

## BEFORE THE FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

**Title of matter:** 4 yearly review of modern awards – Award stage – Group 4 awards – Substantive Issues

**Section:** s.156

**Matter Number:** AM2018/18 and AM2018/20

**Awards:** *Children's Services Award 2010 and Educational Services (Teachers) Award 2010*

**Document:** Submissions of the Australian Federation of Employers and Industries (AFEI)

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## Background

1. On 11 December 2018, President Justice Ross of the Fair Work Commission (**Commission**) issued a Statement confirming that all substantive issues in the *Children's Services Award 2010 (Children's Services Award)* and the *Educational Services (Teachers) Award 2010 (Teachers Award)* (collectively, the **Awards**) would be heard together. Directions were then issued inviting parties opposing the substantive claims to file submissions in response.
2. These submissions are made by the Australian Federation of Employers and Industries (**AFEI**) in response to various claims by United Voice, the Independent Education Union (**IEU**) and the two individuals, who are all seeking substantive changes to the Awards.
3. AFEI opposes the claims for the reasons outlined below.

## Statutory Framework

4. Pursuant to the *Fair Work Act*,<sup>1</sup> the Commission must conduct a 4 yearly review of all modern awards.<sup>2</sup> As part of the review, the Commission may, amongst other things, make one or more determinations varying an award.<sup>3</sup>
5. The legislative framework applicable to the 4 yearly review (the **Review**) was considered in some detail in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision.<sup>4</sup> The Decision outlined a number of principles to be considered in relation to the Review of a modern award.
6. *Firstly*, in exercising its power to vary an award, the Commission must ensure that the award, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters contained in the modern awards objective.<sup>5</sup>
7. *Secondly*, the objects of the Fair Work Act are also relevant to the exercise of this power.<sup>6</sup> The objects include, amongst other things, providing workplace relations laws that are flexible for businesses and acknowledging the special circumstances of small and medium-sized businesses.<sup>7</sup>
8. *Thirdly*, the need for a 'stable' modern award system requires a party seeking to vary a modern award to advance a merit based argument in support of the proposed variation. In this regard, the circumstances of the proposal will dictate the extent of

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<sup>1</sup> 2009 (Cth) (*Fair Work Act*)

<sup>2</sup> *Ibid* at s.156

<sup>3</sup> *Ibid* at s.156(2)(b)(i)

<sup>4</sup> [2014] FWCFB 1788 (**Jurisdictional Issues Decision**)

<sup>5</sup> *Ibid* at [23]; the modern award objectives are found at s134 of the *Fair Work Act*

<sup>6</sup> *Ibid* at [10]

<sup>7</sup> *Fair Work Act* s.3(a) and (g)

argument required. Relevantly, where there is a proposal for a substantial variation, such a proposal must be supported by submissions in addition to probative evidence properly directed at demonstrating facts which support the variation.<sup>8</sup>

9. *Fourthly*, the party seeking the variation must demonstrate that the variation they propose only includes terms necessary to achieve the modern awards objective.<sup>9</sup>
10. *Fifthly*, in conducting the review, the Commission will have regard to the historical context of the award.<sup>10</sup>

## Reply to United Voice Submissions

11. In these submissions AFEI responds to the following claims by United Voice in relation to the Children's Services Award and Teachers Award:
  - a. A new allowance for an *educational leader*;
  - b. A new allowance for a *responsible person*;
  - c. Non-contact time – claims to significantly increase the amount of non-contact time in both Awards, as follows:
    - i. increase the minimum non-contact time from 2 hours to 4 hours per week; and,
    - ii. an additional period of non-contact time for an employee designated an educational leader, in addition to the amount in (i) above, ranging from 2 to 4 hours per week.
  - d. A variation to clause 15 of the Children's Services Award to require the laundry allowance be paid where on-site laundry facilities are available; and,
  - e. A variation to clause 15 of the Children's Services Award to require employers reimburse employees for expenses associated with training undertaken at the employer's direction;
  - f. Higher duties - delete clause 18.1(e) of the Children's Services Award, so that the higher duties allowance is payable when an employee relieves another employee who is attending training;
  - g. Annual leave - Christmas vacation close-down - a claim to limit the period of a close-down to 4 weeks and, during that period, employers to pay employees for any period where an employee has insufficient annual leave.

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<sup>8</sup> *Jurisdictional Issues Decision* at [23]

<sup>9</sup> *Ibid* at [32]

<sup>10</sup> *Ibid* at [24]

12. The claims sought by United Voice amount to a substantial change to the Awards, and could be expected to have a significant impact on an employers' operations and employment costs. In the context of the 4 yearly review, United Voice must provide probative evidence properly directed at demonstrating the facts supporting the variations they are seeking. Further, the United Voice must demonstrate that the terms proposed include only that which is necessary to achieve the modern award objectives. The United Voice's evidence does not establish a need for the variations sought.

### Educational leader allowance

13. The allowances sought by the United Voice vary between the Awards. In the Children's Service Award, the range is 7.5% – 12.5% of the standard rate depending on the number of places in the centre. In the Teachers Award, the amount sought ranges from between 6.5% - 10.9% of the standard rate depending on the number of places within the centre.
14. United Voice claims the allowance is necessary to compensate employees appointed as the *educational leader*, because that person is required to take on additional responsibility above those compensated by the Awards.<sup>11</sup>
15. Regulation 118 of the *Educational and Care Services National Regulation (Reg. 118)* requires that a service "designate, in writing, a suitably qualified and experienced educator...to lead the development and implementation of educational programs in the service."
16. United Voice seeks to define 'educational leader' in both Awards as "a person appointed to lead the development and implementation of educational programs in the service."<sup>12</sup> Arguably, this is materially different to Reg. 118, which only requires that the centre "designate, in writing."
17. The National Law and Regulations does not place the overall responsibility of program development and delivery with the person who has certain designated responsibilities pursuant to Reg. 118. Rather, it is the centre and its Nominated Supervisor that holds the ultimate responsibility for ensuring the program is based on the learning framework and delivered in a manner consistent with the framework.<sup>13</sup> This is also consistent with the Children's Services Award classification structure which includes, inter alia, the following responsibility of a Director at B.1.10(a):
- Supervise the implementation of developmentally appropriate programs for children;
  - Ensure that the centre or service adheres to all relevant regulations and statutory requirements;

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<sup>11</sup> United Voice submissions 15 March 2019 at [27]

<sup>12</sup> United Voice Draft Determination March 2019

<sup>13</sup> *Children(Education and Care Services National Law Application) Act 2010* (NSW) 168

- Ensure that the centre or service meets or exceeds quality assurance requirements; and
  - Provide professional leadership and development to staff.
18. The United Voice evidence does not establish that the introduction of the National Quality Framework (**NQF**) and formal standards has amounted to substantial changes in the way the work is performed, nor that the ‘educational leader’ responsibilities are extraneous to those included in the Awards’ classification structure.
  19. United Voice has not produced probative evidence that prior to 2011, or prior to Award Modernisation, centres did not formally or informally arrange for a person to undertake the same responsibilities as those included in Reg. 118.
  20. There are indicators in the Awards, not addressed in the United Voice claim, that the designated responsibilities in Reg. 118 are already included in various classifications, and thus already compensated for in the ordinary rate of pay.
  21. The indicative duties of an employee at level 4 in the Children’s Services Award, for example, includes *“responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups.”*<sup>14</sup>
  22. Further, the indicative duties of a Level 5 employee in the same award includes *“co-ordinate and direct the activities of employees engaged in implementation and evaluation of developmentally appropriate programs.”*<sup>15</sup> It is notable also, that at this level of the award there are a number of additional responsibilities, as discussed below, within the role including those typically associated with a Responsible Person.
  23. In respect of the Teachers Award, the IEU has elsewhere claimed the following in relation to the inherent responsibilities of early childhood teachers covered by the Award:
 

*‘Early childhood teachers have overall responsibility for the educational program provided by the long day care centre or preschool...Teachers develop the curriculum applying their tertiary level skills and knowledge, are the pedagogical leaders at the service, and professionally develop and support the delivery of education by other employees.’*<sup>16</sup>
  24. We also note that the definition of a ‘teacher’ in the Teachers Award includes someone who *‘...performs duties which include...administering an educational program.’*<sup>17</sup>

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<sup>14</sup> Schedule B.1.6

<sup>15</sup> Children Services Award Schedule B.1.8

<sup>16</sup> IEU Application for an Equal Remuneration Order September 2017 at [15]

<sup>17</sup> Teachers Award cl.3.1

25. The *Macquarie Encyclopaedic Dictionary* defines administer as “to manage; have charge of the execution of.”
26. While a teacher covered by the Award may be required to administer, or manage, an educational program, as contemplated in the definition of a teacher in the Award, not all teachers will be designated as the educational leader. That is not to say, that additional compensation is warranted for discharging a responsibility which may be required of any teacher.
27. The Commission should not be satisfied based purely on the assertions by United Voice, without more detailed consideration of the Award classifications and coverage, that the Award currently fails to compensate employees for the designated responsibilities pursuant to Reg. 118.
28. Further, United Voice has not provided evidence that would support the quantum of the allowance sought. The amounts are significant and disproportionate when compared to the compensation for holding other responsibilities under the Award (including the rate differentials between different classification levels), and when compared to other allowances.
29. A comparison of the differential in pay rates between a Level 4 employee and an Assistant Director, and the allowance sought is shown below.

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 <sup>18</sup>
No more than 39 places	\$2,353	\$1,565	\$788	\$3,277.42
40-59 places	\$2,353	\$1,565	\$788	\$4,369.55
60 above about places	\$2,353	\$1,565	\$788	\$5,451.77

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

30. The amounts sought by United Voice are significantly higher than, and entirely disproportionate to, the amount of compensation that would be payable to employees for performing the full role of an employee at Level 5, which includes not only comparable responsibilities that would attach to a designated educational leader, but other leadership and supervisory responsibilities, including those of a Responsible Person. Further, ‘educational program and practice’ is only one of the seven quality areas within the National Quality Standard.<sup>19</sup>

<sup>18</sup> United Voice Draft Determinations March 2019

<sup>19</sup> Schedule 1 of the National Regulations

31. A comparison of the allowance sought with the Director’s allowance demonstrates that the disproportionate nature of United Voice’s claim.

Centres with	Current Director’s allowance per annum*	Educational leader allowance sought per annum*	Educational leader allowance as a percentage of the Directors allowance
No more than 39 places	\$5,751.96	\$3,251.35	57%
40-59 places	\$7,127.42	\$4,351.30	61%
60 above about places	\$8,652.94	\$5,451.77	63%

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

### Responsible person allowance

32. United Voice seeks a new allowance in both Awards to be paid to employees who are designated a responsible person. The amounts sought vary between the Awards. In the Children’s Service Award, the range is 15% – 20% of the standard rate depending on the number of places in the centre. In the Teachers Award, the amount sought ranges from between 13% - 21.8% of the standard rate depending on the number of places in the centre.
33. United Voice claims that the allowance is necessary to compensate employees designated a responsible person because the fact of being designated requires that employee take on additional responsibility above what is compensated within the Award.<sup>20</sup>
34. The changes involving a requirement to designate a responsible person for the purposes of the National Law and Regulations, are not substantial. The National Law requires a centre ensures that either: a person with management control; the nominated supervisor; or a person in day-to-day charge must be present at all times.<sup>21</sup> The Director of a service will typically fulfil this requirement, this is not disputed by the United Voice.<sup>22</sup> However, invariably services will operate for longer hours than a Director is in attendance or the Director may be temporarily absent due to illness or other unforeseen situations. In such circumstances, a responsible person will be required to be the centre’s ‘point of contact’ and provide limited and interim supervision.

<sup>20</sup> United Voice submissions 15 March 2019 at [86]

<sup>21</sup> *National Law* s. 162; please note the Laws refer to a person in day-to-day charge, which is the same as a responsible person. For clarity, we refer to a responsible person in these submissions

<sup>22</sup> United Voice Submissions 15 March 2019 at [58]-[59]

35. The responsible person is an employee placed in day-to-day charge,<sup>23</sup> in the absence of the Director or nominated supervisor. However, although in charge of a service for that period, the responsible person does not take on the responsibilities of the nominated supervisor and is not acting as a nominated supervisor for that period. The responsibilities of the nominated supervisor remain with the substantive appointment even when they are not physically present at the centre.
36. The overall responsibility for ensuring health and safety of the children on site; ensuring the staff to children ratios are being met; ensuring the physical environment is set out appropriately, and that programming and planning is being carried out in accordance with the NQF are all tasks that are generally determined and arranged in advance, aside from emergency situations. Ensuring these requirements are met is the substantive role of the nominated supervisor/Director. The responsible person does not make such arrangements, but may monitor the service does not divert from the arrangements already in place.
37. 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.”
38. In addition to this particular responsibility, however, the Assistant Director is also responsible for, as noted above, the duties of an educational leader, and further, significantly:
- 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; and
  - Generally supervise all employees within the service.
39. United Voice has not provided evidence that would support the introduction of the new allowance or the quantum sought. Once again, the amounts sought are significant and disproportionate when compared to other allowances and pay rates under the Awards.

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<sup>23</sup> *National Regulations reg. 117A*



40. The following table shows a comparison of the differential payable to a Level 4 employee performing the full range of duties at Level 5, compared with the responsible person allowance shown on an hourly basis.

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
No more than 39 places	\$1.18	\$0.80	\$0.40	\$3.31
40-59 places	\$1.18	\$0.80	\$0.40	\$4.41
60 above about places	\$1.18	\$0.80	\$0.40	\$5.51

41. A comparison of the annualised amount of the allowance sought for Teachers with the Directors allowance is as follows:

Centres with	Current Director's allowance per annum*	Responsible person allowance sought, per annum*
No more than 39 places	\$5,751.96	\$6,503.70
40-59 places	\$7,127.42	\$8,764.15
60 above about places	\$8,652.94	\$10,905.62

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

### ***The combined educational leader and responsible person allowances***

42. In the event that both allowances would be applicable to the same employee, even on a temporary or short term basis, the inordinate nature of the claims is shown below. The table compares the differential payable to a Level 4 employee performing the full range of duties at Level 5, compared with the combined allowances sought for educational leader and responsible person shown on an hourly basis.

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	Educational leader and Responsible person allowances per hour
No more than 39 places	\$1.18	\$0.80	\$0.40	\$3.31 + \$1.64 = \$4.95
40-59 places	\$1.18	\$0.80	\$0.40	\$4.41 + \$2.19 = \$6.60
60 above about places	\$1.18	\$0.80	\$0.40	\$5.51 + \$2.75 = \$8.26

43. Notably, the definition proposed by United Voice states that:

**‘Responsible person** means the person designated as such for the purposes of section 162 of the Education and Care Services National Law and includes a person in day-to-day charge of a centre and a nominated supervisor.’

(Emphasis added)

The allowance would therefore be paid to Directors and Assistant Directors, whose wage rates already compensate for these specific responsibilities.

### Non-contact time

44. United Voice seeks to double the minimum amount of non-contact time provided for under both the Awards, that is, from two hours to four hours per week. It would be applicable to:

“An employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children... for the purpose of planning, preparing, evaluating and programming activities.”<sup>24</sup>

45. Given the nature of the claims it might be expected that United Voice would provide comprehensive witness evidence. Rather United Voice has filed limited evidence which would not assist the Commission in drawing any conclusions about the issue more generally in the sector.

46. While the limited evidence might suggest that more non-contact time may be desirable for some employees, the Commission could not be satisfied that a change of such magnitude is necessary as part of the modern award safety net for all such employees.

47. United Voice further seeks an additional period of non-contact time be provided for employees designated as educational leader. The amount of time sought varies depending on the number of places in the services, but ranges from an additional two hours to an additional four hours.

48. If accepted, the variation would provide an employee, as a minimum, between six and eight hours of non-contact time per week. Such an entitlement would have a significant impact on the rostering requirements of an organisation, particularly in relation to ensuring educator to child ratios are appropriately maintained. This would involve a significant increase in costs for employers, particularly small to medium sized businesses.

49. Further, United Voice has not provided evidence that would satisfy the Commission that such variations to the modern award safety net are necessary.

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<sup>24</sup> At cl.21.5. A similar provision is found in the Teachers Award at Schedule B.3.2

### Laundry allowance

50. United Voice seeks a variation which would provide payment of the allowance to employees, even in circumstances where employees use their employer's laundry equipment and materials.
51. The Children's Services Award currently provides an allowance to employees who are "required to launder any clothing referred to in clause 15.2(a)..." The allowance is an expense related allowance, payable for the expense incurred by an employee.
52. The variation sought by United Voice is unnecessary.

### Training expenses

53. United Voice seek a variation to the Children's Services Award that would require an employer to reimburse an employee for any expenses associated with training.
54. In support of their proposed variation, United Voice refers solely to maintaining first aid and CPR qualifications.<sup>25</sup>
55. The explanatory memorandum recognises the reasonableness of requiring an employee to 'purchase tools' required to perform his or her duties.<sup>26</sup> Where holding and maintaining a first aid certificate is a requirement of the role, the employer should not be required by the Modern Award to cover this cost.
56. If accepted, the variation would involve an increase in costs for employers, particularly small to medium sized enterprises.
57. The reimbursement to employees could also be disproportionate to the expense associated with the certificate renewal. If the proposed variation were made, affected employees with more than one employer, such as Bronwen Hennessy,<sup>27</sup> could claim reimbursement for their first aid certificate renewal from multiple employers.
58. United Voice has not provided probative evidence that would satisfy the Commission that such variations to the modern award safety net are necessary.
59. The Commission should reject this variation.

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<sup>25</sup> United Voice Submission at [191] – [198]

<sup>26</sup> Fair Work Bill (2008), Explanatory Memorandum, at [1292]

<sup>27</sup> Witness statement at [14]

### Higher duties

60. United Voice seek deletion of the higher duties allowance clause which require the allowance be paid where an employee is relieving another employee who is attending paid training.
61. The Commission should have consideration for the fact that the higher duties clause has been so drafted to respond to particular nuances of the industry, and no doubt, its particular regulatory requirements.
62. United Voice has not provided probative evidence to demonstrate that the Award's current provisions are not acting as an appropriate safety net.

### Annual leave

63. The Children's Services Award currently provides for payment, not annual leave, for employees for vacation periods other than the Christmas vacation period. In respect of the Christmas vacation period, the Children's Services Award specifically provides:

**24.4(b)** During the Christmas vacation only, an employee may be directed to take annual leave. An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of four weeks.
64. Further, due to the award variation in July 2016 there is also provision for, by agreement, annual leave in advance.
65. United Voice now proposes, in its amended claim that employees without sufficient annual leave to cover a period of Christmas vacation close-down will be paid at their ordinary rate of pay.
66. The proposal by United Voice would provide a disincentive for employees to retain sufficient leave to cover the Christmas vacation period and could result in disputation over the taking of leave during other periods. The variation would therefore be inconsistent with the need to ensure a stable modern award system.
67. United Voice has not adequately addressed the funding implications of an employer being required to pay an employee for up to an additional four weeks where the employee is not performing work.
68. The provisions in question, were the subject of consideration of the industry's particular circumstances in award modernisation. The United Voice's case does not provide justification for why the approach specifically adopted in award modernisation should now be departed from, and does not include probative evidence that the safety net is not meeting the modern award objective for this industry.

69. United Voice's claim should be rejected.

## Reply to Claims by Individuals

70. The individuals, Ms Isabelle Arrabalde and Ms Elizabeth Arrabalde, seek the introduction of an educational leader allowance and responsible person allowance to the Children's Services Award and Teacher Award in largely the same terms as United Voice.
71. For the reasons previously discussed, the Commission should reject the claims.

## Reply to Independent Education Union of Australia Submissions

72. The IEU has two claims to vary the Teachers Award, as follow:
- a. A variation to the definition of 'teacher' so that a Director who holds a teaching qualification is automatically covered by the Teachers Award; and
  - b. A variation to increase the minimum payment period for casual employees in early childhood centres.

### Definition of Teacher

73. The IEU seeks to vary the Teachers Award so that a Director of an early childcare centre who holds a teaching qualification will be covered by the Teachers Award.
74. The variation would mean that a Director who holds a teaching qualification, irrespective of whether it is utilised in connection with the Director's employment, or for that matter, whether the Director has or intends to maintain teaching accreditation, could no longer be covered by the Children Services Award.
75. The Children's Services Award currently sets out a range of qualifications and experience relevant to the position of Director. These include a relevant Degree or a 3 or 4 year Early Childhood Education qualification.<sup>28</sup>
76. The IEU evidence is too limited for the Commission to assess the potential implication of such a significant variation for the industry. The IEU has not demonstrated that it is necessary to disturb the current award coverage of Directors.

### Minimum payments for casuals

77. The IEU seeks a variation to provide higher minimum payments for casuals employed under the Teachers Award so that an employee who is engaged to work longer than a

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<sup>28</sup> Children's Services Award Schedule B.1.10

quarter day but less than a half day would be paid half a day, and further, where an employee works longer than a half day but less than a full day, paid for the full day.

78. Currently at cl.14.5(b) of the Teachers Award states that:

(b) Provided that:

(ii) a casual employee in a children's service or early childhood education service may be paid for a minimum of a quarter day.

79. The proposed variation is not fair, as it would result in unwarranted payment for time not worked, and is not necessary. The Commission has not been provided any probative evidence which would demonstrate that the clause is necessary to achieve the modern award objectives.

80. The claim should, therefore, be rejected.

**Australian Federation of Employers and Industries**

16 April 2019