IN THE FAIR WORK COMMISSION

Matter No: 2018/18 and 2018/20

Section 156 - Four Yearly Review of Modern Awards –*Children's Services Award 2010 & Educational Services (Teachers) Award 2010*– Substantive review

SUBMISSION OF UNITED VOICE –BACKGROUND DOCUMENT

1. This submission is made pursuant to the directions of the President made on 13 June 2019 requiring '*particular parties*' to file a submission responding to the questions set out in the Background Document in relation to the 4 yearly review of the *Children's Services Award 2010* ('*the Children's Services Award'*) and the *Educational Services (Teachers) Award 2010* ('*the Teachers' Award'*).
2. The Australian Childcare Alliance, Australian Business Industrial and the NSW Business Chamber are collectively referred to as '*ACA and others*' within this submission.
3. This submission traverses a number of areas covered in our submission of factual findings lodged on 29 May 2019 and other submissions. For ease, we have reproduced excerpts from earlier submissions where appropriate.

Clarification of United Voice claims

4. In paragraph [6](iii), the Background Document states that United Voice has a claim to increase the time off the floor away from children ('*non-contact time'*) for Room Leaders and Educational Leaders ('*Non-contact Time Claim'*). To clarify, our claim does not seek to increase non-contact time specifically for Room Leaders. We seek to increase non-contact for '*an employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children*'. Our claim replicates the terminology used in the Awards.[1] In practice, this will *often* be the Room Leader in some services the employer may allocate programming duties to other employees.
5. In paragraph [8] (ii), the Background Document states that United Voice has a claim '*seeking the laundry allowance be paid in circumstances where employees wash their clothes using the on-site facilities at the workplace*.' This is a mischaracterisation of our claim. The United Voice claim does not seek to make the allowance payable in circumstances in which the

[1] See clause 21.5 of the Children's Services Award. Clause B.3.2 'non-contact time' of the Teachers' Award uses similar terminology, stating that '*an employee responsible for programming and planning for a group of children will be entitled to a minimum of two hours per week*.'

employer provides a practical means for washing the laundry on-site and employees wash their clothes using the on-site facilities.

6. We seek to insert a Note below clause 15.2(b) to provide clarification that the existence of on-site laundry facilities does not mean that the laundry allowance is not payable. Many employers have on site laundry facilities that are for centre use and are not practically available to the employees to use to wash their own uniforms. The claim seeks to clarify that the existence of on-site laundry facilities does not provide a justification for an employer to refuse to pay the laundry allowance. There was clear evidence that many employers believe that the existence of on-site laundry facilities provide a justification to not pay the laundry allowance.[2] United Voice member Ms Pixie Bea gave evidence in support of this claim:

> ***Arndt:*** *It's your evidence that there was no space whatsoever in that laundry schedule to wash a load of shirts?*
>
> ***Bea:*** *There was no time in the day to wash a load of shirts.*
>
> ***Arndt:*** *Is that because your other duties prevented that, or is it because the washing machines were operating all day, both machines?*
>
> ***Bea:*** *Both.*[3]

7. In such circumstances, it is appropriate that an employer with laundry facilities on-site should not perceive itself as exempt from paying the laundry allowance.

Question 1: Are the lists at Appendices 1, 2 and 3 accurate?

8. Appendix 1 is correct.
9. Appendix 2 is correct insofar as the 5 United Voice witnesses are listed accurately with accurate transcript references. However in the column titled 'Exhibit no.' our witness statements (exhibits 6 to 12 and 17) are incorrectly labelled with the prefix '*IEU*'.
10. Appendix 3 is correct.

Question 2: Is it generally agreed that most award reliant employees covered by the Children's Services Award are 'low paid' within the meaning of s.134 (1) (a)?

11. Paragraph [26] of the Background Document states '*Chart 1 shows that the full-time weekly wages for all classifications below Level 4A.1 in the Children's Services Award were below the CoE measure of two-thirds of median fulltime earnings. In addition, all classifications below Level 4.1 were below the EEH measure of two-thirds of median full-time earnings*.'

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2 Submission on findings, 29 May 2019, at [102] to [109].

3 Transcript of proceedings, PN440-441.

12. United Voice agrees that most award-reliant employees covered by the Children's Services Award are '*low paid*' within the meaning of s.134 (1) (a) of the *Fair Work Act* 2009 ('the Act').
13. Most employees in the sector would be classified lower than Level 4. Only the Director, Assistant Director (if a service had such a role, some smaller services do not have an Assistant Director) and Room Leaders would be classified at Level 4.1 and above. In addition, the Director position, as the most senior position, is most likely to be paid above award wages.
14. The characterisation of award reliant employees covered by the Children's Services Award as '*low paid'* within the meaning of paragraph 134(1) (a) is appropriate.

Question 3: Are the allowances sought for employees who undertake the roles of Educational leader or Responsible person properly characterised as allowances of the type referred to in s139 (1)(g)(ii)? If not, what sort of allowances are they?

15. The allowances sought for employees who undertake the roles of Educational Leader or Responsible Person are properly characterised as allowances of the type referred to in s139 (1) (g) (ii) of the Act.

Question 4: Is it common ground that UV: allowance claims do not seek to vary modern award minimum wages such that the limitation in s156 (3) does not apply?

16. It is our position that our allowance claims do not seek to vary modern award minimum wages, therefore s156 (3) is not relevant.

Question 5: If s156 (3) does not apply, is the relevant test whether it is necessary to vary the awards to include the claimed allowances to achieve the modern awards objective?

17. Yes. The insertion of the allowances as proposed would ensure that employees who are required to perform the functions covered are provided with a fair and relevant safety net of terms and conditions.

Question 6: Is it common ground that the modern awards objective is a composite expression which requires that modern awards, together with the NES, provides 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss134(1)(a) to (h)?

18. Yes.

Question 7: In considering whether the claimed allowances are 'fair' is it relevant to look at the value of the work being undertaken by employees designated as Education Leaders or Responsible persons? In particular is it relevant to look at the level of skill or responsibility involved in undertaking those roles?

19. Yes, it is relevant to look at the value of the work being undertaken by employees designated as Educational Leader and Responsible Person, and regard must be given to the responsibility and skill involved in undertaking those roles. The use of the term '*value'* does not conflate the claim with what the Act deems to be '*work value.'* The Commission is commonly required to consider work in terms of disutility[4], cost[5] and responsibility.[6] These evaluations do not equate to the Act's concept of work value. As indicated in our submission of 15 March 2019, the responsibilities which are the subject of our allowance claims are not attached to classifications under the Awards.[7] This was clearly confirmed by the evidence that the Commission has heard that the roles of Responsible Person and Educational Leader can and will be performed by a wide variety of persons at different classifications.

Questions 8 to 11 require other parties to comment on our contentions concerning the educational leader allowance and responsible person allowance.

20. We make the following comment for the assistance of the Commission:

3.1.1(A) Educational Leader Allowance

21. In paragraph [46] of the Background Document, there is a reference to the allowance structure for Directors in the Teachers Award, however what is replicated is clause 15.6 of the Children's Services Award (which is a qualifications allowance for certain employees who hold a Graduate Certificate in Childcare Management). The qualifications allowance in clause 15.6 of the Children's Services Award has no relevance to our claim.
22. The structure of our claim is based on the Director's allowance in clause 15.1 of the Teachers' Award, which posits three levels for the allowance: namely a centre with no more than 39 places, a centre with 40-59 places and a centre with 60 or more places.

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[4] The payment of some premium for unsocial hours of work *(*weekend penalty rates generally) or long durations of work (intra-day or weekly overtime entitlements generally).

[5] Where an employee is required to wear a uniform maintained to a certain standard (uniform and laundry allowances generally) or possess a particular tool of trade for work (reimbursement allowances for tools of trade generally).

[6] For example, the award term requiring a minor covered by the *Restaurant Industry Award* 2010 to serve alcohol being paid the adult rate: see: *4 yearly review of modern awards – Restaurant Industry Award 2010 – Hospitality Industry (General) Award 2010 – substantive issues* [2018] FWCFB7263 at [145] to [165].

[7] Submission of 15 March 2019 at [30].

Question 13: UV contends that 'The fact that the allowances will be paid predominantly to women whose work is undervalued is relevant as a consideration.' The premise of the submission put is that the work of employees covered by these awards has been undervalued for gender reasons. What evidence has been advanced in support of that proposition?

23. It is uncontested that this is a sector that is predominantly female and largely low paid. A further '*fact'* in support of an undervaluation is that the current terms and conditions of the safety-net for the sector do not recognise or compensate the predominantly female workforce for the functions covered by our allowance claims. These circumstances or indicia are evidence of a gendered undervaluation. There is no requirement for the Commission to consider a comparator when evaluating the principle of equal remuneration for work of equal or comparable value in the context of the modern awards objective.[8] The modern awards objective is broadly expressed[9] and as such it is open for the Commission to regard this consideration as a relevant one.

Paragraph [81] of the Background Document

24. With respect to paragraph [81], our proposition was in direct response to an ACA submission dated 16 April 2019 that stated: '*2.17 The difficultly with dual roles is educational leaders or responsible persons who are also appointed as directors are already paid at the highest level of the Children's Services Award (Level 6) and provided with a directors allowance of between 11.5% and 17.3% of the standard rate in the award to compensate for any additional responsibilities associated with being a person in charge (or responsible) under the National Law. To pay these roles a further allowance in compensation for duties already included in the Level 6 classification would be inappropriate*.'
25. Paragraph [81] of the Background Document states: '*UV also rejects the proposition that educational leader or responsible persons who are also appointed as directors would also receive a director's allowance of between 11.5 per cent and 17.3 per cent of the standard rate. UV submits that a level 6 Director under the Children's Services Award does not receive a Director's allowance. The Director's Allowance only applies under the Teachers Award (see clause 15.1) to an early childhood preschool teacher who is appointed as a director.'*
26. The first sentence of paragraph [81] correctly reflects our position insofar as the Children's Services Award is concerned. The second sentence of paragraph [81] is also an accurate reflection of our position.

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8 *2015 Equal Remuneration Decision* [2015] FWCFB 8200 at [292].

9 As above, at [35]-[36].

Question 18: UV is invited to respond to the proposition that it is 'the centre and its Nominated Supervisor that holds the ultimate responsibility' to ensure compliance with the National Law and Regulations

27. Under the National Law, both the approved provider and the nominated supervisor can face civil penalties for failing to ensure that a required program is delivered to all children being educated and cared for by the service (s168). We do not dispute this, and this fact is not inconsistent with our claim.
28. The approved provider and the nominated supervisor (generally the centre director) have management responsibility for *ensuring* that a required program is delivered under s168, and the Educational Leader *leads* the development and the implementation of the educational programs within the service in accordance with Regulation 118.
29. Our claim for an allowance for the employee in the role of Educational Leader is based upon the additional responsibility and work such an employee has *within* the workplace. That the approved provider and the nominated supervisor must manage appropriately to ensure that a program is delivered within the service does not detract from the responsibilities or the work of the Educational Leader is required to do.
30. The approved provider can be and is not infrequently a body corporation.[10]

Questions 19: Does the argument advanced by the Individuals overlap with the ERO/work Value proceedings?

31. The argument advanced by the Individuals does not overlap with the ERO/work value proceedings. The argument advanced by the Individuals does not seek to vary minimum wages in the Teachers' Award; rather they seek to insert an allowance in both awards in similar terms to the United Voice allowance claims.

Question 20: If so, how should we deal with such overlap?

32. As arguments do not '*overlap'* there is no need for the Commission to deal with the issue. The task of the Commission in this review is to address whether the Awards provide a fair and relevant safety net of terms and conditions and make any relevant adjustments in the safety-net to ensure this objective is reflected in the terms and conditions of the Awards.

[10] Submission on findings at [33], paragraph 162(1) (a) of the National Law permits the approved provider being a body corporate.

Question 21: Do you contest that part of the ACA, ABI and NSWBC submission as to what are said to be a difference between the OSHC and Long Day Care sectors set out in the first dot point at [94]? And if so, how would the educational leader allowance work in the OSHC sector.

33. We contest the notion that a weekly allowance would be unworkable in OSHC centres.
34. Regulation 118 only requires that one Educational Leader is designated per service, and as such it is appropriate to structure the allowance in OSHC in the same manner as for long day care.
35. The evidence did not establish that most (or a significant number of) OSHC services have split the Educational Leader role in the manner suggested by ACA and others at [94]. The oral evidence given by Ms Brannelly (CEO of the Queensland Children's Activities Network) during the hearing was that *large* OSHC services may designate more than one Educational Leader, such as a service with in excess of 150 licensed places for children.[11]
36. The largest service size in the proposed allowance structure for our Educational Leader claim is a service with '*60 or more children*'. Where a large OSHC service (with 120-150 places or more) has decided to designate more than one employee as an Educational Leader, it is appropriate and fair for that employer to pay both employees the allowance. The empirical evidence which we have supplied and which is quoted at [98] of the Background Document does not support the contention that the OSHC sector can be differentiated from long day care centres on the basis of the scale of OSHC centres operations. The empirical data indicates broad equivalency in scale.

Question 23: UV and the Individuals are invited to respond to AFEI's submission that the quantum of the proposed Education Leader allowance is disproportionate when compared with the compensation for holding other responsibilities under the award.

37. We dispute that the amount sought is disproportionate. That the amount claimed may be greater than the difference between certain classifications within the Awards should not be determinative. What the Commission must determine is the appropriate amount for the additional responsibility and duties carried out by an employee in the Educational Leader role. The employees undertaking this role will be at different classifications.
38. The role of Educational Leader has significant responsibility, as demonstrated by the evidence, for leading programming and planning within a service, mentoring other educators, leading critical reflection and undertaking research. These additional responsibilities are not reflected in the current classifications of the Awards. The amount sought by United Voice reflects appropriate compensation for the role.

[11] PN3481-3485.

39. The concept of relativities between classifications applies to the base rates of award classifications.

Question 24: What is the basis for the quantum of the allowance sought? How did UV and the Individuals come up with the quantum proposed?

40. United Voice gave consideration to the significant responsibility within the role of Educational Leader and proposed an amount that appropriately reflects that responsibility. The allowance does not compensate for an expense occurred, the precise quantification of the amount of the allowance is not referrable to money expended by the employee. What is sought here is a change in the safety-net which involves the balancing of a number of considerations and not simply a consideration of reimbursing the employee for an expense incurred. Appropriate compensation involves a broad range of considerations. [12]
41. The setting of the amount is not a matter of simply placing a '*value'* on the task and then compensating the employee for what has been a previously uncompensated aspect of the work. The setting of the amount concerns the application of the modern awards objective which will necessarily involve applying a number of considerations some of which will compete with each other. Some of these considerations have nothing to do with the employee being compensated but the desirability of the recognition of the responsibilities within the modern award safety-net of terms and conditions.[13] As we indicate in our outline submission made on 15 March 2019:

> *The Awards cannot be said to be fair, as award covered employees are being required to carry out work with complex additional responsibility but with no additional compensation. As noted these responsibilities are not static and are designed to pertain to workplaces and not particular employees.*
>
> *The Awards cannot be said to be 'relevant' as each award fails to recognise that the National Law and Regulations requires each centre based service to have an employee in the role of Educational Leader and Responsible Person. The NQF is a fixed national requirement imposed on the sector and it is appropriate that the Awards reflect this.[14]*

42. In the Penalty Rates Review, the so called '*employment effect'*, namely the effect that setting week end rates at a particular level would have on employment generally was a

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[12] For a recent statement of the difference between modern awards and other industrial instruments see in *4 Yearly Review of Modern Awards –Penalty Rates* [2017] FWCFB 1001 ('Penalty Rates Case') at [129] to [132]

[13] Submission of 15 March 2019 at [106] and [122].

[14] [120] to [121].

consideration.[15] The claimed allowances for Responsible Person and Educational Leader will reinforce good practise and compliance with the National Law and also function as reference points for agreement making.

43. The quantification of amounts of money within the context of what is a fair and relevant safety-net is evaluative. A similar criticism can be levelled against the quantum of a large number of non-reimbursement allowances, loadings and penalty rates that are commonplace and seen as a critical part of the modern award safety net. The characterisation of the amount of this allowance as necessarily a *quid pro quo* for something applies an inappropriate transactional analysis to the task that confronts the Commission. The suggestion that the amount claimed is '*disproportionate'* to something asks the wrong question, the amount claim needs to be appropriate within the broader context of what is a fair and relevant safety-net of terms and conditions.
44. The National Law demands that centres have an Educational Leader. Attaching an allowance to the role will not provide an incentive for employers not to appoint an Educational Leader.

Question 25: UV and the Individuals are invited to respond to AFEI's submission that the quantum of the proposed Responsible person allowance is disproportionate when compared to other allowances and pay rates under the Awards.

45. The general comments made above apply here. Again, we dispute that the amount sought is disproportionate. That the amount claimed may be greater than *some* other allowances and pay rates under the Awards should not be determinative, rather the consideration should be the question of what is the appropriate amount for the additional responsibility and work carried out by an employee in the Responsible Person role.
46. The role of Responsible Person has significant responsibility and a critical role in ensuring the safety and well-being of children in care. This role is also a mandatory requirement of the National Law. As indicated in our submission on findings, there are likely some system benefits in having an allowance attached to the role. The evidence showed that existing practise was to have the role performed by more senior and frequently employees paid above the award.[16]

Question 26: What is the basis for the quantum of the allowance sought? How did UV and the Individuals come up with the quantum proposed?

47. We note our general comments made in answer to question 24 above. United Voice gave consideration to the significant responsibility within the role of Responsible Person and proposed an amount that appropriately reflects that responsibility and the desirability of

[15] Penalty Rates Case as above and at [611] to [688].

[16] Submission on findings at [21] to [25] and [44] to [48].

having such an allowance within the context a fair and relevant safety net of terms and conditions.

48. Having an allowance attached to being a Responsible Person would reinforce these good existing practises and mandatory requirement that a centre when operating has a Responsible Person on the premises. This consideration is not about the disutility experienced by the employee who is the Responsible Person. These '*system benefits'* equate to broader considerations relevant to the setting of the allowance as part of the modern award safety-net.

Question 28: What evidence is relied on in support of the propositions at [129]?

49. The evidence we rely upon in support of the proposition in paragraph [129] is as follows:
50. Some employees *are* required to have a first aid certificate. As we noted in paragraphs [97] and [98] of our submission on the findings filed 29 May 2019, Ms Preston Warner is required to have a First Aid Certificate and CPR Certificate, and employees at Ms Alicia Wade's centre who take on the role of Responsible Person are required to have both certificates as well.
51. Similarly, Ms Pixie Bea was required to have a First Aid Certificate and CPR training when she worked as an award reliant worker at Mornington Street Early Learning and Kinder.[17]
52. In respect of our proposition that it is an expected standard across the sector that employees will have and maintain first aid qualifications, this is based on a reasonable interpretation of how Regulation 136 operates in practice, and on the basis of the evidence of Ms Bronwen Hennessy.

> ***Regulation 136 First aid qualifications***
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> *(1) The approved provider of a centre-based service must ensure that each of the following persons are in attendance at any place where children are being educated and cared for by the service, and immediately available in an emergency, at all times that children are being educated and cared for by the service—*
> *(a) at least one staff member or one nominated supervisor of the service who holds a current approved first aid qualification;*
> *(b) at least one staff member or one nominated supervisor of the service who has undertaken current approved anaphylaxis management training;*
> *(c) at least one staff member or one nominated supervisor of the service who has undertaken current approved emergency asthma management training.*
>
> *Penalty: $2000.*

53. An explanation is provided in page 437 of the Guide to the NQF (Exhibit 1):

> *Centre-based services*

[17] Witness statement of Pixie Bea dated 4 March 2019, Exhibit 8, and paragraph 36.

At all times and at any place that children are being educated and cared for by the service, the following person(s) must be in attendance and immediately available in an emergency:

- *at least one staff member or one nominated supervisor of the service who holds a current approved first aid qualification, and*
- *at least one staff member or one nominated supervisor of the service who has undertaken current approved anaphylaxis management training, and*
- *at least one staff member or one nominated supervisor of the service who has undertaken current approved emergency asthma management training.*

The same person may hold one or more of these qualifications.

If the approved service is operating on a school site (for example, a government kindergarten or preschool), the requirements for regulation 136(2) can be met if one or more staff members of the school holding the relevant qualifications are in attendance at the school site and immediately available during the emergency.

The approved provider should consider how it will meet this requirement during all parts of the day, including breaks, and have contingency plans in place for an educator on leave.

54. As noted within the Guide to the NQF, the approved provider must ensure that this Regulation is met during *all* parts of the day. There is no exception for '*contingency events*', such as the employee with first aid qualifications running late, leaving the premises for a lunch break, leaving work early because they are sick, or taking annual leave. The practical effect of this Regulation is that at the very *least*, a number of employees within a centre based service must have the relevant qualifications. In smaller services, in practice, it is likely to be that all employees will need to have the relevant qualifications in order to ensure compliance with the Regulation.
55. In respect of evidence of the situation within workplaces, the evidence by Ms Bronwen Hennessy during the course of the proceedings is relevant:

Arndt: *Almost finished Ms Hennessy. At 31, you say it's not a formal requirement that you have first aid or CPR? Sorry, I misspoke. You say it's not a formal requirement that all educators have first aid and CPR?*

***Hennessy**: Yes.*

***Arndt:** Do you mean by that, that no one from your employer requires you to have one?*

***Hennessy:** My understanding is there has to be a certain number of people on site that have CPR. I don't know what the number is; what sort of percentage it is.*

***Arndt:** I might just ask the question again. Perhaps I wasn't clear. When you say it's not a formal requirement that all educators have these certificates, are you saying that no one from your employer has ever asked you to - has ever required you to have one these certificates. Or, are you saying something different?*

***Hennessy:** In my Centre, we are all expected to have one. I'm not sure how that differs from a requirement, but it is an expectation that everyone in my Centre - I'm not sure about the company, I'm afraid, sorry.*

***Arndt:** At 34, when you say it's a requirement that the CPR course is refreshed every 12 months and first aid refreshed every three years, whose requirement is that?*

***Hennessy:** I would say that that is a Centre requirement rather than the company requirement. That is - that is how often a CPR course should be refreshed as opposed to - like I said, I'm not sure, I'm sorry.*

***Arndt**: That's okay. If you're no sure it's fine, but just so that I'm clear, in 31 you say it's not a formal requirement for all educators to have these certificates. How could it be the case that it's the Centre's requirements? Sorry, I think I'm confused with your answer?*

***Hennessy:** I think I maybe got my language a little confused when I was going through this. So, I think that it's a requirement that the CPR course is refreshed. I think that's maybe just a misspoke on my part and it may not be an actual requirement, but a strong expectation.*[18]

56. Notably, Ms Hennessy states above that '*in my Centre, we are all expected to have one. I'm not sure how that differs from a requirement, but it is an expectation that everyone in my Centre…'* [19] Whilst Ms Hennessy may not be formally required to hold a First Aid Certificate or a CPR certificate, there is an expectation that employees at her centre hold and maintain those qualifications. The reality is that in practice, for many employees a '*strong expectation*' will differ little from a formal requirement.

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[18] PN333-337.

[19] PN335.

57. On the basis of the above, we say it is reasonable to conclude that there is an expectation across the ECEC sector that employees hold first aid qualifications and CPR qualifications.

Question 29: The first aid allowance in claims 15.4(a) is only payable to employees classified below level 3 who are required to administer first aid to children. What does UV say to the proposition that this suggests that this responsibility forms part of the base wage rate for higher level employees?

58. The first aid allowance in clause 15.4(a) of the Children's Services Award appears to be based in part on the structure of the first aid allowances in the pre-modern awards, the *Children's Services (Victoria) Award 2005* and the *Children's Services (Australian Capital Territory) Award 2005*. Both awards provided a first allowance for employees appointed to act as a first aid person and a per day allowance for employees at below Level 3 who were required to administer first aid (see clause 19.5 in the former, and clause 5.5.2 in the latter).
59. Clause 15.4 of the Children's Services Award does not contain an allowance for employees appointed to act as the first aid person, but does retain an allowance for employees below Level 3 who are required to administer first aid.
60. In our research, we have been unable to find a Decision within the award modernisation period on this matter. It is unclear whether the removal of the allowance for the '*first aid person*' was an oversight or intentional.
61. On that basis, we say it is not possible to conclude that the responsibility to administer first aid forms part of the base wage rate for higher positions.
62. In any case, the lack of such an allowance should not act as a factor against the granting of a claim for a training clause.

Question 31: Is UV prepared to amend its claim in the manner proposed by ACA, ABI and NSWBC? If it is then UV and ACA, ABI and NSWBC are asked to jointly draft a proposed variation

63. We are prepared to amend our claim to limit it to '*hats*' and '*sunscreen lotion*', however we do not believe the other amendments suggested by ACA and others are necessary.
64. The proposed addition of the requirement that the expense incurred is '*reasonable'* and only paid when validated by receipts is a substantive variation to clause 15.2(c). No evidence was adduced that such a variation is necessary. There is no evidence that employees are making unreasonable claims under the current clause. The evidence generally was supportive of our variation. Many centres provide hats and sunscreen. It would be entirely inappropriate in the context of potentially accepting our claim to in effect substantively vary and make more restrictive the scope of clause 15.2(c) for the matters claimed and also the existing items covered by the clause. This clause does not permit and will not permit uncapped claims as it

is phrased in terms of the employee being '*required'* to wear or use the thing for which reimbursement is sought.

Question 35: All parties are invited to comment on whether this claim should be dealt with by the Substantive Issues Full Bench or the Plain Language Full Bench?

65. The annual leave claim should be dealt with by the Substantive Issues Full Bench. There is a substantive merit issue which needs to be resolved and the appropriate place for this to be resolved is in the substantive review of the award. We would also observe that the issue is relatively straightforward in light of the evidence concerning close downs and the Christmas vacation which has been heard. We refer to our submission on findings made on 29 May 2019:

> *[118] The Commission is entitled to find that the current provisions of the Children's Services Award at clauses 24.4(a), (b) and (c) which allow for lengthy unspecified close downs over the Christmas/New Year period where an employee can be directed to take leave without pay and an open ended capacity to direct an employee to take annual leave or be paid at the ordinary rate at other 'vacation periods' are anachronistic. There was no evidence from an employer that the problem which the current clause 24.4(b) is directed towards is real. The evidence indicates that employers responsibly manage the leave entitlements of their employees to accommodate foreseeable seasonal changes in the need for labour. The variation proposed will reinforce the current practise.*
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> *[119] It is not necessary for the Commission to engage in any consideration of legal issues associated with these provisions raised in our submission as there is a clear merit case that the provisions are obsolete and unnecessary. Our variations as proposed should be made.*

Question 36: Do you contest any part of the relevant award history set out in the ACA, ABI and NSWBC submission referred to in [165]?

66. The award history set out in the submission of ACA and others in 9.1 to 9.17 and 18.1 to 18.12 of their submission dated 15 March 2019 is interspersed with statements in support of their claims.
67. We contest 9.3(a) and (b) as this is a submission in support of ACA and others' claim, rather than the award history. We do not dispute that some pre-reform awards and NAPSAs had an ordinary span of hours that ended at 7pm; however other pre-modern awards had a finishing time of 6pm (such as the *Child Care (Long Day Care) WA Award 2005* and *Children's Services (Private) Award*). Two of the pre-modern awards that had a finishing time of 7pm also had a later start time than the current modern award. The *Children's Services (Northern*

Territory) Award 2005 and the *Children's Services (Australian Capital Territory) Award 2005* had an ordinary span of hours of 7am to 7pm.

68. We do not dispute 9.5 to 9.8 insofar as these paragraphs describe the *position* of some of the employer parties at the time. We do not accept the propositions made by the employer parties at the time as fact.
69. With respect to 9.11, ACA have not presented data to support their statement that the working hours and workforce participation of parents increased between award modernisation in 2009 and the transitional review in 2012. We do not take a position on whether there was an increase in that specific period. We dispute the proposition that '*the unworkability of a 6:30pm close started to become apparent*' but not the remainder of the sentence.
70. We contest 9.16 and 9.17, as these paragraphs are a statement of ACA and others' position rather than the award history.
71. We do not dispute 18.8 insofar as this paragraph describes the position of one employer group, as referenced in the submission of ACA and others.
72. With respect to 18.9 we note that the '*interested parties*' who came to a consent position on the rostering clause included a number of groups including United Voice, the IEU, the AEU, Community Connections Solutions Australia, the ACCA (Australian Childcare Centres Association, the predecessor organisation to the ACA) and ABI. We do not concede that the existing clause was '*already impractical*' or that the agreed changes in the 2012 transitional review made the clause impractical.
73. We contest 18.11 and 18.12, as these paragraphs are a statement of ACA and others' position rather than the award history.

Question 37: Do you contest the propositions set out at [167], or any of the material set out in Section 12 and 13 of the ACA, ABI and NSWBC submission?

74. We contest the propositions in [167] (a) and (d) of the Background Document. We also contest a number of matters in paragraphs 12 and 13 of the ACA and others' submission.
75. With respect to (a), we have addressed this in our submission in reply filed 15 April 2019. We refer specifically to paragraphs [61]- [64]:

> *[61] We oppose ACA and others' proposition that ordinary hours in ECEC should commence earlier and conclude later than other industries. This is tied to their characterisation of the primary purpose of this industry as being 'to provide a place for young children to be when their parents are unable to care for them in the home because they are at work.'*
>
> *[62] We disagree with this characterisation. ECEC is not a baby sitting or child minding service. The primary purpose within the ECEC sector is to provide quality*

education and care for children. The National Quality Standards emphasise the delivery of educational program and practice that enhances children's learning and development and helps children to build life skills.

[63] Ordinary hours of work within this sector need to be understood in this context, and set in accordance with industry needs and the modern awards objective. It is not appropriate to set the ordinary hours of work for educators based around the span of hours within other industries.

[64] There is a further general merit consideration that ECEC should not be considered a sector where the aspiration of continuous or extended service delivery, a 24/7 service, is necessarily desirable. The Awards deal with the care and education of children from birth to 6 years of age. An ECEC centre is not a medical, correctional, industrial or hospitality enterprise where there are defensible, social, economic or scientific justifications for extended or continuous service delivery. Extending the normal hours of operation of ECEC is potentially problematic for broad social and health reasons. For children and their parents, the normalisation of absences well into the early evening is inappropriate.

76. With respect to (d), no evidence has been presented by ACA and others to justify the statement that '*childcare is an extremely competitive industry in which affordability, opening hours and compliance with an increasingly complex regulatory regime determines the viability of a business.'* ACA and others did not establish that opening hours have any significant impact on the viability of operators of childcare centres, let alone that it was one of three key factors in their viability. It emerged during the hearing that most ACA witnesses had done no costing or planning on what impact longer opening hours might have on their business.[20]
77. We contest paragraph 12.2 of the ACA submission which states that the role of ECEC Services is predominantly to provide parents with *'peace of mind … knowing that their children are safe while they work*.' We refer to our response to paragraph [167] (a) of the Background Document above. This characterisation of the ECEC sector that it is driven by the needs of parents is problematic and contrary to the current regulatory framework. This is because the well-being and education of the children is the predominate concern.
78. We contest paragraph 12.4, the submission made by ACA and others is unsupported to the extent that no probative evidence has been provided in support of the contention that hours after 6.30pm are '*standard (and necessary)*.' We also disagree with the characterisation of

[20] See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

ECEC as primarily about '*caring for children during the time that their parents are at work*.' As we put in our submission in reply filed on 15 April 2019 '*the primary purpose within the ECEC sector is to provide quality education and care for children.*'[21] This is not simply a rhetorical difference. It informs our position that the ordinary span of hours in these Awards should not be set with reference to the ordinary hours of work in other industries, in an attempt to '*catch*' all the hours that parents may be at work. Further, it is relevant to note that both Awards already contain shift work provisions (as well as time in lieu provisions) that could be utilised by employers.

79. We make no comment on paragraph 12.15.
80. With respect to paragraph 12.16, this statement is inaccurate in relation to (d) '*not-for-profit long day care providers'*. The ACA and others has provided no evidence from not-for-profit day care providers. We also note that large providers have not been represented in the witnesses from the ACA and others. Namely, there is no evidence in this review from larger employers and not-for-profit employers.
81. With respect to paragraph 13.1, there is comprehensive scheme of regulation of ECEC services. The main regulation is the National Law and regulation that is broadly consistent nationally. We make no comment on which of the regulations may or may not be the most difficult to comply with. The pattern of utilisation of ECEC services is not highly variable and some of the regulations that are cited as difficult to comply with have been a feature of the sector for some time. Parents are required to book a place well in advance and pay a fee if their child is unable to attend at late notice.[22] For example, Ms Llewellyn explained that at her service, if a parent provided two weeks' notice of an annual leave absence, they would be charged 50% of the fee whereas if the parent provided less than two weeks' notice, they would be charged 100% of the fee.[23]
82. We do not contest paragraph 13.2 insofar as it is ACA's characterisation of their own witness statements. We do not agree that the current Awards are not easy to understand or sustainable. There is no evidence that there is any suggestion that the sector is seeking to have the current framework of regulation reviewed or changed because it is in any sense problematic. The NQF has applied generally uniformly to the sector since 2012. No witness said there should be substantial change to the National Law.
83. We contest paragraph 13.3, award compliance is not a balancing act. Employers are required to comply with modern awards. No concrete examples are given of how compliance with the '*Childcare regulations*' must be balanced against the requirements of the Awards. In a

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[21] United Voice submission in reply filed 15 April 2019, paragraph [62].

[22] See oral evidence of Brannelly PN3423-PN3424, Mahony PN3991-3993, Llewellyn PN4250-4253, and Hands PN4758-4767.

[23] PN4253.

number of respects our claims would ensure that the Awards are consistent with the National Law and this was agreed by some of the employer witnesses as desirable.[24]

84. We contest paragraph 13.4, we agree that there was significant regulatory change in the ECEC sector with the introduction of the NQF in 2012, however the evidence presented by ACA and others has not indicated that the industry is '*susceptible to a high degree of regulatory change.*' The current system has been stable since 2012.
85. We do not agree with paragraphs 13.5-13.7. These paragraphs are ACA's submissions on how their evidence should be interpreted. We say the following:
    (a) With respect to paragraph 13.5, it is unclear what is meant by '*owners tend to prioritise all the regulations by what is best for the children*'. No genuine argument can be made that complying with the Awards with respect to the ordinary span of hours and the rostering clause is '*bad for children*'. Award compliance is not optional. It is also unclear what legislation ACA and others are alleging is not workable; whether it is the Awards, the *Fair Work Act 2009*, or the National Law and Regulations.
    (b) With respect to paragraph 13.6, ACA and others appear to be asserting that there is non-compliance with award conditions within the industry. It is unclear which award conditions are being referred to; some concrete examples should be able to be indicated. In any case a failure to comply with award conditions should not be taken as an argument in favour of disregarding award conditions. Again, ACA and others make a statement that '*owners are prioritising all the regulations by what is best for the children*' but it is unclear what this means and how it is relevant in the context of this review.

Question 38: Do you contest the propositions set out at [169]?

86. We would note that ACA and others have not presented any evidence from working parents within the ECEC sector. No explanation has been provided as to why there is a complete absence of this evidence when the needs of parents is presented as a critical reason for the claim seeking to alter the ordinary hours of work. We contest [169](b), (d) and (g). We do not contest (c) as a general proposition, but we do not agree that the ACA claims would improve accessibility or affordability of ECEC services.
87. With respect to (b), we agree that affordable ECEC is important. However, we do not agree that cost is the only or the deciding factor in why parents may choose a particular ECEC service. There was evidence that the quality rating of a service could influence parental

[24] United Voice submission on findings, 29 May 2019, at [19] to [20] where the evidence of Llewellyn and McPhail is summarised who both broadly said the Awards were out of '*sync'* with regulation and it would be desirable if this were not the case.

decision making.[25] It may also be that location is an important factor in decision making. Further, it is unclear to United Voice what is meant by '*parent (customer) demand*', whether that is parent demand in terms of opening hours, or quality, or another matter. If '*parent (customer) demand*' is intended to refer to parent demand for longer opening hours, we would note that most of the ECEC employer witnesses had not undertaken any business study of the demand for, or the viability of opening longer hours.[26] The following exchange is illustrative:

> ***Saunders:*** *One of the other reasons you support the claim - you've done no business case modelling on the actual demand for longer hours, have you?*
>
> ***Viknarasah:*** *No.*
>
> ***Saunders:*** *You haven't surveyed your parents?*
>
> ***Viknarasah:*** *No.*[27]

88. Only two employer witnesses appeared to have surveyed parents about opening hours. One employer witness had conducted a Facebook poll a day before the hearing[28] and neither received feedback that suggested any genuine need for change.[29] Therefore even hearsay evidence concerning parents' needs which supported the claims of ACA and others was absent. There is no evidence before the Commission that there is significant parent demand for longer opening hours. It is also important to note that ACA and others have not presented any evidence that granting their claims would actually increase affordability of ECEC services or have any genuine impact on affordability of ECEC services.
89. We disagree with (d), again, there has not been evidence in these proceedings on the impact of the opening hours of services on working parents (aside from the evidence presented by United Voice on the impact on working parents who are ECEC employees). No evidence has been presented from parents who want to utilise centre based care past 6.30pm and as stated above, the two employer witnesses who did survey their clients did not receive feedback that suggested a genuine need for change.[30] We also disagree with the notion that the current span of ordinary hours in the Awards is '*limited*'.

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25 See oral evidence of Paton PN2367-2369 and Maclean PN2575-2576.

26 See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

27 PN1088-1089.

28 See oral evidence of McPhail PN2910-2913

29 See oral evidence of McPhail PN2910-2913; with respect to Tullberg see Exhibit 36: Survey Results From Knox Childcare And Kindergarten And Wallaby Group (less than 2% were dissatisfied or very dissatisfied with the operating hours).

30 As above.

90. We disagree with (g), the line of argument that '*the ordinary hours of the childcare industry should commence earlier and conclude later than other industries*' is infeasible. We refer to paragraphs [61] - [64] of our submission in reply dated 15 April 2019.
91. With respect to (j), we do not contest that *some* parents have long commuting times. There was no evidence about this and whether it impacts on the utilisation of ECEC services in anyway.

Question 39: Do you contest the propositions set out at [171]?

92. We contest [171] (b), (c), (d), (f), (g), (h), (i), (j).
93. With respect to (b), in paragraphs [56]-[59] of in our submission in reply filed 15 April 2019, we noted a number of inaccuracies in the table prepared by ACA and others in paragraph 16.6 of their submission filed 15 March 2019. This may have varied the percentage of awards that contain a span of ordinary hours that finish at 6.30pm.
94. We contest (c), what emerged during the hearing is that most of the ECEC employer witnesses had not undertaken any business study of the demand for, or the viability of opening longer hours.[31] Of the two employer witnesses who had carried out some survey of parents, neither received feedback that suggested any genuine need for change.[32] There is no evidence before the Commission that there is any parent demand for longer opening hours. This deficiency in the case of the ACA and others is problematic.
95. With respect to (d), United Voice presented a table in paragraph [27] of our submission in reply filed 15 April 2019 that indicated that a significant percentage of services close before or at 6pm. One reason this may be the case is that there may not be enough parent demand in many areas to make it financially viable to stay open til 6.30pm. One employer witness, Ms Viknarasah, indicated that she closed a centre at 6pm because '*most of the parents only require care till 6 o'clock so that's why we close at six*.'[33] Ms Llewellyn gave evidence that most children attended her service in the middle of the day, between 8.30am and 4.30pm.[34] There is no probative evidence that any significant portion of ECEC providers close at 6.30pm *specifically* for the purpose of avoiding the payment of overtime.
96. With respect to (f), we disagree. The evidence from both employee and employer witnesses indicated clearly that late pick up of children is not frequent. Clause 23.2(b) of the Childrens Services Award allows employers to direct an employee to remain at work due to a genuine

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[31] See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

[32] See oral evidence of McPhail PN2910-2913, with respect to Tullberg see Exhibit 36: Survey Results From Knox Childcare And Kindergarten And Wallaby Group (less than 2% were dissatisfied or very dissatisfied with the operating hours).

[33] Oral evidence of Viknarasah, PN1379.

[34] PN4130-4131.

and pressing emergency after their normal finishing times and be paid at ordinary hours. We refer to paragraphs [129]-[130] of our submission on findings filed 29 May 2019:

> *[129] One of the reasons advanced for this variation was that late pick up of children by parents provide a rationale for extending the span of ordinary hours to 7.30pm.*[35] *However, the evidence indicated that late pick up of children is not frequent. United Voice member Ms Hennessy provided uncontested evidence that: 'in my experience, most children have been picked up by their parents before 6.15pm. We occasionally have parents who run late when there is an emergency or some other unusual circumstance, though this doesn't happen often'.*[36] *Ms Bea and Ms Wade also provided evidence that late pick up was infrequent.*[37]
>
> *[130] Employer witness Ms McPhail provided evidence that late pick up occurred 'very rarely' at her centre*[38] *and Mr Mahony conceded that 'late pickups at the moment is not a serious problem for us'.*[39] *Late pick-up is not restricted to pick up after closing hours (or after the ordinary span of hours in the Awards):*
>
> > ***Saunders:*** *So about once a week a parent is late picking up their child?*
> >
> > ***Paton:*** *Correct.*
> >
> > ***Saunders:*** *That's not concentrated in the 12 hour session. That can be one of the kids that finishes at 5.30?*
> >
> > ***Paton:*** *Yes. We have the same late pick-up rules for outside of session as we do for late collection.*
> >
> > ***Saunders****: Of course. But it doesn't always push you past the centre's closing time, does it?*
> >
> > ***Paton:*** *No, but it does cause staff who would normally be rostered to finish at 5.30 to stay and that's causing overtime on theirs.*
> >
> > ***Saunders****: Sure, but that could be fixed by rostering someone by changing their roster to six?*
> >
> > ***Paton:*** *Except that I don't know that that parent is going to be late.*

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35 ACA and others, submission filed 15 March 2019, page 19.

36 Exhibit 7 Supplementary statement of Bronwen Hennessy dated 10 April 2019, paragraph 5.

37 Exhibit 9 Supplementary statement of Pixie Bea dated 10 April 2019, paragraph 9; Exhibit 12 Supplementary statement of Alicia Wade dated 12 April 2019, paragraph 5.

38 PN2918-2920.

39 PN3958.

> ***Saunders:*** *Of course. So you wouldn't really roster someone regularly just in case someone was late, would you?*
>
> ***Paton:*** *No.*

97. With respect to (g), the evidence indicated that parents were occasionally late in picking up children.[40] There was little evidence as to *why* some parents were late. The employer witness, Ms Tullberg, had one specific family who were late because of work finishing times[41] but there was no evidence that this was widespread.
98. With respect to (h), we agree there was evidence that some centres charge late fees as a deterrent to late pick-ups by parents. Numerous employer witnesses indicated that they charged late fees.[42] This is an operational decision that businesses make, and there is no guarantee that expanding the span of ordinary hours would result in businesses reducing or eliminating late fees. There would be no compulsion for employers to stopping charging late fees and there would be no reason to stop employers simply pocketing the reduced labour costs as profit.
99. With respect to (j), we note that there is always a risk of unplanned overtime if parents are late, and that extending the span of ordinary hours would not alleviate the disutility for employees (rather, it would increase the level of disutility, as employees would be expected to stay later unexpectedly *without* the payment of overtime). Employer witnesses generally agreed that they would not roster an employee on later just in case a parent was late. We refer to paragraph [132] of our submission on findings filed 29 May 2019:

> *[132] There is a level of inherent uncertainty in parents picking up children late, and it was acknowledged that regardless of the opening hours, there is always a risk of late pick up.[43] There was no evidence that an employer would roster an employee after closing time just in case of a late pick-up[44] and no evidence that extending the ordinary span of hours in the Awards would genuinely address any issues that arise from late pick up.*

Question 40: Do you contest the propositions set out at [173]?

100. We contest all of the propositions in paragraph [173] of the Background Document.

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40 See paragraphs [129]-[130] of our submission on findings filed 29 May 2019.

41 PN3601.

42 See oral evidence of Fraser, PN1717-1719; Paton PN2189-2196; Chemello PN2689-2690; Llewellyn PN4210-4213

43 Llewellyn PN4210.

44 See oral evidence of Tullberg PN3595, Mahony PN3961 and Paton, PN2185.

101. We contest (a) as it was unclear whether any of the employer witnesses would change operating hours even if there was a change to the span of opening hours, as most had not done any costing on the financial viability of a change and there was no real evidence that there was demand for such a change.[45]

102. We contest (b) as we do not agree that the current overtime cost is necessarily *significant*. Employer witnesses Mr Mahony and Ms Hands admitted to having not done the calculations on the cost of opening until 7.30pm.[46] Ms Chemello gave evidence that her centre's late fees were to offset the time in lieu costs (not direct overtime costs, as she offered time in lieu rather than overtime).[47] Ms Llewellyn admitted that the overtime cost that prevented her from opening her Centre until 7.00pm under the current Awards was just under one per cent of last year's annual profit.[48] This evidence did not support the statement in (b).

103. We contest (aa) as ACA and others have not put any evidence on to support this broad assertion. There is absolutely no evidence in these proceedings to support the proposition that extending ordinary hours under these Awards would have any impact on workforce participation or the Australian economy.

104. We contest (bb) as expanding the span of ordinary hours will not necessarily result in businesses reducing or eliminating late fees.

105. We contest (cc). There is always a risk of unplanned overtime if parents are late, and employer witnesses acknowledged that they would not roster employees on after closing time just in case of a late pick-up.[49] We refer to paragraph [132] of our submission on findings filed 29 May 2019.

Question 41: What do you say about the proposition set out at [176]? Does the consideration in s.134(1)(a) extend to all the low paid or is it confined to those covered by the Awards?

106. We contest [176] (a) and (b). We have addressed our opposition to this claim in our submission in reply filed 15 April 2019 in detail; see particularly paragraphs [36]-[42].

107. With respect to (a), there is always a risk of unplanned overtime if parents are late and employer witnesses acknowledged that they would not roster employees on after closing time just in case of a late pick-up.[50] We refer to paragraph [132] of our submission on findings filed 29 May 2019.

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45 See oral evidence of Viknarasah PN1088-1089, Fraser PN1699, Paton PN2237-PN2238, Maclean PN2489, Chemello PN2696-2698, Mahony PN3943 and PN3954.

46 Mahony, PN3947-3948, Hands, PN4635.

47 PN2690

48 PN4170-4207.

49 See oral evidence of Tullberg PN3595, Mahony PN3961 and Paton, PN2185.

50 See oral evidence of Tullberg PN3595, Mahony PN3961 and Paton, PN2185.

108. With respect to (b), we dispute that this is beneficial. Under the current Awards, employers can choose to open until 7.30pm and can create structured employment between 6.30pm and 7.30pm. The difference is that if the ACA claim were granted, employees would not receive the overtime penalty for work between 6.30pm and 7.30pm.

109. We say in the context of the 4 yearly review of modern awards, the consideration in s134(1)(a) must be in respect of the low paid employees *covered* by the relevant Award, rather than low paid employees generally.

110. In the event that the Commission determines that regard should be had to low paid employees generally, we dispute ACA and others' argument that their claim will be beneficial to all low paid employees. We refer to paragraphs [89]-[95] of our submission in reply filed 15 April 2019.

111. The Commission should approach these contentions with extreme caution in light of the complete absence of any evidence from the persons who would allegedly benefit from the extension of ordinary hours as proposed.

Question 46: Do you contest the propositions set out [208], or any of the material set out in Section 21 of the ACA, ABI and NSWBC submission?

112. We address our response to the matters put by ACA and others at what are [208] (a), (b), (c), (d) and (e).

113. We do not contest (a) as such but note that such a statement could be made about almost any sector. Employees across all sectors are often unavailable due to health and other personal reasons. Dealing with the unanticipated absences of employees is a contingency that all employers must plan around. There is no evidence that employees in ECEC are particularly prone to unanticipated absences. This is a finding that would require some evidence.

114. With respect to (b), there is a comprehensive scheme of regulation for ECEC services and we acknowledge that services must comply with the National Law and Regulations, as well as any relevant State based regulations. We do note that attendance at ECEC services is not highly variable, and that generally, parents are required to book a place in advance, and may have to pay a fee if their child is unable to attend at late notice.[51]

115. With respect to (d), it is agreed that there are minimum staffing requirements that centre based services must meet. The question as to whether the replacement of an absent employee in a roster is *required* depends on whether the employer has chosen to staff the service at the bare minimum or not. The evidence indicated that many services roster above

[51] See oral evidence of Brannelly PN3423-PN3424, Mahony PN3991-3993, Llewellyn PN4250-4253, and Hands PN4758-4767.

the minimum required to because it was good practise to do so and not just to accommodate compliance with ratios.[52]

116. With respect to (e), we note that employer witnesses acknowledged that they have several options available in replacing an employee, including asking another employee to work additional hours or vary their shift, engaging a casual employee, having a staff member rostered '*off the floor*' (such as the Director or Assistant Director) step in or using labour hire.[53] There was no evidence that any of the employer witnesses had been non-compliant with the minimum staffing requirements in the National Law or Regulations under the operation of the current Awards.[54]

117. We contest some parts of section 21 of the submission of ACA and others dated 15 March 2019.

118. With respect to 21.3, we do not dispute that there is some complexity in rostering. However, the current Awards already provide employers with sufficient rostering flexibility. Further, last minute changes to employee rosters can cause employees significant stress.

119. With respect to 21.4, there was some evidence that the employer witnesses did try and accommodate employee requests for leave *when possible*. However, we take issue with the last line of this paragraph. It is an overstatement to say that '*employers regularly try to accommodate these employee requests (to swap shifts, change times etc.) rather than force employees to utilise personal leave, annual leave or unpaid leave when such requests arise*.'

120. With respect to 21.5, we agree that flexibility for working parents is important, though we do not agree with the phrasing that the ECEC workforce '*demands*' flexibility. We agree that there was evidence that employees generally agree to late roster changes, where possible.

121. With respect to 21.6, we refer above to our response to paragraph [208] (d) of the Background Document.

122. With respect to 21.7, we refer above to our response to paragraph [208] (e).

123. With respect to 21.8, we disagree that casuals are necessarily unfamiliar with the children and the service. All but one of the employer witnesses who operate services indicated that they employ casual employees.[55] It is appropriate to use casual employees to fill in unexpected rostering gaps.

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[52] See oral evidence of Hands PN4681-4684, Mahoney PN3965-3966, Fraser PN1677-1680 and Paton PN2269-2279.

[53] See oral evidence of Viknarasah, PN 1138-1148, Fraser, PN1794-1800, Paton PN2283-PN2296, Maclean PN2486, Chemello PN2715-2719, Mahony PN3971-3972, Hands PN4698-4702.

[54] See oral evidence of Llewellyn PN4221-4229, Hands PN4703.

[55] See witness statement of Chemello dated 1 March 2019 (Exhibit 27), paragraph 23; witness statement of Hands dated 12 March 2019 (Exhibit 43), paragraph 19; witness statement of Paton dated 14 March 2019 (Exhibit 21), paragraph 20; witness statement of Viknarasah dated 11 April 2019 (Exhibit 13), paragraph 31;

Question 47: Do you contest the propositions set out [210]?

124. We contest all of paragraph [210] of the Background Document.

125. We agree that full time and part time employment should be the preferred employment model for long term and ongoing employees in a service to ensure consistency of care for children. However, the use of casual employees for unexpected absences is appropriate, and accords with the definition of casual employment in the Children's Services Award that casual employees are engaged for '*temporary and relief purposes.*'[56]

126. All but one of the employer witnesses who operate services indicated that they employ casual employees.[57] There is no reason to presume that all these casual employees would not be familiar and trained in the service. Further, there are casual employees with a range of qualifications including Diploma qualified casual employees.

Question 48: Do you contest the propositions set out [212], or any of the material set out in Sections 23 of the ACA, ABI and NSWBC submission?

127. We agree with (a).

128. We contest (b), (c) and (d).

129. We contest the proposition in (b), the evidence demonstrated, there are a wide variety of ways in which an employer can replace an employee who may be unavailable. Some of these options are: asking another employee to work additional hours or vary their shift, engaging a casual employee, having a staff member rostered '*off the floor*' (such as the Director or an Assistant Director) step in or using labour hire.[58] The evidence from employers was almost unanimous that employees were compliant in agreeing to roster changes at less than 7 days' notice and the payment of overtime was not common. Employees, particularly part-time employees, routinely agreed to work additional ordinary hours at short notice.

130. With respect to (c), we say the requirement to record the agreed roster variation in writing is not onerous. There is no reason why an employer could not have a simple pro-

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witness statement of Tullberg dated 9 April 2019 (Exhibit 35), paragraph 19; witness statement of McPhail dated 12 April 2019 (Exhibit 28), paragraph 21; witness statement of Fraser dated 15 April 2019 (Exhibit 18), paragraphs 24-25; witness statement of Maclean dated 15 April 2019 (Exhibit 25), paragraph 30; witness statement of Mahony dated 11 April 2019 (Exhibit 38), paragraph 21.

[56] Clause 10.5(b) of the Children's Services Award.

[57] See witness statement of Chemello dated 1 March 2019 (Exhibit 27), paragraph 23; witness statement of Hands dated 12 March 2019 (Exhibit 43), paragraph 19; witness statement of Paton dated 14 March 2019 (Exhibit 21), paragraph 20; witness statement of Viknarasah dated 11 April 2019 (Exhibit 13), paragraph 31; witness statement of Tullberg dated 9 April 2019 (Exhibit 35), paragraph 19; witness statement of McPhail dated 12 April 2019 (Exhibit 28), paragraph 21; witness statement of Fraser dated 15 April 2019 (Exhibit 18), paragraphs 24-25; witness statement of Maclean dated 15 April 2019 (Exhibit 25), paragraph 30; witness statement of Mahony dated 11 April 2019 (Exhibit 38), paragraph 21.

[58] See oral evidence of Viknarasah, PN 1138-1148, Fraser, PN1794-1800, Paton PN2283-PN2296, Maclean PN2486, Chemello PN2715-2719, Mahony PN3971-3972, Hands PN4698-4702.

forma that is signed which evidences agreement. It is appropriate that such an agreement is maintained in the time and wages record. We would otherwise agree that there appears to be an industry practise whereby permanent employees waived their right to overtime and routinely agreed at short notice to work additional hours to assist with the operational needs of their centre.

131. With respect to (d), we disagree. As stated above, employers have several options available to replace employees. Further, there are sound reasons as to why employees in this sector should be provided with at least seven days' notice of roster changes. We refer to paragraphs [77]-[85] of our submission in reply filed 15 April 2019.

132. We contest 23.1. Firstly, clause 21.7(b) (i) permits an employer and an employee to agree to a variation to the roster. In such circumstances, overtime would not be payable. Secondly, the clause does not suggest that overtime would be paid for *all* hours of work.

133. We contest 23.2. We refer to our response above to [212] (d).

134. We contest 23.3. We refer to our response above to [212] (c). There is no requirement in the Award that the record in writing be made at the *exact* same time that agreement is reached. For example, if an employer and employee reached agreement in the morning at 7am that the employee would come in for an additional shift at 9am; the employee could sign a form on the agreed variation at 9am when they arrive at work.

135. We contest 23.4. We refer to our response above to [212] (c).

Question 53: Clause 14.5(a) appears to place a cap on the salary payable to a casual employee who is engaged for less than five consecutive days: (i) What is the parties' understanding of how this cap operates? (ii) What is the rationale for the imposition of such a 'cap'? (iii) What is the history of this provision and, in particular, has the 'cap' been the subject of an arbitral determination

136. We are unaware of why this cap on the salary payable to a casual employee engaged for less than five days operates. On the face of it, it seems to be an unfair restriction on the wages of casual employees without any apparent justification.

137. The cap appears to have been inserted following consultation on the Exposure Draft of the Teachers Award that was released on 22 May 2009. The Exposure Draft did not contain a cap. We are not aware of a decision in respect of the cap.