
Fair Work Commission: 4 yearly Review of modern awards

**REPLY SUBMISSION CONCERNING ACA/ABI
SUBSTANTIVE CLAIMS**

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

CHILDREN'S SERVICES AWARD 2010

AND EDUCATIONAL SERVICES (TEACHERS) AWARD 2010

SUBSTANTIVE ISSUES

ACA, ABI and NSWBC

29 APRIL 2019

1. BACKGROUND

1.1 This submission in reply is made in accordance with the amended direction of the Fair Work Commission (**Commission**) issued on 26 April 2019 on behalf of:

- (a) Australian Childcare Alliance Inc. (**ACA**);¹
- (b) Australian Business Industrial (**ABI**); and
- (c) New South Wales Business Chamber (**NSWBC**).

(**ACA/ABI**).

1.2 This submission is also supported by the National Outside School Hours Care Services Alliance (**NOSHSA**) and Junior Adventure Group (**JAG**) who are also represented by Australian Business Lawyers & Advisors in these proceedings.

1.3 This submission concerns the Early Childhood Education and Care sector (**ECEC**) in respect of the *Children's Services Award 2010* (**Children's Services Award**) and the *Educational Services (Teachers) Award 2010* (**Teachers Award**) (together the **Awards**).

1.4 This submission addresses the materials filed by:

- (a) the United Voice (**UV**) in submissions in reply and witness statements filed 15 April 2019 (**UV Response**); and
- (b) the Independent Education Union of Australia (**IEU**) in submissions in reply and witness statement dated 15 April 2019 (**IEU Response**).

1.5 The UV Response and the IEU Response address materials filed by ACA/ABI on 15 March 2019 in support of two claims (**Claims**):

'The Ordinary Hours Claim'

- (a) The Ordinary Hours Claim seeks to vary the ordinary hours under the Teachers Award and the Children's Services Award. Currently the Awards identify that ordinary hours may be worked between 6.00am and 6.30pm. ACA/ABI seek a variation to the Awards such that ordinary hours may be worked between 6.00am and 7.30pm.

'The Rostering Claim'

- (b) The Rostering Claim seeks to vary the rostering arrangements in the Awards so that an employer is exempt from having to provide employees with 7 days notice of a variation in roster in circumstances where:
 - (i) another employee has provided less than 7 days notice of their inability to perform a rostered shift; and
 - (ii) in order to comply with its statutory obligations in respect of maintaining staff to child ratios, the employer is required to change an employee's rostered hours so as to replace the absent employee.

¹ Association of Quality Childcare Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare Queensland Inc; Childcare South Australia; Childcare Association of Western Australia.

2. REPLY TO THE UV RESPONSE

2.1 As an initial observation, it is apparent that ACA/ABI agree with many aspects identified by UV as to the 'background' of these proceedings.

2.2 Included in this 'background' is agreement that:

- (a) ECEC plays a vital role in the education of children;
- (b) access to ECEC is a core component of increasing women's participation in the workplace;
- (c) interactions between an educator and a child, in conditions of continuity, care and trust, are a key determinant of quality in ECEC;
- (d) ECEC is a highly feminised industry; and
- (e) by and large, caring responsibilities for children are performed by women.

2.3 Notwithstanding agreement in respect of the above issues, there are number of issues of principle upon which the position of the parties diverge.

Reduction of Conditions within ECEC

2.4 The UV Response in large part focuses on the contention that working conditions within ECEC are currently, in its view, inadequate and therefore should only be 'improved' (presumably in the manner sought by the UV's claims). This submission is made in a context where the Awards are (and have been) subject to a wide variety of union claims including:

- (a) an Equal Remuneration Order application for the Awards which has already been dismissed;
- (b) a further Equal Remuneration Order application for the Teacher's Award; and
- (c) a substantive 'work value' claim for the Teacher's Award.

2.5 The thrust of the UV's submission is summarised at [19] of the UV Response:

Improving education and care standards, and improving access to care, requires improving, not decreasing, the working conditions of educators covered by Awards.

2.6 This primary submission fails to meaningfully engage with the positive case brought by ACA/ABI in the form of the Ordinary Hours and Rostering Claims.

2.7 The claims of ACA/ABI are designed to address specific issues in relation to current conditions within ECEC arising out of the Awards and have been pursued on behalf of employers in ECEC. In the submission of ACA/ABI, its Claims have independent utility which can be assessed regardless of the many other claims of UV and others. Although ACA/ABI oppose the claims of union parties in these proceedings, ACA/ABI acknowledge that the review of the Awards and the making of variations to the Awards is not a binary process, nor is it a 'one way street'. It is entirely possible (and indeed likely) that the ongoing maintenance of a fair and relevant minimum safety net would involve periodic variations to awards which may adjust the safety net 'in favour' of employers or employees, or both.

The Ordinary Hours Claim

2.8 UV opposes the Ordinary Hours Claim on the basis that the claim is:

- (a) unnecessary;

- (b) disruptive on the employees covered by the Awards; and
- (c) does not meet the modern awards objective.

Necessity

- 2.9 The Ordinary Hours Claim has the relatively modest aim of aligning the span of ordinary hours in the Awards to a range which accommodates the specific needs of the ECEC industry and its role within the wider economy and society.
- 2.10 Central to these needs is the proposition that many parents utilise ECEC services during hours in which they are performing work. Indeed, accommodating the working patterns of parents is the primary reason why children are enrolled in ECEC². In circumstances where ‘all’ parents (both or a single parent) are working, children can only be collected by their parents after:
- (a) the cessation of their parent’s work; and
 - (b) the parent’s travel to the relevant ECEC Centre.
- 2.11 To the extent that parents are working full-time or non-‘child friendly’ hours (which will of course vary based on the type of care available), the closing time of ECEC services will in many cases have a direct effect on:
- (a) the ability of parents to pick up their children;
 - (b) the ability of parents to utilise certain types of care; and
 - (c) the ability of parents to attend and perform work.
- 2.12 The above propositions should be self-evident.
- 2.13 This is not to say that ‘child care’ is the only role of ECEC. As noted above, all parties are in agreement as to the importance of ECEC in the education of children, not just in their care. This being said, in the submission of ACA/ABI it would be a mistake for parties to simply dismiss or disregard the reality that many parents utilise ECEC while they are at work, and the closing time of a ECEC centre will have a direct impact on the working hours of the parent and/or the ability to collect their child.
- 2.14 UV supports its claim that the Ordinary Hours Claim is unnecessary through the use of a table at [27] of the UV Response.
- 2.15 ACA/ABI would respectfully submit that the Full Bench should use caution in relying on this data. It plainly has a number of significant limitations, many of which are acknowledged by UV.
- 2.16 While the original data set apparently comprises of 15,091 services, only 8,961 services have been included in the UV’s analysis (an ‘exclusion rate’ of approximately 41%). UV’s calculations appear to exclude 5817 ‘services’ (approximately 39%) on the basis that no closing time is listed. This is an extraordinarily high proportion of the data set which means that the percentage figures relied upon by UV should be viewed with great caution.

² Baxter, Jennifer, *Child care and early childhood education in Australia*, Australian Government Australian Institute of Family Studies accessed on 26 April 2019 at <https://aifs.gov.au/sites/default/files/publication-documents/fs2015.pdf> at p 3 - This analysis excludes pre-schools.

- 2.17 It is also relevant, again as noted by UV, that the reporting of closing times does not appear to be uniform, with a mixture between 12/24 hour times and unclear figures such as 0:00 and 23:59 making up a material proportion of the data. Given these difficulties, attempting to infer accurate percentages from the relevant data set appears to be impossible.
- 2.18 ACA/ABI acknowledges that this data may be more usefully employed to present actual (likely minimum) numbers of centres operating at certain times rather than percentages. Even this analysis would be subject to limitations however, given that as the UV itself identifies that 'spot-checks' of the data did not necessarily correlate with advertised conditions of particular centres. It is therefore also open for the Full Bench to infer that other times included in the data set may not be accurate.
- 2.19 Notwithstanding these reservations, it is not contested by ACA/ABI that a minority of ECEC services currently operate outside the current span of hours under the Awards.
- 2.20 This is in fact consistent with the evidence and the submissions of ACA/ABI that the current span of hours within the Awards creates an effective disincentive for centres to remain open after 6:30pm. Taking the UV's analysis at face value, the data discloses 2184 centres (from those 8,961 who reported a closing time) which close at the current end of the span hours.
- 2.21 This is a significant number of centres which appears to be align with the current span of hours included in the Awards (again, consistent with the evidence of ACA/ABI).
- 2.22 This correlation, when placed alongside the evidence of the ACA/ABI witnesses suggests that an extension in the ordinary hours span would result in a subsequent increase in the operating hours of ECEC Centres. ACA/ABI strongly rejects any assertion arising from the evidence of UV that there is no real demand for ECEC centres to open later. Further, as addressed in the ACA/ABI evidence, the utility of the Ordinary Hours Claim is not limited to centres who may choose to extend operating hours beyond 6:30pm.
- 2.23 The Ordinary Hours Claim would also assist centres which currently and may continue to close at 6:30pm, however are forced to incur additional staffing costs due to late parents or team meetings.
- 2.24 In the submission of ACA/ABI, the extension of the span of ordinary hours from 6:30 pm to 7:30pm in ECEC represents an appropriate and contemporary standard having regard to the conditions of ECEC and the modern awards objective. This pattern does not represent 'unsocial' hours or hours which are out of step with contemporary standards or the purposes of ECEC.
- 2.25 In the context of the Awards, on balance, additional payment for work performed between 6.30pm and 7.30pm does not achieve the modern awards objective. Such a term does not provide a 'fair and relevant minimum safety net', because it overcompensates employees for work performed between 6.30pm and 7.30pm (and hence is not 'fair', to employers) and is not suited to the contemporary circumstances prevailing in the ECEC (and hence is not 'relevant').
- 2.26 It should also be noted that if UV's submissions as to the allegedly minimal demand for the extension of ECEC operating hours are accepted (which they should not be), then it must also be accepted that, contrary to the other submissions of UV, the Ordinary Hours Claims will have minimal impact on employees as a whole.

Educator's Outside of Work Responsibilities

- 2.27 UV submits that the Ordinary Hours Claim would create difficulties for educators under the Awards to manage their own responsibilities as working parents (primarily as mothers).
- 2.28 Specifically the UV contend that an extension of the ordinary hours from 6:30pm to 7:30pm would adversely affect ECEC workers picking up their own children and providing appropriate care.
- 2.29 The relevance of this submission appears to be limited to those employees working at centres who would extend operating hours (and accordingly rostered hours) following the extension of the span from 6:30pm to 7:30pm.
- 2.30 As already submitted, the extension of the span of ordinary hours from 6:30 pm to 7:30pm in ECEC represents an appropriate and contemporary standard having regard to the conditions of ECEC and the modern awards objective. This pattern does not represent 'unsocial' hours or hours which are out of step with contemporary standards or the purposes of ECEC.
- 2.31 It is also noteworthy that the Ordinary Hours Claims would only have effect in respect of parental and caring duties undertaken by ECEC workers after 6:30pm (as well as any time necessary for the ECEC worker to travel from work to their children).
- 2.32 The UV's own evidence suggests that ECEC workers who currently finish work at 6:30pm rely on others to undertake necessary 'pick ups' of children. This would certainly be consistent with the ordinary hours of schools (which finish earlier than 6:30pm).
- 2.33 For those ECEC workers who are required to 'pick up' children from other ECEC services, an argument that the extension of the span of hours will create additional difficulties for them can easily be answered by pointing to the fact *any* relevant span of hours (including the current span) will apply equally to parents working in ECEC and children enrolled in an ECEC program. As such, the difficulties of an ECEC employee picking up their child from an ECEC service will be the same whether both services close at 6:30pm or whether both services close at 7:30pm.
- 2.34 It must also be stressed that the Ordinary Hours Claims does not affect an entitlement of an employee to receive overtime after 8 hours work on a particular day.
- 2.35 As such, should the Ordinary Hours Claim be made, an employee required to work within the 6:30pm-7:30pm 'window' would either:
- (a) commence his/her ordinary hours later, potentially affording them an opportunity to undertake or attend to other responsibilities earlier in the day; or
 - (b) be entitled overtime payments for hours worked in excess of 8 hours per day (in precisely the same manner as they are currently).
- 2.36 In the submission of ACA/ABI, in emphasising the parental responsibilities of ECEC workers themselves and appearing to disregard the corresponding needs of parents who utilise ECEC services generally, the UV discloses the fundamental difference between the parties. In the submission of ACA/ABI, the unique nature of ECEC within the Australian economy and society (i.e. work in ECEC is both employment in its own right as well as facilitative of employment in other industries) means that, in relation to the review of the Awards, the broader aspects of the modern awards objective should receive significant focus including:

- (i) the need to promote social inclusion through increased workforce participation; and
- (ii) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (iii) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (iv) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

2.37 This is not to say that ACA/ABI would seek to underplay the importance of assessing the specific needs ECEC workers and their employers in the review of the Awards. Quite to the contrary. However, in keeping with the requirements of the modern awards objective, a balance needs to be struck between the needs and preferences of employees and the needs and preferences of industry, customers/clients and the wider economy. ACA/ABI submits that this balance is best struck through the granting of the Ordinary Hours Claim.

Increasing Female Participation in the Workforce

2.38 UV makes the submission that there is no support or basis for ACA/ABI's contention that the Ordinary Hours Claims would promote the role of full-time working men in picking up children after work and may also have the effect of moving more women from part-time into full-time work.

2.39 While there is admittedly little direct evidence in relation to this issue before the Full Bench, ACA/ABI submit that the Full Bench could reasonably find that the granting of the Ordinary Hours Claim could have this effect on the basis that:

- (a) an extension of the span of hours to 7:30pm would make it more likely that ECEC centres would extend operating hours past 6:30pm;
- (b) where a centre extended its hours, such extension would make it easier for men whose work currently prevents them from picking up their children before 6:30pm to pick up their children; and
- (c) for women, where a requirement to pick-up children before 6:30pm currently prevents them from engaging in certain hours or types of work (or where that requirement subjects them to considerable stress in addition to their work), an extension of the span of hours may enable them to more readily undertake those patterns of work.

Delays in Parent Pickups

2.40 The UV Response claims that '*extending opening hours in circumstances where the employer charges parents for the disutility of picking up a child late and not recognising the same disutility from the perspective of the employee is 'double dipping' and intrinsically unfair*'.

2.41 This submission appears to misunderstand the purpose of late fees. Late fees are not charged because there is some apparent disutility in collecting children in the evening as opposed to the late afternoon. Late fees are charged in the ECEC to disincentivise late pick-ups because:

- (a) late pick-ups are disruptive to centres and employees because they (by definition) are not planned for; and
 - (b) they can be used to offset the additional cost of employee overtime (either because the employee has worked outside the span or has gone over 8 hours).
- 2.42 ACA/ABI accepts that regardless of the span of hours under the Awards, unexpected occurrences and emergencies will mean that it is impossible to eliminate the possibility of late pick-ups. The Ordinary Hours Claim is not made on the basis that it will eliminate late pick-ups, but rather that it will calibrate the ordinary hours span under the Awards to a period which better accommodates working parents who, given the work finish time and the time taken to travel to a centre, are more likely to 'miss' a 6:30pm pick-up.
- 2.43 The UV Response claims that the most appropriate response to this issue is to manage it through policies and procedures i.e. force parents to arrive by 6:30pm or 'fine' them. In circumstances where the increasing cost and lack of access to childcare services is a matter of national importance, increasing costs and reducing flexibility for parents is not appropriate.
- 2.44 Contrary to the submission of UV, ACA/ABI submits that the evidence in these proceedings supports the proposition that 'late pick-up' policies would change if the span of ordinary hours was extended. This would of course depend on the circumstances including whether a centre varied its opening hours or rostering arrangements.

Ordinary Hours in Other Awards

- 2.45 ACA/ABI acknowledge and accept the submission of UV in respect to the *Health Professionals and Support Services Award 2010* and *Medical Practitioners Award 2010* at [57]-[58].
- 2.46 UV also correctly point out that the purpose of ECEC is broader than '*a baby sitting or child minding service*'. As noted above, ACA/ABI agree.
- 2.47 What should not be understated however is the fact that many parents use ECEC services to facilitate (and in effect to make possible) their continued engagement in the workforce. This purpose can coexist with the importance of ECEC of providing quality education.
- 2.48 Indeed, while children may attend ECEC for a range of reasons, the predominant one is to enable parents to engage in paid employment, followed by providing developmental or social opportunities for children. Of children aged under 6 years in some formal ECEC other than preschool:
- (a) 66% attend because of parents' employment;
 - (b) 11% attend due to other parent-related/other reasons (the most common being "give parents a break"); and
 - (c) 23% attend for child-related reasons.³
- 2.49 Given that this is a legitimate purpose of ECEC, and that such a purpose requires ECEC services to operate both before and after the cessation of parents' working hours (including

³ Baxter, Jennifer, *Child care and early childhood education in Australia*, Australian Government Australian Institute of Family Studies accessed on 26 April 2019 at <https://aifs.gov.au/sites/default/files/publication-documents/fs2015.pdf> at p 3

factoring in travel time), ACA/ABI submits that it is appropriate for the Commission to have regard to the span of hours existing in other awards. There is also precedent for the Commission considering other awards when determining a span of hours in a particular award.⁴

- 2.50 In essence, the UV Response appears to advocate for a position where parents must either be financially punished for the 'late' pick-up of children through the payment of fines (or the indirect payment of overtime) or otherwise curtail their ordinary and standard work patterns so as to allow the ECEC services themselves to close 'on time'.
- 2.51 This position does not, in the submission of ACA/ABI, achieve the necessary balance required by the modern awards objective.
- 2.52 Contrary to the submission of UV, ACA/ABI are not advocating for a system of continuous 24/7 service delivery. The Ordinary Hours Claim is directed to modestly adjust the span of ordinary hours within the Awards to better reflect the role and conditions of ECEC.

Current Mechanisms within the Awards to manage Extended Hours of Operation

- 2.53 ACA/ABI concurs with UV's characterisation of cl 23.2(b) as 'novel'. Contrary to the submission of UV, the exceptional nature of cl 23.2(b) means it of little relevance to the current proceedings.

The Rostering Claim

- 2.54 There should be little argument that the ECEC sector is subject to a complex system of regulation, inclusive of a myriad of titles and statuses, some of which are substantive and others of which are merely procedural or nominal.
- 2.55 This complexity has a particularly complicating effect on rostering, given that the relevant regulations prescribe staffing ratios (inclusive of the qualifications of those staff) which must be adhered to at all times.
- 2.56 It is not contested (indeed it is apparent on the evidence of ACA/ABI) that many ECEC employees are accommodating in assisting ECEC operators comply with the relevant regulations by voluntarily agreeing to vary their rosters either within 7 days or 4 weeks depending on the Awards.
- 2.57 It is the position of ACA/ABI that absent this accommodation, the current conditions of the Awards in respect of rostering would be unworkable. These matters are addressed in the ACA/ABI submission filed 15 March 2019.
- 2.58 In the submission of ACA/ABI, the maintenance of a fair and relevant minimum safety net should not solely rely on the accommodation of employees, just as it does not solely rely on the accommodation of employers. Contrary to the submission of UV, ACA/ABI submits that the current Awards oppressively burden ECEC employers in light of the complex requirements of the overarching legislation. ACA/ABI's Rostering Claim aims only to ensure that ECEC employers are able to comply with overarching legislation within the context of the requirements of the Award, and does not seek to derive any 'advantage' from the variation, commercial or otherwise. The Rostering Claim does not seek to address any scenario other than when an employee has made themselves unavailable at short notice and the ECEC centre is otherwise unable to comply with the overarching legislative regime.

⁴ See at 4 *yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1135]

- 2.59 This would mean that circumstances in which a roster has additional (i.e. surplus) staff of the relevant qualification, the clause would not be engaged. Likewise where the operator is able to fill the 'missing position' in the roster through another employee's consent, the variation would also not have application.
- 2.60 Currently the effects of legislative restrictions on ECEC rostering appears to be borne entirely by ECEC operators, with ECEC employees being able to voluntarily assist ECEC operators to limit these effects through their cooperation. The Rostering Claim seeks to recalibrate the Awards so as to recognise that the ECEC sector is subject to unique and onerous rostering requirements.

UV on the Modern Awards Objective

- 2.61 In summary form, ACA/ABI respond as follows:

134(1)(a)

- 2.62 ACA/ABI do not submit that Ordinary Hours Claim '*will increase the living standards and the needs of all low paid Australians*'.⁵ ACA/ABI do however submit that in assessing s 134(1)(a) (or alternatively s 134(1)(f) and (g)), the effect of any proposed variation needs to be assessed not only against the needs and desires of a particular workforce covered by a reviewed award/s, but also more broadly.
- 2.63 ECEC is distinctive in the way it interacts not only with work performed in other awards, but with social and economic activities more generally.
- 2.64 UV seek to isolate the assessment of the Awards to the specific terms of the Awards and the employees engaged under it. With respect, the scope of the modern awards objective requires a broader and more holistic assessment.
- 2.65 At [95] UV lists its preference for alternative methods of improving the living standards and addressing the needs of the low paid. These methods have been, are, or could be the subject of claims by the UV. The existence of alternative methods to address 134(1)(a) does not appear to be overly relevant to the assessment of the ACA/ABI Claims.

134(1)(b)

- 2.66 As had previously been submitted in this Review, the submission that a proposed claim could otherwise be bargained for and as such should not be granted in light of s 134(1)(b) could be made in opposition to almost any claim.

134(1)(c)

- 2.67 ACA/ABI disagrees with UV's assertion at [101] that the claims are likely to reduce workforce participation within ECEC. As previously submitted, ACA/ABI believes there are strong grounds to conclude that by facilitating increased access to ECEC, specifically services with operating hours cohesive with the working hours of working parents, workforce participation can in fact increase.

134(1)(da)

- 2.68 ACA/ABI disagree that work between 6:30pm-7:30pm is 'unsocial' such as to require the payment of overtime rates. As noted in 4 *yearly review of modern awards – Penalty Rates*

⁵ See UV Response at [91]

[2017] FWCFB 1001 at [195], section 134(1)(da) is a relevant consideration, it is not a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv).

134(1)(f)

2.69 ACA/ABI entirely reject the submission that its claims could result in increased employment costs.

134(1)(g)

2.70 The UV submission in relation to this limb is unclear as to its relevance. The UV Response appears to make some implied reference to the requirements of s 156(5) in order to seek to limit the Full Bench's review of the Awards. Again, as identified above at 2.62, the Full Bench is required to conduct a holistic assessment of the effect of the exercise of its modern award powers. Its review of any particular award does not occur in a vacuum.

UV Reply to the IEU

2.71 ACA/ABI supports the submission of UV at [109]-[114].

3. REPLY TO THE IEU RESPONSE

Ordinary Hours Claim

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

Children's Services Award

23.4 Shiftwork

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

...

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

Shift	% loading
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Afternoon	15
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(d) Definitions

..

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

Teachers Award

B.5 Shiftwork

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

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

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

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

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

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

- 3.2 ACA/ABI understands that utilisation of shiftworker provisions in the ECEC sector is extremely low.
- 3.3 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.
- 3.4 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.
- 3.5 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).
- 3.6 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 9731⁶. 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.
- 3.7 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.
- 3.8 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.'*
- 3.9 At [149], Senior Deputy Kaufman stated in response to this submission:

⁶ See from [143]

'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.'

- 3.10 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.*
- 3.11 Consistent with this approach, and acknowledging that variation between the day worker span of hours and the span of shift definitions is less than desirable, ACA/ABI submits that as a consequence of its Ordinary Hours Claim, the modern awards objective also likely requires the amendment of the definition of Afternoon Shift in the Awards to a shift finishing after 7:30pm.
- 3.12 This, contrary to the submission of the IEU, should not be understood as a 'significant alteration' to ACA/ABI's case.
- 3.13 Such a variation would need to be supported by precisely the same merit and evidentiary materials required to support the extension of the span of ordinary hours as proposed by ACA/ABI. Equally, the factual findings⁷ necessary to support such a finding would also be the same, including findings that:
- (a) engagement of employees on ordinary rates until 7:30pm will increase the hours of operation of centres and make childcare more accessible for Australian families;
 - (b) engagement of employees on ordinary rates until 7:30pm will make childcare more sustainable for ECEC operators who are currently deterred from staying open past 6:30pm due to the significant costs incurred in doing so;
 - (c) engagement of employees on ordinary rates until 7:30pm will increase workforce participation to benefit Australian families and the Australian economy in that it will allow parents to work longer hours;
 - (d) engagement of employees on ordinary rates until 7:30pm will make childcare more affordable for parents by pushing back or removing the "late fees" charged to parents when they arrive after 6:30pm;
 - (e) engagement of employees on ordinary rates until 7:30pm would service to remove the 'unpredictability' of overtime which will benefit childcare workers who are rostered on the 'closing shift' in that those employees could simply be rostered to work the additional time.

Rostering Claim

- 3.14 In seeking to downplay the complexity of rostering within the ECEC sector, the IEU compares an ECEC centre's rostering difficulties to those faced by a 'factory production line'.
- 3.15 ACA/ABI does not support this comparison.

⁷ See Primary Submission of ACA/ABI filed 15 March 2019

- 3.16 Such submission misunderstands the nature and complexity of the ratios required by the overarching legislation, including that the requisite staff composition is dependent on the numbers and characteristics of children on any particular day as well as the qualifications held by staff. This is not simply a ‘numbers game’, but a complex balance to be undertaken of children, qualifications and staff numbers.
- 3.17 It is also obvious to state that the consequences of a factory production line having the incorrect composition is not analogous to the consequences faced by an ECEC centre, which are:
- (a) acting in breach of the Childcare Regulations with risks of incurring fines, losing a centre’s licence or accreditation status or being ‘shut-down’; or
 - (b) calling parents and asking them to pick-up their children from the centre (so the number of children in the centre decreases and as a result the centre returns to being compliant with the Childcare Regulations).
- 3.18 The similar analogy used by the IEU likening the staffing complexities of ECEC operators to those faced by ‘aeroplane operators’ is certainly novel. ACA/ABI submits that the operations of an airline does not in any meaningful sense compare to that of a childcare centre or preschool.
- 3.19 The IEU submission appears to blame ECEC operators for not staffing ECEC centre in excess of statutory requirements, thereby giving rise to a ‘self-created’ rostering ‘problem’.
- 3.20 These submissions should be rejected outright. It cannot be seriously contended that the complex regulatory regime to which ECEC is subject to creates staffing complexities equivalent to the operation of a production line. Neither can it seriously be suggested that the ‘answer’ to the difficulties arising from this position is merely to increase staffing levels over and above the already onerous statutory requirements, particularly in circumstances where the cost of childcare is an issue of national importance.
- 3.21 Finally, in response the IEU, ACA/ABI also repeats the submissions at 2.54-2.60 above.

Scope of Claims re the Teachers Awards

- 3.22 The IEU attempts to create a distinction between the operation of the ACA/ABI Claims with respect to the Teachers Award and the Children’s Services Award.
- 3.23 The reality, from the perspective of ECEC, is that:
- (a) ‘educators’ and ‘teachers’ do have different qualifications are regulated by different awards and have different wages and conditions; however
 - (b) do not necessarily perform different work and are not necessarily required to utilise different skills.
- 3.24 These are obviously matters for dispute (in other ongoing proceedings) however for the purposes of the Ordinary Hours and Rostering Claims, the matters relevant to the determination of the Full Bench are identical for educators and teachers because they are working in identical environments, subject to the same legislative regime and caring for the same children at the request of the same parents.
- 3.25 It is entirely unworkable for different ordinary hours or rostering arrangements to exist for employees subject to the Teachers Award and the Children’s Services Award.

3.26 For this reason, the merit of the ACA Claims should be assessed equally against both awards.

Reply Statement of Ms James

3.27 Further submissions will be made in respect of the statement of Lisa James in Reply should it be admitted into evidence.

3.28 It appears however an opportune time to note that the observations of Ms James at [11]-[13] in relation to the National Register of Approved Children's Education and Care Services would be subject to the same limitations as those identified above at 2.15-2.21.

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