TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT SAUNDERS

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

Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch
(AM2018/9)
Educational Services (Teachers) Award 2020

Sydney

10.10 AM, MONDAY, 23 AUGUST 2021

Continued from 04/06/2021

PN769

VICE PRESIDENT HATCHER: I'll take appearances. Mr Taylor, Ms Saunders, you appear for the IEU.

PN770

MR TAYLOR: Yes, if it please.

PN771

VICE PRESIDENT HATCHER: Mr Champion, you appear for the AEU.

PN772

MR CHAMPION: Yes, I do, your Honour.

PN773

VICE PRESIDENT HATCHER: Mr Ward, you appear for the Australian Childcare Alliance and ABI.

PN774

MR WARD: Yes, your Honour.

PN775

VICE PRESIDENT HATCHER: Mr Warren, you appear for AFEI.

PN776

MR WARREN: Yes, your Honour.

PN777

VICE PRESIDENT HATCHER: Mr Owens, you appear for Catholic Employment Relations.

PN778

MR OWENS: Yes, your Honour.

PN779

VICE PRESIDENT HATCHER: Mr Gunn, you appear for Community Connections Solutions Australia Limited.

PN780

MR GUNN: Yes, your Honour.

PN781

VICE PRESIDENT HATCHER: Mr Rawson, you appear for the Commonwealth. I think there's some connection - - -

PN782

MR RAWSON: Yes, your Honour.

PN783

VICE PRESIDENT HATCHER: Yes, thank you, Mr Rawson. And Ms Arrabalde, you appear on your own behalf. Is that correct?

PN784

MS ARRABALDE: Yes, your Honour.

PN785

VICE PRESIDENT HATCHER: Right.

PN786

MR TAYLOR: Thank you.

PN787

VICE PRESIDENT HATCHER: First of all, there's a number of witness statements that have been filed and we've been informed that none of the witnesses have been required for cross-examination, so I'll proceed to mark those statements. Firstly, Mr Taylor, you tender the statement of Carol Matthews dated 16 August 2021.

PN788

MR TAYLOR: Yes, I do.

PN789

VICE PRESIDENT HATCHER: That statement will be marked exhibit 136.

EXHIBIT #136 WITNESS STATEMENT OF CAROL MATTHEWS DATED 16/08/2021

PN790

Mr Champion, you tender the statement of Cara Nightingale dated 14 July 2021.

PN791

MR CHAMPION: Yes, I do, your Honour.

PN792

VICE PRESIDENT HATCHER: That will be marked exhibit 137.

EXHIBIT #137 WITNESS STATEMENT OF CARA NIGHTINGALE DATED 14/07/2021

PN793

And then, Mr Ward, you have two statements. Do you tender the statement of Rhonda Drake dated 2 August 2021?

PN794

MR WARD: I do, your Honour.

PN795

VICE PRESIDENT HATCHER: That's exhibit 138.

EXHIBIT #138 WITNESS STATEMENT OF RHONDA DRAKE DATED 02/08/2021

PN796

And the statement of Rita Totinto dated 30 July 2021 will be exhibit 139.

PN797

That's all the evidence, as I understand it. Yes, all right. Now, first of all we have the consent position advanced by the IEU and the Australian Childcare Alliance. Mr Taylor and Mr Ward, it's up to you, but the first step might be if you can step us through the proposed variation and just address how each aspect of it addresses the decision we made in April and any contested issues. Is that convenient? Do you wish to do that, Mr Taylor?

PN798

MR TAYLOR: Yes, I'm content to do that. The consent position itself is found as an attachment to the IEU's first submissions - I think the ACA's as well, for that matter, and it is put forward by the two parties that had principal carriage of the proceedings below as a consent position. It's also adopted by Community Connections Services Australia, although they submit for one additional matter, and, other than two specific issues, also agreed by the AEU. To some extent, the CER has departed from it, but in large parts also agrees with it.

PN799

If one goes to that consent position document, it's marked up in the version that was attached to our submissions with new text in red and underlined, and the first relevant issue between the parties is operative date, which is found at 14.4A(1) at the 1 January 2022 as part of the transitional provisions but would otherwise form part of the order of the Commission.

PN800

Vice President, I'm in your hands. What I intended to do is, when I came to each issue, make some short submissions as to why the proposal put forward by the consent parties would be adopted, identify the extent to which any party departs from it and then put some short submissions as to why the consent position should be preferred. Alternatively, I can simply identify the nature of the changes first and then go back and deal with what appear to be the issues.

PN801

VICE PRESIDENT HATCHER: I think the latter course would be preferable, that is, it would just be useful if you could explain the detail of what's in the variation, for example, the way the transitional provisions work, the definitions, et cetera, et cetera.

PN802

MR TAYLOR: Of course. So maybe the starting point then is to go to clause 14.2, and what the Commission will see there is a classification structure that is drawn from the proposal in the decision. It does have some minor changes to it.

PN803

They are, firstly, to add the word 'registration'. That is, outside of New South Wales teachers are not - they're not accredited as proficient, they are registered as proficient, and hence even though in an earlier definition clause the definition of

proficient accreditation picks up registration, it was thought of as useful to make that clear in this clause.

PN804

The second change is that instead of the Commission's approach of levels 3 and 4 being defined to be after three years' satisfactory service at the previous level, the words are 'at a proficient level'. That is done in circumstances where there will be teachers who have only obtained the formal recognition of proficient level in relatively recent times.

PN805

So in New South Wales, for example, it wasn't mandatory to be accredited at proficient level until 2018, at which point teachers who had been teaching prior to the introduction of the accreditation system were all deemed to be proficient.

PN806

The second reason it arises is because at the point of transition, employees at that point will have a particular level. For example, if one looks at the transition table, if they are currently at level 7 they will come across at level 2, but they have in fact a level of service which incorporates proficient service over a number of years that would mean that they are no more than 12 months off becoming level 3.

PN807

This language means that they will go across with the level of service they have had at proficient level so that they can then move to the next level when they've had three years of service at the proficient level.

PN808

That's to be contrasted to the proposal as we understand the AFEI will put forward that someone at level 7 would go to level 2 on transition date, then have to wait three more years before they would go to what would be the equivalent under the current award of level 8, which will translate to level 3, which does not appear to be something that would - well, what it would actually mean is employees would go backwards by way of pay in those following couple of years until they actually got to level 3 under the AFEI proposal.

PN809

Let me just pause there for a moment while I just go back to my notes. The next clause deals with satisfactory service, and as the Commission will have identified from reading submissions, this is a phrase that has generated some differences of view.

PN810

The decision itself suggests that the proposed phrase in the classification clause contained within the decision was drawn from the New South Wales teachers award. That award has a structure that involves the concept of satisfactory service being in effect defined and a very strict procedure as to how it is to be determined, a procedure that one might consider to be effective and practical in respect of a large single employer like the New South Wales government teaching service. It uses objective criteria, namely the APST, and it is a system which, as a matter of fact, results in less than .1 per cent of teachers being considered unsatisfactory.

PN811

There is in the consent parties' view a need for two things. One is some objective criteria against which the concept of satisfactory service can be considered, and that is contained in 14.3(b), that is, against the Australian Professional Standards for Teachers.

PN812

The second thing that is seen to be convenient, as the ACA has recently submitted, something its members prefer, is a deeming provision which deems service satisfactory subject to, if an employer wishes to consider otherwise, a process by which the employer identifies that it is not satisfactory, and the matter is then capable of and is in fact identified as a dispute which can be brought before the Commission.

PN813

The need for some provision is considered necessary so that one can at any point in time determine whether in fact an employee, a teacher, is entitled to a particular rate of pay. There is the obvious risk otherwise that an employer does not in fact determine whether someone is or isn't satisfactory, or, if they do, doesn't record it, or doesn't communicate it, and as such, some provision which in effect means that for each year that a teacher is employed they are said to have that service unless some specific and clearly objectively identifiable step has been taken is considered to be the appropriate way to address the matter.

PN814

There are parties who put other submissions, of course, and we'll leave it for them to do so, including submissions that the satisfactory service should be removed altogether, or alternatively, on the AFEI's approach, that satisfactory service should be determined entirely at the subjective level of the employer and in a manner which doesn't apparently create any obligation for an employer to actually make any assessment, which would lead to some uncertainty as to whether employees have in fact become entitled to a higher rate of pay.

PN815

Turning to the - - -

PN816

VICE PRESIDENT HATCHER: So, Mr Taylor, just dealing with your 14.3(b) - I'm sorry, there's probably some background noise here because my windows are being cleaned. Is that simply the requirement to maintain, in substance, accreditation or registration? That is, if you don't comply with the APST, what's the consequence of that?

PN817

MR TAYLOR: Each state has its own registration or accreditation requirements, but they are all, as your Honour's question implicitly asks me, underpinned by a requirement to maintain the APST, but they extend beyond those requirements. How often one has to make application varies from one end, in South Australia, every year, to the other end, in New South Wales and I think one other state, every five years.

PN818

This assessment is to be made apparently every year and not necessarily, of course, at the same time as an assessment that would be made by an accreditation authority. The accreditation authority is making the assessment against an application process that is completed by a teacher. The employer, even if using the same objective criteria, will be making that assessment based on their understanding of the criteria, but in both cases the objective standard is the APST.

PN819

I note that CER in its latest submissions have agreed that satisfactory service ought be one that is tested against an objective standard, namely the APST, which means, I think, that all parties are of that view other than the AFEI.

PN820

If I turn to the transitional provisions, all parties agree that they are needed and all parties now agree on the transition table which is found at 14.4(b), and that includes the CER, who in its first submission did identify some opposition to a table, but the table in fact that they were critiquing was not the draft that ultimately found its way into the consent position.

PN821

The way in which the transition works is, as I identified earlier, employees would go across based on this agreed table to a new level, but their service at a proficient level will be recognised so that if they have gone across with effectively one year to go, for example, before they would have got to the next level, then that prior service will in fact be recognised and they will then go across in that further year.

PN822

VICE PRESIDENT HATCHER: What if there is some documented performance problem at the time of transition - for example, a person's on a performance improvement plan or something of that nature and they're about to hit an anniversary?

PN823

MR TAYLOR: The consent position would see all - and this, I might add, includes the AFEI, as I understand it. The consent position is that on the transition date, those who are employed would go across to the new classification. The question as to what would happen at the date upon which they might be entitled to move to a new level is dealt with by the satisfactory service provision at 14.3.

PN824

VICE PRESIDENT HATCHER: All right.

PN825

MR TAYLOR: Other things I should mention about the transitional provisions, the first of which is the transitional provisions include at subparagraph (e) a deeming provision, so that one understands at the point of transition how much service at a proficient level an employee has, and it deems that all service beyond the initial two years of service is at that level.

PN826

That is for this reason. New teachers who have commenced over the last - in different states it varies, but approximately the last eight years, were required to have accreditation on commencement but teachers who commenced teaching at earlier times were not, and accreditation to a proficient standard became mandatory at different points in different states, but to take New South Wales for an example, it only became mandatory in 2018.

PN827

So as we understand the way the AFEI would propose it, one only counts service at a proficient level from the date that an employee became recognised as proficient. Teachers were deemed as proficient in 2018 in New South Wales, but there wasn't at that point any deeming of how many years they have been proficient.

PN828

Hence, if one is going to have a system in on a transitional basis which recognises teachers who have been teaching from earlier points in time, there is a need, the consent parties contend, for some method to deem and count that earlier service so one knows at what level they would be and what level they would be moving to.

PN829

The second thing that I wanted to identify in respect of subparagraph (d) is that this transition table applies not just from the commencement date, which the consent parties submit should be 1 January 2022, but for the following 12 months, and that recognises that there will be a cohort of teachers who are not employed on 1 January 2022. They are between jobs.

PN830

They may have finished a job in one school in December and they may commence in a new school in February or thereafter, and it is seen as sensible that any teacher who commences employment during the course of the 12 months would also have the transition table apply to them in the same way.

PN831

Subpara (c) - I know I'm going backwards, I apologise - is a simple provision which recognises that no teacher should be worse off as a result, something that I think the AFEI would suggest be deleted, and (h) addresses, in effect, that for the employer, the converse side of that coin, it allows for over-award payments to be absorbed if there is to be any change arising from the award classification of an employee.

PN832

Can I then move forward to 14.5. (a) is removed because it is part of the previous classification system, and (d) appears to be new but in fact has just been moved from a different part of the award. Someone might send me a note in a moment as to where that was, and it's been moved to here. It's not a new provision.

PN833

Progression in 14.7 is to be really read with 14.2, and sets out in hopefully plain language the way in which one progresses within the classification system, along the lines of the way I described earlier.

PN834

We then move to 14.8, jurisdictions without compulsory accreditation or registration of teachers. As the Bench's decision recognised - I just pause. I have got that note. 14(d) was part of 14.5(a). So part of the deletion of (a) is in fact not a deletion but moving the text to (d).

PN835

So moving now to 14.8, jurisdictions without compulsory accreditation, as the Full Bench decision recognised, whilst all primary and high school teachers now are subject to compulsory accreditation or registration requirements, there are jurisdictions in respect of whom early childhood teachers either don't currently allow registration, and that's the case in the ACT and Tasmania, or allow teachers to register but don't require it in out of school settings, and that's the case in Queensland and the Northern Territory.

PN836

There is also, which is jumping ahead to 14.9, an issue in Victoria, that whilst Victoria has a full registration system, they don't currently have a mechanism to allow teachers to obtain the highly accomplished/lead teacher recognition, known as HALT.

PN837

In those circumstances, the consent parties have put forward proposed clauses which will allow for a system by which early childhood teachers can be effectively recognised as being proficient against the APST, and in respect of HALT teachers in Victoria, a mechanism by which they can be recognised as having reached that level so that they can access the classification scale and it can apply equally to them regardless of the state or territory that they're in.

PN838

The way it does that in 14.(a)(l) is to set out a default position in those locations, that is, to deem proficient status after two years subject to (b) which allows an employer to challenge that default position. So again, for convenience for employers, and, for that matter, for teachers, there's a deeming provision which creates certainty for all concerned.

PN839

It's a two-year period, is, as has been submitted by the IEU, what seemed to be an appropriate rule of thumb. In Victoria, for example, teachers have no more than two years in order to achieve the relevant accreditation. New South Wales allows for three years but it is identified that 160 to 180 days of teaching is what would ordinarily be needed to obtain the status, which is something that could be achieved within or around the 12-month mark, so hence the two years.

PN840

The second part of it is to identify how one counts service beyond that period, that that's in (a)(ii), and that's to count service beyond that period as proficient, so that

one has in effect a clear certainty for determining what wage rate applies as to when it commenced.

PN841

(b) provides a mechanism, as identified, for an employer if an employer considers that there's an issue about whether the teacher is in fact proficient, and that, the consent parties contend, is to be dealt with by way of using the dispute resolution procedure.

PN842

As to that, as we'll come to later in clause 31, which is the dispute resolution procedure, the consent parties put forward some proposed words which recognise that the parties may agree that this issue of whether someone is or is not proficient can be referred for determination by someone with expertise in applying standards.

PN843

Subparagraph (c) provides, in effect, an equivalent mechanism for teachers who believe they've achieved the proficient status within the two-year deeming provision. If they so consider, then there is a mechanism by which that too can be recognised.

PN844

Subparagraph (d) provides - - -

PN845

VICE PRESIDENT HATCHER: If I could stay with paragraph (c), how can that work if the Commission doesn't have the authority to arbitrate without consent?

PN846

MR TAYLOR: The Commission's limited arbitral powers is something that the consent parties did grapple with, and it is understood that the deeming provision would apply unless there was, with the assistance of the Commission, either through conciliation or, if agreed, arbitration, a different outcome. If there was a capacity to actually mandate arbitration, then that may well have been preferred, but as there isn't, the consent parties took it as far as they thought could be done within the powers of the Commission.

PN847

VICE PRESIDENT HATCHER: All right, thank you.

PN848

MR TAYLOR: Subparagraph (d) provides the standard against which it's to be determined, and I think everyone agrees that that standard is the APST - and when I say 'everyone', AFEI's proposal is that we understand it also uses that as the touchstone or standard.

PN849

Subparagraph (e) is there to identify that if, as is expected, a jurisdiction in the future determines to introduce an accreditation or registration system for early childhood teachers - that is, when I say in the future, after the implementation of

this decision, such that a teacher in that state might at that point, in 2023, for example, apply and obtain proficient status, the intention of subparagraph (e) is they would nevertheless retain their classification based upon the history of their teaching, even though they have only been formally accredited as proficient in that year.

PN850

That might also apply to someone who wasn't employed at the point of transition. They might have been on a career break and their jurisdiction introduces an accreditation system. Subparagraph (e) is intended to have the effect that they would nevertheless be recognised as having a service that is consistent with their past teaching history.

PN851

VICE PRESIDENT HATCHER: Mr Taylor, is there any indication that any of the states which don't require registration for ECT (indistinct) moving in that direction? I had a recollection of one of your witnesses; I can't remember which one, thought that Queensland was going to do that at some stage in the future.

PN852

MR TAYLOR: Yes, we did look for some recent statements to update the evidence in that regard, and whilst various people involved in the system are confident that Queensland is moving in that direction, there's been no official statement that we could identify to provide you, if it please, but certainly the understanding is that both in the ACT and in Queensland there are steps being taken with a view to introducing the requirements for early childhood teachers in those states.

PN853

Queensland already allows voluntary registration, but making it compulsory and, in particular, making it compulsory for out of school care, which is where the bulk of early childhood teachers are employed, is something which is a work in progress, we understand.

PN854

VICE PRESIDENT HATCHER: So just so I understand this, in Queensland do your deeming provisions apply in circumstances where teachers can obtain proficient status if they want?

PN855

MR TAYLOR: I think the true answer to that is - and Mr Ward might stand to correct me - I don't think the current draft contemplates that situation, that is, a teacher - - -

PN856

VICE PRESIDENT HATCHER: Well, (a) is predicated on there being a requirement so - - -

PN857

MR TAYLOR: Yes.

PN858

VICE PRESIDENT HATCHER: - - - (indistinct) deeming provision would apply for non-school ECTs in Queensland, but I'm just wondering whether it should if they have the capacity to go out and get it.

PN859

MR TAYLOR: I see. Yes, well, certainly for our part, on the consent position it should apply even if they have the capacity to get it. It's a very significant process to obtain, and if it's not obliged to do so it's unlikely that the employer is going to be wishing to provide assistance to do so and the deeming provision is appropriate.

PN860

The only hesitation I had is that there will be some early childhood teachers in Queensland who teach, for example, in a school setting in respect of whom they will currently be accredited, and I was just thinking that the current draft doesn't contemplate whether they are to be addressed, as one might imagine, under 14.2 and 14.4, or whether they are to be dealt with under 14.8(a) because there isn't a provision.

PN861

I think, as I speak, given that they are required in a certain school setting, then I presume that the view of this drafting would be 14.8(a) wouldn't apply to them, because they are in a school setting, which means it is mandatory, and that certainly, I would have thought, would be the more sensible approach.

PN862

VICE PRESIDENT HATCHER: And what about a teacher who is already in Queensland outside of school who has already voluntarily gone out and got it, perhaps with the help of their employer, perhaps not.

PN863

MR TAYLOR: Yes, one can postulate a teacher who was in a school setting and who moves to an out of school setting but has attained proficient status already - an unlikely scenario given the rates of pay in school settings versus the rates of pay in out of school settings, as a generality, but it's conceptually possible. It's very unlikely that any teacher would have done so merely for the professional satisfaction of having done so, because not only is it timely but there's various costs associated with it.

PN864

The last thing that I'm uncertain of is whether in respect of Queensland and the Northern Territory there is - precisely what the requirements are to obtain registration on a voluntary basis if one is not doing so at the initiative of the employer, whether there's any issues that arise there that will prevent it, from a practical point of view, occurring.

PN865

VICE PRESIDENT HATCHER: There might be people rushing to do it since the April decision.

PN866

MR TAYLOR: I'm sorry, your Honour?

PN867

VICE PRESIDENT HATCHER: There might be people rushing out to do it since the April decision.

PN868

MR TAYLOR: Yes. It's not something that's been suggested to us has been occurring.

PN869

So as your Honour can see, and as the rest of the Full Bench can see, one of the things that the consent parties did spend some considerable time on is thinking through the practicality of how the classification structure will work in states which don't currently have an objective system divorced from the employment to determine the necessarily qualification to obtain the classification rate of pay, and whilst perhaps one can postulate scenarios which suggest that the consent position is not perfect in every possible scenario, it is suggested that it's a practical way of achieving an outcome.

PN870

I might come back to this issue of whether in fact a teacher can do it in Queensland, for example. I've been given a note which says that in Queensland one of the requirements is to have 200 days of teaching in a recognised school, and if that's the case then it wouldn't be something that could be achieved by an early childhood teacher out of the school setting, but I'll need to get some further information about that if that's an issue which the Commission wants to know more about.

PN871

There is one other issue when we come to critiquing the AFEI's alternative proposal, which is to suggest, amongst other things, that teachers outside of a compulsory state can only maintain satisfactory service if, amongst other things, they maintain the same professional development obligations as a teacher in one of those states is that that fails to understand that professional development obligations in some of those places require the particular hours of professional development to be themselves accredited externally.

PN872

So it is perhaps difficult for teachers outside of the formal accreditation system to be able to meet that type of requirement, and when it comes to teachers where registration is optional, again, it's unlikely to be easy for those teachers if they're not teaching within the school setting, which recognises the obligations to be able to access professional development in the same way, and certainly to be able to access accredited professional development, that is, professional developments accredited that would count towards the necessary hours in order to maintain accreditation.

PN873

Turning to clause 14.9, it really maintains the same overall approach as 14.8 but to the different issue of the HALT classification. It again relies upon a mechanism which would see - it doesn't have a deeming provision which deems any particular teacher to be at that level. It does require a teacher to request to be recognised at that level, and failing that, the matter would become a matter of dispute, and it, in subparagraph (b), provides the objective standard against which such a dispute would be determined.

PN874

Again, the dispute mechanism can do no more than allow a mechanism by which that issue can be raised for conciliation and, where the parties agree, consent to arbitration, including consent to arbitration by an expert. This is one of the two areas I identified earlier where the AEU have a different approach. I won't foreshadow that but leave that to them to address.

PN875

Clause 14.10 deals with returning to teaching. This is the issue that arises when teachers take a career break. It is necessary because of the fact that when teachers cease to teach they do not maintain - or retain is probably a better word, their proficient status. So when they recommence teaching, they are not, at that point, an accredited or registered teacher at a proficient level, and what is ordinarily the case is that they then apply afresh, or again, for that status to be recognised.

PN876

There would perhaps be a subset of teachers in respect of whom they'd never formally had that accreditation because their career break commenced at a point prior to that being deemed necessary, but in any event, there will be teachers who will be taking career breaks on a regular basis and returning, and just as the New South Wales teachers award does, the consent parties thought it appropriate that there be a mechanism by which the classification structure would apply to these teachers.

PN877

That mechanism is to recognise them on recommencing at level 2 and give them 12 months in order to obtain that proficient status, at which point their prior service at a proficient level would be recognised and they would then go to whatever level, level 3 or 4, that is consistent with that service.

PN878

Again, what we say is important and the AFEI's proposal seems to ignore, is that it is not years from the point at which someone got recognised as proficient, or recognised again as proficient, but they must have recognition of the fact that this concept of accreditation at a proficient level is not something that's been in place forever but has only come in in more recent times.

PN879

Because of the fact that the consent position has a transition period that applies for the whole of the first 12 months, the return to teaching clause at subparagraph (c) only takes effect after that 12-month period has completed.

PN880

It also addresses what happens when a teacher does not obtain proficient status within the 12 months, and that's dealt with in subparagraph (b) and reflects the way in which the New South Wales teachers award deals with the same subject matter.

PN881

Clause 14.11 deals with support for new teachers. This arises against the background in which the new classification structure requires the accreditation in order to obtain the higher levels of pay and the consent position places an obligation on an employer to support a teacher at level 1 to obtain accreditation or registration to the proficient level standard and specifically identifies that that will include a reasonable release from ordinary duties, but that is subject to the final words, that is, where it's operationally practicable.

PN882

This is put forward by the consent parties as a reasonable position which both recognises the need to support these teachers but also identifies that there may be at particular times, given ratio requirements and the like, and particularly for smaller operators, operational practicability issues that may arise that they will be unable to give the necessary release at that particular point in time.

PN883

VICE PRESIDENT HATCHER: Mr Taylor, what's the release required to actually do?

PN884

MR TAYLOR: I think the AEU will be able to speak to this, but there was evidence before the Commission before, and there's now the additional evidence of the statements put forward by the AEU and some submissions from the IEU to the same effect, that there is a significant amount of time that is required in order to complete the necessary processes and application to obtain proficient status, which is not things that can be done whilst engaging in the usual duties.

PN885

The AEU evidence I think identifies it's the equivalent of as much as seven or eight days of work. There is evidence to the contrary from the ACA, but whilst the witnesses were not required for cross-examination, that is in circumstances where regardless of which evidence one places greater weight on, it's clear that we are talking about something of considerable amount of time that's required, and it's for that purpose that the release is provided.

PN886

VICE PRESIDENT HATCHER: Thank you.

PN887

MR TAYLOR: The next issue is 19.4, the education leader allowance, and I could stand to be corrected, but I think there is now unanimity in the way in which this new allowance that the Commission has determined to be introduced would be done.

PN888

There was some contention that the allowance ought to be paid on a pro rata basis if an employee was employed on a part-time basis. So much was submitted certainly initially by the CER, but certainly that party has come to the view, as the consent parties are, that the obligations that arise from being the educational leader for a service arise in the same way - that is, they are duties in addition to teaching duties that you're otherwise employed to do. They arise in the same way whether you're employed on a part-time or full-time basis, subject to two matters which the clause also recognises.

PN889

The first, if the educational leader role is being shared then the allowance would be similarly shared, and secondly, if the service in question does not operate five days a week, then the allowance would similarly titrate back down to the level of the days it's open, but there is no basis for contending that there is otherwise a reason to reduce the rate where a teacher takes on the role, even if they're working hours as a teacher are not full-time hours.

PN890

It may well be that the AFEI still maintains a view that it should be paid on a part-time basis. It's not clear, frankly, whether they do or don't, in light of material that they provided over the weekend, which didn't include any change to the consent position in that regard.

PN891

VICE PRESIDENT HATCHER: Is it possible that the educational leader might be a casual?

PN892

MR TAYLOR: Well, that is unknown to the IEU, and CER similarly have identified that it's not something that they would expect. So very unlikely, I think is the position of the parties.

PN893

VICE PRESIDENT HATCHER: Perhaps in light of the statutory definition, more unlikely, is it? Right.

PN894

MR TAYLOR: I've already identified the change to clause 31, particularly 31.5 - on one view, not strictly necessary, but helpful, we suggest for the parties to understand that the disputes that the consent position has identified in respect of classification of teachers are ones that the parties may wish to refer to someone with expertise in assessing and applying the Australian Professional Standard for Teachers.

PN895

I think there are only two more minor matters, of which there's no disagreement, as we understand it. The first is schedule C, summary of monetary allowances, and - sorry, the earlier wage rates, summary of rates of pay - I'll get this right. Apologies - which have been calculated by reference to the decision and then including the effect of the annual wage case increase of two and a half per cent.

PN896

So the figures that one finds there, which, as I said, appear to be agreed by all parties, are nothing more than a mechanical exercise of taking the rates determined by the Commission and adding a further two and a half per cent.

PN897

Schedule H retains as a schedule the previous classification system. This is seen as useful, if not necessary, to maintain as a schedule, so that the employers and employees can understand what's to happen on the transition date, that is, to understand what their classification is on the day prior, such that they can understand what it will be the day after.

PN898

That will also be true for the following 12 months for any employee under the consent position who commences employment during that 12 months, but it's suggested by the consent parties that there is ongoing relevance to including it beyond that date, because in any underpayment claim at some point in the future it will be necessary potentially for an employee or an employer to be able to ascertain what was an employee's classification prior to the transition date and then what it became, and whilst that could be done, perhaps, by going back and finding earlier iterations of the award, it is seen as convenient to maintain it as a schedule so that it is part and parcel of the award.

PN899

I think that deals with the various proposals of the consent position. There may be some matters that I have overlooked or misstated, because at various points I have talked about the position of the parties, the consent parties, in a way that Mr Ward may wish to add to or correct, and so I'm obviously in your hands, Vice President, if this is an appropriate time for him to do that.

PN900

Before I hand over, the only other thing I'd say is there are some aspects of some of the matters, including the operative date and phasing in, which go to not what is the change but why it should be, which I can return to if the Commission thinks that will assist, although I do acknowledge that the parties have provided the Commission with three rounds of submissions, and it may well be that our positions in this regard have sufficiently been understood without the need for us to add to them in oral submissions, but I'll leave that to the Commission to indicate.

PN901

VICE PRESIDENT HATCHER: Firstly we'll deal with the explanation of the changes. Mr Ward, do you want to say anything about the explanation of the consent changes advanced by Mr Taylor? Anything you want to qualify or explain further?

PN902

MR WARD: Your Honour, I might try and assist with just two or three matters, and in particular some matters arising from your questions.

PN903

Can I firstly just highlight one change from the decision, which should entirely uncontroversial, but clause 14.2, level 5 - I don't think Mr Taylor took you to this - has added the words 'or equivalent' to manage jurisdictions that don't formally provide for the higher accomplished or lead teacher qualification. There's nothing controversial about that, but you should be aware that that amendment has been made to your proposed structure.

PN904

Can I then deal with, just very, very briefly, a couple of short matters. Your Honour asked a question about 14.3(b), and I think your Honour's question was essentially if somebody holds registration or accreditation does that satisfy it.

PN905

The answer to that would be no, and I think that's what Mr Taylor said, in this sense. You might have been accredited two or three years ago and the employer is making an evaluation this year and might form the view this year that properly applied, you haven't met the requirements of the standards.

PN906

So it's not simply a case that if you hold registration you're over the bar. In any given year the employer might form a view that even though you hold it from a year, two years, three years, four years ago, that you might not have satisfactorily maintained your standards to the APST and that gives rise to the ability therefore to challenge service being satisfactory.

PN907

Otherwise, the submissions made by Mr Taylor are supported by my clients in that my clients are very keen to ensure the maintenance of satisfactory service as a proposition, but also to ensure that there was clarity around the objective basis upon which that's determined, and the need for clarity has been a driving force from my clients, particularly states where registration and accreditation isn't present.

PN908

That's the comment I want to make about 14.3.

PN909

Your Honour then raised the question about the 14.8 about voluntary attainment of proficiency as opposed to the system requiring it. Your Honour, my instructions are that my clients aren't aware of anybody in early childhood who has voluntarily obtained proficiency. That's not to say they might not exist, but my client is not aware of it. But I would acknowledge that the way we drafted 14.8 with the IEU didn't necessarily contemplate somebody working solely in childcare and possibly being able to voluntarily achieve proficiency. As Mr Taylor said, I'm not sure that they could do it. I'm happy to take some further instructions on that, but, at this stage, my clients weren't aware of anybody having done it. It might be because they can't, but we could seek some further clarification on that.

PN910

The only other point I might make in relation to the drafting is you asked a question, your Honour, in relation to 19.4 as to whether or not any casual employees operated as an educational leader. All I can say at this stage is that that was a question put to my clients. My clients weren't able to identify one. To the best of their researches, educational leaders were full-time or part-time employees. That's not to say there might not be a casual, but my clients weren't able to identify one.

PN911

Other than that, your Honour, I would say that Mr Taylor has properly and appropriately explained the position advanced in the drafting between my clients and the IEU. Our submissions later on will go to the matters that seem to be in dispute.

PN912

VICE PRESIDENT HATCHER: Thank you, Mr Ward. Mr Taylor, we will go back to you. It's entirely a matter for you whether you wish to just rely upon your written submissions and then address the contested issues in reply or whether you wish to say anything about them now.

PN913

MR TAYLOR: I will say some things about some of them, but otherwise - - -

PN914

VICE PRESIDENT HATCHER: Mr Taylor, your volume has somehow disappeared.

PN915

MR TAYLOR: Sorry.

PN916

VICE PRESIDENT HATCHER: That was the voice, not the volume of your hair.

PN917

MR TAYLOR: It's lockdown hair. Ms Saunders is promising to give me her clippers in due course, but I haven't had access to them yet.

PN918

Can I deal with just some of the issues and otherwise rely on the written submissions.

PN919

The first is the question of operative date. The consent parties put forward an operative date of 1 January of next year and the IEU submits that the Commission can be satisfied it can introduce these changes earlier than 1 July of next year, pursuant to subsection (2) of section 166. This position of operative date is the position of four of the parties, not only the consent parties, but also the AEU and the CCSA. The CER has indicated a preference for 1 July next year and pointed to section 166, but beyond a preference and the recognition that unless otherwise appropriate to do so, such a change would ordinarily occur on 1 July of the following year, there isn't any other matter put by the CER and the CER indicates,

as we understand it, that if the Commission were minded to make it 1 January, it otherwise is content with that date as an alternative.

PN920

There is an obvious sense, in our respectful submission, if you're dealing with schools, including early childhood centres, to have a change which commences at the beginning, effectively, of a school year rather than part way through a school year. Four months will give a considerable period of time for parties, if the Commission were to confirm its decision to finalise their steps, in circumstances where, of course, they have been aware of the likely outcome since April of this year. It is, we say, that the Commission can place in this regard considerable weight on the fact that the organisations who represent employers most likely to be affected by any change in rates are content with it commencing on 1 January. That's ACA and CCSA.

PN921

One must readily bear in mind, of course, that this change is unlikely to have any practical effect on any employer outside the early childhood sector, and even within that sector, it's going to have an effect on the evidence overwhelmingly within the for-profit sector, which the ACA overwhelmingly represents, and of course only to the extent to which their members are not already paying over award rates of pay.

PN922

There is no evidence presented to the Commission that there are issues of complexity or indeed cost which would mean that the Commission ought to stay its hand in implementing it as early as 1 January. As to complexity, that is that there's some complexity involved, two things are said, firstly, that the transition table, with respect, is quite straightforward, and the second thing is that the only party that's identifying that there is some complexity, the AFEI, is nevertheless content, it would appear, for it to commence on 1 January, subject to the rates being phased in. That is, it doesn't appear to be the complexity is the issue but rather they suggest that there is a cost issue.

PN923

Turning to phasing in, the Commission will have seen the submissions of the parties, including the likely additional cost per child per day, which is, the employers have suggested, something around the $2 mark, and that, of course, has occurred against a background in which there has been increase in Commonwealth funding. It is the case that there may well be some early childhood centres in respect of which the rates being charged already are such that any increase in rates will not necessarily be absorbed by the Commonwealth subsidy, but, as the IEU's submissions identify, statistically they are in a minority.

PN924

In any event, as the ACA has submitted - sorry, before I turn to that, it is quite potentially likely that some of those childcare centres are already paying their teachers more, but, in any event, as the ACA identifies, these increases apply to a limited proportion of the early childhood industry workforce. They are increases of a nature that can be factored into the labour costs for the new year, they can be offset by a modest increase in fees, which the IEU contends will, in many cases,

be absorbed by the Commonwealth subsidy, and to the extent to which they are already paying above award, they can be absorbed into those over award payments.

PN925

There is some authority relied upon by the CER, which the AFEI has picked up. That is a decision of a Full Bench in 2013 that dealt with transitional provisions in respect of apprentices. As part of the consolidation of rates across the country, the Commission determined to increase apprentice rates, the increases of which would vary depending on the rates in various states. In that decision, the Commission did identify at the end that, to the extent to which rates were increased by more than 5 per cent, the amounts above 5 per cent would be delayed for a year, but there is nothing in that decision which would suggest it was intended to have any general precedent position that would apply generally, but, rather, it's a quite different factual scenario if you're dealing with apprentices across four major awards as against a comparatively small cohort of employees within a single industry of the nature that we are dealing with here.

PN926

The question of phasing in, I think I have, in effect, dealt with already, but, as I said, there's no evidence that was presented that that there is any need to phase in as the AFEI contends.

PN927

Turning to the issue of satisfactory service, the AFEI's submissions proceed from the proposition that they assume that the Full Bench, in adopting that phrase from the New South Wales Teachers Award, intended to create a situation where the question of whether the service is satisfactory would be an entirely subjective decision without the need for any objective criteria to be determined by an employer.

PN928

The difficulty with the AFEI position falls into two broad areas. The first is the absence of any objective criteria such that different employers might judge service differently in a way that would mean the award wouldn't have a consistent effect, and the second fundamental issue is that it's entirely unclear on the AFEI approach what is to happen if the employer does not determine whether service was satisfactory or not. There is no obligation to do so on their draft and one, we say, shouldn't be left in a position in respect of any award which sets minimum rates of pay of having in some future year to try and determine in retrospect whether the service in question was satisfactory, and to the extent to which one ever has to do that, to do so without there being any objective criteria.

PN929

Employees will take their years of service with them when they move from employer to employer. How they are to establish, when they go to a new employer, how many years of satisfactory service, as understood by the AFEI, is again entirely unclear. It's not a workable situation. The very fact that the AFEI is suggesting such an approach just emphasises the contrary is needed; you need something which does give a high degree of certainty so that employers and employees know how much an employee should be paid at any given point in

time. This is something that the ACA, in the consent position, as well as the CCSA recognises. The CER, too, recognises that you need at least an objective standard. It is perhaps less surprising that the CER, being the nature of the organisation as it is, would not see any difficulty in a system which turns upon an annual performance review which determines whether service is satisfactory or not, but those engaged with representing smaller employers, with respect, we say, understand, as the IEU does, that the absence of some deeming provision is likely to lead to some real uncertainty and disputation, which is to be, we say respectfully, something to be avoided.

PN930

VICE PRESIDENT HATCHER: Sorry, I was asking you a question and I had my microphone turned off. How does the concept of satisfactory service transfer from one employer to another?

PN931

MR TAYLOR: In this way, if it please, or really in two ways. A teacher has a level of classification, a level, for example, because they have been a proficient teacher for a certain amount of time. They may go to employer A, who nominates a rate of pay which they accept. They may or may not be given the classification or told what their classification is, but so long as the employer is paying them a rate of pay which is not less than the minimum required by the award, they might then teach there for some years.

PN932

They might then go to a new employer and again be offered a rate of pay. It might be a lower rate of pay and they might, a year or two down the track, determine that they think they are being underpaid, at which point they might say to the employer, "I've been teaching for sufficient years to be level 4 but you appear to be paying me a rate that's applicable to something no higher than a level 3" and the employer might say, "Well, how many years of satisfactory service have you had?" At that point, absent a deeming provision, there's then a real question as to how one determines that. Going back to the previous employer and asking them and they may not have ever turned their mind to it in a way, or them may, in retrospect, say, "It wasn't satisfactory."

PN933

If we are dealing with a paid rates award, so much would become clear, apparent to the employee almost immediately if their pay rate doesn't go up, but in a minimum rates award, there's no necessary signal to an employee that they have in fact been judged satisfactory or not.

PN934

VICE PRESIDENT HATCHER: So, if you have a teacher who achieves proficient status with one employer, works two years and then is dismissed for poor performance and they get another job, what happens then?

PN935

MR TAYLOR: If they have completed two years and during those two completed years there was no - the mechanism to question whether their service was satisfactory was not exercised, then they would have two completed years of

satisfactory service under the deeming provision. The fact that during the course of their third year they were dismissed for unsatisfactory reasons would mean that they haven't completed a further year of satisfactory service, so they would take their two years with them but they wouldn't have a third. That's how the consent position would operate, and there would need, we say, to be some mechanism of that nature.

PN936

If one is judging employees against the standards, then one does need to - no, I'll withdraw that, I withdraw that. That's how we would see it working.

PN937

VICE PRESIDENT HATCHER: Thank you.

PN938

MR TAYLOR: Sorry, Vice President, I'm just checking whether there's material in respect of the balance of it that I need to address.

PN939

With respect to the - can I just deal with a matter of detail with respect to the transitional provisions and the way in which the AFEI contends this should work. I did, I think, outline this when we were dealing with transitional provisions in clause 14.4, but I think it's worth emphasising that the way in which the consent position works does recognise not only that an employee goes across at a particular grade but then retains their years of proficient service. The proposal, as we understand the AFEI puts it forward, is that one cannot go from level 2 to level 3 without having three years of service at level 2. The result is that someone who is currently at grade 7 - maybe it's convenient for the Commission to do what I'm doing and that is to pull up the consent position table.

PN940

VICE PRESIDENT HATCHER: Which table?

PN941

MR TAYLOR: The translation table, which is at clause 14.4.

PN942

VICE PRESIDENT HATCHER: Yes.

PN943

MR TAYLOR: So you will see there that someone who's at level 7, that is someone who was a graduate teacher, which is level 3, and has then taught for a further four years, will translate across at level 2. Now, the AFEI proposal, which I acknowledge reflects language drawn from the Commission, says that what then applies is that an employee would take three years before they would get to level 3. Their proposal is that each classification, if one goes to the previous page at 14.2, instead of, as proposed by the consent parties, that it is after three years' satisfactory service at a proficient level, they contend it is to be after three years' satisfactory service at level 2.

PN944

Now, the net result is that that teacher won't go to level 3 for three more years. Under the current classification structure, they would get to a level which would translate to level 3 within 12 months. Now, the net effect of that is that their rate of pay after 12 months would actually be less than their rate of pay if they remained under the current classification structure, and that is not - - -

PN945

VICE PRESIDENT HATCHER: Just about that, now you've raised it, so a four-year degree enters at level 3 on the current structure; is that right?

PN946

MR TAYLOR: Yes.

PN947

VICE PRESIDENT HATCHER: So let's assume they take a year to achieve proficient status. That's level - they will be at level 4.

PN948

MR TAYLOR: Yes.

PN949

VICE PRESIDENT HATCHER: They have reached level 7. Why wouldn't they translate to level 3?

PN950

MR TAYLOR: Well, the consent position of the parties is that whilst they would commence at level 3, they wouldn't have got to proficient status within that 12-month period. They wouldn't get to proficient status until some point during the next 12-month period and, as so, you will see that level 4 translates at level 1 as well, but that's the way in which the parties have determined it, although if they reach proficient status - at any point where they reach proficient status, they will then go to level 2 and that might be something that they obtain prior to - after a transition but prior to the completion of the following year, but an employee who is currently at level 4 will translate at level 1 and then it is three more years that they - this has been a matter of discussion between the parties, your Honour, and I don't want to suggest that a different view could be put forward, but that was the way in which the consent position ultimately - - -

PN951

VICE PRESIDENT HATCHER: Presumably, if you are currently on level 4 but you have achieved proficient status, you must translate to level 2?

PN952

MR TAYLOR: Yes, that is right. As we would read it, that is how it would necessarily have to occur.

PN953

VICE PRESIDENT HATCHER: Then again, if you are at level 7 but you have already done three years' satisfactory service at proficient status, you must translate to level 3?

PN954

MR TAYLOR: Yes, I think that is correct.

PN955

VICE PRESIDENT HATCHER: I don't understand how you could be in a position where you could satisfy the requirements for level 2 or level 3 but not translate to that classification.

PN956

MR TAYLOR: I think that's right, but can I just identify 14.4(c), which states that:

PN957

> *If an employee covered by this award prior to the classification at transition date is better off being classified pursuant to subclause 14.2, then those provisions apply at the point of transition.*

PN958

So, your Honour is right and that is the way in which the consent parties have structured it.

PN959

VICE PRESIDENT HATCHER: All right. There might be a way to better express that. All right.

PN960

MR TAYLOR: But one thing we say is not right is the proposal of the AFEI that someone who has reached proficient status and does have a further three years at that level would, or, sorry, has perhaps two and a-half years at that level, would translate across at level 2 and then have to spend another three years teaching before they get to level 3, which is what would flow from the drafting that they have put forward, which is that one can't get to level 3 without having first been at level 2 for three years.

PN961

VICE PRESIDENT HATCHER: Yes, all right.

PN962

MR TAYLOR: I think I have made that point. Turning then to the question of returning teachers, the same problem with respect to the AFEI proposal emerges when we come to their version of 14.10, that is, by indicating that it only applies based on how many years an employee has been at a certain level rather than how many years they have been teaching at a proficient level, teachers who have had a career break, when they come back will find themselves ultimately bumped down to a lower level than their years of teaching would justify.

PN963

The only other thing, subject to any note that I get while I'm putting this, that I wanted to say now, the CCSA has put forward a proposal that the definition in the award of teacher which already exists ought to be expanded in a way that expressly excludes those who are employed not as teachers but as educators but

are studying to be a teacher and under national regulation requirements are allowed to be counted as a teacher to meet ratio requirements.

PN964

The position of the IEU is this is unnecessary. A teacher is someone as defined in the award currently who is employed as such. An educator is not someone who is employed as a teacher. There is no need for a further provision in this regard. It's not something that arises, we say, out of the decision.

PN965

The reminds me of one other very minor change in the proposed drafting to that which the Commission had in its proposed classification structure at 14.2. If I could take the Commission back to 14.2 of the consent position, you will see level 1 there is described as:

PN966

Graduate teacher and all other teachers (as defined) including those holding provisional or conditional accreditation.

PN967

That differs slightly from the drafting of the Full Bench in the decision, which didn't have the words "and all other teachers (as defined)" for this reason. It's not something that arises in the early childhood industry, but I'm instructed that in the school industry, particularly the high school, there are persons who are employed as teachers who are covered by the award but who do not have a degree, nor do they have the provisional or conditional accreditation, and they are recognised in the award at the moment at the lowest level and would continue to be recognised in this consent position at that low level, level 1. Without being a graduate, they can never become proficient, so they will never move to a higher level, but that's the reason for that very slight change of wording which might not otherwise have been apparent to the Full Bench in that regard.

PN968

That concludes the matters that we wanted to put. There are a number of other matters which we have dealt with, but they have been dealt with, I think, in our written submissions in a way under headings which will allow the Full Bench to readily see what has been said by our client in respect of what appear to be the issues in contention.

PN969

VICE PRESIDENT HATCHER: All right. Thank you. Mr Ward?

PN970

MR WARD: If the Commission pleases, we are largely content to rely on our three written submissions and the evidence of our two witnesses. I don't intend to go back over a lot of what's written. My intention is to address the Commission on a limited number of matters in this order. I just want to briefly address the Commission on the approach my clients have taken in trying to finalise matters arising from the decision.

PN971

I then want to address the Commission on the question of reasonable release for teachers seeking accreditation and the matter that is in dispute between my clients and the AEU, where the AEU seek to extend the notion of reasonable release beyond teachers to persons undertaking the role of mentor or supervisor.

PN972

I am going to briefly address the Bench on the matter Mr Taylor just raised, which is the CCSA issue of diploma-qualified educators and then, lastly, I will make some comments on some issues arising from the AEU's proposal concerning level 5, the highly accomplished lead educator level, and, unless asked otherwise, it wasn't my intention after dealing with those matters to go back over the ground in our written submissions, obviously subject to any questions that arise from the Commission.

PN973

In terms of approach, my clients have taken what might be described as a relatively contained approach to the finalisation of the matter. It has sought to assist the Commission by addressing those matters specifically raised by the Commission at the end of its decision, and to otherwise attempt to assist the Commission by providing the consent position to ensure, as much as possible, operational clarity for the childcare sector.

PN974

We have not sought to raise new issues or tangential issues and we have not sought to ask the Commission to change in any material sense its decision. In effect, we have attempted to give effect to the decision rather than to fundamentally challenge in any material sense what the Commission had proposed. It is in that sense that we worked with the IEU to arrive at the consent position that Mr Taylor has set out this morning and I briefly responded to.

PN975

There are three issues my client sees as material to respond to. The first one is the claim by the Australian Education Union in relation to the drafting of clause 14.11. If I can take the Commission firstly to the consent position, the Commission will see in the consent position in 14.11 that we have agreed, as Mr Taylor explained it, for the employer to support a level 1 teacher initially seeking accreditation or registration and, in supporting them, to provide reasonable release from ordinary duties, subject to the condition of it being operational practicable, and while there might be many reasons why operational practicability might arise, Mr Taylor raised this morning the most obvious one and that is, particularly in small centres, the need to maintain staffing ratios.

PN976

That issue, to us, seemed to be a reasonable issue to grapple with arising from the decision and the Commission has had the benefit of some further evidence in this tranche of the proceedings in relation to this notion of reasonable release. In our written submissions, we have identified the fact that there didn't seem to be a lot on that.

PN977

There's three witnesses who talked about the amount of release required by a teacher. Ms Nightingale's evidence, exhibit 137, we ask the Commission to approach Ms Nightingale's evidence with some caution. She is a union official and she very generously explains that she is giving opinion evidence as a union official and the evidence she gives really does lack any specificity in terms of how she arrives at her opinions, but her evidence is that a teacher might require up to 10 days of release from face to face teaching.

PN978

There is evidence from Ms Drake, which is exhibit 138. Ms Drake's evidence we say should be favoured. Ms Drake is the owner of a centre. She is also a primary school teacher and an early childhood teacher, and she is also a mentor for the State of Victoria. I will come back to her evidence later in relation to mentoring, but, relevantly, Ms Drake's conclusion, having mentored people through the process, is that a teacher might require, at paragraph 42, some four days off the floor for gaining accreditation or registration.

PN979

Ms Totinto's evidence, which is exhibit 139, she is also a holder of a Bachelor Degree of Teaching, Early Childhood Education. She operates several centres but she actually works as the teacher in one of those centres. Her evidence is that her teachers have gained proficiency without the need for any release from duties, and it's a finding that can be comfortably made from both Ms Drake and Ms Totinto that the primary activities involved in seeking accreditation or registration can be blended into the day to day program of work of the teacher.

PN980

I don't think anything I have just said is particularly controversial in this sense: in a given circumstance, a teacher might be able to achieve accreditation with no release, in some circumstance, they might require a certain level of release and, possibly in others, given the nature of what they are seeking to focus on, they might require more than somebody else.

PN981

The fact of the matter is that some level of release for a teacher supported by an employer seems to be a reasonable position to arrive at and I think all the parties have described that position as a balanced position, and my client has supported that because it is dealing with the relationship between the employer and their teachers and my client sees that as an important factor which is distinguishable from the AEU's claim around supporting mentors, which I will come to.

PN982

The AEU have drafted an alternative clause, which is in their proposed document. Bear with me. I am struggling to remember where I put it.

PN983

MR CHAMPION: Mr Ward, I promise not to interrupt you, but it's attached to our third round of submissions on 13 August, if that's of any assistance.

PN984

MR WARD: Thank you very much, Mr Champion. I find sitting in a study doing this much harder than a bar table. The AEU's proposal pleads an alternative clause in relation to this issue. It is contained at page 18 of their amended award, and if the Bench goes to their proposed clause 14.11, the Bench will see that it effectively adopts the proposal advanced in the consent position with some additions. Those additions are that somebody performing the role of a mentor or supervisor assisting a level 1 teacher to achieve accreditation or registration is also entitled to the benefit of release that the teacher would otherwise receive.

PN985

Now, we have a real problem with that proposition, which I will just deal with now. A number of things can be found from the evidence in the matter. It is relevant to that consideration, but I would have to say that there's very modest evidence considering the nature of that claim. From Ms Drake's statement, it's reasonable to find that, one, persons becoming mentors or supervisors may very well do that other than at the direction or request of their employer; they may in fact do it for altruistic reasons. I think Ms Drake uses the term "giving back". Ms Drake's in a unique position, obviously, because she's the owner of centres and she's able to manage her time as she deems appropriate, and similar findings actually can be made from Ms Nightingale's understanding of why people become mentors.

PN986

The second finding that can be made, and it's an important one, is that it may well be the case that the mentor is undertaking mentoring for another employer's employees, that is, employer A employs a person, that person elects to become a mentor and that mentor chooses to mentor employees not of their employer but of another employer. That arises from all three witness statements.

PN987

I think it's very important to understand the character of what we've just described. The award is setting a fair and relevant minimum safety net. That fair and relevant minimum safety net needs to be fair and relevant for both the employer and the employee. The effect of the clause claimed by the AEU is that it wants an employer to fund time off work for an employee who may have personally chosen, for personal reasons, to be a mentor, and where that employee is assisting a business completely unrelated to the employer's business.

PN988

In our respectful submission, there couldn't be anything further removed from the notion of a minimum safety net than requiring employer A to pay somebody to provide a service to employer B's business. In effect, the employee is choosing to second themselves to another business to undertake an activity that their employer may not have agreed to, may not have supported. In our view, the claim goes way beyond the notion of a fair and minimum safety net.

PN989

Importantly, we are unable to find in any modern award any award provision where the Commission has imposed on an employer an obligation to release an employee on pay to do something for another employer, and we think that that

would be, with respect, an extraordinary step for the Commission to take in the context of establishing the minimum safety net.

PN990

There's a series of other submissions we would make in regard to this issue. Firstly, respectfully, it appears to us that the union have sort of tagged this very substantial matter on at the back end, at the death. It is materially different in character to an employer supporting their own employees achieve accreditation. If the AEU wanted to advance this claim, it really should have been advanced in the proper way rather than being tagged on the back of the wash-up of a very long case.

PN991

Importantly, there is really no probative evidence to support the necessary findings of fact that might allow the Commission to entertain such a claim. Ms Nightingale's evidence that's said to support the claim is, in her own words, the views of a union official. In that sense, the evidence is really more an advocation of a claim rather than the establishment of necessary facts.

PN992

There is some money paid in Victoria to an employer who has an employee undertaking accreditation. That's true. Our understanding is that there is not money paid to an employer whose employee is mentoring someone else. I think the Commission needs to be mindful that even though there is some funding in Victoria, it does not necessarily go to the heart of the claim, or, relevantly, there is no evidence that that funding actually supports the costs incurred by the employer. It's also relevant to note, as is attested to by Ms Totinto, there is no funding in New South Wales.

PN993

In our respectful submission, that claim, in fact, offends the notions contained in section 138 of the Fair Work Act. Section 138 operates as a point of containment for the formulation of the fair and relevant minimum safety net and, in its language, prevents the Commission from simply doing something that it might see as industrially desirable but is actually more than is necessary to establish a fair and relevant minimum safety net. The AEU's claim, in our view, squarely fits into that category.

PN994

This type of matter is appropriately dealt with by agreement between an employer and their employee who aspires to be a mentor. This type of matter appropriately is dealt with in bargaining. Ms Nightingale, who attests to being a principal issue involved in bargaining, informs the Commission that the AEU's primary enterprise agreement covering 300-odd employers includes provisions for mentor leave. We don't cavil with that. It's an entirely appropriate topic to include in an enterprise agreement. It is not an entirely appropriate topic to include as part of the minimum safety net.

PN995

Those are our submissions against the AEU's claim for mentor release as we have outlined from their version of the proposed award.

PN996

I intend just then to deal with two further matters in brief order. I am going to deal firstly with this claim by the CCSA, and I do this just to make sure that it doesn't fall through the cracks inadvertently. I notice that Mr Taylor has already submitted that the claim should not be taken up by the Commission and that's the position that my clients have advanced. I appreciate that we have dealt with this in some detail in our written submissions of the 30th, paragraphs 27 through to 34, but I just want to, for abundant caution, emphasise the importance of this matter being rejected.

PN997

In effect, the CCSA have asked to change the coverage of the Teachers Award. They ask that persons who are diploma-qualified educators but are not teachers now be covered by the Teachers Award. As we have indicated in our written submissions, these persons ordinarily working in childcare centres would be childcare workers.

PN998

If the CCSA want to run an argument to change award coverage of employees then the appropriate thing to do is to put that application on pursuant to sections 157 and 158 and to allow parties to be fully heard on that matter. It is somewhat mischievous to throw it in at the eleventh hour in relation to a case of this magnitude and nature dealing with equal remuneration and work value. We don't need to say any more than that. We rely on our written submissions, but we would emphasise it to ensure that it's not missed.

PN999

Subject to any questions, that leaves us really just briefly with the level 5 issue. It is entirely appropriate that the words "or equivalent" be included in the classification structure as we read the decision. What we mean by that is that, as we read the decision, we have assumed that the Commission intended level 5 to be available to all teachers who meet the criteria for it, not necessarily limited to those states that actually had formally a highly accomplished lead teacher regime.

PN1000

We are assuming that that was right and, assuming that it is right because it seems to follow broader reasoning of the decision's application at large, there's a small matter that arises in how disputes concerning level 5 might be resolved.

PN1001

The AEU have proposed, at clause 14.9 of their draft, in 14.9(a), a relatively convoluted process that my client is not enamoured by. In essence, what they propose is that the employer and employees are required to agree on a three-person panel to conduct the assessment. My client is concerned by the sheer complexity and bureaucracy of that, particularly in circumstances where one might be dealing with relatively small businesses. The notion that there is scope to have an argument about how should be on the panel, the notion that there may be arguments as to how the panel is funded seem entirely unnecessary to us and far too complex for the type of business involved.

PN1002

The Commission is empowered under section 590 of the Act to inform itself as it needs to in dealing with disputes and matters before it and, in our view, to the extent that the Commission might need to avail itself of some expertise in the sense of research or like, section 590 would provide for that. My client is fair more comfortable with the simple notion that a dispute in relation to these matters can be brought to the Commission, and we note with some frustration the obvious limitations on the Commission's powers, but my client would be happier if the Commission is simply available. It's a fast and speedy process, it is cost-effective and doesn't involve a sort of public sector bureaucracy of establishing assessment panels. So, my client has an issue with the AEU's proposal in relation to 14.1.

PN1003

I just might address a couple of small points before I conclude. Your Honour the Vice President has questioned Mr Taylor around the usability of the disputes processes before the Commission. I think we are all aware of the scope but also limitations that might apply. My client, in the consent position, has attempted to adopt what will be practical ways for resolving what might be areas for disputation.

PN1004

My client was of the view that the likelihood of there being disputation around satisfactory service or whether or not somebody was proficient is likely to be very limited. My client was of the view that if somebody seriously was not satisfactory, they would more likely than not not survive the year, so that would be less of an issue. If it became the case that those processes for resolving disputes proved to be unsatisfactory, that would be something that we could deal with at a later date if that issue arose. My client is optimistic, though, that that won't arise.

PN1005

I just want to deal with the question of operative date. It would go without saying that my client's industry at the moment is in a very challenged position. The Bench are able to take notice that the State of Victoria effectively closed down the childcare sector again over the weekend, subject to authorised workers' children being able to access it. New South Wales is facing material challenge with the New South Wales Government requiring certain levels of vaccination to have been achieved for persons to work in childcare centres related to what are called the Local Government Areas of Concern, which is south-western Sydney. My client is aware that the sector is very well challenged.

PN1006

In arriving at the operative date, my client canvassed its membership nationally at length on the viability of these and it has to be said that my client reached its position on operative date because of reasons we've set out in our written submissions, but I will simply touch on for amplification now.

PN1007

Firstly, and I say this without any mischief or disrespect, the aggregate outcome of the decision, although hard to pinpoint precisely, but could be said to be relatively modest compared to what was claimed. Secondly, it is uncontroversial that the decision only relates to a small part of a childcare centre's workforce.

PN1008

The aggregate effect, therefore, has to be considered and my client considered that, and weighed up the natural desire for a more prospective operative date, against the very important need for clarity. And in that sense, the clarity that the consent position has provided my client's members allows my client to feel more comfortable with the viability of the 1 January dated.

PN1009

And it that sense, it's a balance between cost impact and it's a balance between operability and clarity of operability. As we've said in our submissions, if this decision impacted the workforce as a whole, Commission would likely have been presented by an application for many years of phasing in, many years. But the arrangement reached with the IEU, after extensive engagement with the membership, has attempted to balance a clarity of operation and transition with an honest understanding of the aggregate impact.

PN1010

Mr Taylor has also identified the fact that some employers will pay over Award payments. The ability, and the ability to have the consent position acknowledge that, was an important issue for my client in that any increase can be absorbed into an over-Award payment. It is uncontroversially understood in the industry that, for instance, in Victoria, over-Award payments are prevalent.

PN1011

So it's a balanced decision my client's taken, sorry, my client, the ACA took, supported by ABI, it's a balanced position that arrived at the ultimate, operative date, juggling aggregate impact, affordability, timing in the middle of the year to allow for any need to change pricing structures to occur at the beginning of the new year, balanced against this issue of clarity of transition and population.

PN1012

And it's in that context that the consent position on operative date was reached with the IEU and my client's stand by it.

PN1013

Now, unless there are any specific questions from the Commission, those were the submissions we were intending to put today.

PN1014

VICE PRESIDENT HATCHER: No, thank you, Mr Ward.

PN1015

Mr Champion, is it convenient for you to go next?

PN1016

MR CHAMPION: Yes, your Honour, it probably is convenient, if it meets the Commission's convenience.

PN1017

The AEU has participated in the three rounds of submissions, if the Full Bench pleases, and I certainly don't intend to read what's been put in previously. The

AEU's revised, proposed Award variation, as I indicated when I interrupted Mr Ward, is to be found as an attachment to our submissions filed on 13 August 2021. And how we have done it is, because by and large, we are added in with the consent parties, or the consent proposed variation, we have just annotated that document as to the two points of difference, which I'll come to in due course, but they're at clause 14.9 and clause 14.11, both of which Mr Ward touched on. And I rely on Ms Nightingale's witness statement, which is now exhibit 137.

PN1018

Can I say at the outset, the AEU has benefited greatly from the position in the proposed consent variation, and I want to emphasise at the outset that, by and large, and very broadly, the AEU supports the position in the proposed consent variation, it very substantially narrows the issues. And is where formerly, might I say, we support what's been put by Mr Taylor and Mr Ward, subject to the two, discreet issues on which Mr Ward and I are part - Mr Ward's clients and my client, the AEU, part company.

PN1019

Might I backpedal to this extent, just to set the industrial landscape in respect of those for whom I speak? The AEU's members, who are dependent on the provision of this Award, are in Victoria. There's about 200 to 300 teacher members, in Victoria, who rely on the EST Award and its provisions as to their terms and conditions of employment. Ms Nightingale says that at paragraph 7 of her witness statement.

PN1020

There are very many more AEU members, in Victoria, in the early childhood sector, whose employment terms and conditions are governed by the Victorian Early Childhood Teachers and Educators Agreement (VECTEA) 2020, which is usually referred to as the VECTEA 2020. That was recently approved by Commissioner McKinnon, on 12 July 2021, in the run-up to this case. And thereby, commenced operation on 19 July 2021, and the citation for the approval decision of Commissioner McKinnon is [2021] FWCA 3620.

PN1021

And in terms of at an agreement level, VECTEA 2020 applies to 383 early childhood sector employers, and Mr Ward was correct to point out, at an agreement level, and I appreciate the difference between an agreement level and award level, there is, at an agreement level, in clause 52(a) and 52 (b), of VECTEA 2020, there's prescribed four days of paid leave, both for a Level 1 teacher, or a PRT, a provisionally registered teacher, and for a mentor of that PRT.

PN1022

And we have attached the relevant extracts from VECTEA 2020 just to identify the industrial landscape, it's attachment 12 to the AEU's submissions on 14 July 2021. There's a large number of public documents attached to that, it's found in the very last page, the provision of the VECTEA 2020 is found on the very last page of that material. And of course, in terms of the relevance of the EST Award for the members for whom I speak, the EST Award is the relevant comparator award for BOOT purposes, for those employees to whom VECTEA 2020 applies.

PN1023

Having set that background, might I put what I wish to say as to the two issues which divide the AEU, on the one hand, and ACA and ABI, on the other. And I think it's fair to say that AFEI's submissions also supportive of Mr Ward's opposition to the matters for which I contend. Might I start with, perhaps, the less contentious issue, which is clause 14.9, 14.9 of the proposed award variation?

PN1024

There is common ground as to the premise between the AEU and the consent parties in this way, that the premise is that exemplary teachers, regardless of the jurisdiction in which they work, ought to be able to access the apex of the classification structure, namely Level 5, as articulated, in the April reasons at paragraph 657.

PN1025

Mr Ward said, and I submitted, and I agree, that the inclusion of the words, "or equivalent", at level 5, in clause 14.2 assists the practical issue, is that for Victorian teachers, there is no certifying authority which - no regulating authority that enables them to access level 5. And both the consent parties, by their version of clause 14.9, and the AEU, by its version of clause 14.9, seek to address that particular issue.

PN1026

VICE PRESIDENT HATCHER: Sorry, no certifying authority just for early childhood teachers or for all teachers?

PN1027

MR CHAMPION: It's for all teachers in Victoria, but in terms of those - this is not the reference award for primary and secondary teachers in Victoria, your Honour. But it is true to say, your Honour, that VIT just does not administer highly accomplished leading teacher. That designation's not administered in Victoria, which is of concern to - well, creates a practical issue, might I put it that way, for (indistinct).

PN1028

VICE PRESIDENT HATCHER: But how is dealt with, if at all, in the relevant award?

PN1029

MR CHAMPION: Look, your Honour, I don't think it is dealt with at all in the relevant award, but might I take that on notice?

PN1030

VICE PRESIDENT HATCHER: All right.

PN1031

MR CHAMPION: Yes, I have note that there's nothing in the Public Sector Award in Victoria that deals with that issue at all.

PN1032

The difference in the AEU's proposed clause 14.9, as contrasted with the position of the proposed consent variation, is really so far as is possible to, reproduce, in Victoria, the process that applies in States where there is a certifying authority, making the minimum adjustments possible. Might I - the concern that the AEU had, it was very grateful to read the proposed consent variation, but the concern the AEU had when it saw it was this, that highly accomplished lead teacher accreditation or recognition, in jurisdictions where there is a certifying authority, is a matter that happens external to the individual employer, and thereby is a portable matter as between employers.

PN1033

The approach in the consent variation is to permit an individual employer, and an individual employee, to agree that a teach should be HALT recognised, and then in the event of dispute, for the matter to come to the Commission, under the Dispute Resolution Procedure in clause 31. The AEU, in contrast, seeks to reproduce, allowing for the fact that there is not certifying authority in Victoria, an approach which very closely mimics, or mirrors, the approach in the HALT jurisdictions.

PN1034

And although Mr Ward expressed some concern about his clients not being enamoured of the process because of perhaps a perception that it was bureaucratic, that the scope and size of the issue needs to be kept in perspective, in that we went to the AITSL, and there's only been 812 teachers, I gather, nationally, since 2012, who have achieved HALT accreditation, so there's not anticipated to be a deluge or a flood of applications here.

PN1035

But there is an AITSL published guide, which we included as an annexure to our attachment 3 to our 14 July material, titled, "Certification of highly accomplished and lead teachers in Australia". And without doing more than reading it, more than referring to its necessary part, the issues that, how it works in a State or jurisdiction where there is a certification process, is that there are assessors appointed, external to the employer, and the certifying authority acts upon the recommendation of those external assessors.

PN1036

So it's level 5 accreditation in HALT jurisdiction is not something within the individual gift of an employer, or employee, to agree, there has to be an external verification process by the appointment of assessors, and then that is given the imprimatur by the certifying authority. And what the intent, in any event, of clause 14.9, as in the AEU's exposure draft, is to reproduce that assessor process as closely as possible in the non-HALT jurisdictions, as in the HALT jurisdiction, and that's why it's done.

PN1037

There is a point of principle which is of importance to the AEU, which is this, that it says:

PN1038

There remains a teaching profession and it is the AEU's principal position that it's expert teachers or educators who are best placed to assess whether teachers have attained the HALT standards.

PN1039

It is a matter where professional peer assessment of attainment of a professional standard is appropriate, rather than a situation where the Commission may find itself in the de facto position of a certifying authority for HALT teachers at the end of a dispute resolution process.

PN1040

Expert teachers do it in the HALT jurisdictions, expert teachers, in my submission, ought to do it in the non-HALT jurisdictions, and that's the way in which the AEU's clause is intended to work, and we don't - I, rather, do not submit on behalf of my client that that would be - a decision by the expert assessors would be final, that would not be a matter which was amenable to the dispute resolution process under clause 31, before the Commission.

PN1041

But it is, might I finish that point, it is a difference of nuance, and a narrow difference, between the AEU and the parties who have signed on to the proposed consent variation, as to that issue. The AEU agrees that there is a particular issue in Victoria that there's not a certifying authority available to breed senior teachers, wishing to access level 5. There needs to be an equivalent mode created, and the AEU's method is to try to reproduce, as closely as is possible, the mechanism that exists in the HALT jurisdictions.

PN1042

And as to that, so I think that came out of one of the sets of submissions from CER, was that in the HALT jurisdictions assessment, that classification needs to be renewed every five years, and that point, the AEU acknowledges, has merit and ought to be reproduced in the non-HALT jurisdictions, notably Victoria, and to that end, there is, at least on the copy I'm working off, in green text, a proposed 14.9(c) which acknowledges the merit of CER's position as to renewal of HALT recognition after a period of five years.

PN1043

As a final point, might I add, if the current situation were to change, and there was a certifying authority in Victoria, there would be no room for operation of clause 14.9(a), because the premise on which it operates would fall away. A certifying authority process operates to the exclusion of a panel of assessors, is how the AEU's clause in intended to work. That's what I wish to say about clause 14.9 and the AEU's different mechanism as to level 5 teachers.

PN1044

Might I turn now to the second issue, if the Full Bench pleases, which is the issue of reasonable release were operational practicable for both a level 1 teacher and, as the AEU contends, for their mentors and supervisors, so that the level 1 teach can attain full registration. In orienting the Commission, it is perhaps useful if the Commission has access to proposed clause 14.11, as drafted by the AEU, because it illuminates the points of common ground, and the points of difference, between

the AEU, on the one hand, and the parties to the proposed consent variation, on the other.

PN1045

VICE PRESIDENT HATCHER: So the reference about loss of pay, I took that as implicit in the consent provision, is that - - -

PN1046

MR CHAMPION: Well, I suppose I was - - -

PN1047

VICE PRESIDENT HATCHER: I'm seeing nods.

PN1048

MR CHAMPION: Mr Ward's nodding. I wish to be - something that I don't remember, which, in honesty, your Honour, some party raised something in a submission that caused those assisting me to be concerned that reasonable release might be met by way of release, with loss of pay, and that was the reason for that qualification in terms that inclusion of without loss of pay, but I'm grateful for Mr Ward's nodding, and if I'm leaning against an open door, I don't wish to fall over on that issue.

PN1049

The common ground is the AEU supports the proposed consent variation as to reasonable release for a level 1 teacher, or sometimes called a PRT teacher, where operationally practicable. There is a balance to make in terms of the evaluative judgment the Commission makes, under section 134:

PN1050

Reasonable release, where operational practicable, is intended to strike a fair balance between employer and employee.

PN1051

And I agree with Mr Ward, what might be necessary for one, level 1 teacher may not be necessary for the next. What may be operationally practicable for one childcare provider might not be operationally practicable for another, and there is a inbuild flexibility in the provision. There is, as is perhaps not surprising, between employees and employers, a difference as to how much work, over and above ordinary duties, is required for a level 1 teacher to do what is necessary to attain full registration.

PN1052

The Commission may recall, in its April reasons, there was a reference to a PRT having a form of licence, a form of licence to teach in the workplace while they acquired the necessary skills to attain full registration. And where, I suppose, the springboard for the notion of reasonable release where operationally practicable, comes from the fact that, as the Commission observed at 653 of the reasons:

PN1053

The new remuneration structure is tied to teacher registration.

PN1054

And then one goes back to the critical eights(?) document as to teacher registration, which is the National Framework for Teacher Registration, the NFTR, which was surveyed by the Commission at 21 of the April reasons. And what it says in appendix 1 is that:

PN1055

A level 1 teacher, the four-year graduate teacher, will be given the appropriate support to advance from level 1 to full registration.

PN1056

And all that 14 - why the AEU supports 14.11(a) in terms of reasonable release where operationally practicable, for a PRT, is whether Ms Drake is right, that four days' work is required, over and above normal duties, or Ms Nightingale is right, that 10 days' work is required. The clause, as crafted, has the inbuilt flexibility such that the Commission does not need to determine that issue on this application.

PN1057

Both the employer and the employee witnesses say that there is additional work, which in my submission, supports a safety-net level of reasonable release without loss of pay. So that the body of evidence which a PRT needs to assemble, can be assemble to achieve full registration.

PN1058

The sharp point of difference between ACA, ABI, and the AEU is whether reasonable release ought to be extended to mentors and supervisors. And I attempted to up in writing, at 23 of the written submissions filed on 13 August, why we say it is appropriate. But might I revisit, briefly, the key elements of that? I reason, through my submission, in this way, (1) one starts with the reality that the new remuneration structure is tied to teacher registration.

PN1059

(2) the relevant, teacher registration document is the NFTR. The NFTR promises to new teachers, level 1 teachers, appropriate support through the period of provisional registration. (3) in each State and Territory, the means of provision of that support to PRTs is the adoption of a system whereby the PRT is linked with a mentor or supervisor. Each State and jurisdiction adopts a similar methodology that the new teacher needs a professional mentor, that professional mentor, among other matters, has to, on at least three occasions, observe the work done by the PRT, so that PRT can advance to full registration.

PN1060

And the issues at, doubtless - go back a step. Doubtless, as Ms Drake says, many teachers in the past and into the future perform that work as mentors out of a sense of professional collegiality, a sense of wanting to give back. But the AEU submits, whatever the professional reasons teachers may do it, now the industrial schema in the remuneration structure has an essential element that mentors undertake this work.

PN1061

If mentors do not undertake mentoring work, a level 1 teacher cannot do what is necessary to move from level 1 to level 2.

PN1062

VICE PRESIDENT HATCHER: So Mr Champion, just to be clear, when we talk about a mentor in your proposed clause, is this somebody who has been directed by their employer, act as a mentor?

PN1063

That's the first question, I think. Or is this somebody who's just done it voluntarily, in response to an informal request from somebody seeking registration?

PN1064

MR CHAMPION: Well, both could apply. And my proposal, on behalf of the AEU, would include someone who, at their own initiative, has offered to act as a mentor.

PN1065

VICE PRESIDENT HATCHER: And presumably, if it's the former, then that is, it's pursuant to the direction, and an employer will have to take steps of that, that they make sure they have the time to comply with the direction.

PN1066

So really, the work of your clause would be someone doing it voluntarily, would it?

PN1067

MR CHAMPION: It would. And it does address this practical issue, your Honour, something that Ms Nightingale touched on, is that there is - touches on at paragraph 34 of her witness statement, that in the early childhood sector, there any many level 1 teachers who need to look outside their own employer to find a mentor. That's a practical issue on the ground. So there is mentors for employer A who - mentors who are employed by employer A, mentoring an employee of employer B.

PN1068

But that seems to be, as I submit to the Full Bench, that's essential for the new remuneration structure to operate in a practical way, that senior teaches continue to do that kind of work.

PN1069

VICE PRESIDENT HATCHER: So that raises the prospect of the employer, in effect, has to pay for a mentoring teacher to mentor somebody of another employer, for whom the employer gets no benefit.

PN1070

MR CHAMPION: Well, Ms Tatino - Totinto, I beg your pardon, says that. I say that that takes an unduly narrow view of what a benefit is - what benefit may accrue to that - if a senior teacher acts as a mentor, although it can only be put at a

high level of generality, your Honour, a teach who acts as a mentor and reflects on their own practice, is likely to enhance their own professional skills.

PN1071

But it is - and Mr Ward also said that they could find no analogue provision in another Modern Award, but I say this is an industry-specific situation that, your Honour, I could not readily tell your Honour, without having done an absolute, fulsome search of another industry, which relies on a mentor system in this way, for a junior teacher, a level 1 teacher, to be able to attain full registration.

PN1072

They are wholly dependent on a mentor teacher, industrially, as well as professionally, industrially, stepping forward to act as a mentor, otherwise they cannot do what they have to do to advance to level 2. And therefore, I say it's a - in terms of the evaluative judgment under section 134 that falls to this Full Bench, it is appropriate that there be reasonable release where operationally practicable even though, doubtless, there will be a cost to an early childhood centre, of the kind run by Mr Tino(?), by providing that.

PN1073

We don't expect it will be unduly arduous, I might say. Ms Drake says that she - in her evidence, she says that she has released senior teachers to observe the work of others. And it may be that it is - reasonable release is of relatively, limited compass. And I also acknowledge that the release for a mentor is likely to be less that, and this is something that I believe arose out of Ms Nightingale's statement, is likely to be less than the release required for a PTR.

PN1074

But industrially, the submission is really based on this premise, that the rubber hits the road in this way, that the schema adopted depends, absolutely, on mentors. It also depends, sometimes, on mentors mentoring level 1 teachers outside their own individual employer, but if they don't do it, a PRT cannot advance from level 1 to level 2, and that's the springboard for the AEU's submission as to this point.

PN1075

VICE PRESIDENT HATCHER: One of the fundamental features of our decision as recognising the professional status of early childhood teachers, and the obligations, and expectations, and accountability which came with that.

PN1076

Part of being a professional is attending to matters going to your status, professionally, in your own time, Mr Champion, but isn't this part of being a professional?

PN1077

MR CHAMPION: Well, it always has been, and teachers are very proud professionals, and the nation depends on them, but it has an industrial element too. It has an industrial element because of the remuneration structure which has been adopted. I do submit it's not appropriate to have a situation where mentors are expected to assume additional duties, beyond their ordinary duties, purely out

of a sense of altruism, or giving back, to borrow Ms Drake's phrase, or pure, professional collegiality.

PN1078

They are being asked to do work which is essential, and I choose that word, essential, essential because it appears in section 142 of the Act, for the remuneration structure to operate in a practical way. They're asking - - -

PN1079

VICE PRESIDENT HATCHER: (Indistinct).

PN1080

MR CHAMPION: That's the submission that I put, your Honour.

PN1081

VICE PRESIDENT HATCHER: Yes.

PN1082

MR CHAMPION: And in terms of it being work of substance, might I say this? I don't intend to go to the different regulatory guards in detail, we did collect them, there' schedule 1, 2 are 13 August submissions, gathered together the regulatory documents, in the different States and jurisdictions, and your Honour's associate was very helpful to Mr Kensington-Evans, who's assisting me and helping the links work, late last week.

PN1083

But in short, there's the VIT Guide to supporting provisionally registered teacher. And without taking you to it, there is work of substance for a mentor to do, it's on a sinecure in any way, part 4(a), page 15 of the VIT Guide says:

PN1084

It's anticipated there'll be joint planning, collegial interaction, professional discussion.

PN1085

That's page 15, part 4(a). Also:

PN1086

In Victoria, a senior teacher must observe a level 1 teacher on at least three occasions.

PN1087

Again, part 4(a), page 15. And:

PN1088

It's expected there'll be discussions between the mentor and the PRT, before and after the observation.

PN1089

And in New South Wales, and I'll finish here, is the NESA Guide, at page 3 of 15, and I think Mr Taylor may have extracted the relevant in the IEU's submissions,

but at page 3 of 15, in any event, in terms of the NESA Guide, the NESA Supervisor Guide:

PN1090

A mentor observes the teacher's practice, over time, provides timely and constructive feedback, and an observation report for the purposes of finalising accreditation.

PN1091

So it is a contribution from the mentor, over and above their current duties, which in my submission, is something more than might be expected out of a sense of professionalism and collegiality or giving back. It is something which, in this specific industry of teaching, is important for the operation of the remuneration structure. And that's why, in my submission, it's appropriate - it's the other half of the whole, might I put it that, if the Full Bench pleases.

PN1092

One half of the whole for a PRT to achieve full accreditations. They have some reasonable release to do what they need to do, but the other half of the same whole, in my submission, is that they depend - all States and Territories have adopted a system whereby they do what they do with the support of mentors, and it is for that reason that there needs to be a safety net provision, in my submission, not only to support the PRTs, but to support the mentors.

PN1093

Might I end on the note of the public interest? In terms of the evaluative judgment that, in the end, is to be made under section 134 in the Modern Award's objective, I don't think I would be contradicted to say that there's a clear, public benefit in senior teachers acting as mentors to their junior colleagues. The students, of course, are the beneficiaries of that, and the broader community is the beneficiary of it.

PN1094

And reasonable release for mentors would serve as a support for mentoring being done well, as opposed to being some form of bolt-on, and in a remuneration structure which is tied to registration, teacher registration, and which depends on mentors, there's no other award statement without a provision of the kind for with the AEU contends, of the value of mentoring work.

PN1095

They're the submissions for the AEU, unless there's any questions, I can assist the Full Bench with?

PN1096

VICE PRESIDENT HATCHER: No, thank you, Mr Champion.

PN1097

Mr Gunn, I was going to go to you next, but how long do you think you'll be?

PN1098

MR GUNN: Less than 5 minutes, your Honour.

PN1099

VICE PRESIDENT HATCHER: All right, we might hear from you and then we'll take a break for lunch.

PN1100

So go ahead, Mr Gunn.

PN1101

MR GUNN: Thank you, your Honour.

PN1102

We concur that the proposed consent position, effectively, addresses the Full Bench's decision of 19 April, including matters such as the operative date, the transition from current classification and pay structure. Our only (indistinct) from the proposed consent position is to seek clarification on how individuals with conditional accreditation, in an early childhood setting, will be treated for the purposes of award coverage.

PN1103

By including conditional accreditation in the table at para 657 of the April decision, the Commission was, effectively, broadening the definition of teaching, compared to the current award. By definition, conditional accreditation applies to individuals who have not yet completed the full requirement to have had their degree conferred. This is primarily an issue for early childhood, rather than schools, because of the engagement of both degree-qualified, early childhood teachers and diploma-qualified educators, working side-by-side in the education of children.

PN1104

The inclusion of conditional accreditation in the definition of the level 1 classification, therefore, creates an apparent overlap which requires clarification. Contrary to the ACA's characterisation, CCSA is not attempting to broaden the entitlement. Rather, we're trying to avoid situations where disputes arise in small services, such as when employees have gained conditional accreditation at their own initiative.

PN1105

Going to your earlier question, Vice President, conditional accreditation can be achieved voluntarily, in fact, the New South Wales Department of Education run scholarship programs for current, diploma-qualified individuals to obtain early childhood degrees which would allow them to acquire conditional accreditation, while still only holding a diploma-level, early childhood qualification.

PN1106

CCSA had proposed a limitation that clearly identifies, and limited, the circumstances under which an individual in an early childhood service will be covered by level 1 of this new classification structure, as it was expressed in the April decision. That is, if the individual has conditional accreditation, it would be limited by needing to also be taken to a teacher for the purposes of the Education and Care Services National Regulations.

PN1107

Those regulations will actually, at the moment, run out on 31 December this year, in six of the eight States and Territories, which would make this a moot point, other than in the Northern Territory and Western Australia, where it continues for a further two years, other than since 2011, the relevant regulation, regulation 242, has been extended on four occasions, from the original expiry date in 2016. And we don't know whether it will, in fact, continue beyond 31 December 2021 or not.

PN1108

While the approach that we had taken created clearly, delineated, eligibility criteria, it's possible that the parties and the Commission may agree that there is some other grouping that can apply. Our only concern is for certainty. In our view, the current drafting does not provide that. Where we concur with Mr Ward's clients is that it is not, for this case, to be the basis for extending award coverage. Removing the word, "conditional", from the level 1 description would resolve that in the early childhood sector.

PN1109

Alternatively, if it is necessary to return "conditional" for school teachers, certainty can be provided by a note excluding the early childhood sector from the operation of level 1, sorry, conditional from (indistinct) the early childhood sector from the operation of level 1. Either of these course of action, of course, require a change from the way in which level 1 was described in the April decision of the Full Bench.

PN1110

That completes my submission, your Honour.

PN1111

VICE PRESIDENT HATCHER: Thank you.

PN1112

Mr Warren, we'll go to you after lunch. How long do you think you'll be?

PN1113

MR WARREN: Did you say mine?

PN1114

VICE PRESIDENT HATCHER: Yes, you.

PN1115

MR WARREN: I couldn't quite get the Warren part, your Honour. (Indistinct). Half an hour, I would say.

PN1116

VICE PRESIDENT HATCHER: And hour or so, all right.

PN1117

MR WARREN: Half an hour. Half one hour.

PN1118

VICE PRESIDENT HATCHER: Half an hour, all right. Well, I need to finish by 4, so we might resume at 1.45 pm. We'll now adjourn.

LUNCHEON ADJOURNMENT [12.56 PM]

RESUMED [1.46 PM]

PN1119

VICE PRESIDENT HATCHER: Hi, Mr Warren?

PN1120

MR WARREN: Yes, thank you, your Honour. May I start by saying that we – AFEI – have filed two written submissions. One on the 30 July and one dated 13 August. With respect to those submissions there are some minor amendments now as to the parts of the submissions they do not read and do not rely upon and with respect to the submission on 30 July there has been a significant change in the AFEI's position and it no longer reads nor rely.

PN1121

VICE PRESIDENT HATCHER: Sorry. Can you just hold on while I pull that up?

PN1122

MR WARREN: Sure, certainly.

PN1123

VICE PRESIDENT HATCHER: I've got 50 tabs opened here so I just – what's the date of the first one?

PN1124

MR WARREN: 13 July, your Honour – 2021 I think.

PN1125

VICE PRESIDENT HATCHER: Yes.

PN1126

MR WARREN: Paragraphs 45 and 46 are no longer read or relied upon. There's a subsequent amendment also at paragraph 53. The last sentence in paragraph 53 which starts, 'An approach' down to 45 and 46 above as a consequential deletion. And in the submissions of the 13 August.

PN1127

VICE PRESIDENT HATCHER: Sorry, where are we up to?

PN1128

MR WARREN: The submissions on the 13 August, your Honour.

PN1129

VICE PRESIDENT HATCHER: Sorry. Yes.

PN1130

MR WARREN: In paragraph 17 the last sentence commencing, 'AFEI have addressed' down to 'July submissions' should be deleted, please.

PN1131

VICE PRESIDENT HATCHER: Okay.

PN1132

MR WARREN: Those are the only amendments to those submissions.

PN1133

VICE PRESIDENT HATCHER: Yes.

PN1134

MR WARREN: Can I commence by saying your Honours are have received a proposed clause 14 from AFEI and it's in two forms. There are a final form and a tracked changes form.

PN1135

VICE PRESIDENT HATCHER: When was that filed?

PN1136

MR WARREN: Filed on the weekend, your Honour.

PN1137

VICE PRESIDENT HATCHER: On the weekend?

PN1138

MR WARREN: Yes.

PN1139

VICE PRESIDENT HATCHER: Variations were meant to be filed on the 14 July, Mr Warren.

PN1140

MR WARREN: Yes. I appreciate that, your Honour, but with respect to the AFEI position they have made a significant change in their position and I could have talked your Honour through that or the Commission through that at these oral submissions, as to the change as I have just deleted certain parts of the earlier submissions. It's a fundamental change and we thought it was – well AFEI thought it was appropriate to put in – it in documentary form.

PN1141

VICE PRESIDENT HATCHER: Right. So what document do you want us to look at?

PN1142

MR WARREN: It's a document that was filed on the weekend, entitled 'Education Services Teachers' Award 2020' AFEI Group.

PN1143

VICE PRESIDENT HATCHER: We've got the email. There was five attachments so which one is it?

PN1144

MR WARREN: It's the one that's the AFEI proposed variations to clause 14.

PN1145

VICE PRESIDENT HATCHER: Right. Yes.

PN1146

MR WARREN: Your Honour has that document?

PN1147

VICE PRESIDENT HATCHER: Yes.

PN1148

MR WARREN: Thank you. There are two central issues with respect to the change in the AFEI position. Firstly, they have adopted the Commission's classification criteria structure found at paragraph 657 of the decision, subject to the decisions, in particular words and you will see in paragraph 14.2 the exact words from the Commission's criteria and classification document or table have been repeated there. So there's that change and that's a change from the position of the consent draft award. Secondly - - -

PN1149

VICE PRESIDENT HATCHER: You've moved away from the consent position?

PN1150

MR WARREN: Yes, your Honour. The AFEI is not part of the consent position.

PN1151

VICE PRESIDENT HATCHER: I know that you're not part of it but you've moved further away from it.

PN1152

MR WARREN: We have adopted the Commission's approach to it, to the classification criteria. And the classification criteria the Commission will see in the document I have referred the Commission to at paragraph 14.2 classification of employees – the classification criteria are identical to them. The classification and criteria that are found in the Commission's decision at paragraph 657.

PN1153

VICE PRESIDENT HATCHER: So let's be clear about this. Earlier you agreed with what the position was and now you don't?

PN1154

MR WARREN: No. No, your Honour. We have never agreed to the consent position.

PN1155

VICE PRESIDENT HATCHER: So what was your earlier position?

PN1156

MR WARREN: The earlier position was – well, with respect the classification – the AFEI has always supported the classification structure that the Commission

awarded in its decision. Have always supported that classification structure but it has now produced it into a document and that document, with the classification structure and criteria is different from the classification and criteria structure in the consent position.

PN1157

VICE PRESIDENT HATCHER: Yes, but what was your earlier position?

PN1158

MR WARREN: The position was – has never been – that it didn't support the Commission's decision.

PN1159

VICE PRESIDENT HATCHER: Well, I am just trying to work out what the import of these changes to your position are.

PN1160

MR WARREN: If your Honour will bear with me I will come to them.

PN1161

VICE PRESIDENT HATCHER: Right.

PN1162

MR WARREN: The AFEI have adopted the Commission's structure which is different from the common – from the said position and have adopted the Commission's decision at paragraph 653. And this is a fundamental difference between the AFEI and the consent position. Your Honours will be aware at 653 that the Commission dealt with the old structure, the old award structure for rates of pay and the new award structure. And said it is annual increments – an instrument – not properly relate to the work value of teachers who have received a new classification structure should be at the state of the standards and upon professional career standards satisfy APST. The Commission then went on to say, 'The key classification in the (indistinct) will be a proficient teacher who has a degree and has attained registration, or in the case of an early childhood teacher his registration is not yet required in their jurisdiction has met the requirements for registration as if they apply.'

PN1163

AFEI have adopted those words and have applied those words to enable a teacher who has the jurisdiction where the APST standards are not yet applicable with respect to becoming proficient in their role that the AFEI adopted a position where if the employee demonstrates that they have equivalent qualifications, equivalent standards – professional standards – and those professional standards are referred to in the Commission's decision from paragraph 26 and 27 of the decision earlier on.

PN1164

If the employee maintains or obtains those standards then they can properly be dealt with in accordance with the progression up the scale, as adopted. Your Honours will see and, indeed, your learned friend criticised the AFEI position by saying that with respect to satisfactory service that the AFEI has deleted and you

will see it in the tracked changes. Deleted and has complied with the requirements of the Australian Professional Standards for Teachers – APST.

PN1165

That is a standard which is referred to in the satisfactory service. It is the situation though, your Honours, that if a teacher has complied with the requirements of the Australian Professional Standards for Teachers, then they have had satisfactory service and, indeed, that the provisions of the classification structure would chime in with respect to proficient accreditation. It is a fundamental part of the Commission's decision that no longer does a teacher progress up a scale according to years of service but must obtain satisfactory accreditation in that process. And to move beyond Level 2 the teacher must obtain that qualification – that accreditation – as proficient.

PN1166

And if one then looks to the consent award, the fundamental concern of AFEI is found when one applies the words in 14.4(d). The 14.4(d) of the draft consent award under transitional provisions, 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 recognised teaching qualification. In other words the graduate.

PN1167

So a graduate, in terms of the draft consent award, all the graduate has to have done is to continue service – continue service beyond the first two years and that service is counted as proficient. They do not need to do anything further to obtain that proficiency, i.e. a private regional of the APST. They do not have to inform of those provisions. They'd merely have to have service. And a teacher may well have had a significant amount of service – significant amount of service before the introduction of these provisions. And all of a sudden they have capacity to move up the scale as if their service had been satisfactory. And for satisfactory service even on the IEU's wording you need to have satisfactory service the teacher – the person has complied with the requirements of the APST.

PN1168

In other words, it's a deeming provision which gives the employee the capacity to move up the scale on years of service without regard to obtaining satisfactory service with proficient accreditation. And the same thing applies, your Honours, with respect to clause 14.7 on progression – 14.7(c) – provided however the total number of years of service at proficient level will be deemed to be not less than that total service of the teacher minus two years in the case of teachers, covered by the transitional provision.

PN1169

In other words, after you've got two years' service. A current teacher, they do not need to gain proficiency in accordance with those requirements in the consent award – consent draft award to move up the scale. They can move from Level 2 to Level 3, to Level 3, Level 4 – merely on their previous service which has been deemed to be proficient. The same thing occurs in 14.8(a)(2). This is – and this is dealing with new additions without compulsory accreditation and, once again,

count for all service beyond the first two years as service at a proficient level for the purpose of subclause 14.2.

PN1170

So, that's the AFEI's fundamental concern with that type of wording in the consent award that it allows a teacher to move up the scale on exactly what the Commission has rejected already, saying that that is anachronistic situation to move up a salary scale upon years of service there need to be proven proficiency but those words have been served during the consent order get around that. And that is the fundamental – a fundamental concern of AFEI why they produced the wording that they have.

PN1171

And when, further more, when one looks at the satisfactory service the AFEI position is as found at 14.3(a) of their consent draft – of their draft suggested clause. It reads that the teacher accredited as a proficient teacher maintains their accreditation. That's a fundamental position of maintaining of obtaining satisfactory service, that the teacher accreditor's provision maintains their accreditation.

PN1172

And my learned friend, Mr Taylor – pardon me – criticises the AFEI position saying that they abandoned the need to comply with the requirements of the Australian Professional Standards of Teachers. That's not at all. If a person is accredited as proficient and maintains their accreditation they are complying with APST requirements. And so it was considered by AFEI that the words in the consent draft to do with compliance of the requirements of the Australian Professional Teachers were somewhat redundant. If the words - - -

PN1173

VICE PRESIDENT HATCHER: Mr Warren, do you accept that if you do have proficient status then your previous service counts for the purpose of translation?

PN1174

MR WARREN: To the extent – yes, your Honour, to an extent.

PN1175

VICE PRESIDENT HATCHER: I am not suggesting you have to start again. That is if you have got proficient status already and you have got four years satisfactory service you accept you'd go to Level 3 per cent then.

PN1176

MR WARREN: And you have proficient status for that time.

PN1177

VICE PRESIDENT HATCHER: Yes. Go on.

PN1178

MR WARREN: Proficient accreditation for that time because the words in the classification structure provided by the Commission speaks at the level if either teacher with proficient accreditation up to three years' satisfactory service. And

that's the important part. And for example in the returning to teaching provisions as found in the suggestion put by the AFEI if one turns to 14(10) of that clause a teacher and I am referring to 14(10)(a) and the last paragraph it starts shall be classified on Level 2 for one year full-time equivalent teaching service. And then this is a teacher who had previously accredited as proficient. So the teacher there he had accredited as proficient but has lost his or her proficiency but then they reattain that proficiency when they come back to work.

PN1179

And then you will see from the AFEI's position in 14(10)(a), halfway through the last paragraph, 'they shall be classified upon attaining proficient teacher accreditation the teacher will progress to the relevant level in accordance with the criterion in 14.2. All previous accredited service at a proficient level will count as service at a proficient level following the reattaining of proficient accreditation.'

PN1180

Now that may well mean that the teacher might come in at Level 2 but then they jump two levels if their previous proficient accreditation they carry it with them to the extent that they previously had it. And I hope that answers your Honour's question.

PN1181

VICE PRESIDENT HATCHER: You seem to be saying one your position was before.

PN1182

MR WARREN: The position before is if a teacher – I am sorry – could your Honour just repeat again?

PN1183

VICE PRESIDENT HATCHER: Well, you said you changed your position on the weekend. I am still trying to understand what you changed it from.

PN1184

MR WARREN: Well, on the – prior to that, as your Honour will see from our submission from the AFEI submissions at 45 and 46 that it was the AFEI's position if a person wasn't – hadn't obtained accreditation of proficiency the employer would remain on a current structure. Would remain in the current structure. And there would be two structures running. The structure in the current – in the new award dealing with teacher who are – who had obtained a proficient accreditation and those who hadn't – they didn't need to obtain it later and continue working on the old structure which didn't recognise proficient accreditation. And then in 46 – paragraph 46 the AFEI went onto propound how that would occur.

PN1185

Now, your Honour, that is the position that the AFEI has moved away from. They have said, 'Okay, all teachers move straight across to the new structure.' And you go to Level 2 if you were – and in accordance with the scale of the 14.4(b) you would move across from Level 6 to Level 2, Level 7 to Level 2, Level 8 to the level – it's the same transition table as is adopted and proposed by the consenter.

The same transition table. And before AFEI was challenging that because you were transitioning people across to a scale – a new scale which was dependent upon a teacher becoming, having proficient accreditation.

PN1186

And now the AFEI's position is, 'Okay. Right. Everyone moves across in accordance with that total and then you're given time to obtain proficient accreditation and once you obtain your proficient accreditation you then apply the provisions of the classification and criteria structure which is a teacher who is proficient at Level 3, you first have to have three years' satisfactory service, Level 2.' And even under the consent award satisfactory service is considered to be a person who has complied with the requirements of the Australian Professional Standard for Teachers.

PN1187

So in AFEI's position, your Honour, they have moved from saying that the old structure continues for those teachers who have not got proficient accreditation to say abandon that. You then went over to the new structure and then the teacher has to obtain proficient accreditation and they objected to the situation where there's a deeming proficient accreditation which allows a teacher to move up the scale on deemed – serve on deemed accreditation for previous service which was unaccredited.

PN1188

VICE PRESIDENT HATCHER: Well, firstly, you accept that we need to deal with jurisdictions where accreditation is not available and there needs to be some deeming for them. Correct?

PN1189

MR WARREN: Look there needs to be a deeming if they moved in accordance with the Commission's words, have met the requirements for registration as if they applied, and AFEI picked up those words and said, 'That's right.' With respect that's right. The new structure and the waging and the salary increases have been based on a fundamental shift in the teachers' accreditation and proficiencies. I understand that. And they are thus applying that the words as adopted by the Commission, the requirements of the registration as if they applied.

PN1190

So they're then needs to be an assessment made. If there isn't such requirement in place in the particular State jurisdiction in which that teacher is working that they need to have – that there needs to be a system in place which applies the APST standards as set out in the Commission's decision in the final paragraphs 20, 26, 27. And that's the fundamental position that is put by AFEI to the Commission.

PN1191

VICE PRESIDENT HATCHER: That means it's been there for 20 years satisfactorily but you say you have to start again based on some new assessment.

PN1192

MR WARREN: Well, your Honour, that's precisely what the draft consent award does. The draft consent award says that satisfactory service – service is

satisfactory if the teacher has complied with the requirements of the APST. And so a requirement of the APST is to obtain accreditation et cetera.

PN1193

VICE PRESIDENT HATCHER: No. I'm still trying to address the States that don't have an accreditation requirement. So I am BCT. I have been there 20 years' satisfactory service.

PN1194

MR WARREN: Yes.

PN1195

VICE PRESIDENT HATCHER: What's your proposal as to how we deal with them?

PN1196

MR WARREN: There needs to be a requirement for registration as it is applied. In other words you apply the standards that are required for teachers to obtain accreditation in those places where those standards are applying and you apply the APST standards to a teacher who has not got accreditation and we say that - - -

PN1197

VICE PRESIDENT HATCHER: Well, I end up with standards for the last 20 years.

PN1198

MR WARREN: Well, your Honour, that's a fundamental part of the Commission's decision that these teachers have now moved to a position of proficiency and the capacity to obtain and maintain the APST standards of teaching and that's fundamental as we see it from the decision of the Commission. And thus applying that provision it is necessary. If teachers have to – want to move beyond Level 2 in accordance with the – with the criteria as applied by the Commission, and indeed, even as applied by the draft consent award it speaks of up to three years satisfactory service at a proficient level.

PN1199

VICE PRESIDENT HATCHER: So doesn't that lead to like a snakes and ladders result where somebody who currently is at the top of the scale could then slip right down to Level 1?

PN1200

MR WARREN: Well, or a Level 2. It's still a long snake. I take your point, your Honour. Your Honour, that could be an unintended consequence which needs to be dealt with on a case by case basis. That could be an unintended consequence. But we maintain - - -

PN1201

VICE PRESIDENT HATCHER: It needs to be dealt with by way of transitional provisions, doesn't it?

PN1202

MR WARREN: I'm sorry, your Honour?

PN1203

VICE PRESIDENT HATCHER: It needs to be dealt with by way of transitional provisions. That is we have to work out a practical and fair way to translate people who have worked under the current system into where they fit under the proposed new system. You can't pretend that the new system being in place forever because it hasn't. And we need to ensure that people with long experience and satisfactory service in the industry on there have a transitional move to the new system so they don't slip back to Level 1 or Level 2 at all.

PN1204

MR WARREN: Well, your Honour, there is a need to maintain the integrity of the Commissioner's decision and said, 'These increases' and they're not asking for substantial increase - I'll come to that in a moment but there's increases – are based on the new work value of teachers. Now, if they've got those – if the teacher has those new capacities then they've got the capacity to meet the APST standards.

PN1205

VICE PRESIDENT HATCHER: Mr Warren, with respect, the decision said the changing work value has already occurred.

PN1206

MR WARREN: Mm.

PN1207

VICE PRESIDENT HATCHER: And if you go from Level 11 under the current structure and Level 1 in the new structure you're not getting any increase. You're getting a pay cut.

PN1208

MR WARREN: No, your Honour. You all go across. No one – no one in the current – no one who is currently classified as either a Level 1 all the way through to Level 12 gets paid up – on the transition.

PN1209

VICE PRESIDENT HATCHER: Will they go across in their current pay?

PN1210

MR WARREN: They go across on the new pay. For example, Level 7 – Level 5 – Level 5's current pay is $60,395. They go to $66,712. Or if you go to another one – Level 9 – it goes from $68,247 to $72,625. Level 11 goes from $72,314 to $78,539. Level 12 goes from $74,344 to $78,539. Everyone gets a pay increase on the structure – on the transition – as proposed by AFEI by moving you straight across. It's then where do they go from there that they need to obtain proficiency in accordance with, indeed, the union and the consent employer's own words which deal with satisfactory service. And satisfactory service being one of the elements of that satisfactory service is that they complied with the requirements of the Australian Professional Standards. Your Honour, it is – the AFEI position is maintaining the integrity of the decision, the integrity of the transition clause

across and the integrity of the Commission's decision which says it is anchored upon the professional career standards established by the APST.

PN1211

And that's with the AFEI says is fundamental and is, indeed, to an extent supported by the definition of satisfactory service by in the consent draft award. I will move from that point, your Honour.

PN1212

The educational leaders allowance, the AFEI submissions at 63, 64 and 65 deals with and the submission in 63 raises the question of how the allowance is stated at 3845.14 when applying 2.5 per cent increase to the quantity awarded by the Commission and it comes up 3385.02. The Commission at paragraph 658 in its decision awarded the allowance of 3302.46 per annum justified clearly on what value grounds. If that amount is then increased by 2.5 per cent you get to the figure that's expressed by AFEI in its submission at paragraph 63. The Commission had awarded that amount as an amount and it's the position of AFEI that that amount is the amount that should go into the award.

PN1213

So I have dealt with the return to teaching and expressed that the AFEI view that or the previous approval and service counts once a teacher reattains accreditation. The operative date you will be – the Commission would be aware from the submissions of the AFEI that there's two options given there. Either after the award rate increase on the 1 July – 1 January 2022 and the remainder go on the 1 July 2022 or the whole lot on the 1 July 2022.

PN1214

The submissions have referred to a decision of the Full Bench of this Commission with respect to apprentices. It says no more in the AFEI's submission that the Commission recognises that when there is substantial wage increases there may be a need to phase them in. And I refer, particularly, to the submissions at paragraph 15 of the 30 July submissions and there have found the significant in percentage terms rate increases that the Commission has awarded to treat this on this occasion. But 8.4 per cent for a Level 1 teacher, 10.5 per cent for a Level 2 teacher, 9.6 per cent for a Level 11 teacher. Those are significant wage increase – salary increases, whichever way it was looked at.

PN1215

It is recognised that the number of teachers employed as a percentage of the other staff employed at a pre-school is small that that's recognised and understood but those wage increases are substantial and it's the position of AFEI that they should be phased in, and if not phased in they should not come in until the 1 July 2022 when the employees had an opportunity to (indistinct) and to assess properly how they should adjust their fees accordingly.

PN1216

VICE PRESIDENT HATCHER: Well, Mr Warren, in the main proceedings the Australian Child Care Alliance called a range of employer witnesses who gave evidence about issues of costs and affordability and they were cross-examined at length. If having regarded that the ACA's position is now the pay increases are

affordable to be paid on the 1 January why would we take a different position? I mean you haven't called any evidence about any of these issues, have you?

PN1217

MR WARREN: No. It's interesting to note though, of course, (indistinct) the consent award's in there that the AFEI also said it would have been preferable to have a longer date. Preferable for their members to have a longer date for the 1 July but in terms of the consent position they went along till the 1 January. You know, that's at least, the passage of assessment that there is going to be a significant change in the rates that have been the salary for teachers at another stage.

PN1218

VICE PRESIDENT HATCHER: I will probably (indistinct) Mr Warren but I am not sure what that means.

PN1219

MR WARREN: I'm sorry, your Honour?

PN1220

VICE PRESIDENT HATCHER: Well, I mean the ACA would probably prefer never to have to pay them. That's not the point. The point is they say they can pay them at 1 January next year.

PN1221

MR WARREN: I'm merely noting the submission that was made, your Honour, which was there wasn't a need to make that submission. They could have simply said, 'Yes. 1 January is great.' But they didn't. They said we would prefer to have made a later date and I am just noting that observation from AFEI that if they would have preferred to be a later date. And I am putting to the Commission that there is precedent for the Commission considering when there are substantial salary increases that those salary increases should be phased in. And if not phased in the position of 'I will pay AFEI', which they're not alone in this case, the position of the AFEI is that the (indistinct) should be the 1 July next year.

PN1222

I have spoken about the educational leaders alliance, the support to give new teachers. I note, particularly, the submissions of Mr Ward with respect to the mentoring and AFEI supports and adopts those submissions that Mr Ward has so clearly put to the Commission today. And I'm nearly there.

PN1223

It is the position of AFEI that a person's professional qualifications are a matter for the particular teacher or a particular professional to maintain themselves. It's a fundamental premise of professional qualifications that it's your responsibility, to get your professional qualifications and maintain them and the AFEI are opposed to the suggestion that or the consent position that the Level 1 teacher, regardless of support being provided by the employer, it notes of course that that is a qualified support and that it is only granted provided it is operationally practical.

PN1224

It's a potential for concern and for dispute at the workplace as to what is operationally practicable and what is not and the AFEI position is that so far as the teachers are concerned if they wish to become professional they should maintain their own professional status in their own time, and is their own efforts.

PN1225

Apart from our written – the written submissions of AFEI, your Honour, those are the submissions of AFEI in these proceedings. We rely on the written submissions except to the extent that I have amended in this this afternoon. If the Commission pleases.

PN1226

VICE PRESIDENT HATCHER: Well, thank you. Just hold on a sec, Mr Warren. I'm just – I haven't looked at – I'm just looking at your proposed transition table.

PN1227

MR WARREN: Mm.

PN1228

VICE PRESIDENT HATCHER: Yes. All right, thank you.

PN1229

MR WARREN: Thank you, your Honour.

PN1230

VICE PRESIDENT HATCHER: Mr Owens?

PN1231

MR OWENS: Thank you, your Honour. I don't propose – sorry, I propose to rely on the submissions previously made in this matter. I will just briefly address three matters. In respect of the operative date, section 166(1) of the Fair Work Act requires that any change to minimum wage rates needs to come into operation on the 1 July of the following financial year. Section 166(2) allows the Fair Work Commission to select another date if it is satisfied that is appropriate to do so.

PN1232

Your Honour, except in this case that the consent positions put forward is something that the Full Bench could take into consideration when determining that if the operative date should be something different than the 1 July. We also note the comments you just made in regards to evidence that was heard in the substantive hearing with respect to the increase in minimum wage rates not being significant, which is also another matter that the Full Bench can take into consideration in determining whether another operative date is appropriate.

PN1233

But, nonetheless, the Full Bench needs to be satisfied that another date is appropriate, otherwise the operative date must be the 1 July 2022. With respect to the issue of satisfactory service and whether it should be deemed satisfactory unless brought into issue by the employer. We would concede, as suggested, I think, by Mr Taylor or Mr Ward Catholic employers in this space will generally

have the support of HR departments and have robust procedures in place in managing and reviewing performance and it's likely that a teacher not meeting the APST standards would follow your performance improvement process and subject to improvement have their employment terminated.

PN1234

And as noted by either Mr Ward or Mr Taylor this is not necessarily – would not necessarily be true of small operators. So with respect to satisfactory service we are – our position is moving close to that of the consent position.

PN1235

With respect to highly accomplished and lead teachers and whether it is appropriate that there be an equivalent for those jurisdictions that don't have it, of course, yes there should be an equivalent process for teachers to reach Level 5. We support the proposal by the AEU, in particular, noting their clause 14.9(c) which as pointed out by Mr Champion was drafted in response to our submission of the 30 July 2021 so that the system is fair for all teachers, progressing to level five and that they would face the same requirements.

PN1236

In particular, teachers in New South Wales would have to every five years have that – be reassessed to be highly accomplished lead teachers, whereas under the IEU, ACA consent position, teachers in Victoria would not need – would only need to be assessed once to achieve Level 5, and there's a Level 1 fairness in that position.

PN1237

If there's nothing further, your Honour, that's all I wanted to add.

PN1238

VICE PRESIDENT HATCHER: Right. Thank you. Ms Arrabalde, do you want to say anything in addition to your written submissions?

PN1239

MS ARRABALDE: Yes, please. One of the things that I would like to point out in the consent position with respect to the educational leadership allowance, in 9.4(e) it says that the allowance can be shared if the position is shared. But that's at odds with the regulations for childcare. Regulation 118 which they also mention in that clause at 9.4(c) so in Regulation 118 it says that – it uses the word 'individual' which suggests that it's one person that can have that position. So I think that 9.4(e) would be redundant in that clause.

PN1240

The other issue that we had concerns about was with the definition of satisfactory service with ABI's proposal we did – I did mention it in the last submission that I thought that the idea of being proficient isn't equivalent to having satisfactory service. Now, that's because your proficiency isn't addressed in the workplace. That's something that's done by an external body.

PN1241

In the case of New South Wales, and from New South Wales, sir, I am familiar with the process. I got my proficient accreditation automatically because I was a teacher when that system came into place and I had just done my reaccreditation to be proficient. To do that all I had to do was pay a fee and do 100 hours of professional development. The professional development can be self-possessed and it has nothing to do with my work at my job.

PN1242

So I don't think that that is a way of assessing satisfactory service since it has nothing to do with my actual work in my workplace. And the other idea of using the professional standards for teachers to measure satisfactory service I mentioned in the submissions that the Australian Professional Standards for Teachers were not developed with early childhood teachers in mind, and the result of this is that in early childhood teaching there is certain language that's used.

PN1243

One of the – so we use the word 'children' instead of students. We use the word 'centres' and 'services' instead of schools which the Professional Standards for Teachers don't use the language of early childhood and what that means is that if you were going to use that as an objective measure of an early childhood teachers service there would be a lot of interpretation involved.

PN1244

A lot of the standards you can interpret in some capacity to apply to early childhood teachers but there are some parts of the standards which don't apply to all. For example, when you're assessing children's learning we don't moderate that. So in schools they do moderation for children's or students – see I don't use that language – for students' marks. In early childhood we don't. We don't have lessons. We have experiences. So there are lots of parts of the standards for teachers which don't directly translate into early childhood. So I don't feel that would be effective to be used as a measure for satisfactory service.

PN1245

VICE PRESIDENT HATCHER: Ms Arrabalde, you said you were given automatic efficient status. You were an ECT when that happened?

PN1246

MS ARRABALDE: Yes. So, I was - - -

PN1247

VICE PRESIDENT HATCHER: When did that happen?

PN1248

MS ARRABALDE: It would have been five years ago in July because I have just done it now in July – become reaccredited. So it was five years ago. When that came into play, basically, we were told once again we had to pay fees. There was no system to start. We had no guidance as to how to maintain proficient status at that stage. So five years ago there was early childhood teachers weren't even mentioned on the NESA website for New South Wales. We had to every time they sent out any information that wasn't a bill we kind of had to call them and say, 'But this doesn't apply to us.'

PN1249

It was just little things like when we put in an application to be proficient they said, 'How many students are in your school?' And had a scale. And it said less than 500. So like that sort of thing it just didn't apply to us. In more recent years they have like fixed it to a certain extent, but the Professional Standards for Teachers have remained the same.

PN1250

So to become proficient in New South Wales you don't have to show evidence that you are or have done professional development that meets every one of those standards. So you don't – so even to become proficient you don't have to show evidence of meeting every standard which I would argue – yes, I don't think it can be used as a measure.

PN1251

It would also mean that people who have no experience in working with the standards, so employers aren't usually teachers themselves in my experience, and so it would mean that non-teachers are using the standards for teachers to assess the service of teachers, which I don't think makes sense, and I don't think you could ever do that objectively, unless there was a document that assisted – especially smaller early childhood operators to do that. And I think that by using the standards in a way that could never be objective, would be unfair for a lot of people.

PN1252

For my employer – we have two teachers, we're a small centre, we're not for profit. We don't have those performance appraisal systems in place. We do a self-assessed performance appraisal because we don't have a requirement to do that. And I think it's really important in early childhood. Because we're working with such little people that unsatisfactory service is addressed in the workplace immediately and doesn't go to that stage where it would be a matter to be discussed when it only comes to pay.

PN1253

The other bit - - -

PN1254

VICE PRESIDENT HATCHER: Ms Arrabalde can I just go back again? So when you automatically became or assessed as – or given proficient status.

PN1255

MS ARRABALDE: Yes.

PN1256

VICE PRESIDENT HATCHER: How long had you been a working graduate teacher when that happened?

PN1257

MS ARRABALDE: I graduated in 2014. So that would have been two years.

PN1258

VICE PRESIDENT HATCHER: Right, thank you.

PN1259

MS ARRABALDE: Yes. The other issue which – I have only seen during the course of these proceedings today is that the idea of the mentors getting paid or getting a reasonable relief to be a mentor this – I don't know how practical this could be. When a teacher mentors a person who it has – is working towards their degree within a workplace. So if you have a student teacher the educational institution usually does pay the mentoring teacher directly. So you do get a payment for mentoring students but not actual teachers. So if you were to mentor a teacher that wasn't in your workplace I don't think it's appropriate to be paid for that or given release for that. I think that's something that can be done in the non-rostered hours. I don't think it has to be done during your rostered hours if you choose to do that. And I think that is all. Thank you.

PN1260

VICE PRESIDENT HATCHER: All right. Thank you. Mr Rawson, are you still there? No?

PN1261

MR RAWSON: Yes, your Honour. Can you hear me?

PN1262

VICE PRESIDENT HATCHER: Yes. Do you wish to say anything?

PN1263

MR RAWSON: No, your Honour, as far as you may be aware the Commonwealth has filed an updated aid memoir on its funding arrangements in the sector on the 21 May 2021. We don't otherwise seek to play any role in the matter beyond that, your Honour.

PN1264

VICE PRESIDENT HATCHER: Right, thank you. Mr Taylor? Or Mr Ward do you wish to say anything in reply?

PN1265

MR WARD: I do, your Honour, but I might let Mr Taylor go first.

PN1266

VICE PRESIDENT HATCHER: Right, thank you.

PN1267

MR TAYLOR: Thank you. Yes, I have got a few things to say. Can I start by just dealing with minor clarification matter which requires the Bench to have available to it the consent position and the translation – sorry, the classification table and 14.2 in the transitional provision table at 14.4. I indicated by way of the reason why the words in Level 1 include 'And all other teachers as defined', that teachers who would fall within Level 1 would include teachers who are not graduates, and that is certainly how the classification will work going forward.

PN1268

I also stated something which I need to correct which was that under the current award teachers cannot rise above the minimum level and therefore won't translate to above Level 1. The current clause is 14.4(d) and it provides that a teacher who has only a two-year degree or no degree can rise to Level 5. And so under the transitional provisions that person – that teacher at Level 5 would translate to Level 2 but wouldn't then be able to progress further. But any further teacher coming behind them who hasn't already go to Level 5 would translate at Level 1 and couldn't get to Level 2.

PN1269

So it's really more of a grandfathering provision, though it might be a small cohort who would be at Level 2, because lest they otherwise go backwards in pay. I should say, of course, that these are teachers who, to the best of our knowledge, only exist in a high school environment. And as to that the likelihood is that they are covered by an enterprise agreement which would mean that they – the award rates will have no effect on them at all.

PN1270

The next matter I wanted to address is the minor issue in clause 14.11. The AEU identified that it might be useful to add the words 'without loss of pay'. Can I just note that, like Mr Ward apparently indicated by nodding, that our view as the other parties to the consent position that those words are strictly unnecessary. Given it's a release from ordinary duties it would follow that the employees would be paid. If the Bench were of any view that there's any doubt about then, certainly for our part we see no difficulty with adding the words 'without loss of pay'.

PN1271

The next thing I wanted to do arising out of the ABI submissions is address, particularly, this question of satisfactory service. And to that end could the Bench have available to it, again, the consent position of clause 14.3. It might not surprise the Bench to know that our clients – our client – has a very strong concern that there not be a position where employees would be denied a wage rise based on a subjective employer view, as to whether they would be performing at a satisfactory level. It's a concern that is only heightened if that assessment is made without any objective criteria or only such criteria as the employer may discern.

PN1272

The compromised position that our client reached with the ACA is to have a default or deeming provision which is found in 14.3(a). It's understandable that both from an employer and an employee perspective certainty as to this is to be encouraged as where the deeming provision has strength.

PN1273

A deeming provision like this, on its face, might seem a little unusual but it is suggested that in this particular industry where it's most likely to have effect, that is in respect of early childhood industry with small employers it is the most efficient and effective way of dealing with this issue.

PN1274

If the Bench were not persuaded of that, if the Bench were in some way persuaded by the AFEI that there shouldn't be a deeming then, frankly, the IEU's position is

it should be removed altogether that there shouldn't be such an obligation to achieve satisfactory service. Certainly, if the touchstone for determining satisfactory service is maintenance of the APST it is, perhaps, on one view, unnecessary for the simple reason that if you don't maintain the APST in a manner that what follows is if you lose accreditation you don't have a job.

PN1275

And so can I echo the submissions that Mr Owens made on behalf of the CER that if there are concerns about performance there are ways of addressing those concerns that might ultimately lead to a loss of a job. But, certainly, if the concerns are ones that a teacher is not meeting the standards then they will not be able to maintain their job because upon losing accreditation they're unable to teach.

PN1276

Alternatively, if the Bench were minded to think that there needs to be some method which is not the consent position which, frankly, we strongly urge upon the Commission then such that the employers are in some way making a subjective view about this then there needs to be some clear established method by which the employer is mandated to go through a process which involves giving the employee in advance of the year ending an understanding of their potential view about it, in writing, by reference to the standards for the employee to be able to respond to that in writing so that there is strong procedural fairness that would have effect.

PN1277

But I think one of the things that we say about the AFEI position on this is this. Any person listening to a number of the witnesses who gave evidence on behalf of employers during the course of the proceedings would, whatever else one thought about the way in which they are running this service and their knowledge of the childcare industry which, in many cases, was good and high is that one would not come to the view that they had a careful and good understanding of professional standards of teaching and how that might apply in an early childhood setting.

PN1278

And so one couldn't have confidence that in respect of some of these smaller operators, firstly, that they would conduct such a review but, secondly, that they would do so against objective criteria that they would understand in a way that wouldn't be likely to give rise to disputes.

PN1279

One needs to understand where the concept of satisfactory service came from. It's come from a New South Wales Teachers' Award where there are a number of features which means that issues of certainty and enforcement and for that matter portability, which is one of the things the Vice President raised with me, don't arise. If you have one large employer that has a very extensive HR capacity that is using a paid rates award, so there is absolute clarity as to whether an employee is moving to the next classification or not, underpinned by access to full arbitral rights by going to the Commission, who can determine any dispute, you have a system which provides a high level of clarity and protection and certainty that doesn't exist on the AFEI proposal.

PN1280

Can I turn also to the need for 14.3(b). 14.3(b), and it's got similar provisions in respect of the transitional provision recognition - sorry, the recognition of service for those areas which don't yet have formal accreditation. What 14.3(b) is doing is creating an objective standard. It's creating an objective standard for the simple reason, as the Vice President raised, that the Commission does not have an arbitral power conferred upon it without agreement of the parties, and so if there was to be a dispute about whether service was satisfactory, there needs to be a method by which an employee can ultimately determine, if necessary, can go to a third party, a court, and determine what their appropriate rate of pay is and there is a standard which can then be understood.

PN1281

Under the AFEI proposal, as we understand it, it is entirely a matter for the employer, but if the employer simply does not determine one way or the other whether service is satisfactory, it's entirely unclear as to what rate of pay should then apply.

PN1282

Can I then turn to some other aspects of the AFEI proposal, and perhaps the best way of doing that is to have Mr Warren's client's document that his client provided to the parties over the weekend. There are two documents. I'll turn to the first of which, which deals with clause 14. Can I just say this. It was entirely unsatisfactory for his client to provide us with this material the weekend before this hearing commenced, particularly in circumstances where there are no submissions to explain exactly why various propositions are being put, particularly propositions which are not reflective of any earlier submissions.

PN1283

Generally, and in a number of respects, they just misunderstand teaching and teaching regulation in a way that ultimately means that this Commission, we say, would find them of little or no assistance in determining the appropriate changes that need to be made to this award. Can I just identify a number of them without being exhaustive.

PN1284

Firstly, at 14.2, the classification deletes the words "all other teachers" resulting in those teachers who currently are not degree-qualified or have a two-year degree now having no rate of pay at all. Then when we get to 14.3(a)(i), "Service is said to be satisfactory if a teacher is accredited as proficient", something that is entirely unnecessary because they can't actually get to level 2 unless they are so accredited, but it does rather beg the question of teachers who are not able to be registered or accredited as to how they achieve this first step of satisfactory status.

PN1285

The second requirement is in jurisdictions which don't have formal accreditation, they've got to meet the professional development requirements as if they did, but, as I identified earlier, there are jurisdictions which don't have formal accreditation which, for those teachers who do need to be accredited, have requirements that cannot be met by people who are not accredited, so they won't be able to meet this

requirement, they must do professional development that is in turn accredited, and they won't be able to do that.

PN1286

Then we have (iii) and (iv), which, while said to be two alternatives, are really the same thing. It's the subjective view of the employer, the first being against criteria the employer may have developed and the second being against no criteria at all, but ultimately leaves us in a position where, if the employer chooses not to do this at all, then presumably service is not satisfactory and there is no apparent capacity for the teacher to do anything about that, there is no mechanism by which the employee could then assert a higher rate of pay, and it fundamentally just doesn't have any objective criteria.

PN1287

When we get to 14.4, the transitional provisions, 14.4(c), as Mr Warren valiantly tried to justify, is a provision which means that, on transition, employees who translate to the new level in circumstances where they are only six months or so off hitting a level which would translate into the next level, must now wait a further three years. Ms Saunders, your Honour and the Bench, has prepared some calculations out of curiosity as to how this would affect teachers, that is, if they simply had no increase in pay and were maintained under the same classification structure, and what that demonstrates is that notwithstanding the Commission has found there has been a substantial work value increase, it would be teachers who would find that they actually have less pay for a period of time than if the Commission had made no decision and made no variation at all. If it would assist, we can provide those calculations, a schedule of calculations, at the end of today.

PN1288

VICE PRESIDENT HATCHER: Yes, that would be convenient, Mr Taylor.

PN1289

MR TAYLOR: Thank you. Can I just identify further matters. The AFEI deletes what was in the consent position subparagraph (c), presumably acknowledging that employees can, in fact, and should be able to go backwards as a result of these changes, notwithstanding there's been an apparent increase in their work value. It also seeks to delete (d) of the consent position, which would mean that any employee who's not employed as at 1 January 2022 is not going to translate in accordance with the transitional provisions.

PN1290

When it comes to what was in the consent position subparagraph (e), which under the AFEI proposal would be renumbered subparagraph (d), there is this frankly misunderstood way in which teacher proficiency is counted. The way that this is drafted, whether intentional or not, is that it's only service from the point that a teacher has "gained proficiency". Now, as has been identified more than once, there are teachers across the country who were only formally recognised as having gained proficiency from a certain date, which is not necessarily at around the point which they could have obtained it if there was an accreditation system in place when they commenced teaching, and so much would effectively wipe out large parts of their service for no apparent reason.

PN1291

VICE PRESIDENT HATCHER: Mr Taylor, just so I can be clear, what's the state that has most recently introduced accreditation for ECTs?

PN1292

MR TAYLOR: I will try and answer that question by a note because I don't have the answer. I do know the answer to - the position in New South Wales is that regardless of whether it's ECTs or not, accreditation was only required in 2018, at which point teachers who hadn't been accredited by that time were deemed to be proficient, but that deeming didn't come with any deemed years of proficiency, just from that date they are formally accredited as proficient. It may be that I need to give you a note to answer that question more completely.

PN1293

VICE PRESIDENT HATCHER: If you applied that - that's why (indistinct) New South Wales, (indistinct). At best, you might (indistinct) bit over three years. Is there any proficient scale so you would go to level 3 when in fact, if you were using service (indistinct) tests, it would be level 4? Is that the territory we're in?

PN1294

MR TAYLOR: Both in this clause and then when we get to 14.8, both clauses have provisions which the consent parties have drafted which are intended to deem years of proficient service in circumstances where a teacher has started at a time prior to accreditation formally existing, so that one has a method of counting those years, and the AFEI drafting keeps using expressions - 14.8 is another example in (a) - that it only counts from the point of accreditation, and that just misunderstands that there's a raft of teachers who would not therefore have all their what might be colloquially called proficient teaching counted because it wasn't a concept that existed when they commenced teaching, it's a more modern construct.

PN1295

The note I've been given, and I can check this, is that existing early childhood teachers who were teachers in 2016 and who were employed at any time between July and September 2016 were deemed to be proficient, and that might echo Ms Arrabalde's evidence from the Bar table, so to speak, her own personal circumstance in any event, which said that, as she recalled it, she was automatically told that she was proficient and she has now had to renew her position some five years later.

PN1296

That was the provision I'm instructed occurred, but Ms Arrabalde may, in her case, have only been teaching two years, but a different teacher might have been teaching for 20 years before then, and so any clause needs to recognise some method to deem those earlier years for the purpose of counting service for the purpose of the transition period from one classification to another, and also, in respect of states which don't have compulsory accreditation, for determining their classification as to how many years they have been "proficient" (in inverted commas) because, of course, they can't formally demonstrate proficiency in accordance with an external regulatory standard.

PN1297

VICE PRESIDENT HATCHER: We are only concerned with six years' service, aren't we, perhaps seven years' service, but as - - -

PN1298

MR TAYLOR: As we do it, I think it's eight. The deeming provision assumes, perhaps to the benefit of employers, although Mr Ward would quibble with that, that it takes two years to become proficient, and then there's two three-year periods after that.

PN1299

VICE PRESIDENT HATCHER: Okay.

PN1300

MR TAYLOR: Can I go to 14.8 of the AFEI proposal. I have noted already in (a) that apparently the teacher has to demonstrate that he/she has met the APST requirements for accreditation as if they applied to the teacher. Now, there are guides as to how the APST applies and including guides that apply to early childhood teachers. I interpose that because Ms Arrabalde seemed to be suggesting there was some difficulty in translating the APST to early childhood teachers.

PN1301

There is a document, it's document 105 in the proceedings. I might need to double check the exhibit number. I think it's document 105 within an exhibit that the IEU tendered, so I will need to get that in a moment, but it is a guide which is titled "Proficient Teacher Evidence Guide, Early Childhood Teachers" and so there is such a guide, but whilst there is a guide, the requirements for accreditation in each state include meeting the Australian Professional Teaching Standards, but they don't stop there. There's a lot of requirements and, necessarily, you heard the AEU contend it takes as much as 10 days to complete all the paperwork and necessary steps to meet these requirements and prove that you do so. The thought that - and we're talking about states that don't have these requirements, so it's not really clear which of the many states' requirements the AFEI think can be adopted.

PN1302

Can I then pass on to (b). You will see there the employer is to be the person who is responsible for determining this, and I echo what I said earlier about some of the employers' capacity to be able to do so is to be questioned, and hence it is sensible, to avoid disputes about this, to have the default position proposed by the consent parties.

PN1303

VICE PRESIDENT HATCHER: Just going back to the APST, I am just rereading paragraph 30 of the decision. It was written for school teachers, it does not address the position of ECTs, and then there's some state developments which are either modified to cover ECTs or, in New South Wales, there's the evidence guide, but that's in three states out of all the jurisdictions only, and there was a recommendation that the APST be amended to ensure applicability of early childhood teachers, but that apparently hasn't happened yet?

PN1304

MR TAYLOR: Yes, I think that reference there to the evidence guide is a shorthand reference to the Proficient Teacher Evidence Guide, Early Childhood Teachers, document 105, that I mentioned earlier, and I think that's - it's a New South Wales-specific document.

PN1305

VICE PRESIDENT HATCHER: It's not actually part of the APST?

PN1306

MR TAYLOR: No. I'm not asking the Bench to go to it now, but when one does go to it, it is a guide to assist those who wish to determine whether an early childhood teacher is proficient to understand how to apply the Australian Professional Standard for Teachers to early childhood teachers, and it includes each of the standards from the APST as set out in that guide and then language then sets out what sort of evidence an early childhood teacher could demonstrate to show it meets that standard.

PN1307

I think the last thing I wanted to say about the AFEI submissions, if it's convenient - it was in the next document, it's the document which has 14.10 and what used to be 14.11 before the AFEI simply deleted it. 14.10 deals with return to teaching and, at 14.10(a), the full paragraph that appears below (ii), as redrafted by the AFEI, would see previous accredited service at proficient level counted. I place emphasis on the word "accredited" because, again, this drafting seems to ignore the fact that teachers will have, in some cases, years of service that wasn't accredited for no reason other than the fact that such a regulatory system didn't exist.

PN1308

There's not much more, I think. Just let me check. The calculation error that Mr Warren identified is not a calculation error, it's a misunderstanding by Mr Warren's client as to how the Full Bench determined the relevant allowance and how it should be calculated. The Full Bench determined that the education allowance should be the same rate as the level 1 category C leadership allowance that applies in schools.

PN1309

That allowance, like all the leadership allowances, is, in turn, based on the standard rate. The standard rate is linked to level 1 and, because level 1 has been increased by the Bench's decision, what flows from that is an increase in the allowance which is greater than two and a-half per cent, hence the calculation that the IEU has done, which has been double-checked and is correct. It reflected precisely the category C level 1 rate that the Bench said was the rate that should be set for the educational leaders allowance, which, in turn, is set as a percentage of the standard rate. The award doesn't set out the percentage, but that percentage can be easily determined by examining what the rates are in the award for the allowances compared against the standard rate, and that's what was done and it has been checked and it is correct.

PN1310

Document 105 is found as part of exhibit 76, so if the Bench is looking for that document, it's document 105 in exhibit 76.

PN1311

That concludes what I wanted to say in reply, other than just to emphasise that both the ACA and the IEU, as the parties who took the lead in this matter, took what one would imagine the Bench would consider a very sensible approach, sitting down and working through how best to implement the Commission's decision in a way which was practicable and gave full effect to that decision as we understood it. That's what we have done.

PN1312

Inevitably, both sides needed to reach some level of compromise to be able to come to this happy position where we have reached agreement. We urge that consent position on the Commission. To the extent to which the Commission departs from it, we just ask the Commission to be mindful that, in doing so, each party had given some consideration to whether it could put alternative submissions as to various matters, which it ultimately has not done so.

PN1313

Of course, ultimately, the Commission must determine what it considers to be appropriate and fair minimum conditions, but we do, in particular, want to place emphasis on our concern that any departure from what was considered by the ACA and the IEU to be an appropriate way of dealing with satisfactory service doesn't result in the unintended consequence of disputation and uncertainty as to whether teachers are entitled to particular rates of pay.

PN1314

If it please the Commission.

PN1315

VICE PRESIDENT HATCHER: All right. Mr Ward?

PN1316

MR WARD: Thank you. If the Commission pleases, I just want to address, very briefly, four matters.

PN1317

In relation to Mr Champion's submissions on the mentor issue, part of his submission raises concerns he has on behalf of his client with the approach the Victorian Government is taking to how it has built its mentoring scheme. Those, potentially, are entirely reasonable comments to make in engaging with the government around how it establishes its public policy settings on that issue. I would urge caution for the Commission to think that it should step in in setting a minimum safety net in relation to that issue.

PN1318

He said in his submissions that the Commission should be less concerned about their claim because, in his words, "what was required was not arduous". I would ask the Commission to be cautious about that proposition. Firstly, the evidence of Ms Drake is that she is currently mentoring some seven people. That arises from

paragraph 6 of her statement. The evidence of Ms Nightingale, at paragraph 28, is to the effect that, in her view, being a mentor involves "a substantial workload". So, attempts to downplay the consequence of their claim for a specific employer should be approached with very real caution.

PN1319

Ms Nightingale, at paragraph 36, states quite candidly that, as a union official, it's her view that reasonable release should be provided to a mentor. That understandable opinion from a union official is a long way removed from establishing factual probative evidence as to why one employer should release their employee with pay to go and assist another employer.

PN1320

I appreciate that Mr Champion evoked the public interest and, with respect to him, in my experience, if you have to evoke the public interest in an award matter, it tends to mean you are gaining speed and losing altitude fairly fast.

PN1321

We would adopt the comments of the Vice President that being a professional involves a degree of self-investment. That self-investment arises in relation to the employee and anyone who wants to "give back to the profession" as a mentor.

PN1322

Lastly, if the Commission is keen to stop employers employing mentors, make the employer pay a mentor to go and do work with somebody else, and I can almost be assured that employers will, on the whole, not employ them.

PN1323

I said before that it's entirely appropriate for the employer and employee to discuss and reach agreement if they want to become a mentor and to allow them to manage that that way. It is entirely appropriate for that to be done through bargaining, which Mr Champion's client has succeeded in doing in other places. It is entirely inappropriate and oversteps the mark in the context of a minimum safety net.

PN1324

Mr Owens raised an issue which I sense has gained some support from the AEU and the IEU and this concerns the proposed clause 14.9(c) dealing with reassessment and, if I have understood the mood of the room, we would have no objections to that either.

PN1325

Two more matters, if I can. Ms Arrabalde took the Commission briefly to regulation 118 of what I understand is the New South Wales Education Care Services National Regulations dealing with educational leaders. With respect to Ms Arrabalde, I would just ask the Commission to be cautious about how the phrase "individual" is used in that regulation.

PN1326

The regulation requires suitably qualified persons to be designated for the purposes of educational leader and it identifies, and I quote, "educator,

coordinator or other individual", and that's the basis upon which it uses the word "individual". The inclusion of the ability to share the educational leader's allowance is important from my client's perspective. As a matter of fact, my client has a number of members where part-time employees job share and, in so doing, share the role of educational leader in their centre.

PN1327

Lastly, can I just make a short comment on satisfactory service. This was seen as an important element to maintain by my clients. We thought it was an important signpost in the shift from service to proficiency. We have searched for a formulation that we thought suited all jurisdictions and my clients were particularly concerned, and the ASA were particularly concerned, that it balanced maintaining one thing and avoiding another, that is, it didn't want to end up in an environment that very small centres were mandated to introduce detailed performance review processes, but, by the same token, wanted to maintain an opportunity, in a given case, for the employer to debate whether service was satisfactory.

PN1328

It is important to understand that that notion of service being satisfactory is not in the context of their employment at large, for our purposes, it's purely in the context of whether or not they move in a classification structure, and we would commend the consent position to the Commission because it has struck a balance between operability, but also maintaining the right of the employer, in what we anticipate will be very small cases, to raise the question of service being satisfactory for the purposes of advancement in the structure in distinction to service being satisfactory in the general sense in the employment relationship.

PN1329

We, like Mr Taylor, would urge the Commission to place weight on the consent position. It appears to have fairly broad endorsement, with the exception of AFEI, and we believe it has balanced the intentions of the Commission in its decision with the operability that the industry needs to easily and reasonably apply that decision. If the Commission pleases.

PN1330

VICE PRESIDENT HATCHER: All right. We thank the parties for their submissions. We reserve our decision and will now adjourn.

ADJOURNED INDEFINITELY [3.17 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs