



DECISION

Fair Work Act 2009

s.158—Application to vary or revoke a modern award

Independent Education Union of Australia (AM2018/9)

Educational services

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT SAUNDERS

SYDNEY, 11 OCTOBER 2021

Application to vary Education Services (Teachers) Award 2020 on work value grounds.

A. Introduction

[1] On 19 April 2021 we issued a decision¹ (April decision) in which, first, we dismissed an application made by the Independent Education Union of Australia (IEU) pursuant to s 302 of the *Fair Work Act 2009* (FW Act) for an equal remuneration order with respect to early childhood teachers and, second, in respect of an application by the IEU pursuant to s 157 of the FW Act to increase the minimum pay rates for teachers covered by the *Educational Services (Teachers) Award 2020* (EST Award), we found that an adjustment to those rates was justified by work value reasons. In relation to the latter finding, we identified two variations to the remuneration structure in the EST Award which we considered to be justified by work value reasons, would properly reflect the work value of teachers covered by the EST Award and would constitute properly-fixed minimum rates of pay. The first was a new classification structure with pay rates that reflected our work value findings, as follows:

Classification	Criteria	Weekly salary - preschools and schools \$	Annual salary - preschools and schools \$	Weekly salary - long day care centres \$	Annual salary - long day care centres \$
Level 1	Graduate teacher with provisional or conditional accreditation where applicable	1,141.20	59,545	1,186.80	61,927

¹ [2021] FWCFB 2051

Level 2	Teacher with proficient accreditation or equivalent	1,247.30	65,085	1,297.20	67,688
Level 3	Teacher with proficient accreditation after three years' satisfactory service at Level 2	1,357.90	70,854	1,412.20	73,688
Level 4	Teacher with proficient accreditation after three years' satisfactory service at Level 3	1,468.40	76,623	1,527.20	79,688
Level 5	Teacher with Highly Accomplished/Lead Teacher accreditation	1,579.00	82,392	1,642.20	85,688

[2] The second was a new allowance for early childhood teachers appointed to the statutory role of Educational Leader.

[3] We gave consideration in the April decision as to whether the identified variations would meet the modern awards objective in s 134(1) and the minimum wages objective in s 284(1) of the FW Act and, in respect of the matters specified in s 134(1) which are required to be taken into account in that respect, we made findings as to paragraphs (a)-(e) and (g) of s 134(1) and paragraphs (b)-(e) of s 284(1). However, in relation to paragraphs (f) and (h) of s 134(1) and paragraph (a) of s 284(1), we did not consider that we were in a position to make findings, primarily because the evidence concerning the effect of wage increases on the viability, profitability and prices had been directed at the IEU's initial wage claim and the parties had not been heard in relation to the variations we proposed to make. Accordingly we concluded as follows:

“[665] We consider that the appropriate course is to afford interested parties the opportunity to adduce further evidence and make further submissions which respond to the modifications to the remuneration structure in the EST Award which we consider to be justified by work value reasons, and which address s 134(1)(f) and (h) and s 284(1)(a), before we make findings concerning whether the variation of the EST Award to give effect to those modifications is necessary to achieve the modern awards objective and would be consistent with the minimum wages objective. Such further evidence and submissions might, among other things, usefully deal with the following matters:

- what the operative date of the variation should be if it is made;
- whether any phasing-in arrangements should apply; and
- the capacity of the Commonwealth Government and State and Territory Governments to assist in funding the wages of early childhood teachers.”

[4] Following a directions hearing, the parties requested by consent that the Commission assist the parties in narrowing the issues between them. On 24 May 2021, a conference was held before Deputy President Dean to allow interested parties to discuss the outstanding matters set out in paragraph [665] of the April decision above. The parties then reported their progress to the Full Bench on 4 June 2021 and were directed to file evidence and submissions.

[5] Subsequently, a consent position was reached between the IEU and the Australian Childcare Alliance and Australian Business Industrial (ACA/ABI) as to the variations to the EST Award which should be made to give effect to the April decision (consent position). The proposed consent variation is set out in Attachment A to this decision.

[6] The matter was the subject of a final hearing on 23 August 2021.

B. Issues in dispute

[7] The issues in dispute between the parties arise from matters raised in the submissions of the following parties in response to the consent position:

- Australian Education Union (AEU);
- Australian Federation of Employees and Industries (AFEI);
- Catholic Employment Relations (CER);
- Community Connections Solutions Australia (CCSA); and
- Isabelle Arrabalde and Elizabeth Arrabalde, who are individual early childhood teachers (Arrabaldes).

[8] The issues in dispute may be categorised as follows:

1. The operative date of the variations to the EST Award and whether phasing in arrangements should apply.
2. Classification structure issues:
 - 2.1 Whether the requirement for “*satisfactory service*” for progression from Levels 2 to 3 and 3 to 4 should be retained and, if so, whether and how it should be defined.
 - 2.2 Transitional arrangements from the old classification structure to the new structure.
 - 2.3 The application of the new classification structure in jurisdictions which do not currently have compulsory accreditation/registration for early childhood teachers and/or do not have Highly Accomplished/Lead Teacher accreditation.
 - 2.4 The application of the new classification structure for teachers who have a career break.

- 2.5 The availability of support to teachers seeking to obtain proficient status.
3. Quantification and pro-rata payment of the Educational Leader allowance.
4. Whether the coverage of the EST Award should be expanded to include employees with conditional teacher accreditation working in an early childhood education service.

[9] We will deal with the above issues *seriatim*.

[10] Significantly, no party submitted that variation of the EST Award to implement the new classification structure and the Educational Leader allowance would not result in the achievement of the modern awards objective in s 134(1) and the minimum wages objective in s 284(1).

1. Operative date and phasing in

[11] Under the consent position advanced by the IEU and the ACA/ABI, the operative date for the variation of the EST Award to give effect to the April decision should be 1 January 2022. In support of the consent position, the IEU submitted that an operative date of 1 January 2022 provides affected employers with sufficient time to take steps to implement the changes. It noted that the employers most likely to be affected by the new pay rates operate in the early childhood sector and submitted that it is appropriate that these rates coincide with the start of a new year, so that employers can have regard to the new rates of pay for teachers when considering the rates they charge parents. Further, it submitted that preschools and kindergartens determine their fees for the year in the last quarter of the preceding year to commence from the start of the preschool year and that long day care centres generally adjust their fees twice a year on 1 January and 1 July.

[12] The ACA/ABI submitted that a date beyond 1 January 2022 would have been preferable; however, on balance and in the interest of resolving the implementation issues in an orderly basis, this date is tolerable. It stated that the benefit of a prospective operative date is that it provides employers with an opportunity to prepare for transition in an orderly way and it provides some economic amelioration of the impact of the increase by adjusting their cost structure or preparing parents with reasonable advance notice of any fee increases.

[13] The AEU did not object to the consent position.

[14] CCSA supported a proposed operative date of 1 January 2022. In this respect, it submitted that 1 January 2022 was appropriate because the NSW Government had included additional funding in its latest Budget by creating the Start Strong Free Preschool program, which will provide approximately \$4,000 per enrolment per year in additional funding to each community preschool that opts-in to the program from 1 January 2022. CCSA said that this compares with a likely increase in cost per enrolment of less than \$520 per year resulting from the increase to early childhood teachers' wages, leaving not-for-profit community preschools in a sound financial position to meet the additional wages cost without needing to pass the increased fees to families, as preschool in NSW will be free for services participating in the new program. In respect of Commonwealth Government support, CCSA submitted that changes to the operation of the Child Care Subsidy (CCS) arrangements scheduled to come into effect

in July 2022 whereby the Government will provide greater funding support to families with second and subsequent children in childcare directly supports increased wages of early childhood teachers through the higher, ongoing contribution to total CCS-approved centres' costs.

[15] CER submitted that 1 July 2022 should be the operative date of the variation pursuant to s 166(1) of the FW Act, which provides that any determination setting or varying modern award minimum wages should generally come into operation on 1 July in the next financial year after it is made. Further, it submitted that it is more appropriate to provide employers with ten months, rather than four months (if the operative date were 1 January 2022 as proposed by the consent position) to prepare for and implement the variations to the EST Award. It submitted that in the alternative, the operative date should not be earlier than 1 January 2022.

[16] CER also submitted that a number of operators of Catholic early learning centres view phasing-in of increases to minimum rates as preferable in order to spread the cost of wage increases over a period of between two and five years, to mitigate the costs of an increase to wage rates paid to early learning teachers. It submitted that we have the power to specify that a determination that changes minimum wages under a modern award take effect in stages pursuant to s 166(4) of the FW Act.

[17] The AFEI also submitted that the operative date should be 1 July 2022, as it is highly likely that many employers in this sector would not have budgeted for the proposed wage rates. It contended that the proposed structure is a significant departure from the status quo and an appropriate timeframe is required for transition, the capacity to pay increases to wages will be challenging as the sector is heavily reliant on government funding or subsidies and the Commonwealth Government have not provided any direct funding to pay for the new classification structure and minimum rates, which means employers will have to either absorb the cost or pass this additional cost on to parents. In the alternative, it submitted that if the Commission determines 1 January 2022 to be the operative date, phasing in of the new rates should occur in two equal instalments, being 1 January 2022 and 1 January 2023.

[18] The Arraballes submitted in respect of the Educational Leader allowance that no phasing-in arrangement should apply and that the allowance should be introduced without delay. They submitted that an immediate introduction of the allowance was appropriate given the significant challenges Educational Leaders have faced in leading the educational program for centres during the COVID-19 pandemic, being required to devise and deliver concurrent educational programs to children attending a centre and also online for those learning from home. They pointed to the Early Childhood Relief Package introduced by the Federal Government during the pandemic and submitted that the immediate introduction of the allowance would not place excessive burden on early childhood education and care providers. They also noted the finite impact of the proposed allowance on employment costs as the position of Educational Leader does not necessarily require a teaching qualification, may only be held by one person per service and that person may be Educational Leader to various services so not every provider will bear the cost of the allowance. The Arraballes did not comment as to whether any other phasing-in arrangement should apply.

Consideration

[19] We consider that the variation to the EST Award to give effect to the April decision should have an operative date of 1 January 2022, and that there should be no phasing-in of the increases. In reaching this conclusion, we have taken into account the following matters:

- (1) Employers covered by the EST Award, including the early childhood sector employers who will principally be affected, have been on notice since the date of the April decision (19 April 2021) as to the wage increases which will be made to the minimum wage rates in the EST Award. This will mean that, by 1 January 2022, they will have had over 8 months to make the necessary adjustments to accommodate the impact (if any) of the increases.
- (2) The increases to minimum rates which will be made are, while not insignificant, not of such a quantum or scope as to require a phasing-in period. For employers currently paying only minimum award rates, the increases involved range from approximately 3.3% to 13.6%, depending on the level at which the employee is currently graded. Further, in respect of the early childhood sector, the EST Award will likely only be applicable to a small minority of the employer's workforce.
- (3) The funding changes identified in CCSA's submissions, and its analysis of the impact on the charged cost of early childhood education and care, support the conclusion that an operative date of 1 January 2022 without phasing-in is appropriate.
- (4) Considerable weight must be placed on the adherence of the ACA/ABI to the consent position, albeit that those organisations would undoubtedly have preferred a later operative date. The ACA was the principal employer participant in the main proceedings, and adduced extensive evidence from a wide range of businesses in the for-profit early childhood sector in response to the original claims advanced by the IEU, including detailed evidence concerning the affordability (or otherwise) of those claims. In that context, we have confidence that the ACA/ABI is representative of a wide range of employers in that sector and that its assessment that an operative date of 1 January 2022 is viable may be relied upon.
- (5) By contrast, the AFEI called no evidence from any employer in the sector in the main proceedings, nor has it adduced any evidence from any employer in the post-April decision phase of the proceedings in support of its position concerning operative date and phasing-in. In that context, its submissions concerning affordability cannot be weighed as rising above the level of mere assertion. The same may be said in relation to the position of the CER, which did not participate in any meaningful way in the main proceedings.
- (6) 1 January 2022 appears to us to be the most convenient operative date since it will allow employers to set their charges for the 2022 calendar year on the basis that the wage increases have become payable.

[20] Section 166(1) of the FW Act establishes a default position that, relevantly, determinations that set or vary modern award minimum wages outside of the annual wage review are to come into operation on 1 July in the next financial year after the determination is

made. However, s 166(2) empowers the Commission to specify another day in the determination as the operative date “...if it is satisfied that it is appropriate to do so”. In this case, we consider that it is appropriate to set 1 January 2022 as the operative date having regard to the six matters stated above.

[21] We see no reason to give an earlier operative date in respect of the Educational Leader’s allowance, as submitted by the Arrabaldes.

2. Operation of the proposed classification structure

2.1 Definition of “satisfactory service” for the purpose of the new classification structure

[22] The consent position is that “satisfactory service” within the new classification structure should be governed by a new clause 14.3 in the EST Award, which would provide:

14.3 Satisfactory Service

- (a) All service will be deemed satisfactory for the purposes of subclause 14.2 unless the employer disputes for a given year that it is satisfactory by notifying the Fair Work Commission of the dispute pursuant to Clause 31—Dispute Resolution following a formal review and the provision of specific reasons.
- (b) Service is satisfactory if the teacher has complied with the requirements of the Australian Professional Standards for Teachers (APST).

[23] The IEU submitted, in support of the consent position, that the proposed classification and pay structure is drawn from the *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2020* (NSW Teachers Award), which contains the concept of years of “satisfactory service”. Pursuant to that award, the NSW Government has a detailed policy that requires teachers to be assessed on an annual basis by reference to the criteria in accordance with a detailed procedure and allows a teacher to appeal a decision that their performance is not satisfactory. The IEU submitted that employers covered by the EST Award include small businesses who may not necessarily adopt a formal annual performance procedure to determine whether service of each teacher is satisfactory and, due to the nature of the sector, employers may use different criteria leading to variance in performance assessments. The IEU submitted that if service cannot be determined to be satisfactory through the proposed dispute resolution process because, for example, agreement cannot be reached and a party does not agree to refer the dispute to arbitration, then the issue is determined by reference to the objective Australian Professional Standards for Teachers (APST) as set out in proposed clause 14.3(b). Clause 14.3(b), it submitted, can also be applied in any arbitration of a dispute. Further, it submitted that the proposed consent variation does not intend that a single act contrary to the APST would result in service not being satisfactory. The ACA/ABI also submitted, in support of the consent position, that given the April decision placed emphasis on the role of the APST, it is reasonable to align what would be satisfactory service to them. It also noted that the APST set out a very broad array of requirements that an employer can consider in whether to challenge satisfactory service in a particular case.

[24] The AEU did not object to the consent position and the CCSA supported it.

[25] CER agreed that there should be an objective method of determining whether service was satisfactory, but opposed the proposed consent variation deeming “*satisfactory service*” on the basis that it places the onus on the employer to dispute whether a teacher has not displayed satisfactory performance rather than the employee. Instead, it proposed an alternative approach by which the employer and employee are involved in an annual performance review process to allow both parties to address satisfactory service issues without the intervention of the Commission. It submitted that the matter should only be referred to the Commission where necessary and agreed to by the employer and employee.

[26] The AFEI opposed the consent position on the basis that it is inconsistent with the Commission’s consideration in the April decision and there is no similar requirement for “deemed satisfactory service” in the NSW Teachers Award to warrant the Commission adopting this approach. Instead, it submitted, satisfactory service should mean that the proficient teacher maintains their accreditation, or in jurisdictions where formal accreditation does not exist, maintains their professional development requirements. In addition, it submitted that satisfactory service should mean that where an employer has adopted a staff development and performance appraisal scheme, the employer determines that the employee has demonstrated satisfactory performance, and in circumstances where there is no appraisal scheme, the employer otherwise determines that the employee’s service has been satisfactory.

[27] In opposition to the AFEI’s position, the IEU relied upon a witness statement made by Carol Matthews, the Deputy Secretary of the IEU’s NSW/ACT Branch and dated 16 August 2021.² In her witness statement, Ms Matthews analysed the classification progression requirement for “*satisfactory performance of duties*” in the NSW Teachers Award, an award of the Industrial Relations Commission of NSW which covers public school teachers in New South Wales. She identified that “*satisfactory performance of duties*” under the NSW Teachers Award is assessed by reference to the detailed *Guidelines for the Management of Conduct and Performance* published by the NSW Department of Education, which form part of the Department’s *Performance and Development Framework for Principals, Executives and Teachers in NSW Public Schools* which was agreed with the NSW Teachers Federation in 2013. Ms Matthews described how the Guidelines document provides for a staged process to deal with unsatisfactory performance, which initially involves individualised and targeted support and may then move to a structured Teacher Improvement Program. Teachers who are assessed as not reaching the required level of performance after the completion of such a program may then be subject to remedial or disciplinary action. Disputes about such programs are subject to the disputes procedure in the NSW Teachers Award. Ms Matthews referred to a NSW Auditor-General’s Report to the NSW Parliament which identified that, in 2018, only 53 of 49,000 permanent and 39,000 casual and temporary teachers were involved in a Teacher Improvement Program.

[28] The Arraballes opposed the inclusion of “*satisfactory service*” in the new classification structure and submitted that it is problematic in the context of early childhood education and care services because the APST and NSW Teachers Award were not designed with early childhood teachers in mind. They submitted that unlike schools, early childhood education and care providers have contextually specific policies and procedures and every employer may have a different process for performance evaluation, which could result in teachers and employers

² Statement of Carol Matthews dated 16 August 2021 (Exhibit 136)

having different expectations as to what constitutes “*satisfactory service*” and undermine s 134(1)(e) of the FW Act. They proposed that the word “*satisfactory*” be deleted, which they submitted would maintain employee performance as an internal workplace issue, provide certainty for progression through the classification structure and fairly remunerate early childhood teachers for their service.

Consideration

[29] It may be acknowledged that there is some difficulty in translating the concept of “*satisfactory service*”, which in the April decision we imported from the NSW Teachers Award as part of the concept of a standards-based classification structure, from the context of a large, centrally regulated public school system to the diverse range of employers covered by the EST Award. This is particularly the case with the many small businesses operating in the early childhood sector. However, we do not consider that this difficulty is sufficient to scrap the requirement for “*satisfactory service*” altogether, as the Arraballes submitted. Although we envisage that the circumstances where an employee will be unable to progress through classifications because of unsatisfactory performance are likely to be rare, there will clearly be some circumstances where non-progression will be appropriate – for example, where an employee has undergone a performance improvement plan as a consequence of a failure to meet the basic professional standards of a teacher and has continued to fail to meet those professional standards.

[30] There appears to be a consensus that the APST should be used as an objective yardstick for the assessment of satisfactory service. We accept this position. We do not, however, accept the position of the AFEI that employers without any formal staff development and performance appraisal scheme should, additionally, be effectively conferred with a broad discretion to determine what constitutes satisfactory service for the purpose of progression through Levels 2-4 of the new classification structure. This moves the concept of satisfactory service away from any objective basis and would likely lead to inconsistency in outcomes across employers.

[31] We broadly accept the thrust of the consent position in respect of the concept of “*satisfactory service*”, but modifications are required to the draft variation in the following respects:

- (1) The EST Award classifications are currently based on years of “*teaching service*”, as defined (somewhat clumsily) in clause 14.2. The concept of “*satisfactory service*” was intended to incorporate this concept, and the label used shall accordingly be amended to: “*satisfactory teaching service*”. Further, the existing definition of “*teaching experience*” in the EST Award, which is incorporated into the draft variation, shall be modified to make it consistent with the concept of “*teaching service*”.
- (2) Some allowance needs to be made for an employer to assess an employee as not meeting the APST in a fair and transparent way without having to automatically bring a dispute to the Commission, particularly as an employee may not dispute the assessment.
- (3) Where the dispute resolution procedure is required to be utilised, all the steps in the procedure should be followed rather than, as is apparently the case in the consent position, accessing the Commission as a first resort.

[32] Accordingly, our view is that the new clause should provide as follows:

14.3 Satisfactory teaching service

- (a) For the purpose of progression to Levels 3 and 4, **satisfactory** teaching service shall mean:
 - (i) maintenance of Proficient accreditation/registration as a teacher, where applicable; and
 - (ii) compliance with the requirements of the APST.
- (b) An employee will be deemed to have complied with the APST unless the employer has, in the 12-month period immediately preceding the date upon which the employee is due for progression to Level 3 or Level 4:
 - (i) identified, in writing, that the employee has not complied with the requirements of the APST in specified respects on an ongoing basis; and
 - (ii) afforded the employee a reasonable period of time, with the provision of support, training and feedback, to bring the employee’s performance into compliance with the APST; and
 - (iii) assessed the employee, in a formal and documented review of performance, as still not complying with the requirements of the APST on an ongoing basis.
- (c) If the employee disputes an assessment that the employee has not complied with the requirements of the APST such as not to qualify for progression, the employer shall seek to resolve the dispute with the employee in accordance with the dispute resolution procedure in accordance with clause 31 of this award. This shall include, if necessary, reference of the dispute to the Fair Work Commission by the employer pursuant to clause 31.4.

2.2 Transitional arrangements from the existing classification structure to the new structure and progression for transitioning employees

[33] The consent position proposes that the EST Award be varied to add a new clause 14.4 to provide for transitional arrangements from the old to the new classification structure. It proposes the following translation table as follows in clause 14.4(b):

Classification prior to the classification structure transition date	Classification after the classification structure transition date
Level 1	Level 1

Level 2	Level 1
Level 3	Level 1
Level 4	Level 1
Level 5	Level 2
Level 6	Level 2
Level 7	Level 2
Level 8	Level 3
Level 9	Level 3
Level 10	Level 3
Level 11	Level 4
Level 12	Level 4
No transition	Level 5

[34] The above table operates subject to proposed clause 14.4(c), which provides that if an existing employee is better off being classified pursuant to the new classification structure, then the new structure shall apply at the point of transition. The transitional arrangements proposed in the consent position also include the following requirements:

- employees employed in the first year after the new classification structure takes effect who, prior to the operative date, qualified as a teacher or held teaching accreditation/registration status, will be classified according to the translation table and the provisions of the old classification structure (to be preserved in a schedule to the award) or the new structure, whichever is the more beneficial (proposed clause 14.4(d));
- for all employees transitioning pursuant to proposed clauses 14.4(b) or (d), all service in excess of two years will count as service at a proficient level where the service has followed the attainment of a recognised teaching qualification, provided that where a teacher has gained proficiency within two years, all service will be at a proficient level from the date that the teacher gained proficiency (proposed clause 14.4(e));
- no employee shall suffer a reduction in their annual rate of pay as a consequence of the transition (proposed clause 14.4(h)(i)); and
- an employer is not required to increase monetary obligations above the minimum annual rate and any increase may be absorbed into existing over award payments (proposed clause 14.4(h)(ii)).

[35] In support of the transitional arrangements in the consent position, the ACA/ABI submitted they are relatively simple and allow an employer to undertake the transition with a modest administrative burden, limit the time operation of the transition provisions to a period of 12 months, and provide a clear mechanism for deeming service that might have been acquired other than in the context of accreditation/registration as a proficient teacher but where the teacher has been qualified as such for more than two years.

[36] The consent position also involved a new clause (proposed clause 14.7) concerning progression between classifications which would provide that:

- a teacher on Level 1 will progress to Level 2 from the first full pay period after the teacher has been accredited as proficient;
- a teacher on Level 2 will progress to Level 3 from the first full pay period after the teacher has completed three years satisfactory service at a proficient level;
- a teacher on Level 3 will progress to Level 4 from the first full pay period after the teacher has completed six years satisfactory service at a proficient level; and
- the total number of years of service at a Proficient level will be deemed to be not less than the total service of the teacher minus two years in the case of teachers covered by the transitional provisions in the proposed clause 14.4.

[37] The IEU submitted that the proposed new clause 14.7 addresses the pay period upon which a new classification takes effect, that progression is subject to other proposed clauses addressing jurisdictions that do not have an accreditation/registration scheme or Highly Accomplished/ Lead Teacher accreditation and returning to teaching following a career break, and how to assess years of total service in respect of teachers who have transitioned pursuant to the transitional provisions in proposed clause 14.4. It submitted that the latter is necessary to determine years of service for teachers who transition to the new classification structure who have taught for many years but have only been designated proficient for the most recent of those years since the introduction of an accreditation/ registration scheme.

[38] The AEU did not object to the consent position and CCSA supported it.

[39] CER did not oppose transitional provisions being included in the EST Award, but did not agree with the consent position in this respect. Instead, it submitted that a graduate teacher who achieves proficient teacher status should be classified as proficient if they achieve this within a year or a year and a half. For transitioning existing staff, it submitted that teachers starting at Level 3 of the current structure should transition to Level 1 of the new structure and should spend two years at that level before reaching proficient status. Only an existing Level 5 teacher, it submitted, should transition to Level 2 of the new structure as they have two years of service at the graduate level.

[40] CER submitted that the progression to Levels 3 and 4 should be confined to teachers who have three years' satisfactory service at those levels. It noted that in jurisdictions that require registration, except South Australia, Victoria and the ACT, the maintenance period is five years and as such, the classification and pay structure proposed by the consent position which relies on "*service*" rather than "*satisfactory service*" may see teachers progress from Level 2 to 3 or Level 3 to 4 in circumstances where their service has not been satisfactory and where they would not maintain their proficiency if they were at the end of their maintenance period.

[41] The AFEI did not oppose transitional provisions being included in the award, however it proposed its own variation in this respect. Its variation stipulated that employees who transition to the new classification structure must meet the requirements established by the APST or, where the standards are not required in a jurisdiction, employees must meet the standards as if they applied in order to progress to the next classification level. The AFEI otherwise opposed the consent position in relation to progression within classifications on the basis that it submits that it is inconsistent with the proposed structure set out in the April

decision because it allows for progression between Levels 2-4 on the basis of “*three years satisfactory service at a proficient level*” rather than “*three years satisfactory service*” at each Level. It also opposed the provision concerning progression from Level 4 to Level 5 because it states “*Highly Accomplished or Lead Teacher accreditation/ registration or equivalent*” rather than “*Teacher with Highly Accomplished/ Lead Teacher accreditation*”. Finally, the AFEI submitted that employees should only be able to advance from Level 2 to Level 3 and Level 3 to Level 4 when the employee obtains the classification criterion relevant to progression, that being the professional career standards established by the APST at each level.

[42] The Arraballes opposed the proposed basis for progression within the new classification structure and the consent position on the basis that progression should not be tied to a teacher’s performance. Rather, they submitted, progression through the classifications solely in terms of years of service is entirely appropriate given the importance of continuity in staffing for children’s learning and development and ongoing staff retention issues in the sector. They submitted that early childhood teachers are already accountable to their employers, colleagues and to the children and families they work with and underperformance can be managed through best practice guidelines and prompt management by employers.

Consideration

[43] We broadly accept the proposition embodied in the consent position that special transitional arrangements concerning the initial classification and subsequent progression of teachers should apply in respect of two categories of employees. The first consists of currently-employed teachers (wholly or primarily early childhood teachers) who have a number of years of teaching service but have not obtained proficient accreditation/registration because it is not required in respect of their workplace. The second consists of currently-employed teachers who have relatively long periods of teaching service but have only recently obtained proficient accreditation/registration because of the date of introduction of a requirement for such accreditation/registration in the State or Territory in which they are employed. For example, in New South Wales, compulsory accreditation of early childhood teachers commenced on 18 July 2016, so if a teacher then took two years to obtain registration, they would have less than 3½ years’ service at the proficient level even if they had many years of teaching service prior to the introduction of the requirement. We also accept, in respect of these two categories of teachers, that special arrangements are required for their subsequent progression through the new classification system.

[44] We will adopt the main principles of the consent position, but with the following modifications:

- (1) The transitional arrangements will be contained in a schedule to the award rather than in clause 14 in order to facilitate their removal once they have served their function.
- (2) The transitional table proposed in the consent position will be applicable to teachers in the two categories identified above.
- (3) The transitional table will apply to those currently classified at Level 5 or above; those currently classified lower than Level 5 will be classified in accordance with the new classification structure.

- (4) We will not include the proposed clause 14.4(e), which concerns teachers who have been employed as a teacher before 1 January 2022 but are not employed as at that date. Their position can be accommodated in the “career break” provision proposed as part of the consent position, which we discuss below.
- (5) In respect of the proposed clause 14.4(g), the FW Act itself deals with when a modern award “*applies*” and “*covers*” an employee (see ss 47 and 48), and we do not consider it appropriate for an award provision to deal with this question.
- (6) We do not consider that it is necessary or appropriate for the EST Award to contain a provision dealing with the absorption of overaward payments. Clearly, nothing in the EST Award, either currently or pursuant to the variations we intend to make, requires any employer to make or to continue to make any overaward payment. Nor is it the function of modern awards to engage in the regulation of overaward payments, as was stated in the Full Bench decision in the 4 yearly review of modern awards which dealt with the then standard absorption clause in modern awards.³

“[74] Modern awards are part of the minimum safety net of terms and conditions established by the Act. It is not the function of such a minimum safety net to regulate the interaction between minimum award entitlements and overaward payments. Such matters are adequately dealt with by the common law principles of set off to which we have referred and should be left to individual employers and employees to determine. It is not necessary to include an absorption clause in modern awards in order to provide a fair and relevant minimum safety net. As the absorption clause is not a term which is necessary to achieve the modern awards objective it cannot be included in a modern award.”

- (7) We likewise do not consider it necessary to include a provision to the effect that no employee “*shall suffer a reduction in their annual rate of pay as a consequence of the transition*”. Insofar as minimum award rates of pay are concerned, the transitional arrangements will ensure that this does not occur and that anyone on minimum award rates will receive an increase in pay. To the extent that a provision of this nature attempts to regulate overaward payments, it is not appropriate for the reasons already stated.
- (8) The proposed progression provisions in clause 14.7(a)-(b) are, we consider, unnecessary since the new classification structure speaks for itself in terms of progression. Proposed clause 14.7(c) effectively doubles up with proposed clause 14.4(e), and they may be incorporated into a single transitional provision.

[45] The new schedule to the EST Award will provide:

Schedule H – Transitional Arrangements

³ [2015] FWCFB 6656, 253 IR 1

H.1 This Schedule applies to employees who are employed in a position covered by this award immediately prior to 1 January 2022 and who:

(a) do not as at 1 January 2022 hold proficient teacher accreditation/registration and are not as at 1 January 2022 subject a requirement to hold Proficient teacher accreditation/registration; or

(b) hold proficient teacher accreditation/registration.

H.2 Employees to whom this clause applies shall be classified on and from 1 January 2022 in accordance with the following table, despite clause 14.1,⁴ except where classification pursuant to clause 14.1 would result in the employee being classified at a higher level:

Classification prior to 1 January 2022	Classification on and from 1 January 2022
Level 5	Level 2
Level 6	Level 2
Level 7	Level 2
Level 8	Level 3
Level 9	Level 3
Level 10	Level 3
Level 11	Level 4
Level 12	Level 4

H.3 For the purpose of progression under the new classification structure:

(a) an employee classified at Level 2 pursuant to the table in clause H.2 shall be deemed to have reached 3 years' teaching service at Level 2 when the employee has 5 years of teaching service in total; and

(b) an employee classified at Level 3 pursuant to the table in clause H.2 shall be deemed to have reached 3 years' teaching service at Level 3 if the employee has 8 years of teaching service in total.

This Schedule remains subject to the requirements in clause 14.3 concerning satisfactory teaching service.

2.3 Application of the new classification structure in jurisdictions currently without compulsory accreditation/registration for early childhood teachers and/or Highly Accomplished/Lead Teacher accreditation

[46] The consent position addresses the issue of how the new classification structure should apply in jurisdictions which do not require accreditation/registration of early childhood teachers

⁴ The new classification structure will be placed in clause 14.1

in the proposed new clause 14.8. In summary, the consent position proposes that a teacher in such a jurisdiction will automatically be deemed to have proficient status for the purposes of the EST Award after two years' service or upon obtaining such accreditation/registration, whichever happens sooner, unless their employer has notified the Commission of a dispute as to whether the teacher has met the requirements of the APST for a proficient teacher in the first 18 months of service. The proposed clause 14.8 also permits a teacher who considers that they have equivalency to a proficient teacher prior to the completion of two years' service to utilise the provisions of the dispute resolution procedure. The proposed clause would also provide that teachers in a jurisdiction which introduces accreditation/ registration where it has not previously existed retain the classification they had before that accreditation/ registration system was introduced.

[47] In respect of progression to Level 5 of the new classification structure in jurisdictions without the Highly Accomplished/Lead Teacher (HALT) accreditation, the consent position proposes a new clause 14.9 which would provide that such progression shall occur if a teacher meets the APST for a HALT. Additionally, it would provide that a teacher may seek recognition that they meet the APST for a HALT by utilising the award dispute resolution procedure.

[48] In its submissions in support of the consent position, the IEU noted that while all states and territories require the accreditation or registration for primary and secondary teachers, there is no universal compulsory accreditation or registration schemes for early childhood teachers in Queensland, the Australia Capital Territory, Tasmania and the Northern Territory and therefore these teachers do not ordinarily obtain proficient or HALT accreditation. It further noted that it is not possible for teachers in Victoria to be recognised as a HALT. It submitted that the proposed consent variation addresses s 154 of the FW Act, which requires that the EST Award have provisions that enable teachers in those states and territories to be able to be classified in a manner that does not create a State-based difference. It submitted that the proposed clauses 14.8 and 14.9 set objective standards for progression to Level 2 (proficient teacher) and Level 5 (HALT).

[49] The ACA/ABI submitted that the consent position seeks to overcome the challenges for employers in jurisdictions that do not have accreditation or registration by providing a set of provisions to allow them to apply the new classification structure without having to carry the burden of becoming an expert in accreditation. It was also submitted that the consent position adopts a reasonable default standard for proficiency in such jurisdictions at two years following being fully qualified as a teacher but despite this, allows an employer an opportunity to challenge whether an employee is proficient and an employee to challenge whether they are proficient earlier than the two year hurdle.

[50] CCSA supported the consent variation. The AEU did not oppose the consent position in respect of the application of the new classification structure in jurisdictions which do not currently have compulsory accreditation/ registration for early childhood teachers. However, it opposed the consent position in respect of teachers seeking to progress to Level 5 of the new classification structure. It proposed an alternative variation in which a teacher in a jurisdiction that does not have HALT accreditation is able to be classified at Level 5 if they meet the requisite HALT standards, as assessed by expert teachers or specialist educators (rather than the Commission, as provided for in the consent position). The AEU proposed that the employer and employee would appoint external assessors to act in the place of a HALT certifying authority on the basis that teacher assessment recognises teachers' specialist expertise as to the standards of their own profession and ensures the process more closely reflects the process in

HALT jurisdictions. Further, in response to a submission by CER, the AEU proposed that Level 5 employees in jurisdictions that do not have HALT accreditation should also be subject to a renewal process every five years, as is the case for employees in jurisdictions that have such accreditation.

[51] CER likewise did not oppose the consent position in respect of the application of the new classification structure in jurisdictions which do not currently have compulsory accreditation/registration for early childhood teachers. In respect of teachers seeking to progress to Level 5 in the new classification structure, CER supported the ability of teachers to progress to this level in jurisdictions where HALT accreditation does not exist, but noted that the consent position does not provide for a renewal process every five years, as required in jurisdictions where HALT accreditation/registration is available. In this respect, it supported the AEU's proposed variation.

[52] The AFEI supported the APST being the objective standard, however it opposed the consent position on the basis of "*deemed proficiency*" after a certain period of service, which it submitted was directly inconsistent with the April decision's finding that there was no evidence before it to suggest that the work value of teachers increases year by year. It proposed that the employer first be responsible for assessing whether an employee has met the APST requirements for accreditation/registration as a proficient teacher or as a HALT and that only following that could an employee notify the Commission of a dispute pursuant to the award's dispute resolution procedure.

Consideration

[53] The April decision clearly contemplated as necessary the establishment of an equivalency to Proficient and HALT accreditation/registration in jurisdictions where no regime of such accreditation or registration currently exists. There is a consensus amongst the parties that the APST constitutes the objective standard by which equivalency should be assessed, but there is disagreement as to the mechanism for assessment.

[54] We do not agree with the consent position insofar as it simply deems teachers to have reached the equivalent of Proficient status after two years unless the employer notifies the Commission of a dispute pursuant to the dispute resolution procedure in clause 31 of the EST Award. There is no basis for a presumption that a teacher had met the APST for Proficient status at the two year mark, and the proposed variation would put the matter before the Commission in the first instance without there having first been any assessment by anyone as to whether the employee has met the APST. Nor, in respect of progression to Level 5, do we accept that equivalency to HALT accreditation should be established by resort to the Commission in the first instance. In both respects, it is necessary to observe that the Commission does not have the power to arbitrate disputes brought to it pursuant to clause 31 unless the parties agree to arbitration (see s 595(3) and s 739(4)). We consider that a better course is to establish the APST as the objective criterion for equivalency, and to provide for an assessment mechanism as a way to demonstrate that the criterion has been met. This is not intended to be the exclusive mechanism, and an employee will have the option of seeking court enforcement of an entitlement to progress from Level 1 to Level 2 and beyond.

[55] The proposal advanced by the AEU that an external assessor can be utilised to determine equivalency to HALT accreditation has some merit, but this can only occur by agreement between the employer and the employee. We also accept that, as with HALT accreditation,

there should be some capacity to be re-assessed for equivalency every five years, but this need only occur if the employer considers that the employee is not meeting the relevant APST. We consider that the issue of HALT equivalency should otherwise be dealt with in the same way as for Proficient teacher equivalency.

[56] Accordingly, the following new provisions will deal with the equivalency issue:

14.5 Equivalency to proficient accreditation

(a) For the purpose of Levels 2, 3 and 4 of the classification structure in clause 14.1, an employee will have the equivalent to proficient accreditation if:

(i) the employee works in a State or Territory where there is no requirement applicable to the employee to be accredited or registered as a Proficient teacher and there is capacity for the employee to voluntarily obtain such accreditation or registration; and

(ii) the employee meets the APST applicable to a Proficient teacher.

(b) For the purpose of clause 14.5(a)(ii), an employee will meet the APST applicable to a Proficient teacher if the employer is assessed by the employer as doing so.

(c) The following provisions apply to the assessment of an employee under clause 14.5(b):

(i) An assessment must be conducted by the employer if the employee requests such an assessment at any time after the completion of the first year of teaching service, provided that no more than one such request may be made in any calendar year.

(ii) An assessment must be conducted by the employer when the employee has completed two years' teaching service, even if the employee has not requested such an assessment.

(iii) If the employer fails to conduct an assessment in accordance with clause 14.5(c)(ii), the employee will be deemed for the purpose of Levels 2, 3 and 4 of the classification structure in clause 14.1 to have the equivalent to proficient accreditation.

(iv) The assessment must be conducted in consultation with the employee.

(v) The employer and employee may agree to an identified expert assessor to conduct the assessment.

(vi) If an employee is assessed as not meeting the APST applicable to a Proficient teacher and this is disputed by the employee, the employer shall seek to resolve the dispute with the employee in accordance with the dispute resolution procedure in accordance with clause 31 of this award.

This shall include, if necessary, reference of the dispute to the Fair Work Commission by the employer pursuant to clause 31.4.

14.6 Equivalency to Highly Accomplished/Lead Teacher accreditation

(a) For the purpose of Level 5 of the classification structure in clause 14.1, an employee will have the equivalent to Highly Accomplished/Lead Teacher accreditation if:

(i) the employee works in a State or Territory where there is no capacity for the employee to obtain such accreditation; and

(ii) the employee meets the APST applicable to a Highly Accomplished/Lead Teacher.

(b) For the purpose of clause 14.6(a)(ii), an employee will meet the APST applicable to a Highly Accomplished/Lead Teacher if the employer is assessed by the employer as doing so.

(c) The following provisions apply to the assessment of an employee under clause 14.6(b):

(i) An assessment must be conducted by the employer if the employee requests such an assessment at any time after the completion of the first year of teaching service at Level 4, provided that no more than one such request may be made in any calendar year.

(ii) An assessment must be conducted by the employer when the employee has completed three years' satisfactory teaching service at Level 4, even if the employee has not requested such an assessment.

(iii) If the employer fails to conduct an assessment in accordance with clause 14.6(c)(ii), the employee will be deemed for the purpose of Level 5 of the classification structure in clause 4.1 to have the equivalent to Highly Accomplished/Lead Teacher accreditation.

(iv) The assessment must be conducted in consultation with the employee.

(v) The employer and employee may agree to an identified expert assessor to conduct the assessment.

(vi) If an employee is assessed as not meeting the APST applicable to a Highly Accomplished/Lead Teacher and this is disputed by the employee, the employer shall seek to resolve the dispute with the employee in accordance with the dispute resolution procedure in accordance with clause 31 of this award. This shall include, if necessary, reference of the dispute to the Fair Work Commission by the employer pursuant to clause 31.4.

(d) If the employer considers that a Level 5 employee to whom clause 14.6(a)(i) applies is no longer meeting the APST, the employer may conduct a re-assessment of the employee in accordance with the requirement in clause 14.6(b)(iv) to (vi) once upon every five-year anniversary of the employee's progression to Level 5. If the employer does not conduct such a re-assessment, the employee will be deemed for the purpose of clause 14.1 to have equivalency to Highly Accomplished/Lead Teacher accreditation for the following five years.

2.4 Application of the new classification structure for teachers who have a career break

[57] As part of the consent position, the IEU and the ACA/ABI propose a new clause 14.10 to address how the new classification structure applies to teachers who have had a career break. The consent variation proposes that for a teacher who has had at least two years' service prior to taking a career break will be paid at Level 2 for 12 months (that is, as if they were proficient). Provided the teacher obtains or is recognised as having proficient status within that 12 month period, they will from the date of achieving that status be classified based on their years of service at a proficient level (with all years of teaching other than the first 2 years being deemed to be at that level). The provision would take effect on or after 1 January 2023 and prior to that date, the proposed transitional provisions would apply.

[58] In support of the consent variation, the IEU submitted that when a teacher takes a career break, they are unable to maintain their proficient status (in jurisdictions that have such schemes) and must reapply on their return, as proficient status cannot be maintained if a teacher is not actually teaching. It submitted that it is not uncommon for a teacher to take up to 12 months to reobtain this status. Further, it noted that a teacher returning to teaching in a jurisdiction that has only recently introduced accreditation or registration may not have previously obtained proficient status even if they have taught for many years. The IEU noted that the NSW Teachers Award has a similar provision. The ACA/ABI submitted that the proposed consent variation promotes return to the industry by allowing experienced teachers to be deemed proficient whilst working towards re-attaining accreditation on a similar basis to how the accreditation jurisdictions already operate.

[59] The AEU did not oppose, and CCSA supported, the consent position in this respect. CER did not strongly object to the consent position, noting it is not dissimilar to provisions which operate in industrial instruments, such as clauses 15.1(b) and 15.3(c)(ii) in the *NSW and ACT Catholic Systemic Schools Enterprise Agreement 2020*. It submitted that the proposed clause should also include a provision whereby a teacher who has not become re-accredited as proficient within a certain time period (e.g. 12 months) will revert to being paid as a graduate until such time as they achieve proficient status.

[60] The AFEI characterised the consent position as "*problematic*" on the basis that it does not take into account the need for the returning teacher to demonstrate current knowledge in education to maintain proficient status, how long the teacher has been absent from teaching, and in what capacity the teacher will be returning, either full or part-time.

Consideration

[61] We consider that the provision proposed in the consent position should be adopted (as clause 14.7 and subject to minor drafting modifications) except, as earlier stated, it should operate from 1 January 2022.

2.5 *Support available to new teachers seeking to obtain proficient status*

[62] The IEU and ACA/ABI propose as part of the consent position that a new clause 14.11, to provide as follows:

14.11 Support for new teachers

- (a) It is the responsibility of the individual Level 1 teacher to achieve accreditation or registration at the level of proficient teacher within the required timeframes. The employer will support the Level 1 teacher to obtain accreditation or registration at the proficient teacher standard, which will include reasonable release from ordinary duties for the Level 1 teacher where operationally practicable.
- (b) If a Level 1 teacher has concerns regarding the support being provided by the employer, they should discuss the matter with the employer. If the matter remains unresolved, the matter may be dealt with in accordance with Clause 31 - Dispute Resolution.

[63] In support of this aspect of the consent position, the IEU submitted that, in jurisdictions with mandatory accreditation or registration as a proficient teacher, proficient status must be obtained within a certain time. It relied on the example of a full-time teacher in NSW, who must achieve proficient status within 3 years of completing their teaching qualifications and noted that a teacher cannot progress to Level 2 of the new classification structure without such status. It noted that preparing the application to become proficient is time-consuming and must include documentary evidence and observation reports to the accrediting authority covering at least one of the Proficient Teacher Standard Descriptors for each of the seven Standards and demonstrate their engagement in a range of professional activities. It submitted that the expectations are the same in all sectors, including in early childhood education and care. It referred to the requirement for a teacher seeking to obtain proficient status needing access to a supervisor or mentor who has proficient status and noted the difficulty for some early childhood teachers to identify and/or access a mentor, as it is not uncommon for there to be only one early childhood teacher employed at a location. It further submitted that the staffing and ratio obligations in the sector may make it difficult to allow an early childhood teacher time away from their teaching duties to prepare their application. To this end, the consent variation proposes that employers have a balanced obligation to provide assistance to teachers to the extent that it is operationally practicable.

[64] CCSA supported the consent position and CER did not object to it.

[65] The AEU supported the consent position insofar as it provides “*reasonable release*” to a Level 1 teacher where operationally practicable. However it proposed in addition that “*reasonable release*” ought also to be extended to supervising/mentor teachers without loss of pay to the supervisor/mentor. It submitted that the Commission must ensure that modern awards provide a fair and relevant safety net of terms and conditions under the modern awards objective and that “*reasonable release*” makes available to new or proficient teachers a safety net level of support to enable the new remuneration structure to work in a fair and relevant manner. The AEU submitted that extending “*reasonable release*” to a supervising teacher where it is operationally practicable is necessary because of the significant additional time required to

mentor a Level 1 teacher and add value. Without this, it submitted, the remuneration structure will rely upon supervising teachers voluntarily assuming an extra burden in addition to their ordinary duties out of selfless collegiality or pride in profession.

[66] In support of its position, the AEU relied upon a witness statement made by Ms Cara Nightingale, the Vice President Early Childhood of the Victorian Branch of the AEU made on 14 July 2021.⁵ Ms Nightingale was not required by any party for cross-examination. In her statement, Ms Nightingale expressed the opinion that both provisionally-registered teachers (PRTs) and their mentors/supervising teachers should be provided with some reasonable release from ordinary duties because of the additional work, time and support required for a PRT to achieve full registration. Ms Nightingale described the position pertaining in Victoria whereby the Victorian Institute of Teaching (VIT) has set out a five-stage process for teachers to apply for full registration. Ms Nightingale's assessment was that a total of approximately 10 days' work over and above a PRT's normal duties was necessary to complete this process, and said on average it takes a PRT two years to progress to full registration. She said that she regularly discussed the process with PRTs and their mentors, and they reported to her that a significant workload was required for both the PRT and their mentor. In respect of mentors, Ms Nightingale's estimate was that the process requires the equivalent of 7 days of work in addition to the ordinary duties for that teacher, and she said that this made some senior teachers reluctant to act as mentors at all or for a second time. She noted that in the *Victorian Early Childhood Teachers and Educators Agreement 2020*, which applies to 383 early childhood sector employers, provision is made for up to 4 days' paid leave for PRTs and mentors for the purposes of moving to full registration, and requests for leave must not unreasonably be refused. Ms Nightingale also said that a PRT in the early childhood sector may face challenges in accessing a mentor because many workplaces are small, employ few teachers and frequently only roster one teacher to work at a time, unlike in schools. This may mean that a mentor needs to be found from another employer.

[67] The ACA/ABI opposed the AEU's proposal. It was submitted that the proposal could apply in two distinct scenarios: first, where the employer had encouraged or supported one of their teachers to become a mentor/supervisor for use in the employer's business or, second, where a teacher has chosen to become a mentor/supervisor and makes themselves available at large for different employers. The ACA/ABI submitted that it was questionable whether the award needed to deal with the first scenario, since the employer and the employee would no doubt resolve any operational issues arising. As to the second scenario, it was submitted that the award should not deal with this issue taking into account that a decision to become a mentor/supervisor does not necessarily arise in the context of the employment relationship, concern the work the teacher otherwise does for their employer, and may concern teachers in an entirely unrelated business. In those circumstances, ABI submitted, a requirement for an employer to provide paid release time to a teacher who is also a mentor/supervisor would not align with the notion of a fair and relevant minimum safety net, since it would involve an employer paying an employee to do something in another employer's business without the employer's consent which is outside the duties and role for which the employee was hired.

[68] ABI relied on two witness statements, the makers of which were not required for cross-examination. The first was made by Rhonda Drake, the approved provider, director and owner

⁵ Statement of Cara Nightingale dated 14 July 2021 (Exhibit 137)

of Snuggles Early Learning Centre in Victoria, on 2 August 2021.⁶ Ms Drake is registered as both a primary school teacher and an early childhood teacher, is a mentor for PRTs, and has mentored approximately 4 PRTs and is currently mentoring another 7. In her witness statement, Ms Drake described the process by which she became a mentor, including that she was asked by the VIT to become a mentor and undertook a 2-day workshop conducted by the VIT. Ms Drake said that she “*believe[d] strongly in ‘giving back’ to the profession*” and that becoming a mentor has allowed her to mentor early childhood teachers in the Snuggles business and also at other centres. Ms Drake said she managed to ‘*juggle*’ her role as a mentor with her other duties and that, in her experience, early childhood teachers who had been through the process did not require time off other than when visiting teachers to observe practice or having scheduled discussions with herself as mentor. She also said that the evidence and documentation required is not arduous. Ms Drake went through the five-stage process, and her estimate was that only about 4 days were required “*off the floor*” to complete the process. Her opinion was that “*this is a personal formal accreditation and thus should be viewed as such by the teacher*”.

[69] The second witness statement was made by Ms Rita Totinto, the approved provider, CEO and owner of three long day-care centres in NSW.⁷ She is qualified as an early childhood teacher and works as such for three days per week. Ms Totinto said that it is the responsibility of the individual teacher to find a supervisor and to achieve proficient accreditation, and it was up to the teacher to contact the NSW Education Standards Authority (NESA) to be assigned a supervisor. Ms Totinto, of her own initiative, had contacted the NESA in 2018 about becoming a supervisor, but was informed that this would be too complex for a small business operator to undertake and that it was easier to assign a mentor. She said in her business, she does not require any teacher to become a supervisor, and she does not consider it prudent as a business owner to release from duty a teacher acting as a supervisor for someone else outside of her centres since this would be a significant disruption to her business and cause additional costs with no benefit to her business. Ms Totinto said that, in her experience, a lot of the work required to achieve accreditation can be done while the early childhood teacher is at work, and her teacher who went through the accreditation process did not have any release from duty.

[70] The AFEI opposed the inclusion of any mentoring clause.

Consideration

[71] It is clear that, under the new classification structure which will be implemented arising from the April decision, the capacity of a teacher to obtain accreditation as a proficient teacher is a significant matter since such accreditation is necessary in order for a teacher to progress from Level 1 to Levels 2, 3 and 4. However, in our view, the responsibility to obtain (and maintain) professional accreditation/registration is a fundamental characteristic of being in a professional occupation, such that the primary burden for obtaining proficient accreditation must fall on the teacher themselves. In this respect, we consider that new clause 14.11 proposed by the IEU and the ACA/ABI as part of the consent position is correct in principle. The obligation proposed for the employer to support a graduate teacher in obtaining proficient accreditation, including by providing reasonable release from ordinary duties where practicable, appears to us to strike a fair and appropriate balance as to the extent of assistance which is to be provided by the employer.

⁶ Statement of Rhonda Drake dated 2 August 2021 (Exhibit 138)

⁷ Statement of Rita Totinto dated 30 July 2021 (Exhibit 139)

[72] As to the AEU's proposed further variation, it may be accepted that the evidence before us in the primary hearing showed that, in early childhood education and in particular in regional areas, graduate teachers are likely to have difficulty in obtaining a mentor/supervisor within their workplace and will have to look further afield. This is primarily a function of the small and dispersed nature of early childhood centres, where there is likely only to be a small number of teachers at any given centre. This may result in senior teachers acting as mentor/supervisor for teachers employed in other businesses.

[73] It is obviously important for the teaching profession in the early childhood sector that senior teachers, as Ms Drake put it, 'give back' to the profession by acting as mentors/supervisors in this way. However, it does not follow that it would be fair for the employer of any such senior teacher acting in this way to be required to bear the cost of this by releasing the teacher from ordinary duty, in circumstances where it is not proposed that the employer's consent to the teacher taking on the mentor/supervisor's role would be required and where the employer may not employ the teacher who is being mentored/supervised and thus would derive no benefit from the arrangement. Accordingly, we will not accede to the AEU's proposed further variation.

[74] The EST Award will be varied to insert the proposed clause 14.11 in the consent position (as clause 14.8). However, the parties should engage in continuing review of the practical capacity of graduate teachers to obtain proficient accreditation/registration such as to enable progression from Level 1 to Levels 2-4. If it proves to be the case that there are structural impediments to obtaining proficient accreditation/registration so that graduate teachers are unable to progress to the higher levels in the classification structure as we intend they should, then it may be necessary for the EST Award to be varied further to overcome this.

3. Educational Leader allowance

[75] In respect of the Educational Leader allowance as set out at paragraph [658] of the April decision, the consent position provides for the allowance to be payable to Educational Leaders in addition to any Director's allowance (where applicable). The proposed variation stipulates that where the position of Educational Leader is shared, the payments may also be shared and in circumstances where a centre operates less than five days a week, the allowance is reduced *pro rata*. In support of the consent position, the IEU submitted that the proposed variation clarifies that where the responsibilities of being Educational Leader are shared with another teacher or teachers, the allowance is similarly shared, however this does not mean that merely because a teacher works part-time hours the allowance is to be paid *pro rata*. It submitted that the full allowance is payable to the person who bears the responsibilities of Educational Leader regardless of their working hours, unless the early childhood facility operates less than five days a week, in which case the allowance is payable on a *pro rata* basis. Should an Educational Leader also be a Director, the proposed consent variation stipulates that they are entitled to both allowances.

[76] The CCSA and CER supported the consent position and the AEU did not object to it.

[77] The AFEI filed a submission opposing the consent position. It submitted that it was unclear why the allowance is stated as \$3,845.14 per annum in the proposed consent variation when applying the national minimum wage increase of 2.5% to \$3,302.46 as set out in the April decision which equates to \$3,385.02. Further, it submitted that part-time employees should get

a *pro rata* entitlement as is the case with the director's allowance pursuant to clause 19.2 of the EST Award.

Consideration

[78] We accept the consent position in relation to the quantum of the Educational Leader allowance. In the April decision at [658], we determined that the allowance should be equal to the Level 1, category C leadership allowance currently provided for in clause 19.3(g) of the EST Award. Clause 19.3(g)(i) provides that the quantum of the allowances is based on a percentage of the “*standard rate*”, which is defined in clause 2 to mean “*the minimum annual rate applicable to Level 1 in clause 17.1*”. No party suggested that we should change this definition of “*standard rate*”, or remove the linkage between the leadership allowances and the “*standard rate*”, by reason of the new classification structure and its redefined Level 1. The percentage amount for the Level 1, category C leadership allowance is 0.63%. The proposed variations advanced as part of the consent position correctly quantifies the allowance at \$3,845.14 per annum (that is, 0.63% of the Level 1 classification rate of \$61,034, as adjusted in accordance with the most recent Annual Wage Review).

[79] We also accept that there should be a pro-rata adjustment of the allowance for employees acting as Educational Leader who perform the role on less than 5 days per week (whether because they are a part-time employee, or share the role with another employee, or work in a centre that is not open 5 days per week). The pro-rata adjustment should be on a daily basis, since the evidence in the main part of the proceedings did not indicate that teachers are required to act as Educational Leaders on a part-day or hourly basis. The consent position involves a new clause 19.4 which deals with the Educational Leader allowance. We do not consider that proposed clauses 19.4(e) and (f) deal with pro-rata payment situation with sufficient precision. These proposed provisions will be replaced with the following:

- (e) Where an employee is required to act as educational leader for less than 5 days per week, the annual allowance prescribed by clause 19.4(c) will be payable on a pro rata basis calculated by reference to the number of days per week the employee is required to act as educational leader.

4. Scope of award coverage – definition of “teacher”

[80] In addition to the consent variation proposed by the IEU and the ACA/ABI, CCSA proposed the amendment of the definition of “*teacher*” in clause 2 of the EST Award to extend its coverage to include employees with conditional teacher accreditation working in an early childhood education service. This would encompass some diploma-qualified educators who are taken to be teachers for the purposes of the *Education and Care Services National Regulations 2011* (National Regulations) after they have completed 50% of an approved early childhood degree. CCSA proposed that the new Level 1 classification should only be applicable to these individuals.

[81] The IEU submitted that the proposed amendment would not make a practical difference since any person employed as a teacher who has conditional accreditation/registration would be a teacher for the purposes of the National Regulations. The ACA/ABI opposed CCSA's amendment on the basis that it sought to extend the coverage of the EST Award beyond “*teachers*” as defined in the award, the National Regulations are not applicable in all jurisdictions or are due to expire within the next two years and, if CCSA wished to prosecute

the issue, it should be done by filing an application under s 158 of the FW Act in the normal and proper manner.

Consideration

[82] Clause 4.1 of the EST Award provides that it covers employers in the school education industry and the children’s services and early education industry and their “employees”. Clause 2 defines “employee” to mean, relevantly, “a person employed as a teacher” in either of the industries identified in clause 4.1. “Teacher” is defined by clause 2 to mean:

teacher means a person employed as such by a school, children’s service or early childhood education service and who performs duties which include delivering an educational program, assessing student participation in an education program, administering an education program and performing other duties incidental to the delivery of the education program. So as to remove any doubt, teacher includes a teacher in a senior leadership position, but not a principal or deputy principal.

[83] To the extent that CCSA’s proposed change to the definition of “teacher” would expand the coverage of the EST Award, this would presumably come at the expense of the *Children’s Services Award 2010* which otherwise covers the children’s services and early education industry. Section 163(1) of the FW Act provides, relevantly, that the Commission must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the Commission is satisfied that they will instead become covered by another award “that is appropriate for them”. We do not consider that we have sufficient material for us to reach the requisite state of satisfaction that the EST Award is “appropriate” for the category of employees to which the CCSA refers (as compared to the *Children’s Services Award 2010*). Indeed, these proceedings have not been concerned with any issues of the scope of coverage of the EST Award, so that there has been no evidence addressing the issue. Further, the current phase of the proceedings is concerned with the implementation of the April decision, and the issue now raised by the CCSA does not appear to us to have any real connection to the April decision. Accordingly, we will not make the variation proposed by the CCSA. This issue may be pursued by way of a separate application made pursuant to s 158(1) of the FW Act.

C. Conclusion and next steps

[84] We consider that the variation to the EST Award to implement the new remuneration structure determined in the April decision and further articulated in this decision is necessary to meet the modern awards objective in s 134(1) and would be consistent with the minimum wages objective in s 284(1). In respect of s 134(1), we set out our consideration of the matters specified in paragraphs (a)-(e) and (g) in [661] of the April decision. Having regard to the matters identified in [19] above, we consider that paragraphs (f) and (h) are to be assigned neutral weight. As to s 284(1), we set out our consideration of the matters in paragraphs (b)-(e) at [663] of the April decision. In relation to paragraph (a), we again assign this matter neutral weight having regard to our conclusion in [19] of this decision.

[85] A draft determination to vary the EST Award to give effect to the April decision and this decision shall be published in conjunction with this decision. Interested parties will be allowed 14 days from the date of this decision to file any submission they wish to make about the terms of the draft determination. After any such submissions are received, the presiding

member shall, if necessary, conduct a conference of the parties to resolve any outstanding issues.



VICE PRESIDENT

Appearances:

I Taylor SC with L Saunders of Counsel on behalf of the Independent Education Union.

M Champion of Counsel on behalf of the Australian Education Union.

N Ward on behalf of the Australian Childcare Alliance and Australian Business Industrial.

R Warren of Counsel on behalf of the Australian Federation of Employers and Industries.

J Gunn on behalf of Community Connections Solutions Australia Ltd.

C Owens on behalf of Catholic Employment Relations Ltd.

C Rawson on behalf of the Commonwealth.

I Arrabalde on behalf of herself and Ms E Arrabalde.

Hearing details:

2021.

Sydney (via video-link):

23 August.

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Attachment A – Proposed variations to give effect to the consent position

2. Definitions

...

full registration has the same meaning as Proficient accreditation.

Proficient accreditation means accreditation as a Proficient Teacher that meets the requirements for full registration by a body which oversees accreditation and recognition of teachers' professional capacity in any State or Territory. A reference to full registration is a reference to Proficient accreditation.

...

14. Classifications

...

14.2 Classification on Appointment

On appointment, an employee will be classified according to the criteria set out below and paid in accordance with Clause 17 - Minimum Rates.

Classification	Criteria
Level 1	Graduate Teacher and all other teachers (as defined) including those holding provisional or conditional accreditation /registration
Level 2	Teacher with Proficient accreditation/registration or equivalent
Level 3	Teacher with Proficient accreditation/registration or equivalent after three years' satisfactory service at a proficient level
Level 4	Teacher with Proficient accreditation/registration or equivalent after six years' satisfactory service at a proficient level
Level 5	Teacher with Highly Accomplished / Lead Teacher accreditation / registration or equivalent

14.3 Satisfactory Service

(a) All service will be deemed satisfactory for the purposes of subclause 14.2 unless the employer disputes for a given year that it is satisfactory by notifying the Fair Work Commission of the dispute pursuant to Clause 31—Dispute Resolution following a formal review and the provision of specific reasons.

(b) Service is satisfactory if the teacher has complied with the requirements of the Australian Professional Standards for Teachers (APST).

14.4 Transitional Provisions

(a) On 1 January 2022 [“the classification structure transition date”], the classification and pay structure was varied from a twelve level incremental system to a five level

system based on accreditation/registration status and teaching service at a proficient level.

(b) An employee shall transition to the new classification structure based on the following table:

Classification prior to the classification structure transition date	Classification after the classification structure transition date
Level 1	Level 1
Level 2	Level 1
Level 3	Level 1
Level 4	Level 1
Level 5	Level 2
Level 6	Level 2
Level 7	Level 2
Level 8	Level 3
Level 9	Level 3
Level 10	Level 3
Level 11	Level 4
Level 12	Level 4
No transition	Level 5

(c) Provided that if an employee covered by this Award prior to the classification structure transition date is better off being classified pursuant to subclause 14.2 then those provisions apply at the point of transition.

(d) An employee who is employed after 1 January 2022 and before 1 January 2023 who was, prior to the classification structure transition date, qualified as a teacher or who held teaching accreditation / registration status, shall be classified in accordance with subclause 14.4 (b) and the provisions in Schedule H, or in accordance with subclause 14.2, whichever is the more beneficial.

(e) For employees who transition pursuant to 14.4 (b) or (d), all service, in excess of two years, will count as service at a proficient level where that service has followed the attainment of a recognised teaching qualification. Provided that where a teacher gained proficiency within two years, all service will be at a proficient level from the date that they gained proficiency.

(f) Following transition pursuant to this subclause 14.4, such employees will progress in accordance with subclause 14.7.

(g) To avoid doubt, these transitional provisions apply to employees who are covered by the award on the relevant dates, even if the award did not apply to them on the relevant dates.

(h) When transitioning to the new classification structure:

(i) no employee shall suffer a reduction in their annual rate of pay as a consequence of the transition; and

(ii) an employer is not required to increase monetary obligations above the relevant minimum annual rate and any increase may be absorbed into existing over award payments.

14.5 Recognition of previous service

(a) Service as a part-time teacher will normally accrue on a pro rata basis according to the percentage of a full-time teaching load undertaken in any year. However, subject to clause 11.3, where the hours are more than 90% of a fulltime load, service will count as a full-time year.

(b) In the case of a casual employee, the equivalent of a full-time year of teaching service is 200 full casual days in Australian schools.

(c) In the case of an early childhood/preschool teacher, the following will count as service:

(i) teaching experience in preschools, kindergartens, multi-purpose centres, early intervention services, long day care centre and other similar services;

(ii) teaching experience of children from 4 to 8 years (or in the infants department) of a school registered and/or accredited under the relevant authority in each state or territory;

(iii) service as a lecturer in early childhood education or child development, as a child development officer or equivalent; and

(iv) service as a diploma qualified childcare worker, at the rate of one year for every 3 years' service up to a maximum of 4 years.

(d) For the purpose of this award teaching experience does not include employment as a teacher in a TAFE program (unless the teacher is employed to teach a Vocational and Educational Training (VET) program) or in an English Language School.

14.6 Evidence of qualifications and teaching experience

(a) On engagement, the employer may require that the employee provide documentary evidence of qualifications and teaching experience.

(b) If an employer considers that the employee has not provided satisfactory evidence, and advises the employee in writing to this effect, then the employer may decline to recognise the relevant qualification or experience until evidence is provided. The employer will not unreasonably refuse to recognise the qualifications or teaching experience of an employee.

(c) Where an employee has completed further teaching experience with another employer (for example during unpaid leave) or additional qualifications after

commencement of employment, they will be entitled to be classified accordingly and back paid from the date of completion of the experience or qualifications, provided the employee provided satisfactory evidence to the employer within 3 months of completion. In all other cases the employee will be classified and paid from the date satisfactory evidence is provided.

14.7 Progression

(a) Subject to subclauses 14.8-14.10, an employee on Level 1 will progress to Level 2 from the first full pay period after the teacher has been accredited as Proficient.

(b) Subject to subclauses 14.8-14.10, progression from Level 2 to Level 3 and Level 3 to Level 4 will occur from the first full pay period after the employee has completed the years of service set out on subclause 14.2.

(c) Provided however the total number of years of service at a Proficient level will be deemed to be not less than the total service of the teacher minus two years in the case of teachers covered by the transition provisions pursuant to subclause 14.4.

14.8 Jurisdictions without compulsory accreditation / registration of Teachers

(a) Where a State or Territory has not introduced a requirement for teachers (or a subset of teachers) to be accredited as proficient/ fully registered, such teachers in these jurisdictions will:

(i) be deemed Proficient for the purposes of this Award either after two years of service or on obtaining proficient accreditation/full registration, whichever occurs sooner; and

(ii) count all service beyond the first 2 years of service, or after they obtain full registration, (whichever is the greater) as service at a proficient level for the purposes of subclause 14.2.

(b) A teacher will not be deemed proficient after 2 years pursuant to subclause 14.8(a)(i) if during the first 18 months' service the employer notifies the Fair Work Commission of a dispute pursuant to Clause 31 - Dispute Resolution as to whether the teacher has met the requirements of the Australian Professional Standards for Teachers (APST) for a proficient teacher. Such a dispute may only be notified following a formal review and the provision of specific reasons and a reasonable period to respond.

(c) A teacher who forms the view that they have equivalency to a proficient teacher before they have completed 2 years of service, can utilise the provisions of Clause 31 - Dispute Resolution to seek recognition that they have reached Proficient status.

(d) A teacher in a State or Territory which does not have a method to obtain accreditation as a proficient teacher has that status if they meet the requirements of the Australian Professional Standards for Teachers (APST) for a proficient teacher.

(e) These provisions also apply if a State or Territory introduces a requirement for teachers (or a subset of teachers) to be accredited as proficient/ fully registered after 1

January 2022 in respect of teachers who, as at that date the requirement was introduced had commenced employment.

14.9 Progression to Level 5

(a) A teacher in a State or Territory which does not have a method to obtain accreditation as a highly accomplished or lead teacher can utilise the provisions of Clause 31 - Dispute Resolution to seek recognition that they meet the requirements of the Australian Professional Standards for Teachers (APST) for a highly accomplished or lead teacher.

(b) A teacher in a State or Territory which does not have a method to obtain accreditation as a highly accomplished or lead teacher has that status if they meet the requirements of the Australian Professional Standards for Teachers (APST) for a highly accomplished or lead teacher.

14.10 Returning to Teaching

(a) A teacher with at least two years' service who was previously registered / accredited as Proficient or who was not required to be registered/accredited as Proficient who:

(i) is returning to teaching following a break of service, where they have not obtained or maintained proficient status; or

(ii) otherwise does not hold proficient accreditation/registration status;

shall be classified on Level 2 for one year full-time equivalent teaching service, during which period the teacher may apply for proficient teacher accreditation or registration or apply for mutual recognition (in the case of an interstate teacher) with the relevant teacher accreditation authority. Upon attaining proficient teacher accreditation or registration, the teacher will progress to the relevant Level between Level 2 and Level 4 based on their service at a proficient level. All service, in excess of two years, will count as service at a proficient level where that service has followed the attainment of a recognised teaching qualification.

(b) If the teacher does not attain proficient teacher accreditation or registration within the one year full-time equivalent teaching service, the teacher will be paid at Level 1 until the teacher achieves proficient teacher accreditation; on such date the teacher will progress to the relevant Level between Level 2 and Level 4 based on their service at a proficient level. All service, in excess of two years, will count as service at a proficient level where that service has followed the attainment of a recognised teaching qualification.

(c) Subclause 14.10 applies on or after 1 January 2023. Prior to that date, the provisions of subclause 14.4 apply.

(d) If a teacher to whom this subclause 14.10 applies is employed in a State or Territory that has not yet introduced a requirement for teachers (or a subset of teachers) to be accredited as proficient/ fully registered, then subclause 14.8 applies.

14.11 Support for new teachers

(a) It is the responsibility of the individual Level 1 teacher to achieve accreditation or registration at the level of proficient teacher within the required timeframes. The employer will support the Level 1 teacher to obtain accreditation or registration at the proficient teacher standard, which will include reasonable release from ordinary duties for the Level 1 teacher where operationally practicable.

(b) If a Level 1 teacher has concerns regarding the support being provided by the employer, they should discuss the matter with the employer. If the matter remains unresolved, the matter may be dealt with in accordance with Clause 31 - Dispute Resolution.

...

19.4 Wage-related allowances—educational leader

(a) Clause 19.4 applies only to a teacher in the children's services and early childhood education industry.

(b) The allowance is based on a percentage of the standard rate.

(c) An educational leader's allowance of \$3845.14 per annum will be paid to an employee who is required to discharge the responsibilities of the educational leader under Regulation 118 of the National Regulations.

(d) The educational leader's allowance is payable in addition to any director's allowance payable under Clause 19.2.

(e) Where the position of educational leadership is shared, the payments may also be shared.

(f) In respect of an early childhood facility that operates less than 5 days a week, the allowance payable is reduced pro rata.