what is meant by '*parent (customer) demand'*, whether that is parent demand in terms of opening hours, or quality, or another matter. If '*parent (customer) demand'* is intended to refer to parent demand for longer opening hours, we would note that most of the ECEC employer witnesses had not undertaken any business study

[101] See oral evidence of Paton PN2367-2369 and Maclean PN2575-2576.

of the demand for, or the viability of opening longer hours[102]. The following exchange is illustrative:

> ***Saunders****: One of the other reasons you support the claim - you've done no business case modelling on the actual demand for longer hours, have you?*
>
> ***Viknarasah****: No.*
>
> ***Saunders****: You haven't surveyed your parents?*
>
> ***Viknarasah:*** *No.*[103]

Only two employer witnesses appeared to have surveyed parents about opening hours. One employer witness had conducted a Facebook poll a day before the hearing[104] and neither received feedback that suggested any genuine need for change.[105] Therefore even hearsay evidence concerning parents' needs which supported the claims of ACA and others was absent. There is no evidence before the Commission that there is significant parent demand for longer opening hours. It is also important to note that ACA and others have not presented any evidence that granting their claims would actually increase affordability of ECEC services or have any genuine impact on affordability of ECEC services.

We disagree with (d), again, there has not been evidence in these proceedings on the impact of the opening hours of services on working parents (aside from the evidence presented by United Voice on the impact on working parents who are ECEC employees). No evidence has been presented from parents who want to utilise centre based care past 6.30pm and as stated above, the two employer witnesses who did survey their clients did not receive feedback that suggested a genuine need for change.[106] We also disagree with the notion that the current span of ordinary hours in the Awards is *'limited*'.

We disagree with (g), the line of argument that '*the ordinary hours of the childcare industry should commence earlier and conclude later than other industrie*s' is infeasible. We refer to paragraphs [61] - [64] of our submission in reply dated 15 April 2019.

With respect to (j), we do not contest that some parents have long commuting times. There was no evidence about this and whether it impacts on the utilisation of ECEC services in anyway.

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[102] See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

[103] PN1088-1089.

[104] See oral evidence of McPhail PN2910-2913

[105] See oral evidence of McPhail PN2910-2913; with respect to Tullberg see Exhibit 36: Survey Results From Knox Childcare And Kindergarten And Wallaby Group (less than 2% were dissatisfied or very dissatisfied with the operating hours).

[106] As above.

Question for UV, the IEU and the Individuals
Q.39 Do you contest the propositions set out at [171] above?

I and E Arrabalde

No response.

Independent Education Union

The IEU contests the propositions at [171] to the extent that:

a. in respect of (b), not all (indeed not even most) employees work to the full span of hours permitted by an award; it is too much of a leap to say that just because longer spans of hours exist in other awards that all or even a significant percentage of parents working in those industries using ECEC services work later than 6.30;

b. the disability caused by unplanned overtime is compensated for by penalty payments; further, the submissions do not address the disability caused by being required to work to 7.30 at night without compensation; and

c. the actual extent of late pickups is, on the ECEC Employer's evidence, significantly lower than what is set out at [171].

United Voice

We contest [171] (b), (c), (d), (f), (g), (h), (i), (j).

With respect to (b), in paragraphs [56]-[59] of in our submission in reply filed 15 April 2019, we noted a number of inaccuracies in the table prepared by ACA and others in paragraph 16.6 of their submission filed 15 March 2019. This may have varied the percentage of awards that contain a span of ordinary hours that finish at 6.30pm.

We contest (c), what emerged during the hearing is that most of the ECEC employer witnesses had not undertaken any business study of the demand for, or the viability of opening longer hours.[107] Of the two employer witnesses who had carried out some survey of parents, neither received feedback that suggested any genuine need for change.[108] There is no evidence before the Commission that there is any parent demand for longer opening hours. This deficiency in the case of the ACA and others is problematic.

With respect to (d), United Voice presented a table in paragraph [27] of our submission in reply filed 15 April 2019 that indicated that a significant percentage of services close before or at 6pm. One reason this may be the case is that there may not be enough parent demand in many areas to make it financially viable to stay open til 6.30pm. One employer witness, Ms Viknarasah, indicated that she closed a centre at 6pm because '*most of the parents only require care till 6 o'clock so that's why we close at six.*'[109] Ms Llewellyn gave evidence that

[107] PN4130-4131.

[108] See oral evidence of McPhail PN2910-2913, with respect to Tullberg see Exhibit 36: Survey Results From Knox Childcare And Kindergarten And Wallaby Group (less than 2% were dissatisfied or very dissatisfied with the operating hours).

[109] Oral evidence of Viknarasah, PN1379.

most children attended her service in the middle of the day, between 8.30am and 4.30pm.[110] There is no probative evidence that any significant portion of ECEC providers close at 6.30pm *specifically* for the purpose of avoiding the payment of overtime.

With respect to (f), we disagree. The evidence from both employee and employer witnesses indicated clearly that late pick up of children is not frequent. Clause 23.2(b) of the Childrens Services Award allows employers to direct an employee to remain at work due to a genuine and pressing emergency after their normal finishing times and be paid at ordinary hours. We refer to paragraphs [129]-[130] of our submission on findings filed 29 May 2019:

> *[129] One of the reasons advanced for this variation was that late pick up of children by parents provide a rationale for extending the span of ordinary hours to 7.30pm.[111] However, the evidence indicated that late pick up of children is not frequent. United Voice member Ms Hennessy provided uncontested evidence that: 'in my experience, most children have been picked up by their parents before 6.15pm. We occasionally have parents who run late when there is an emergency or some other unusual circumstance, though this doesn't happen often'.[112] Ms Bea and Ms Wade also provided evidence that late pick up was infrequent.[113]*
>
> *[130] Employer witness Ms McPhail provided evidence that late pick up occurred 'very rarely' at her centre[114] and Mr Mahony conceded that 'late pickups at the moment is not a serious problem for us'.[115] Late pick-up is not restricted to pick up after closing hours (or after the ordinary span of hours in the Awards):*
>
> ***Saunders**: So about once a week a parent is late picking up their child?*
>
> ***Paton**: Correct.*
>
> *Saunders: That's not concentrated in the 12 hour session. That can be one of the kids that finishes at 5.30?*
>
> ***Paton:** Yes. We have the same late pick-up rules for outside of session as we do for late collection.*
>
> ***Saunders**: Of course. But it doesn't always push you past the centre's closing time, does it?*
>
> ***Paton:** No, but it does cause staff who would normally be rostered to finish at 5.30 to stay and that's causing overtime on theirs.*
>
> ***Saunders:** Sure, but that could be fixed by rostering someone by changing their roster to six?*

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[110] PN4130-4131.

[111] ACA and others, submission filed 15 March 2019, page 19

[112] Exhibit 7 Supplementary statement of Bronwen Hennessy dated 10 April 2019, paragraph 5.

[113] Exhibit 9 Supplementary statement of Pixie Bea dated 10 April 2019, paragraph 9; Exhibit 12 Supplementary statement of Alicia Wade dated 12 April 2019, paragraph 5.

[114] PN2918-2920

[115] PN3958.

Paton: *Except that I don't know that that parent is going to be late*

Saunders: *Of course. So you wouldn't really roster someone regularly just in case someone was late, would you?*

Paton: *No.*

With respect to (g), the evidence indicated that parents were occasionally late in picking up children.[116] There was little evidence as to why some parents were late. The employer witness, Ms Tullberg, had one specific family who were late because of work finishing times[117] but there was no evidence that this was widespread.

With respect to (h), we agree there was evidence that some centres charge late fees as a deterrent to late pick-ups by parents. Numerous employer witnesses indicated that they charged late fees.[118] This is an operational decision that businesses make, and there is no guarantee that expanding the span of ordinary hours would result in businesses reducing or eliminating late fees. There would be no compulsion for employers to stopping charging late fees and there would be no reason to stop employers simply pocketing the reduced labour costs as profit.

With respect to (j), we note that there is always a risk of unplanned overtime if parents are late, and that extending the span of ordinary hours would not alleviate the disutility for employees (rather, it would increase the level of disutility, as employees would be expected to stay later unexpectedly *without* the payment of overtime). Employer witnesses generally agreed that they would not roster an employee on later just in case a parent was late. We refer to paragraph [132] of our submission on findings filed 29 May 2019:

> *[132] There is a level of inherent uncertainty in parents picking up children late, and it was acknowledged that regardless of the opening hours, there is always a risk of late pick up.[119] There was no evidence that an employer would roster an employee after closing time just in case of a late pick-up[120] and no evidence that extending the ordinary span of hours in the Awards would genuinely address any issues that arise from late pick up*

Question for UV, the IEU and the Individuals
Q.40 Do you contest the propositions set out at [173] above?

I and E Arrabalde

Yes.

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[116] See paragraphs [129]-[130] of our submission on findings filed 29 May 2019.

[117] PN3601

[118] See oral evidence of Fraser, PN1717-1719; Paton PN2189-2196; Chemello PN2689-2690; Llewellyn PN4210-4213

[119] Llewellyn PN4210.

[120] See oral evidence of Tullberg PN3595, Mahony PN3961 and Paton, PN2185.

Extending ordinary hours until 7.30pm will not necessarily mean that centres will be open longer hours. This is because the operating hours of an early childhood education and care setting are not discretionary and instead must comply with local government planning controls and be approved by the regulatory authority. Therefore, the argument that workforce participation will be enhanced through the extension of ordinary hours is inaccurate because extending ordinary hours does not allow centres to stay open later. If centres do not or cannot increase their hours of operation, an extension of ordinary hours would ultimately result in a reduction in pay for employees who continue to work past 6.30pm (for example, if families arrive late to collect their child).

Further, extending ordinary hours should be considered with great caution given the potential ramifications for broader societal change. If an extension of ordinary hours does result in an extension of operating hours, this could potentially normalise children remaining in formal care longer and later. This is a very important consideration given the significant and ongoing impact of children's experiences during the early years on the rest of their lives.

Independent Education Union

The IEU contests the propositions at [173], for the reasons set out in its previous submissions. In particular:

a. no witness has given evidence that they would in fact extend their opening hours if the span of hours has changed, and none are in fact using the full span at present;

b. there is no evidence that the claim will make childcare 'more sustainable', noting the failure of any ACA witness to bring actual 5 financial information in respect of current business costs and the obvious marginality of current overtime costs;

c. there is no evidence to support the proposition that the claim will increase workforce participation; as a matter of common sense this would not seem to flow from permitting childcare centres to remain open longer at slightly less expense;

d. extending the opening hours does not mean parents will never be late; given that no witness has said they would roster staff past closing time to cover for unexpected late pickups; both the 'unpredictability' for staff and the late fee cost for parents would remain

United Voice

We contest all of the propositions in paragraph [173] of the Background Document.

We contest (a) as it was unclear whether any of the employer witnesses would change operating hours even if there was a change to the span of opening hours, as most had not done any costing on the financial viability of a change and there was no real evidence that there was demand for such a change.[121]

[121] See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

We contest (b) as we do not agree that the current overtime cost is necessarily *significant*. Employer witnesses Mr Mahony and Ms Hands admitted to having not done the calculations on the cost of opening until 7.30pm.[122] Ms Chemello gave evidence that her centre's late fees were to offset the time in lieu costs (not direct overtime costs, as she offered time in lieu rather than overtime).[123] Ms Llewellyn admitted that the overtime cost that prevented her from opening her Centre until 7.00pm under the current Awards was just under one per cent of last year's annual profit.[124] This evidence did not support the statement in (b).

We contest (aa) as ACA and others have not put any evidence on to support this broad assertion. There is absolutely no evidence in these proceedings to support the proposition that extending ordinary hours under these Awards would have any impact on workforce participation or the Australian economy.

We contest (bb) as expanding the span of ordinary hours will not necessarily result in businesses reducing or eliminating late fees.

We contest (cc). There is always a risk of unplanned overtime if parents are late, and employer witnesses acknowledged that they would not roster employees on after closing time just in case of a late pick-up.[125] We refer to paragraph [132] of our submission on findings filed 29 May 2019.

Question for UV and the IEU

*Q.41 What do you say about the proposition set out at **[176]** above? Does the consideration in s.134(1)(a) extend to all the low paid or is it confined to those covered by the Awards?*

Independent Education Union

The ECEC Employer's submission, summarised at [176]:

a. does not deal with the fact that employees, as set out in Lisa James statement dated 15 April 2019 would greatly prefer to have occasional access to overtime payments than to be required to work to 7.30pm as part of their ordinary hours;

b. asserts without basis that 'structured employment' would be created between 6.30 and 7.30pm – rationally, the claim will not lead to any additional jobs, but will simply make the existing positions less desirable;

c. although acknowledging that overtime will still be accessible in some circumstances, does not address the fact that this will be greatly reduced,

and does not meet the modern awards objective in that it fails to provide fair compensation for employees working unsocial hours.

[122] Mahony, PN3947-3948, Hands, PN4635.

[123] PN2690

[124] PN4170-4207.

[125] See oral evidence of Tullberg PN3595, Mahony PN3961 and Paton, PN2185.

The question in respect of whether s.134(1)(a) applies to only award covered employees or all low paid workers does not appear to arise in this 6 matter as there is no rational connection between the propositions advanced in [176] and that principle.

United Voice

We contest [176] (a) and (b). We have addressed our opposition to this claim in our submission in reply filed 15 April 2019 in detail; see particularly paragraphs [36]-[42].

With respect to (a), there is always a risk of unplanned overtime if parents are late and employer witnesses acknowledged that they would not roster employees on after closing time just in case of a late pick-up.[126] We refer to paragraph [132] of our submission on findings filed 29 May 2019.

With respect to (b), we dispute that this is beneficial. Under the current Awards, employers can choose to open until 7.30pm and can create structured employment between 6.30pm and 7.30pm. The difference is that if the ACA claim were granted, employees would not receive the overtime penalty for work between 6.30pm and 7.30pm.

We say in the context of the 4 yearly review of modern awards, the consideration in s134(1)(a) must be in respect of the low paid employees *covered* by the relevant Award, rather than low paid employees generally.

In the event that the Commission determines that regard should be had to low paid employees generally, we dispute ACA and others' argument that their claim will be beneficial to all low paid employees. We refer to paragraphs [89]-[95] of our submission in reply filed 15 April 2019.

The Commission should approach these contentions with extreme caution in light of the complete absence of any evidence from the persons who would allegedly benefit from the extension of ordinary hours as proposed.

Question for ACA, ABI and NSWBC
Q.42 How would the variation increase the prospect of collective bargaining?

Australian Childcare Alliance and others

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.

[126] See oral evidence of Tullberg PN3595, Mahony PN3961 and Paton, PN2185

Question for ACA, ABI and NSWBC

Q.43 What evidence supports the proposition that the current ordinary hours span is not easy to understand?

Australian Childcare Alliance and others

In isolation, the current ordinary hours span of 6.00am to 6.30pm is not difficult to understand.

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.

Questions for the ACA, ABI and NSWBC

Q.44 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 it claims?

Australian Childcare Alliance and others

In short, the Applicant's contest the IEU's characterisation of the relevant award provisions 17 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.

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

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 ***Error! Reference source not found.****,* ***Error! Reference source not found.*** *and* ***Error! Reference source not found.****, employees may be*

employed as shiftworkers.

…

(b) 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 A.1.1(a) by 5; and*

(c) *the rate of pay for a casual is first calculated in accordance with the provisions of clause* ***Error! Reference source not found.****.*

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*

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

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.

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.

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).

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 9731[127]. 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.

[127] See from [143]

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.

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.*'

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.'*

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.*

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.

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 for the Applicants

Q.45 Are the Applicants able to provide any data on the existing operating hours of services in the ECEC sector?

Australian Childcare Alliance and others

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 for UV, the IEU and the Individuals

Q.46 Do you contest the propositions set out [208] above, or any of the material set out in Section 21 of the ACA, ABI and NSWBC submission?

I and E Arrabalde

In response to [208](a):

Agreed

In response to [208](b)(i):

This is true to a certain extent. Enrolment patterns are fairly stable. The number of children in attendance cannot exceed the number of licenced places and so there should not be changes to *how many* staff are required per day. Staff/child ratios should not be considered a complexity, rather a simple calculation.

Many centres calculate ratios and organise staffing based on the number of children of a certain age at a fixed point in time (such as the beginning of the calendar year) or the number of staff may be based on the capacity of a "room" in terms of physical floor space and the age grouping of the children. For example, a room for children aged 2-3 years may have 15 children and 3 staff.

It is acknowledged that some complexity may arise when staff/child ratios are being calculated to minimise costs and maximise profit. In order to reduce costs, some centres minimise how many staff are rostered on and vary the number of staff they employ in the event that children are not in attendance on a particular day or if children have a birthday. For example, if there are nine 3-year old children and one 2-year old child in attendance it is necessary to have two staff members due to ratio requirements. If the 2-year old child is absent or if the 2-year old child turns 3, only one staff member is needed. This could potentially *halve staffing costs* despite the centre's *fee revenue remaining the same* as daily fees remain payable for non-attendance

In response to [208](b)(ii):

This should be a stable number based on children's recurring enrolment patterns.

In response to [208](b)(iii):

Once again this should be a stable number based on children's recurring enrolment patterns.

In response to [208](c):

Agreed.

In response to [208](d):

Agreed.

In response to [208](e)(i):

This is contested. Services may apply for a waiver without any risk:

> Waivers play an important role in helping providers maintain their level of service to families while dealing with special circumstances or unexpected events.
>
> An approved provider may apply to a regulatory authority for a waiver of an element of the National Quality Standard and/or the National Regulations. Approved providers can apply for

a service waiver where an issue is likely to be ongoing, or a temporary waiver, where the issue can be addressed within 12 months.[128]

In response to [208](e)(ii):

This would be a decision made by the centre if they believed if their staffing issued posed a risk to the children's wellbeing.

Independent Education Union

The IEU does not contest the propositions set out at [208], although as set out in its earlier submissions takes issue with the suggestion that there is anything unusual about employees taking personal leave at short notice.

As to teacher:child ratios, the IEU observes that the ECEC employer submissions appear to misunderstand the nature of the ratios. Tables explaining the system are set out below.

REG	NUMBER OF CHILDREN	TEACHER REQUIREMENT
r.130	Fewer than 25 approved places	'access to' teacher for 20% of time education and care is provided (incl. by ICT), calculated quarterly
r.131	More than 25 approved places, but fewer than 25 children in attendance on a given day	'access to' teacher for 20% of time education and care is provided (incl. by ICT), calculated quarterly. Time a teacher is 'in attendance' counts as access
r.132	Between 25 and 59 children in attendance on a given day	**OPTION A:** r.132(1)(a)If the centre operates more than 50 hours a week, a teacher must be 'in attendance' for at least 6 hours on that day. r.132(1)(b) If the centre operates less than 50 hours per week, a teacher must be 'in attendance' for 60% of that day's operating hours. **OPTION B** Per r.132(2), if the approved number of places is less than 60 and more than 24, and the centre engages a full time (or FTE) teacher, the centre is not required to comply with r.133(1). i.e. the fact of employing a full time teacher to work at the service is sufficient, regardless of whether they are there on that particular day.
r.133	Between 60 to 79 children in attendance on a given day	**OPTION A**: r.133(1)(a)(i) and (b)(i)If the centre operates more than 50 hours a week, one a teacher must be 'in attendance' for at least 6 hours, and a second for at least 3 hours, on that day.

[128] Australian Children's Education and Care Quality Authority (ACECQA). 2018. *Guide to the National Quality Framework.* p. 60. https://www.acecqa.gov.au/sites/default/files/2019-06/Guide-to-the-NQF_0.pdf

		r.133(1)(a)(ii) and (b)(ii) If the centre operates less than 50 hours per week, one teacher must be 'in attendance' for 60% of that day's operating hours, and a second for at least 30%, on that day. **OPTION B** Per r.133(2), if the approved number of places is less than 80 and more than 60, and the centre engages: one full time (or FTE) teacher, a second 0.5FTE teacher, the centre is not required to comply with r.133(1). i.e. the fact of employing 1.5 FTE teachers to work at the service is sufficient, regardless of whether they are there on that particular day.
r.134	More than 80 children on a given day	**OPTION A:** r.133(1)(a)(i) and (b)(i)If the centre operates more than 50 hours a week, 2 teachers must be 'in attendance' for at least 6 hours each on that day. r.133(1)(a)(ii) and (b)(ii) If the centre operates less than 50 hours per week, 2 teachers must be 'in attendance' for 60% of that day's operating hours each on that day. **OPTION B** Per r.133(2), if the approved number of places is more than 80, and the centre engages two full time or FTE teachers, the centre is not required to comply with r.133(1). i.e. the fact of employing 1.5 FTE teachers to work at the service is sufficient, regardless of whether they are there on that particular day.

In other words, in states other than NSW services who employ the required number of full time or FTE teachers comply with these ratios even if the teacher is absent. Note also r.135 – where an teacher is absent due to illness or other leave, for up to 60 days of the year either a diploma-qualified worker or a primary school teacher can count for the purposes of r.132(1), 133(1) and 134(1). This is not necessary where the relevant number of FTE teachers are employed.

The NSW ratio requirements, which are slightly different, are set out below.

REG	Number of children present	Teachers required
r.130-131	0-24	Per r.130-131 above
r.132	25-29	Per r.132 above
r.272(2)	30-39	1 teacher in attendance at all times
r.272(3)	40-59	2 teachers in attendance at all times

r.272(4)	60-79	3 teachers in attendance at all times
r.272(5)	80+	4 teachers in attendance at all times

'In attendance' is defined at r.11; in short, the teacher must be physically present at the service and carrying out education and care activities including:

a. working directly with children;

b. planning programs;

c. mentoring, coaching, or supporting educators (a term which is not used in the act to encompass teachers by default, as r.126(3) above demonstrates);

d. facilitating education and care research; or

e. performing the role of educational leader per r.118.

Although physical attendance is required, it is much easier to replace a teacher via senior management than an educator for ratio purposes: a teacher-qualified director, for example, satisfies ratio requirements even when not working directly with children.

As such, the ECEC Employers submission that they need to be able to require teachers to change their rostered days and hours of work to meet teacher:child ratio requirements:

a. is simply not true in states other than NSW; and

b. is of very little force in NSW.

United Voice

We address our response to the matters put by ACA and others at what are [208] (a), (b), (c), (d) and (e).

We do not contest (a) as such but note that such a statement could be made about almost any sector. Employees across all sectors are often unavailable due to health and other personal reasons. Dealing with the unanticipated absences of employees is a contingency that all employers must plan around. There is no evidence that employees in ECEC are particularly prone to unanticipated absences. This is a finding that would require some evidence.

With respect to (b), there is a comprehensive scheme of regulation for ECEC services and we acknowledge that services must comply with the National Law and Regulations, as well as any relevant State based regulations. We do note that attendance at ECEC services is not highly variable, and that generally, parents are required to book a place in advance, and may have to pay a fee if their child is unable to attend at late notice.[129]

[129] See oral evidence of Brannelly PN3423-PN3424, Mahony PN3991-3993, Llewellyn PN4250-4253, and Hands PN4758-4767.

With respect to (d), it is agreed that there are minimum staffing requirements that centre based services must meet. The question as to whether the replacement of an absent employee in a roster is *required* depends on whether the employer has chosen to staff the service at the bare minimum or not. The evidence indicated that many services roster above the minimum required to because it was good practise to do so and not just to accommodate compliance with ratios.[130]

With respect to (e), we note that employer witnesses acknowledged that they have several options available in replacing an employee, including asking another employee to work additional hours or vary their shift, engaging a casual employee, having a staff member rostered '*off the floor*' (such as the Director or Assistant Director) step in or using labour hire.[131] There was no evidence that any of the employer witnesses had been non-compliant with the minimum staffing requirements in the National Law or Regulations under the operation of the current Awards.[132]

We contest some parts of section 21 of the submission of ACA and others dated 15 March 2019.

With respect to 21.3, we do not dispute that there is some complexity in rostering. However, the current Awards already provide employers with sufficient rostering flexibility. Further, last minute changes to employee rosters can cause employees significant stress.

With respect to 21.4, there was some evidence that the employer witnesses did try and accommodate employee requests for leave *when possible*. However, we take issue with the last line of this paragraph. It is an overstatement to say that '*employers regularly try to accommodate these employee requests (to swap shifts, change times etc.) rather than force employees to utilise personal leave, annual leave or unpaid leave when such requests arise*.'

With respect to 21.5, we agree that flexibility for working parents is important, though we do not agree with the phrasing that the ECEC workforce '*demands*' flexibility. We agree that there was evidence that employees generally agree to late roster changes, where possible.

With respect to 21.6, we refer above to our response to paragraph [208] (d) of the Background Document.

With respect to 21.7, we refer above to our response to paragraph [208] (e).

With respect to 21.8, we disagree that casuals are necessarily unfamiliar with the children and the service. All but one of the employer witnesses who operate services indicated that they employ casual employees.[133] It is appropriate to use casual employees to fill in unexpected rostering gaps.

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[130] See oral evidence of Hands PN4681-4684, Mahoney PN3965-3966, Fraser PN1677-1680 and Paton PN2269-2279.

[131] See oral evidence of Viknarasah, PN 1138-1148, Fraser, PN1794-1800, Paton PN2283-PN2296, Maclean PN2486, Chemello PN2715-2719, Mahony PN3971-3972, Hands PN4698-4702.

[132] See oral evidence of Llewellyn PN4221-4229, Hands PN4703.

[133] See witness statement of Chemello dated 1 March 2019 (Exhibit 27), paragraph 23; witness statement of Hands dated 12 March 2019 (Exhibit 43), paragraph 19; witness statement of Paton dated 14 March 2019 (Exhibit 21), paragraph 20; witness statement of Viknarasah dated 11 April 2019 (Exhibit 13), paragraph 31; witness statement of Tullberg dated 9 April 2019 (Exhibit 35), paragraph 19; witness statement of McPhail dated 12 April 2019 (Exhibit 28), paragraph 21; witness statement of Fraser dated 15 April 2019 (Exhibit 18), paragraphs 24-25; witness statement of Maclean dated 15 April 2019 (Exhibit 25), paragraph 30; witness statement of Mahony dated 11 April 2019 (Exhibit 38), paragraph 21.

Question for UV, the IEU and the Individuals
Q.47 Do you contest the propositions set out [210] above?

I and E Arrabalde

No. We generally agree with these propositions.

United Voice

We contest all of paragraph [210] of the Background Document.

We agree that full time and part time employment should be the preferred employment model for long term and ongoing employees in a service to ensure consistency of care for children. However, the use of casual employees for unexpected absences is appropriate, and accords with the definition of casual employment in the Children's Services Award that casual employees are engaged for '*temporary and relief purposes.*'[134]

All but one of the employer witnesses who operate services indicated that they employ casual employees.[135] There is no reason to presume that all these casual employees would not be familiar and trained in the service. Further, there are casual employees with a range of qualifications including Diploma qualified casual employees.

Question for UV, the IEU and the Individuals
Q.48 Do you contest the propositions set out [212] above, or any of the material set out in Sections 23 of the ACA, ABI and NSWBC submission?

I and E Arrabalde

No. We do not contest these propositions.

United Voice

We agree with (a).

We contest (b), (c) and (d).

We contest the proposition in (b), the evidence demonstrated, there are a wide variety of ways in which an employer can replace an employee who may be unavailable. Some of these options are: asking another employee to work additional hours or vary their shift, engaging a casual employee, having a staff member rostered '*off the floor*' (such as the Director or an Assistant Director) step in or using labour hire.[136] The evidence from employers was almost unanimous that employees were compliant in agreeing to roster changes at less than 7 days'

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[134] Clause 10.5(b) of the Children's Services Award.

[135] See witness statement of Chemello dated 1 March 2019 (Exhibit 27), paragraph 23; witness statement of Hands dated 12 March 2019 (Exhibit 43), paragraph 19; witness statement of Paton dated 14 March 2019 (Exhibit 21), paragraph 20; witness statement of Viknarasah dated 11 April 2019 (Exhibit 13), paragraph 31; witness statement of Tullberg dated 9 April 2019 (Exhibit 35), paragraph 19; witness statement of McPhail dated 12 April 2019 (Exhibit 28), paragraph 21; witness statement of Fraser dated 15 April 2019 (Exhibit 18), paragraphs 24-25; witness statement of Maclean dated 15 April 2019 (Exhibit 25), paragraph 30; witness statement of Mahony dated 11 April 2019 (Exhibit 38), paragraph 21.

[136] See oral evidence of Viknarasah, PN 1138-1148, Fraser, PN1794-1800, Paton PN2283-PN2296, Maclean PN2486, Chemello PN2715-2719, Mahony PN3971-3972, Hands PN4698-4702.

notice and the payment of overtime was not common. Employees, particularly part-time employees, routinely agreed to work additional ordinary hours at short notice.

With respect to (c), we say the requirement to record the agreed roster variation in writing is not onerous. There is no reason why an employer could not have a simple pro-forma that is signed which evidences agreement. It is appropriate that such an agreement is maintained in the time and wages record. We would otherwise agree that there appears to be an industry practise whereby permanent employees waived their right to overtime and routinely agreed at short notice to work additional hours to assist with the operational needs of their centre.

With respect to (d), we disagree. As stated above, employers have several options available to replace employees. Further, there are sound reasons as to why employees in this sector should be provided with at least seven days' notice of roster changes. We refer to paragraphs [77]-[85] of our submission in reply filed 15 April 2019.

We contest 23.1. Firstly, clause 21.7(b) (i) permits an employer and an employee to agree to a variation to the roster. In such circumstances, overtime would not be payable. Secondly, the clause does not suggest that overtime would be paid for *all* hours of work.

We contest 23.2. We refer to our response above to [212] (d).

We contest 23.3. We refer to our response above to [212] (c). There is no requirement in the Award that the record in writing be made at the *exact* same time that agreement is reached. For example, if an employer and employee reached agreement in the morning at 7am that the employee would come in for an additional shift at 9am; the employee could sign a form on the agreed variation at 9am when they arrive at work.

We contest 23.4. We refer to our response above to [212] (c).

Question for ACA, ABI and NSWBC

Q.49 What evidence supports the proposition that the current rostering clause is not easy to understand?

Australian Childcare Alliance and others

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

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.*'[137]

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.[138]

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[137] Statement of Kerry Mahony at [36]

[138] Ms Viknararash at [92]

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 children[139] *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 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.[140]

[139] '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.

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

Question for the IEU

Q.50 The IEU is asked to respond to AFEI's characterisation of the effect of the proposed variation (at [272] above).

Independent Education Union

The AFEI's characterization of the effect of the proposed variation misses the point. The question is whether the director is employed 'as a teacher' – a qualification and participation in the activities described in r.11 – would all seem sensibly to be requirements. Given that the role of a Director expressly requires, among other things, involvement in the oversight and administration of an educational program, it is unclear how a director with a teaching qualification could sensibly said not to be using that qualification in connection with their employment.

Notably, none of the ECEC witnesses adhered to an alternative view under cross-examination.

Questions for ACA, ABI and NSWBC and AFEI

Q.51 Do the Employers contest the IEU's interpretation of clause 14.5 and, if so, what do they contend is the correct interpretation of the clause?

Australian Childcare Alliance and others

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.

Australian Federation of Employers and Industries

AFEI is uncertain as to the IEU's interpretation of Clause 14.5(b), although it appears that the IEU's proposed variation in 14.5(b)(ii) would result in more uncertainty.

Q.52 Do the Employers dispute the proposition that the correct interpretation of the clause is in accordance with the IEU's proposed drafting?

Australian Childcare Alliance and others

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.

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.

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).

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.

Australian Federation of Employers and Industries

See our submissions above at Question 51. To the extent that any ambiguity exists, it is better resolved by reference to the minimum payment, reflecting on quarter of a 7.6 hour day, or for such time actually worked.

Questions for all parties

Q.53 Clause 14.5(a) appears to place a cap on the salary payable to a casual employee who is engaged for less than five consecutive days:

(i) *What is the parties' understanding of how this cap operates?*

(ii) *What is the rationale for the imposition of such a 'cap'?*

(iii) *What is the history of this provision and, in particular, has the 'cap' been the subject of an arbitral determination.*

Australian Federation of Employers and Industries

In relation to questions 53(i) and (ii), the 'salary level' for a casual employee is based on years of experience as a teacher more generally, except that for shorter casual engagements, that is less than 5 consecutive days subject to a cap of 8 years' service, with longer engagements not so capped, noting that casual engagement periods are also capped at 4 weeks, or by agreement no more than 10 weeks.

In relation to question 53(iii), AFEI is unaware of the history of this particular provision but notes that the predominant state awards in NSW appear to contain lower caps of 4 years' service, relating casual pay levels. In both cases the caps reflect the short term nature of casual engagements and potentially limited opportunity for employees with general teaching service to contribute to the operation of the particular service.

I and E Arrabalde

We do not have sufficient knowledge to comment on the cap.

Independent Education Union

The IEU is conducting research into these matters and will provide further submissions as soon as possible.

United Voice

We are unaware of why this cap on the salary payable to a casual employee engaged for less than five days operates. On the face of it, it seems to be an unfair restriction on the wages of casual employees without any apparent justification.

The cap appears to have been inserted following consultation on the Exposure Draft of the Teachers Award that was released on 22 May 2009. The Exposure Draft did not contain a cap. We are not aware of a decision in respect of the cap.

Background Document 2

We received responses from:

- Australian Federation of Employers and Industries on 17 July 2019;
- I and E Arrabalde on 19 July 2019;
- United Voice on 19 July 2019;
- Independent Education Union of Australia on 19 July 2019; and
- Australian Childcare Alliance and others on 19 July 2019.

Question for the ECEC Employers

Q.1 The ECEC Employers are invited to expand on the import of the point made at [7](a)(ii) above.

Australian Childcare Alliance and others

The significance of the point made at [7](a)(ii) is two-fold.

Firstly, the point is raised to substantiate the general finding identified in the text of [7], that there is a degree of confusion as to the legal effect and status of the elements of NQF amongst the participants in the ECEC sector, including whether responsibilities arising from the NQF also arise from other sources. The fact that Dr Fenech, an academic who is relied upon by UV as a expert witness and someone who has a research background in the area appears to be in error as to the responsibilities of a person in day-to-day charge of a service demonstrates this confusion.

Dr Fenech's Report at page 2 identifies that '[t*]he responsible person is required to oversee educational programs*.' When asked at PN630 where that obligation comes from, Dr Fenech identified Section 168 of the National Law and "*that's in respect to the nominated supervisor. So my comment on page 2 is when, in the absence of the nominated supervisor, the responsible person is therefore responsible for ensuring that the educational programs are developed and delivered in accordance with the national approved framework."*

Dr Fenech's evidence above and at PN638 was that s 168 of the National Law had the effect that in the absence of a Nominated Supervisor, the person in day to day charge of a centre essentially inherited all of the obligations of the nominated supervisor, including the responsibility to oversee educational programs.

Section 168 of the National Law states:

> *168 Offence relating to required programs*
>
> *(1) The approved provider 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, in the case of an individual.
$20 000, in any other case.

(2) 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.

On the face of s 168, Dr Fenech's evidence is simply not correct that responsibility for educational programs falls to Responsible Persons.

Further, and with respect, reviewing Dr Fenech's evidence, the Full Bench should not be inadvertently led to a conclusion that other obligations arising for a Nominated Supervisor (other than overseeing educational programs) somehow automatically attach to the position of Responsible Person in the absence of the Nominated Supervisor. To the extent that Dr Fenech's evidence suggests this, it should not be accepted.

It is not in contest that status as an educator in day to day charge (i.e. a Responsible Person who is not Nominated Supervisor or Approved Provider) does not bring with it any additional legal responsibilities (see PN624). This is significant in understanding what obligations fall to the Responsible Person (when that role is undertaken by an educator in day to day charge).

In the absence of any relevant law or regulation conferring obligations upon a Responsible Person (person in day to day charge), the Full Bench should not accept that Responsible Persons (person in day to day charge) inherit the obligations and responsibilities of a Nominated Supervisor.

The second point of significance relates specifically to whether the introduction of the NQF created further responsibilities for Responsible Persons.

It was put to Dr Fenech at PN651 and PN653 that the obligations Dr Fenech identified as being relevant to a Responsible Person *("entry and exit from the premises, provision of food and beverages, administration of medication prescription/non prescription drugs/alcohol, children's sleep and rest, excursion, staffing... oversee educational programs and the supervision of safety of children"*) all pre-existed the introduction of the National Quality Framework.

Dr Fenech's response was that the "*The educational programs is definitely different since the introduction of the National Quality Framework. That under the law and the national regulations, it talks about the responsible person as the nominated supervisor ensuring that*

the programs are developed and delivered in accordance with an approved learning framework".

Again, given that oversight of educational programs does not fall to the Responsible Person (it instead is the responsibility of the Approved Provider and Nominated Supervisor as per s 168) Dr Fenech's evidence should in fact lend support to the proposition that all of the responsibilities listed by Dr Fenech as being relevant to a Responsible Person pre-existed the introduction of the NQF.

For abundant clarity, ACA/ABI maintain the only change brought about by the NQF was the term 'Responsible Person'. As described by Ms Tullberg in Exhibit 353 , the obligation for an Approved Provider (then called a Licensee) to designate a person to be a Responsible Person and the requirement to make sure that person was 'present on the premises' pre-date the NQF in Victoria by at least 16 years where the term 'Nominated person' was used instead of Responsible Person.[141]

Question for other parties
Q.2 Which of the findings sought by the ECEC Employers (at [4] above) are contested?

I and E Arrabalde

With reference to [4]7(a)-(d), the National Quality Framework is complex and expansive. The NQF refers to the entire early childhood education and care regulatory and quality assessment system. It consists of:

- The legislative framework - *The Education and Care Services National Law* and the *Education and Care Services National Regulations*.
- The National Quality Standard (NQS)
- The Assessment and Rating system
- Two nationally approved learning frameworks - *Being, Belonging and Becoming: The Early Years Learning Framework* (EYLF) and *My Time, Our Place: Framework for School Aged Care in Australia* (MYOP)
- State and territory based regulatory bodies
- ACECQA

The NQF is underpinned by six principles relating to children, families and practice and was effective from 1 January 2012.[142]

Given the volume of material included in the NQF, it is unrealistic to expect that every ECEC participant has precise and accurate knowledge of the specifics without access to documents for reference.

[141] s 30 Children's Services Act 1996 (VIC)
[142] For more information, see https://www.acecqa.gov.au/sites/default/files/2018-02/ACECQA-AnnualReport-20152016.pdf

United Voice

We contest [4] (1) and aspects of (7). We do not contest [4](4) as a general proposition, but we do not agree that the ACA claims would improve accessibility or affordability of ECEC services.

With respect to (1) this characterisation of the ECEC sector implies it is a '*baby-sitting*' for parents whilst they are at work.[143] This is problematic and contrary to the current regulatory framework. The primary purpose of the ECEC sector is to provide quality education and care for children. This is not inconsistent with facilitating the parents' participation in work. The National Quality Standards emphasise the delivery of educational program and practice that enhances children's learning and development and helps children to build life skills.[144]

We disagree with ACA and others' characterisation of the evidence of Ms Fenech in (7)(a)(i). We note that Ms Fenech did not conclude that a person in day to day charge of a service faces additional legal liability as an individual, at [639] she clarifies that in relation to the person in day to day charge: '*If something goes wrong they're not legally liable, so that's what I meant by that, but they still are responsible for those roles*'.[145] Ms Fenech also gave a specific examples on how a person in day to day charge as a Responsible Person has responsibility for overseeing educational programs in [632]:

> ***Arndt:*** *What would a person in day-to-day charge, who's a responsible person, so it's a scenario where approved provider isn't there, nominated supervisor isn't there, person in day-to-day charge - can you give me an example of what in your view that requirement would be, that is, to oversee educational programs?*
> ***Fenech:*** *Again it's a compliance role. So it's not - it could be consulting with the educational leader to check that, you know, perhaps they have met with a particular educator who was having difficulty; their nominated supervisor or the responsible person may check, you know, how is that going, or it could be, you know - who knows - they could get a spot check on the day that the nominated supervisor isn't there. So a regulatory officer turns up, and it's up to that responsible person to make sure that the educational programs are up to speed, because they're the ones that will have to talk to the authorised officer about the educational programs.*[146]

With respect to [4](7)(ii), ACA and others make a broader assertion than is warranted from the question put to Ms Fenech, which was as follows:

> ***Arndt:*** *Are you aware of any responsibility of a responsible person in the National Quality Framework which only exists in the National Quality Framework?*
> ***Fenech:*** *I don't know. I can't comment.*[147]

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[143] We elaborated on this point in our submission in reply made on 15 April 2019 at [5] to[19].

[144] Guide to the NQF, page 93.

[145] PN639.

[146] PN632.

[147] PN650.

With respect to [4](7)(b)(i), Ms Warner was able to acknowledge that NQF standard 7.2.2 of the NQS was relevant to her role of Educational Leader when it was put to her directly.[148]

As to [4](7)(c), Ms Hennessy acknowledged that it was her centre manager who was '*ultimately*' responsible, but as Educational Leader, her centre manager had '*delegated that responsibility*' to her to ensure policies dictated by the NQF are considered and integrated into the programming and curriculum.[149]

Question for all other parties

Q.3 Other interested parties are invited to comment on the findings sought by IEU (at [5] above) and UV (at [6] above).

Australian Childcare Alliance and others

In respect of the IEU's findings at [5], ACA/ABI contest the following findings.

Finding 2.(b) - that the overwhelming majority of teachers and educators employed in ECEC services are "low paid".

ACA/ABI refer to their submissions dated 10 July 2019, paragraph 5 on this point with respect to the Children's Services Award 2010 and non-teacher educators.

With respect to teachers paid in accordance with the Educational Services (Teachers) Award 2010, ACA/ABI submit that the Penalty Rates decision held that the "*threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid ', within the meaning of s.134(1)(a)*." When looking at ABS statistics, the 2/3 median full time earnings from the Characteristics of Employment Survey[150] is $886.67 and Survey of Employee Earnings and Hours is $973.33 per week. Under the Educational Services (Teachers) Award 2010 a level 3 (Graduate) is paid $1,045.14[151] per week which cannot considered to be low paid when compared against the median full time earnings.

Finding 4(c) Difficulties in recruiting and retaining suitable staff.... are in part caused by poor wages and conditions in the sector.

ACA/ABI disputes the sweeping proposition that the ECEC sector has 'poor wages and conditions'.

With respect to recruitment and retention, this statement also oversimplifies the complexities of an industry where ratio requirements (for degree qualified teachers and Certificate III or Diploma qualified educators) have increased the number of qualified staff required in the sector and that those regulatory ratio requirements have contributed significantly to the difficulty recruiting and retaining suitably qualified staff as demand outstripped supply since

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[148] PN1533-1536.

[149] PN278-286.

[150] in conjunction with the analysis conducted by the Full Bench (in Background Document 1) of employees in the Children's Services Award relevant are the ANZSIC divisions P: Education and Training and Division Q: Health care and social assistance

[151] LDC 4% added

the regulatory changes. Furthermore, in direct contrast to the IEU's position the Productivity Commission Report 2015 Part 2, page 325[152] suggests that:

> a. there is not a retention issue - the Productivity Commission Report (2015) stated that teachers and directors spent more time in the sector than educators. The average tenure of educators was 7 years and for teachers and directors it was 11 years; and
>
> b. to the extent difficulties in recruitment and retention are caused in part by 'poor wages and conditions' - the 2013 National ECEC workforce census staff survey found that the main reasons why staff thought they may finish their current job in the next 12 months also included:
>
> i. to seek work outside the sector (30.2 per cent);
> ii. return to study, travel or family reasons (22.4 per cent); and
> iii. the job was stressful (20.5 per cent).[153]

Furthermore, we submit that the wages of degree qualified teachers and diploma qualified educators are not 'poor' as they are not considered 'low paid' when compared to other professions (see submissions at paragraphs 17 and 18 above).

Finding 4.(d) Difficulties in recruiting and retaining suitable staff … will likely be exacerbated by further reductions in conditions.
ACA/ABI refer to the above submission.

Finding 5
ACA/ABI contest the entirety of this finding. There is no evidentiary basis to suggest that such findings apply to 'many' employees or further that such a finding could somehow be isolated to the 'for profit' ECEC industry.

Finding 7
This finding should be qualified on the basis that, again, there does not appear to be a sufficient basis for isolating such findings to the 'for profit' ECEC industry.

With respect to the UV's findings at [6], ACA/ABI contest both findings.

ACA/ABI contest that the NQF has made a '*significant'* change in the nature of the work within the sector and that the Awards do not reflect the NQF. In the submission of ACA/ABI, the NQF simply codified and consolidated various states' legislation. Although terms such as 'Responsible Person' were created in the NQF, this does not mean that the position was new. Mr Fraser gave evidence that "*before the NQF, there was always someone in charge of the centre*"[154] and that the "*NQF did not create this role … it merely standardised a concept that already existing and legislated that there would be a penalty, to the Approved Provider if they did not have a responsible person on-site*".[155]

[152] See Productivity Commission Report cited in ACA Submission dated 15 March 2019 and Exhibit 38 Annexure KM-2

[153] See figure 8.8 (Productivity Commission Report 2015)

[154] Amended statement of Jae Fraser at [114]

[155] Ibid

I and E Arrabalde

We agree with the findings sought by United Voice at [6]. Following the introduction of the NQF in 2012, the nature of work in early childhood education and care changed dramatically with increased administration, regulation and accountability.[156] These changes are consistently associated with perceptions of burden.[157] As this reform package was introduced two years after the introduction of the Modern Awards, the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2010* do not accurately reflect the roles and responsibilities of employees in the sector.

Question for other parties
Q.4 Which of the findings sought by the ECEC Employers (at [8] above) are contested?

I and E Arrabalde

The findings sought by the ECEC Employers for an extension in ordinary hours are not underpinned by sufficient evidence to support the assertion that this substantive change would help ECEC providers to better meet the needs of working families or that extending the ordinary hours of employees is desired by any persons who cannot generate a profit from such a change.

For example, with reference to [8]5(a), Ms Wade acknowledges that some of her employees who are working parents feel pressure to collect their children on time.[158] However, rather than wanting an increase in the hours of their care arrangements[159] her staff have expressed a desire that the centre closes earlier.[160] This demonstrates that employees do not want to work longer hours, they would rather collect their children earlier.

Independent Education Union

The following findings are contested:

a. 1, for the reasons set out in the IEU's response to the First Background Document filed 10 July 2019;

b. 2, to the extent it is said that current available opening hours of ECEC services are actually restricting working hours of parents;

c. 3, as it ignores the fact that many parents work part time or not at all, and many children attend ECEC services for reasons other than 'childcare while their parents are working' – for example, during school hours – and is otherwise a gross oversimplification;

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[156] Cumming, Tamara, Jennifer Sumsion and Sandra Wong, "Rethinking early childhood workforce sustainability in the context of Australia's early childhood education and care reforms," *International Journal of Child Care and Education Policy* 9, no. 1 (2015): 2

[157] Arrabalde submission (26 April 2019) at [58]-[59]

[158] PN884

[159] PN887

[160] PN885

d. 6, for the reasons set out above and in the IEU's response to the First Background Document filed 10 July 2019; in particular, there is no actual evidence as to working patterns of working parents who use ECEC services;

e. 7, in that unplanned overtime is a feature of all industries, including that incurred through unexpected late finishes outside the employer's control;

f. 8, to the extent that this is said to be an overwhelmingly common occurrence;

g. 9, in that there is no evidence that any ECEC witness *would in fact* extend their centre hours, or that it is overtime costs preventing them from currently doing so (noting that none bar two had bothered to perform any calculations, and those that had had done so in only a rudimentary way without exploring actual affordability);

h. 10, as there is not so much 'relatively little' as 'no actual' evidence supporting a suggestion that there is any real demand for ECEC services to operate later, or that this will permit parents to work longer/later hours (or indeed that this is itself desirable);

i. 11, as requiring a 7.30pm finish would make the prospect of secondary employment practically impossible rather than merely very difficult;

j. 12(a), as Ms James' evidence – on which she was not cross-examined – consists of a reliable survey of workers in the sector and their views on the proposed change.

United Voice

We contest [8](1), (2), (5), (6),(8), (9), (10) and (11).

With respect to (1) we refer to our submission on the background paper filed 9 July 2019:

> '*[76] ..... no evidence has been presented by ACA and others to justify the statement that 'childcare is an extremely competitive industry in which affordability, opening hours and compliance with an increasingly complex regulatory regime determines the viability of a business.' ACA and others did not establish that opening hours have any significant impact on the viability of operators of childcare centres, let alone that it was one of three key factors in their viability. It emerged during the hearing that most ACA witnesses had done no costing or planning on what impact longer opening hours might have on their business.*[161]'

With respect to (2), we refer to our submission on the background paper filed 9 July 2019:

> '*[89] .....again, there has not been evidence in these proceedings on the impact of the opening hours of services on working parents (aside from the evidence presented by United Voice on the impact on working parents who are ECEC employees). No evidence has been presented from parents who*

[161] See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

want to utilise centre based care past 6.30pm and as stated above, the two employer witnesses who did survey their clients did not receive feedback that suggested a genuine need for change.[162] *We also disagree with the notion that the current span of ordinary hours in the Awards is 'limited'.'*

With respect to (5), we note again that ACA and others have not presented any evidence from working parents. United Voice witness Ms Wade provides evidence in relation to *ECEC employees* who are working parents and the difficulty such employees face even with the current ordinary span of hours finishing at 6.30pm.[163] ECEC employees who are working parents would face additional stress if the ordinary span of hours was extended past 6.30pm.

With respect to (6) this is a disingenuous way of characterising ordinary hours in the ECEC industry in comparison to other industries. In any case, a significant number of ECEC services do not even utilise the full ordinary span of hours in the Awards as present.[164]

With respect to (8), late pick up by parents was infrequent.[165]

With respect to (9), most ACA witnesses had done no costing or planning on what impact longer opening hours might have on their business.[166]

With respect to (10), we would say there no evidence before the Commission that there is significant parent demand for longer opening hours. Ms Wade's evidence does not support the proposition that '*extending the ordinary hours until 7.30pm will increase access to ECEC service allowing parents to work longer or later hours*'. Rather, she indicates that employees at her centre had expressed a desire that their centre close *earlier* than 6.30pm.[167]

As to (11), an increase of the ordinary span of hours from 6.30pm to 7.30pm *is* likely to have an impact on secondary employment prospects. Whilst Ms Hennessy acknowledged that she was not receiving many disability support work shifts whilst working the 6.30pm finishing shift[168], she indicated that a 7.30pm finishing shift would make her secondary employment work '*pretty much impossible*.'[169]

Question for the ECEC Employers and AFEI

Q.5 Which of the findings sought by UV (at [9] above) and IEU (at [10] above) are contested?

Australian Childcare Alliance and others

ACA/ABI contest all of the findings sought by UV at [9].

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[162] As above.

[163] Oral evidence of Wade, PN879-889.

[164] See table 1 (on page 6) in our submission in reply filed 15 April 2019.

[165] See paragraphs [129]-[130] of our submission on findings filed 29 May 2019.

[166] See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

[167] PN879-889

[168] PN339-345.

[169] PN356.

ACA/ABI do not contest the following findings of the IEU at [10]: 3, 4, 5(a)-(c), 6, 7(a), 8(a)-(b).

Question for other parties

Q.6 Which of the findings sought by the ECEC employers (at [11] above) are contested?

I and E Arrabalde

While we do not contest the findings sought, given the evidence presented we do not quite understand the practicalities of the rostering claim. While changes to rosters with little notice may be useful in some circumstances, there has been limited discussion as to how an employee's acceptance of an additional shift would impact on the employee's already rostered shifts. Would a rostering variation within 7 days be hours worked in addition to the employee's already rostered hours or in lieu of working another shift? Could the total number of hours an employee has been rostered to work in a week be reduced by the introduction of this clause?

It should be noted that the decision of employers to reduce their staffing in relation to the ratios of children attending on a particular day may be a commercial decision. Most children attend centres on regular days as per their enrolment agreement. In many services, families still pay for their child's place even if they are absent for example, because a child is ill. In this circumstance, some services may choose to reduce the number of staff to reflect the number of children in attendance. If this clause were to be introduced, could its operation allow this?

Independent Education Union

The IEU notes that the ECEC Employers have, to date, not:

a. provided the text of their proposed variation; or

b. explained why it should also apply to teachers, and resists any application at this late stage for it to amend its claim (e.g. to reduce the scope of the power sought).

The IEU contests the following findings set out at [11]:

a. 1, in that it is unclear what is meant by 'roster changes';

b. 3, in that maintaining staff ratios is not in fact complex and is only difficult if services are staffing to ratio – i.e. not taking ordinary incidents of employment like personal leave into account – rather than at appropriate levels;

c. 4, in that there is extensive evidence before the Full Bench that this is a sector in which employers:

   i. use any flexibility granted by the Award to the hilt;
   ii. regularly exceed what is permissible – for example, like Ms Viknarasah rostering on less than a week's notice, or a number of employer using

highly questionable 'minimum hours contracts' for part time workers'; and

iii. staff to a minimum, and will further reduce numbers if it is made possible (i.e. if less of a buffer is required).

In reality the evidence cited by the ECEC employers in this respect demonstrates a lack of need or support for the claim amongst their own witnesses.

d. 5, in that the suggestion that requiring staff to remain permanently on-call is the only solution to rostering issues is entirely baseless.

United Voice
We contest [11] (4) and (5).

With respect for (4), while we agree that many of the employer witnesses expressed a preference for employee agreement, a clause allowing an employer to vary an employee's roster without notice is inherently unfair.

With respect to (5), we disagree that the legislative requirements in the ECEC sector mean that late changes to rosters *without* employee agreement are required. The current Awards provide permit late changes to the roster with employee agreement, and there are numerous other ways in which employers can address unexpected absences. Some of these options are: asking another employee to work additional hours or vary their shift, engaging a casual employee, having a staff member rostered '*off the floor*' (such as the Director or an Assistant Director) step in or using labour hire.[170]

Question for the ECEC employers and AFEI
Q.7 Which of the findings sought by UV and IEU (at [12] and [13] above) are contested?

Australian Childcare Alliance and others

With respect to the UV findings, ACA/ABI do not contest finding 4 at [12].

With respect to the UV findings which are contested:

Finding 1 is uncontested save for the first sentence.

In respect of Finding 2, it is correct that a number of employer witnesses during the hearing gave evidence which did not suggest (and in fact denied) that they sought a power to 'force' employees to vary their rosters at short notice.[171]

In the submission of ACA/ABI, this evidence should not necessarily be determinative of ACA/ABI's rostering claim. While such evidence does not necessarily assist ACA/ABI's claim, as was put in opening, the rostering claim seeks to amend the awards to address one particular scenario, where an employee does not provide sufficient notice to an employer that

[170] See oral evidence of Viknarasah, PN 1138-1148, Fraser, PN1794-1800, Paton PN2283-PN2296, Maclean PN2486, Chemello PN2715-2719, Mahony PN3971-3972, Hands PN4698-4702.

[171] Employers can, under the current award provisions, require an employee to vary their roster without 7 days notice albeit that such requirement brings with it an obligation to pay overtime.

they will be absent and the employer is required to replace the employee in a roster to satisfy their statutory obligations as to staff ratios.

In the submission of ACA/ABI, reviewing the relevant evidence which UV states is relevant to Finding 2, it apparent that such evidence was provided on a general basis that, as an employer, such witnesses would not (or in some cases literally could not) force their employees to work varied shifts on short notice.

What was generally not covered in covered in cross-examination during these exchanges was the prospect that an employee's absence would put the centre in breach of the law. The only witnesses who canvassed this situation (where, in the words of the relevant draft determination: "*in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required is required to change an employee's rostered hours*" were:

c. Ms Paton who when asked whether she wanted the ability to '*demand*' employees come in to the workplace said:

MS SAUNDERS:	You don't need to have that ability, do you?
MS PATON:	I would love to have that ability, yes. I would like to clarify that what I said before was about the type of person I am. I should - I would always seek to request something of someone before demand it, as a human.
MS SAUNDERS:	As an employer you want to be able to demand that that person comes in?
MS PATON:	Yes.
MS SAUNDERS:	Do you think that's fair as an employer?
Ms PATON:	Yes I do.
MS SAUNDERS:	But not as a person?
MS PATON:	I personally would have a great relationship with my staff and if I rang someone and they couldn't do it I would ring the next one. I would respect that if they couldn't. But at the same time if I'm going to not legally be able to open my centre I would say 'You have to be there'.

d. Mr Fraser who advised he did not want his employees to have to agree to roster changes in circumstances where there was, "*a potential of being in breach of the regulations, then, no, we don't have an opportunity to wait for them to agree*."[172]

ACA/ABI's position with respect to the IEU's proposed findings at [13] are outlined below.

ACA/ABI do not contest the IEU findings in [13](1) that employers can and do maintain staffing ratios in various ways. ACA/ABI submits that the costs, difficulties and outcomes arising from these current practices warrant a change to the existing rostering provisions.

Firstly, to be highly rated by ACECQA, Area 4.1.2 of the NQS relates to "Staffing Arrangements" and services must ensure every effort is made for children to experience continuity of educators at a service. Therefore, if a service is using a lot of casual employees

[172] PN1428

or agency staff, that can affect their rating which is a large deterrent.

Kristen McPhail gave evidence that continuity of care is incredibly important for the ECEC sector and that casual employment and the use of agencies is therefore not desirable. She stated in her statement that "*in order for children to part with their parents easily and have a sense of belonging to their environment, they need the continuity*."[173] Ms McPhail stated that employing casuals is not "*the answer*"[174] as it is important for casual employees to have child-specific knowledge. Ms McPhail states that she refuses to use agencies as she does not believe they can adequately care for the children in her service.

In Jae Fraser's statement, he stated that agency staff can cost as much as $45-$50 per hour which is approximately 3 times more than the award rates. Apart from the large cost on a service, Mr Fraser stated that agency staff also create "*a huge issue around continuity and consistency of care because we are likely to be engaging people who are not familiar with the centre and not familiar with the children.*"[175]

The IEU's findings at [13] (2), (3), (4), (5) are not contested.

With respect to the IEU's findings at [13] (6) and (7), we refer to our submissions at 32-35.

Question for the ECEC employers and AFEI
Q.8 Which of the findings sought by UV (at [15] above) and the Individuals (at [16] above) are contested?

Australian Childcare Alliance and others

With respect to the findings sought by UV, ACA/ABI submit as follows.

Findings 1, 3, 6, 7, 8(ii), 13 are uncontested.

With respect to the remaining proposed findings, which are contested, ACA/ABI submit as follows.

With respect to point 4, while it is conceded that a Responsible Person must be present at a centre at all times, ACA/ABI is unsure of the significance of identifying this as the 'defining characteristic' of the Responsible Person role. The nature of the ECEC industry means that almost all relevant work is performed at a centre and employees are not rostered to perform work anywhere else. In that sense, it could be said that the 'defining characteristic' of all ECEC roles is that work is required onsite.

With respect to point 5, UV seek a finding that the role of Responsible Person is not encompassed in the current Modern Awards and the contention that it is "*nonsensical in light of the role not being appurtenant to any classification*." ACA/ABI respectfully disagrees.

As we have stated in our reply submission on 16 April 2019, two of the Employer witnesses stated that the duties of the Responsible Person existed well before the implementation of the NQF in 2012 and therefore would have been contemplated in the making of the Modern Awards.

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[173] Kris McPhail Statement at [74]

[174] Ibid at [72]

[175] Jae Fraser Statement at [93]

Sarah Tullberg stated from a Victorian perspective: "*I know that the concept and duties of a 'Responsible Person' has existed in Victoria for decades and I believe it existed as early as the commencement of the Children's Services Act 1996 over twenty years ago*."[176]

Additionally, Pam Maclean from Queensland stated "*the role of Responsible Person, as required by the National Quality Framework (NQF) is not a new concept despite not being explicitly mentioned in the Children's Services Award 2010 or Educational Services (Teachers) Award 2010. Speaking from my own experience, acting in such a role, I always knew that role as being called the 'early group leader' or 'late group leader'. These people were the ones to make operational decisions as required until the Director arrived at work. We were instructed about the choices we could make and who to contact in an emergency and it was regarded as part of our normal role. Rosters were devised using the team members who were qualified, experienced and capable to undertake such a role to make sure someone 'responsible' was always on-site*."[177]

Additionally, ACA/ABI submit that the duties and responsibilities of the Responsible Person are captured in the Children's Services Award classification structure. Even though the exact words 'Responsible Person' do not appear in the award (as that term did not exist), there was always someone responsible for centre. Every duty or responsibility proposed by the parties can be captured in the classifications for Levels 4 - 6 in the Children's Services Award.

As stated in our reply submissions on 16 April 2019 examples of level 4 and level 5 being captured by the Responsible Person role is clear with the classifications.

For example, a Level 4 has in their classifications '*Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups, responsible to the Assistant Director/Director for the supervision of students on placement, responsible for ensuring a safe environment is maintained for both staff and children and responsible for ensuring that records are maintained accurately for each child in their care*.'

A level 5 is '*Responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues*.'

In respect of point 8(i) ACA/ABI disagree that the proposed Responsible Person allowance would not impose any additional record keeping obligations. It was a point of contention during the hearing as to the meaning of 'staff record' in s 150 of the National Regulations.[178] In contrast to the view of UV, ACA/ABI submit that 'staff record' in the National Regulations does not have the same meaning as 'employee record' or 'payslip' in the Fair Work Act 2009 (Cth). Further, ACA/ABI submit that there is no additional record that needs to be maintained in addition to displaying the names of staff in accordance with s150.[179] The Employer evidence suggests that s150 is legally complied with by using an arrow[180] or laminated name tag[181] that is stuck to a particular educator's picture at the front entrance of a service (which is moved throughout the day depending on who the Responsible Person is at any given time). There is no need keep a record of who the Responsible Person is on a roster

[176] Reply submissions at 4.6

[177] Reply submissions at 4.7

[178] PN3031 - PN3061

[179] PN3061

[180] PN1230 (Ms Viknarasah cross examination)

[181] PN3032 (Kristen McPhail cross examination)

(though some employers do this) or to maintain an hourly 'record' in the same way an employer would record overtime or personal leave.[182] ACA/ABI submit that keeping such a record would be in addition to the 'staff record' obligations in s150.

In respect of points 9, 10, 11 and 16 it is not clear to ACA/ABI that the payment of an above award wage would necessarily disentitle an employee to an allowance award provision. Such a contention would presumably depend on the contractual arrangements entered into by the employer and the employee. ACA/ABI would welcome further explanation of this point by UV to ensure clarity as to the scope of its claim.

Points 14 and 15 are previously addressed in our submissions.

Points 17 is contested on the basis that it assumes that allowances would not be payable for those employees engaged on higher classifications.

In respect of the Individuals findings at [16], ACA/ABI submit as follows:

Points 2 and 5 are uncontested.

Point 1 is uncontested however for reasons previously submitted, the evidence disclosed that such responsibilities and duties either do not arise specifically from the designation as Responsible Person (arising instead from other designations under the NQF or the Awards), arise for all educators engaged in the service or are considerably qualified when applied to Responsible Persons (person in day to day charge).

Point 3 is not understood.

Point 4 is agreed however those designated as Responsible Person require skills and abilities to perform their roles independent from their designation as Responsible Person.

Point 6 is not contested save for the third sentence.

Point 7 is not contested in so far that it is acknowledged that some employees currently designated as Responsible Persons are being paid above award rates. There is no evidence that state of affairs is seeking to 'reward' those employees for being so designated.

In respect of Point 8 ACA/ABI submit that an allowance every time someone is designated Responsible Person (throughout the day for 15 minutes to several hours) would be an additional record keeping obligation for employers that is not captured by s150 of the National Regulations.[183] Recording (and paying) such an allowance would be an additional administrative and payroll obligation that s150 does not currently require. It would also be more difficult than payment of other irregular payments like personal leave as suggested by Mr Fraser under cross examination.[184]

Question for UV and the Individuals

Q.9 Which of the findings sought by the ECEC Employers (at [17] above) and the AFEI (at [18] above) are contested?

I and E Arrabalde

With reference to [17]1(a)-(d), there is no dispute that Responsible Persons do not have the same legal responsibilities as Approved Providers or Nominated Supervisors. This does not

[182] PN1870

[183] See submission at paragraph [52] above.

[184] PN1870

devalue the role of the Responsible Person or their work as the person appointed in day-to-day charge of the service.[185]

The statements at [17]2(a)-(c) imply that an employee designated as the Responsible Person would get paid the same as any other employee with the same Award classification despite taking on this role and performing its associated duties as the person appointed in day-to-day charge. This is not fair.

With reference to [17]3, being a Responsible Person is an additional role for employees and an organisational hierarchy remains in place. This is confirmed in Ms Farrant's evidence.[186] In most organisations, strategic decision-making is usually reserved for management.

Ms Farrant also provides evidence that Responsible Persons make decisions in her absence[187] and that she chooses the most senior[188] and capable[189] members of the staff team for this role.

Ms Mravunac also states that she is the only early childhood teacher at her centre[190] and she believes that as an early childhood teacher her work is "of a higher quality or an expectation…"[191] Therefore, Ms Mravunac's evidence of her role from [17]3(c)(i)-(iv) may be indicative of a sense of personal obligation rather than substantiating a finding that Responsible Persons lack autonomy in general.

[17]3(d) demonstrates that the Responsible Person has a role in receiving feedback in Ms Wade's absence which they then communicate to other members of the staff team.

At PN809 Ms Wade provides evidence that Responsible Persons deal with issues independently as they arise which contradicts the finding sought at [17]3 that a Responsible Person does not "act with autonomy":

> I'm really asking you, you are not the responsible person at all times at the centre, because you do not work all the time. What I'm asking you is are there any inquiries or questions that are asked when you are not there that you subsequently attend the meeting for or answer yourself? No, because my responsible people there deal with those matters quite frequently and any complaints that come through. We haven't had - we really haven't had any complaints because our issues that are brought up straight away are dealt with with the responsible person in a timely manner, so that families are satisfied with the service that we provide for children, and for the families.

[17]3(e) At PN1525-PN1527, Ms Warner also provides evidence of her role and responsibilities as the Responsible Person in the event of an incident:

> PN1525 At 40 you say you have responsibility if an incident or issue were to occur while you were responsible person?---Yes.

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[185] Arrabalde submission (27 May 2019) at [29]-[30]

[186] PN3361

[187] PN3359

[188] PN2328

[189] PN3363

[190] PN4432

[191] PN4449

> PN1526 What do you mean by having responsibility?---Well, I am the most senior staff member that's there. It's my responsibility to handle that situation.
>
> PN1527 You don't mean legal responsibility, do you?---As responsible person I am in charge during those times.

[17]4-5 In oral evidence Brannelly at PN3458 acknowledges that there was no requirement to have a Responsible Person prior to 2012:

> Thank you. Now in relation to – if you go to paragraph 41 of your statement, and its title Responsible Person Role Existed Prior to 2012. You'd agree that prior to the National Quality Framework, there was no uniform standard in relation to what a responsible person was?---There was no legislated requirement for a responsible person to be placed in charge.

[17]6 This is contested.[192]

In addition, the findings sought by AFEI at [18]1-5 and 7 are contested and have been discussed in previous submissions.[193]

With reference to [18]6, this statement is incorrect. Evidence was provided in the proceedings that teachers are designated as the Responsible Person.

Ms Farrant provides evidence of teachers being designated as the Responsible Person at PN3237-PN3238:

> Do you know how many would?---Yes. All of our teachers are certified supervisors.
> How many of them act as responsible people, though?---In my absence and in the absence of my assistant director, all of them, according to seniority.

Ms Frend states that only teachers are designated as the Responsible Person at her centre at PN3800-PN3801:

> Are they the responsible person when you're absent?---She is, along with the other two teachers who have degrees.
>
> So you don't use any non-teacher as a responsible person?---No.

United Voice

We contest [17](2),(3),(4),(5),(6). We also contest the findings sought by AFEI in [18](3),(4),(6) and (7).

With respect to [17] (1) we agree that a Responsible Person who is not an approved provider or a Nominated Supervisor does not have any additional legal liability. We do not agree with the proposition that the Responsible Person (as person day to day in charge) does not have additional responsibilities in the workplace.

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[192] Arrabalde submission (27 May 2019) at [43]

[193] A discussion of findings [18]1-5 is in our Response to Background Document (5 July 2019) at Q.25-Q.26

With respect to [17](2), we disagree that the duties and responsibilities of a Responsible Person are captured within the Children's Services Award classifications. We address this in paragraphs [26]-[30] of our submission on findings filed 29 May 2019.

With respect to [17](3) the evidence indicated that the employee in the role of Responsible Person acts with a significant level of autonomy and has specific responsibilities that arise from their designation as Responsible Person. For example, Ms Warner gave evidence of her responsibility as a Responsible Person if a child hurt themselves: '*so for example if a child was to fall over and hurt themselves the next steps following that would be I would have another lead educator or whoever happened to be the witness to the incident take care of that child, provide basic first aid. Then an incident report is written, either by myself or by the lead educator that witnessed the incident. Regardless of who writes that I proof read and overlook that form and then sign off as responsible person. The parents are communicated with via phone and also in person when they arrive to collect their child, and then it's my job as responsible person to input that incident report into our online database*.'[194]

With respect to [17](4), it is uncontested that all educators may communicate with parents and have a role in ensuring safety. However, the Responsible Person has overall responsibility for such matters. The following exchange with employer witness Ms Tullberg is indicative:

> ***Arrabalde****: …Like, say for example if it was a centre wide issue that affects the whole centre, not a particular child, and it was a time sensitive issue, who would unify the staff response in the absence of the director? So, for example, if you had a swarm of bees in your playground, they've just descended on there and causing a risk to everybody because you've got your windows open, who would deal with that?*
> ***Tullberg:*** *The responsible person at the time.*[195]

We disagree with [17](5) and refer to paragraphs [21]-[23] of our submission on findings filed 29 May 2019.

We dispute [17](6) and refer to paragraphs [39]-[43] of our submission on findings filed 29 May 2019.

With respect to [18] we disagree with (3), (4), (6), (7). Points (3) and (4) are similar to points raised by ACA and others, and are addressed above. With respect to [18](6), early childhood teachers can and may take on the role of Responsible Person. We say there is no impediment to the Commission finding that there is merit to inserting similar allowances into the Teacher's Award, as the role of Responsible Person is essentially the same across the Awards. We have responded to [18](7) in paragraphs [45]-[48] in our submission on the background paper dated 9 July 2019.

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[194] PN1540.

[195] PN3743.

Question for ECEC Employers and AFEI

Q.10 Which of the findings sought by UV (at [19] above) and the Individuals (at [20] above) are contested?

Australian Childcare Alliance and others

ACA/ABI respectfully contest the findings sought by UV at [19].

Save for points 2, 5, 11 and 12, ACA/ABI respectfully contest the findings sought by the Individuals at [20].

In seeking their respective findings, the UV and Individuals have attempted overstate the educational leader role, suggesting that it is a concept created in 2012 and that it is an extensive role with a clear and voluminous list of duties.

The statements of Fraser, Viknarash and Brannelly provided evidence that the duties of an Educational Leader existed before the NQF. The creation of the NQF was to harmonise and codify the already existing roles into a new federal standard, not to create a brand new classification structure, roles and duties. In childcare services, there have always been educational programs and persons leading and coordinating the development of those programs. Similarly, there have always been Nominated Supervisors which were called Authorised Supervisors before the NQF but is substantially the same role.

The Viknarash statement states:

"The ECEC sector to my knowledge has always had an educational leader, even before the NQF as services still needed to be accredited and a person was still in charge of guiding that educational program. Annexed and marked 'KV-1' is an example of a 2005 NCAC Quality Practice Guide which shows that the role of educational leader needed to be performed under Quality Area 3 (Programming and Evaluation) and Quality Area 4 (Children's Experiences and Learning) in order to meet the qualities required of a centre. This clearly shows that there was a person fulfilling the role of "Educational Leader" well before the NQF and therefore this role was contemplated and given consideration in the making of the Modern Award created in 2009 by the Australian Industrial Relations Commission."

Australian Federation of Employers and Industries

The proposition at the heart of the educational leader allowance claim is that the award does not take into account the responsibilities associated with being designated to lead the development and implementation of educational programs in the service. That proposition is contested by AFEI: in this regard, AFEI relies upon its submissions filed 2 June 2019 and its written responses filed 10 July 2019 to questions posed in the background document of 13 June 2019, most notably responses to questions 7, 8, 9 and 10. While, those responses can be taken in answer to question 10 of Background Document 2 of 5 July 2019, it will assist to take this opportunity to draw attention to particular aspects of AFEI's position.

The allowance claim is said to be supported by the requirement of an approved service provider to designate an individual to lead the development and implementation of educational programs in the service. The requirement at Regulation 118 of the National Regulations is as follows:

> The approved provider of an education and care service must designate, in writing, 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.[196]

It is readily apparent that the regulation is concerned with 'educational programs'. In the context of the industry to which the award applies,[197] it would be an unremarkable experience for an employee to be engaged/involved with educational programs. In fact, this would likely explain the frequent reference to 'programs' within the indicative duties of classification levels 2 to 6.[198] In this regard:

- '*Assist in the implementation of the children's program under supervision*' is an indicative duty of Level 2.
- '*Assist in the preparation, implementation and evaluation of developmentally appropriate programs for individual children or groups'*; and 'Record observations of individual children or groups for program planning purposes for qualified staff' are indicative duties of Level 3.
- '*Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups'* is an indicative duty of Level 4.
- '*Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs'* and '*Co-ordinate centre or service operations including Occupational Health and Safety, program planning, staff training'* are indicative duties at Level 5.
- '*Supervise the implementation of developmentally appropriate programs for children*' is an indicative duties at Level 6. 8. It is relevant that each classification level expresses a degree of responsibility. Responsibility is more substantial at the higher end of the structure, especially in relation to supervision of the work of others. For instance, those at levels 4 to 6 can be expected to supervise work of lower level classifications. To illustrate, a Level 3 employee can be expected to assist in the implementation of developmentally appropriate programs, a Level 5 employee can be expected to direct employees in that implementation, and a Level 6 employee can be expected to supervise that implementation and have overall responsibility for management and administration.

It is relevant that each classification level expresses a degree of responsibility. Responsibility is more substantial at the higher end of the structure, especially in relation to supervision of the work of others. For instance, those at levels 4 to 6 can be expected to supervise work of lower level classifications. To illustrate, a Level 3 employee can be expected to assist in the

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[196] *Education and Care Services National Regulations*, Regulation 118

[197] *Children's Services Award 2010* MA000120 at cl.3.1 defines the industry as ' the industry of long day care, occasional care (including those occasional care services not licensed), nurseries, childcare centres, day care facilities, family based childcare, out-of-school hours care, vacation care, adjunct care, in-home care, kindergartens and preschools, mobile centres and early childhood intervention programs'.

[198] *Children's Services Award 2010* MA000120 at Schedule B – Classification Structure

implementation of developmentally appropriate programs, a Level 5 employee can be expected to direct employees in that implementation, and a Level 6 employee can be expected to supervise that implementation and have overall responsibility for management and administration.

Regulation 118 expresses a leadership expectation. That is so because the individual is designated to 'lead' the development and implementation of programs within the service. In the hierarchy of the classification structure, qualities of leadership are similarly expected from levels 4 to 6 — this is clear from the indicative duties associated with each of those levels.

Therefore, taking into account:

- the leadership expectations of levels 4 to 6; and
- the significance of development and implementation of educational programs in the context of indicative duties of the classification structure,

—the inevitable conclusion is this: responsibility for leading the development and implementation of educational programs is a responsibility that is already known to the award and thus has been taken into account in the rates of pay, most notably pay rates for levels 4 to 6.

Question for UV and the Individuals

Q.11 Which of the findings sought by the ECEC Employers (at [21] above) and AFEI (at [22] above) are contested?

I and E Arrabalde

In response to [21]1:

There is a template for an "Educational Leader Position Description" on p.147 of the Educational Leader Resource (Exhibit 5). As this is a document produced by ACECQA, it forms part of the NQF.

In response to [21]2:

There is no instance of 'educational leader' in the National Law. This would confirm that the confusion arising from the complexity of the NQF as described in Background Document 2 at [4]7 is also shared by others.

While the National Regulations (at 118) prescribes the role of the educational leader without the imposition of specific duties, it does not impose comprehensive duties on any employee. For example:

> ***early childhood teacher*** means a person with an approved early childhood teaching qualification[199]

If a similar logic is applied as has been used when considering the role of educational leaders, the role of an early childhood teacher is to simply possess a relevant qualification. This is clearly not the case.

[199] Regulation 4, *Education and Care Services National Regulation*

The description of the responsibility of an educational leader within the National Regulations is not "unclear", rather it is purposefully broad to afford professional autonomy and contextually-specific application. ACECQA resources have been developed to clarify the role in practice.

In response to [21]3:

Dr Fenech presented a list of skills that characterise effective Educational Leaders. Desirable skills (as well as knowledge and attributes) are also listed from p.65-67 in the Educational Leader Resource (Exhibit 5).

In response to [21]4(a)-(c):

The evidence presented at 4(a)-(c) does not diminish the role of the Educational Leader. Rather, it highlights the work of all educators who routinely observe children, plan for their learning and communicate with families about children's learning. As Ms Tullberg stated in oral evidence:

> All educators bring quality and value to a service. Without educators we wouldn't have a service.[200]

In response to [21]4(d):

This responsibility derives from Standard 7.2 of the NQS:

> To lead effectively, leaders need current, in-depth content knowledge as well as a deep understanding and appreciation of children's learning and development.[201]

To maintain current knowledge to meet (or exceed) this standard, research must be conducted by the educational leader. The quantity of research is unspecified because it would be dependent on advancements in the particular area of inquiry, the ease of finding relevant documents and the depth of knowledge of the individual. In our experience, finding the answer to one question can lead to more questions, requiring more research to be undertaken.

In response to [21]4(e):

While Ms Mravunac is involved in the educational program at her centre, this may be because she has been an educational leader in the past[202] and is currently mentoring the designated educational leader.[203] Ms Mravunac also acknowledges that educational leaders perform work in addition to duties captured in the Award classifications.[204]

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[200] PN3748

[201] Australian Children's Education and Care Quality Authority (ACECQA). 2018. *Guide to the National Quality Framework*. p. 298. https://www.acecqa.gov.au/sites/default/files/2019-06/Guide-to-the-NQF_0.pdf

[202] PN4519-4520

[203] PN4523-PN4524

[204] PN4527

In response to [21]5:

The Award classifications do not adequately reflect the duties of educational leaders and so educational leaders are not being paid fairly or consistently.[205]

In response to [21]6:

There is no current requirement to provide educational leaders with additional non-contact time to perform their role. Further, not all of the duties of the educational leader can be performed "in lieu" of other duties. Dr Fenech's evidence confirms that being an educational leader permeates an educator's practice and requires working directly with children and other educators at the centre:

> So the educational leader needs to actually model what they're expecting of the other educators in the centre. So they should be modelling high quality practice in terms of the development of curriculum that is responsive to individual children and that meets the outcomes of the approved learning frameworks. So I think it's part - it's also a modelling for other staff. So it's embedded in their practice, however the actual role is above and beyond what their practice is, because as I mentioned before, inherent in the role is working with other educators in the centre.[206] (Emphasis added)

In response to [21]7:

There is academic evidence suggesting that the lack of remuneration for leadership positions discourages employees from accepting these positions.[207]

In response to [22]1:

Organisational hierarchies are independently defined. This statement may not accurately describe the hierarchy in all early childhood education and care settings.

In response to [22]2:

If an educational leader's judgement and discretion is limited, this is a result of workplace design rather than the nature of the role.[208]

In response to [22]3:

Certain responsibilities of an educational leader (for example, communicating with families) are common to other roles. However, the work of an educational leader goes above and beyond the work of an educator or senior educator.[209]

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[205] Arrabalde submission (27 May 2019) at [20]-[23]

[206] PN667

[207] Arrabalde submission (14 March 2019) at [26]-[27]

[208] Arrabalde submission (27 May 2019) at [12]

[209] Arrabalde submission (27 May 2019) at [9]-[10]

In response to [22]4:

While the concept of an educational program in early childhood education and care settings is not new, the role of the educational leader is new to the Australian context.[210]

In response to [22]5:

The allowance sought is not disproportionate to the level of responsibility.[211]

United Voice

We generally contest [21] and [22].

To avoid excessive repetition, we respond to [21] as a whole:

- Regulation 118 states that '*the approved provider of an education and care service must designate, in writing, 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*.'
- We agree that the NQF does not contain a job description or minimum qualification requirement for Educational Leaders (provided the educator is suitably qualified).
- ACA and others repeatedly refer to the responsibilities and duties of an Educational Leader being unclear. We disagree with this proposition. There was general consensus between the union and employer witnesses on what the role of the Educational Leader entailed on a practical basis within services. We refer to paragraphs [54]-[68] of our submission on findings filed 29 May 2019. For summary, the evidence indicates that Educational Leaders undertake duties including leading programming, mentoring other employees, leading critical reflection and undertaking research to assist in providing a quality service.
- The skill set outlined in Dr Fenech in her report (in paragraph 1.6) identifies the skills required to perform the role of Educational Leader. The skill set identified by Dr Fenech (including skills such as strong communication skills and interpersonal skills, a capacity to lead, mentor, support and influence educators, and capacity to build a learning community) aligns with the evidence given by union and employer witnesses on what work Educational Leaders perform practically in the workplace. For example, Ms Llewellyn provided evidence on the work of the Educational Leader at her centre: '*She supports the educators to do their program planning. She is a mentor. She does room inspections. She ensures that the program plans are up to date, that the observations and learning stories are educational and of a high level, and any training that may need - she may need to do with the staff to ensure that their observations are - to name a few things*.'[212]
- We agree that the ACECQA resources provide useful guidance on the role of the Educational Leader. We agree that the ACECQA guide does not determine

[210] Arrabalde submission 26 April 2019 at [4]-[9]

[211] Arrabalde Response to Background Document (5 July 2019) at Q.23-Q.24

[212] PN4379.

entitlements for employees. Determinations of employee entitlements are a matter for the Commission.

- We disagree with the claim that the duties of Educational Leaders are already included in the classifications. We refer to paragraphs [69]-[71] of our submission on findings filed 29 May 2019.
- Provision of non-contact time in which to complete work is not compensation for the value of the work being undertaken. In any case, the Awards do not currently provide specific non-contact time for Educational Leaders.
- Finally, Ms Fenech indicated that the academics that she was referring to in the context of cross-examination in paragraphs PN612-613 were '*education academics*'.[213] No negative inference can be drawn from the lack of explicit consideration of remuneration issues by education academics. Further, the proposition of ACA and others that '*nor is there any support for additional remuneration within the NQF*' is misleading. The NQF does not set out pay rates, allowances or deal with *any* employee remuneration issues. That is beyond the scope of the NQF.

We have addressed the matter raised by AFEI in [22](1) in paragraphs [27]-[30] of our submission on the background paper filed 9 July 2019.

With respect to AFEI's propositions in [22](2), an Educational Leader would be supervised, generally by the Centre Director (except for circumstances in which the Educational Leader is the Centre Director). We disagree with the statement that the Educational Leader only exercises limited independent judgment and discretion.

With respect to [22](4) and (5) we have addressed these matters previously. The former in paragraphs [17]-[18] in our further submission in reply filed 29 April 2019 and the latter in paragraphs [37]-[39] in our submission on the background paper filed 9 July 2019.

Question for the ECEC Employers and AFEI

Q.12 Which of the findings sought by UV (at [24] above) are contested?

Australian Childcare Alliance and others

Findings 1, 2, 4 and 5 at [24] are contested. Finding 3 is partially contested, with ACA/ABI submitting that an Educational Leader *may* require specific non-contact time in which to undertake their duties.

ACA/ABI's responses to findings 1, 2, 4 and 5 are contained in its response to the previous background paper.

Australian Federation of Employers and Industries

The UV submission extracts at [24] expressly mention particular responsibilities being 'mentoring of other employees', 'leading critical reflection', 'undertaking research.' Insofar as UV submits that these particular responsibilities are outcomes of being designated to lead the development and implementation of educational programs, then that submission is not contested by AFEI. However, to the extent that UV advances the proposition that these

[213] PN681-683.

responsibilities are not taken into account in the classification structure, that proposition is contested by AFEI.

AFEI's position is that the classification structure responds adequately to these responsibilities and this is demonstrated in the terminology of the classification structure at levels 4 to 6. For instance, 'mentoring of other employees' corresponds with these indicative duties at levels 4 to 6, or at least is incidental to these duties:

- *Co-ordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs*. (Level 5)
- *Supervise the implementation of developmentally appropriate programs for children*. (Level 6)
- *Provide professional leadership and development to staff*. (Level 6) 13.

Similarly, with regard to 'leading critical reflection' and 'undertaking research', these are matters that should be seen sensibly as incidental or ancillary to the indicative duties of these classification levels and therefore are matters that have been taken into account in the award.

With respect to the non-contact time claim, it will assist to consider the sub-clause in its complete form.

> ***21.5 Non-contact time***
>
> ***(a)*** *An employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children will be entitled to a minimum of two hours per week, during which the employee is not required to supervise children or perform other duties directed by the employer, for the purpose of planning, preparing, evaluating and programming activities.*
>
> ***(b)*** *Wherever possible non-contact time should be rostered in advance.*
>
> ***(AFEI underlining)***

Thus the sub-clause expresses a minimum entitlement. If it is shown that the minimum requirement is insufficient with respect to a particular service, a longer period might be accommodated as a result of employer/employee agreement. This strikes a fair balance between the interests of employer and employee. Further, the entitlement is a relatively significant period of time. In this regard, 2 hours represents just over 5% of weekly hours.[214] Therefore, in its current form, the clause 21.5 is both fair and relevant.

Question for UV

Q.13 Which of the findings sought by the ECEC Employers and AFEI (at [25] and [26] above) are contested?

We contest all of [25] and [26](2) and (3).

In respect of [25](1) and [26](2), we disagree that the Awards' current provision of 2 hours of non-contact is sufficient in the context of a minimum safety net or that issues only arise

[214] On assumption of full time employment at 38 ordinary hours per week i.e. 2/38 = 0.0526315

where employees are provided with less than 2 hours non-contact time. We refer to paragraphs [84]-[91] of our submission on findings filed 29 May 2019.

We dispute [25] (3). The programming requirements under the NQF are onerous and we have detailed those in paragraphs [123]-[155] of our outline of submissions filed 15 March 2019. The use of templates does not detract from this, as educators are required to program in a manner that takes into account the needs of each child.[215]

As to [26] (3), that some employers may re-distribute duties or provide additional non-contact time in order to address the insufficiency of non-contact time in the Awards suggests the non-contact time clauses require revision.

Question for the ECEC Employers and AFEI

Q.14 Which of the findings sought by UV (at [28] above) are contested?

Australian Childcare Alliance and others

Findings 1 and 2 are uncontested. Findings 3 and 4 are contested.

Australian Federation of Employers and Industries

AFEI agrees with the first proposition to the extent that it was the consensus in the evidence, but this cannot be relied on as evidence as to the whole industry. This is demonstrated by the fact that the evidence provided for was given by operators of long day care centres and out of school hours care providers only.

AFEI contests the proposition that employees in this sector are being required to undertake training by their employer without reimbursement. It is further contested that employees in this sector have to pay for required training themselves, or undertake that training on weekends or during periods of annual leave.

AFEI relies on its submission filed 16 April 2019 and 2 June 2019. As UV's evidence refers only to maintaining first aid and CPR qualifications, we submit the use of the word training is too broad.

The evidence relied on by UV in seeking this variation is that of Ms Alicia Ann Wade[216] and Ms Warner. Ms Wade's position description attached to her statement[217] expressly states first aid and CPR certificates are critical qualifications required for performance of the role.[218] As outlined in our submissions dated 16 April 2019, where holding and maintaining a first aid certificate is a requirement of the role, the Modern Award should not require an employer to cover this cost. This is consistent with the explanatory memorandum.[219] No evidence has been provided where first aid and CPR training are not an inherent requirement of the role.

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[215] Guide to National Quality Framework, page 96.

[216] United Voice Factual findings Submission [98]-[101]

[217] Exhibit 11

[218] United Voice Factual findings Submission [97]

[219] Fair Work Bill (2008), Explanatory Memorandum, at [1292]

The fourth proposition put by UV is also contested. AFEI relies on its submissions made on 16 April 2019 and 2 June 2019.

Question for UV

Q.15 Which of the findings sought by the ECEC Employers and AFEI (at [29] and [30] above) are contested?

We contest all of [29] save for the proposition that *some* employers do pay for employees to undertake First Aid and CPR qualifications. We contest [30].

With respect to [29] and [30] we say the following:

There is sufficient and credible evidence before the Commission to establish our claim for training expenses to be reimbursed and time spent in training to be considered time worked. We refer to paragraphs [93]-[101] of our submission on findings filed 29 May 2019.

In respect of [29] (3), we say the proposition made by ACA and others is not a relevant consideration. If the variation proposed by United Voice was made, the relevant question in determining whether the training course fee and time was to be paid would be whether the employer required the employee to undertake that training.

Question for the ECEC Employers and AFEI

Q.16 Which of the findings sought by UV (at [32] above) are contested?

Australian Childcare Alliance and others

Findings 1 and 4 are contested. Findings 2 and 3 are uncontested.

Concerning the contested finding 1, ACA/ABI's submission in respect of Ms Bea's evidence is addressed in our response to Background Paper 1.

Concerning finding 4, ACA/ABI respectfully contest that the evidence filed is sufficient to suggest that there is a 'real' problem with uniform allowance and that this problem could be solved by the insertion of their proposed allowance clause.

As previously stated in ACA/ABI's reply submissions dated 16 April 2019, it does not make sense to pay employees an allowance to wash their uniforms where:

(a) the employee is washing their uniform during work time (eg; at a cost to the employer) or the employee's uniform is washed by someone else at the centre (eg; another employee or Director); and

(b) the employer pays for electricity, water, detergent; and

(c) there is no cost to the employee.

The evidence has shown that employees had the ability to use the washing facilities at the employer's cost if they needed.[220]

[220] Fraser Statement at [126]-[127]; McPhail Statement at [105]-[106]; Llewellyn Statement at [99]-[100]; Mahony Statement at [105]

Australian Federation of Employers and Industries

The fourth proposition by UV is contest by AFEI and we rely on our submissions dated 16 April 2019 and 2 June 2019. No evidence was provided in the proceedings which could support an evidentiary finding that employees were neither paid the laundry allowance nor had laundry facilities available to them.

The insertion of the note would allow employees who do have access and use the laundry facilities to also be entitled to the allowance. The allowance is an expense related allowance, payable for the expense incurred by an employee. The variation sought is unnecessary and would not provide a fair and relevant minimum safety net of terms and conditions.

AFEI does not contest propositions 1, 2 and 3.

Question for UV
Q.17 Which of the findings sought by the ECEC Employers and AFEI (at [33] and [34] above) are contested?

We contest [33](2) and [34].

We disagree with the proposition that employees can necessarily access and use laundry facilities at an ECEC centre. We refer to paragraph [6] of our submission on the background document filed 9 July 2019. We disagree with ACA and others' characterisation of Ms Bea's evidence. It would be expected that centre laundry would take priority over individual employees washing their shirts. There are also obvious difficulties in an employee leaving '*the floor*' and attempting to use laundry facilities in a sector that has ratio requirements.

We disagree with [34]. We refer to paragraphs [102]-[108] of our submission on findings filed 29 May 2019.

Question for ECEC Employers and AFEI
Q.18 Which of the findings sought by UV (at [36] above) are contested?

Australian Childcare Alliance and others

As previously stated in ACA/ABI's Reply Submissions dated 16 April 2019, there is no real contest in the evidence that sun hats, sunscreen should be provided and/or paid by the employer.[221] However, the two small issues that ACA/ABI took with the proposed allowance is that firstly it places no 'cap' on the cost of items purchased by employees, which could give rise to employers having to reimburse unreasonable expenses e.g. an expensive branded hat or sunscreen and secondly, 'sun protection' was a vague term that could again, lead to unreasonable expenses on the employer. On this basis, ACA/ABI agreed to the UV claim on the basis that the claim was amended to 'hats' and 'sunscreen lotion' only (and not the generic term "sun protection"); and those reimbursements be 'reasonable' and validated by receipts or otherwise.

Australian Federation of Employers and Industries

[221] Employer Reply Submissions dated 16 April 2019 at 9.1.

The proposition is contested by AFEI. AFEI relies upon its submissions filed 2 June 2019 and its written responses filed 10 July 2019 to questions posed in the background document of 13 June 2019, most notably responses to question 30.

Question for UV

Q.19 Which of the findings sought by the ECEC Employers and AFEI (at [37] and [38] `above) are contested?

We contest [38]. Whilst we agree that some employers (including several during these proceedings) do provide a hat and sunscreen, we disagree that there is no basis to vary the Children's Services Award. Our proposed variation would provide more certainty for employees.

Question for ECEC Employers and AFEI

Q.20 Which of the findings sought by IEU (at [44] above) are contested?

Australian Childcare Alliance and others

ACA/ABI contest the following findings sought by the IEU at [44]:

a. 3. - ACA/ABI dispute that <u>all</u> teachers appointed as directors would carry out the tasks itemised by the IEU in this list. In particular ACA/ABI dispute the duties listed at (a), (b) and (c). The reality is some teacher/directors will perform a more managerial role as a director and others (smaller services) will likely switch between a teaching role (directly delivering the program) and managerial director duties. The duties of the employee depend on the nature of the role and the service.

b. 5. - ACA/ABI disagree with the "usual" industry practice being to pay degree qualified teachers in accordance with the Teachers Award. ACA submits that its members either:

i. consider the duties in the two awards and chose the most appropriate (e.g. is the teacher directly teaching or a managerial director);

ii. consider whether the teacher has completed a degree that is "recognised" by the relevant licensing and accreditation authority; or

iii. choose the award which contains a higher wage rate.

e. 7. - ACA/ABI agree that usually the Teachers Award wages are higher. However, there are occasions when the Director's wage under the Children's Services Award would be preferential to being paid as a Teacher Level 3, 4 or Level 5.

ACA/ABI otherwise do not contest the findings sought by the IEU.

Australian Federation of Employers and Industries

AFEI disputes a number of proposition sought by the IEU on the basis that there is insufficient evidence to make the findings sought at 3, 4, 5 and 6. AFEI relies on its submissions dated 16 April 2019.

AFEI does not contest proposition of 1, 2, 3(c), 3(d)

Question for IEU

Q.21 Which of the findings sought by the ECEC Employers (at [45] above) and AFEI at (at [5(a)-(c)] above) are contested?

The IEU contests the following findings set out at [45]:

a. 1, in that the evidence is clear that a teaching degree provides a higher level of pedagogical skill, vital to the educational role of a Director in an ECEC service;

b. 2, in that it misses the point – the issue is whether a teacher director is employed as a teacher for the purposes of the award, not whether they are 'more valuable' than someone with a business degree;

c. 3, in that it demonstrates that there is from time to time a dispute;

d. 4, in that the witnesses give credible opinion evidence properly based on their experiences;

e. 5, in that AFEI misunderstands what it means to be 'employed as a teacher' – neither the Teachers Award nor the National Law limit it to hands-on teaching, and its submission at (c) are matters of interpretation rather than evidence.

Question for IEU

Q.22 Which of the findings sought by the IEU (at [47] above) and the ECEC Employers (at [48] above) are contested?

As to the findings sought by the ECEC employers at [48]:

a. (a) and (b) are irrelevant;

b. AFEI's proposition at (c) is too bare to be sensibly responded to.