



STATEMENT

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

**4 yearly review of modern awards – Award stage – Group 4 awards –
*Children’s Services Award 2010 and Educational Services (Teachers) Award
2010 – Substantive Issues – Confidential Evidence*
(AM2018/18 and AM2018/20)**

JUSTICE ROSS, PRESIDENT

DEPUTY PRESIDENT CLANCY

COMMISSIONER LEE

MELBOURNE, 23 MAY 2019

*4 yearly review of modern awards – Award stage – Group 4 awards – Children’s Services
Award 2010 and Educational Services (Teachers) Award 2010 – Substantive Issues –
Confidential Evidence.*

[1] This Statement deals with a request from the Australian Childcare Alliance Inc. (ACA) that certain evidence given to the Commission at the hearing of this matter on 6 – 9 May 2019, together with a number of documents tendered as exhibits remain confidential. The ACA further requests that the statement and amended statement of Ms Kristen McPhail be removed from the Commission’s website.

[2] The request follows a Confidentiality Order made by consent on 1 May 2019.

[3] The Independent Education Union (IEU) opposes the ACA’s requests. It submits that its consent to the 1 May 2019 Confidentiality Order was given in order to facilitate “a document production regime” and at a time when it had neither seen the documents in question nor been able to assess what, if any, of their contents had “any quality of confidence about them”.

[4] The IEU submits the discretion in s.594 of the *Fair Work Act 2009* (the Act) grants the Commission the power to prohibit publication of certain material and to make related orders must be balanced against the considerations of open justice and the proper administration of justice. It submits the default position is that Commission hearings are heard in public and the power to make suppression orders is properly issued infrequently and with caution.

[5] The IEU submits this is particularly so in proceedings relating to modern awards which will potentially affect thousands of workers and contends this is why the materials are published more extensively than usual (i.e. on the Commission’s website). It submits suppressing evidentiary material potentially relied on in the making of any decision brings with it a greater than usual risk of undermining public confidence in the Commission’s processes and that workers covered by either modern award are entitled to have access to the material underpinning any Commission decision about their terms and conditions.

[6] Further, the IEU submits the discretion is only enlivened where the Commission is positively satisfied that the evidence has a “confidential nature” and ‘Personal information’, including wage rates, is not inherently confidential. It submitted that information that is generally available or has been disclosed, for example, a job advertisement, loses any confidential quality it may have had. The IEU submits the onus is on the ACA to demonstrate the evidence is confidential and no effort to do so has been made.

[7] The position of the IEU is that, with the exception of a number of exceptions it outlined, the material identified by the ACA lacked any conceivable quality of confidence.

[8] The United Voice (UV) position is that it did not object to the ACA request because it understood the request to be for a redacted version of the transcript to be placed on the Commission’s website, as opposed to it being a request for the transcript to be confidential. However, UV advised it agrees with the position of the IEU that the redactions sought in relation to the evidence given to the Commission are excessive and not deserving of a formal confidentiality order.

[9] UV nonetheless consents to certain exhibits (Exhibits 24 & 30) being confidential because this was an undertaking it gave to ACA when it received them from ACA voluntarily.

[10] The IEU did not express a view on whether or not Ms McPhail’s statements should remain on the Commission’s website. UV did not appear to object to their removal.

[11] We have reviewed the copy of the transcript from each day of the hearing the ACA has produced and the submissions made by the IEU and UV.

[12] We do not consider that a confidentiality order in the terms sought by the ACA is warranted. In our view, the material that would be covered by an order in the terms sought by the ACA largely lacks the requisite quality of confidentiality required by s.594 of the Act.

[13] We are persuaded by the submissions of the IEU and have determined that that only some of the evidence given to the Commission at the hearing of this matter on 6 – 9 May 2019 should be kept confidential. This evidence comprises names of certain employees disclosed by various ACA witnesses and their contracts of employment, financial results of a particular child care centre and the report from which they were derived, the results and reports from some Australian Children’s Education & Care Quality Authority National Quality Standard Assessment and Ratings and some parts of the evidence given by Ms McPhail at the hearing.

[14] We are not persuaded that either the statement or amended statement of Ms McPhail should be removed from the Commission’s website.

[15] We have particularised the evidence we consider should be kept confidential in the Confidentiality Order accompanying this Statement.

[16] The Parties should now proceed to complete and file any submissions they intend to make in accordance with the Directions dated 9 May 2019. Such submissions must take into account the Confidentiality Order we now make. Following a request for an extension to file submissions, this request is granted and submissions are now due by **4pm Wednesday 29 May 2019**.

PRESIDENT

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