

Submission in reply to IEU s.158 application

Matter No.: AM2018/9

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Introduction

1. The Applicant's claim is for a variation to the minimum rates of pay in the *Educational Services (Teachers) Award 2010* ('the Teachers Award') under s158 of the *Fair Work Act 2009* (the Act), for increases between 11% - 34% depending on the classification ('the primary claim'), or alternatively an increase of 25% to all classifications ('the alternative claim').¹
2. In the primary claim, the Applicant is seeking variation to the rates in two respects²:
 - a. firstly, variation to decompress internal relativities in the Award³; and,
 - b. secondly, the Applicant claims an increase for the stated purpose of reflecting 'significant changes in the work value of teachers' work.'⁴
3. The Application was made in the context that the Applicant also has an outstanding application for an equal remuneration order to apply to early childhood teachers also covered by the Teachers Award in matter C2013/633.
4. At the time of these submissions, the Application in matter C2013/633 has not been withdrawn by the Applicant.
5. References to 'the Application' in these submissions, are (unless otherwise stated) references to the Application in matter AM2018/9.
6. AFEI objects to the Application on the following grounds:
 - a. the Application does not meet the threshold requirement of establishing that a variation to the Teachers Award is justified on work value grounds⁵;
 - b. the proposed rates cannot be included in the Teachers Award, because they are either contrary to, or not necessary to achieve the modern awards objective and the minimum wages objective.^{6,7,8}

¹ IEU Application to vary a modern award, 17 August 2018, at para 6, and 8

² IEU Application to vary a modern award, 17 August 2018, at para 7

³ IEU Application to vary a modern award, 17 August 2018, at para 9a

⁴ IEU Application to vary a modern award, 17 August 2018, at para 9b

⁵ As required by s157(2)(a)

⁶ s157(2)(b)

⁷ As required by s138

⁸ The minimum wages objective is at s284(1), s284(2)(b) confirms that the minimum wages objective applies to the performance or exercise of the FWC's functions under Part 2-3 of the Act, so far as they relate to setting or varying modern award minimum wages.

Statutory framework and general principles

The Commission's relevant powers only extend to minimum rates

7. The exercise of the Commission's power in assessing the Applicant's claim is limited by s138 insofar as the Commission may only include terms in the Award which are necessary to achieve the modern awards objective (at s134) and the minimum wages objective (at s284).
8. Both these statutory objectives (at s134 and s284) specifically require the Commission to ensure that terms and conditions in modern awards are confined to those which are 'minima.' That is, a *minimum* safety net and *minimum* wages.
9. This reading of the statutory framework for modern awards is consistent with prior instructive decisions of the Commission (including full benches),⁹ as well as authoritative decisions of the Federal Court, including in the decision of the Full Court of the Federal Court, in *CFMEU v Anglo American Metallurgical Coal Pty Ltd*¹⁰ where it was stated at [23],

The words "only to the extent necessary" in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.

Relevance of wage-fixing principles and relativities

10. AFEI does not agree with the Applicant's submission that matters prescribed by the National Wage Case Principles developed by the Australian Industrial Relations Commission (AIRC) are not directly relevant to the considerations required by s157(2)(a).¹¹
11. These wage-fixing principles are directly relevant to any proposal to vary modern award minimum wages under s157, due to the statutory mandate for awards to include terms only to the extent necessary to achieve the modern awards objective,¹² and the minimum wages objective,¹³ that is, a fair and relevant safety net of minimum terms and conditions.

⁹ Re 4-yearly review of the Alpine Resorts Award 2010 [2018] FWCFB 4984 at [52]; cited in Re 4-yearly review of the Pharmacy Industry Award 2010 – APESMA Work Value Claim [2018] FWCFB 7621 at [126].

¹⁰ *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [45].

¹¹ See IEU submission of 26 November 2018 at [12].

¹² s138

¹³ s284

12. In particular, the following wage fixing principles are necessary to ensure a fair and relevant minimum safety net:
- a. fixing rates that are relative to classifications in other minimum rates awards;
 - b. the avoidance of double-counting of work value reasons; and
 - c. the avoidance of leapfrogging;

13. As noted by a Full Bench in *re Pharmacy Industry Award 2019*¹⁴ (the Pharmacy Decision), work value assessment has its origin in the need to fix the wage margins which recognises a workers skills, to be paid in addition to the basic wage for relatively unskilled workers, as was explained by H.B. Higgins J, in the making of the first federal award for the metals and engineering industry in 1921.¹⁵

“This Court assumes that a skilled man should, as has been the uniform practice, get more for his skills or other necessary qualifications than a mere labour – more or better commodities, and to that end more money wages. This Court takes the basic wage for the labourer and then adds to it the extra wage without which, under present conditions, lads will not take the trouble of mastering the difficulties of a skilled trade. If there is one thing that has been made clear in all the Australian tribunals.”

14. The imperative for meaningful margins in minimum wages is not only founded in the historical purpose of work value assessments, but is also provided in:
- The modern awards objective, to the extent that it requires a ‘fair and relevant’ safety net; and
 - s135(2), which states that ‘in exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order;’

15. The rationale for fixing award rates of pay with reference to external relativities in other minimum rates awards is as applicable now, under the current statutory framework, as it has been throughout history.

16. This applies not only for the setting of meaningful margins in wages, but also for the maintenance of meaningful margins and thus stability in a minimum wages award framework. As was stated in the 30 October 1991 Safety Net Review Decision:

A fundamental thrust of the structural efficiency principle has been the minimum rates adjustment process as a prerequisite to the establishment of stable, modernised awards. The

¹⁴ [2018] FWCFB 7621

¹⁵ At [131]

*Commission decided in the February 1989 Review decision that minimum rates awards would be reviewed "to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards". To ensure that this fundamental purpose of the structural efficiency principle is applied properly, we have decided to amend the work value changes principle. In making a monetary assessment of a change in work value, the Commission will take account, inter alia, of the relativities and integrity of internal award classifications structures and other external classifications to which the structure is related.*¹⁶

Also as expressed by the AIRC in the 1998 Paid Rates Review Decision:

'The MRA principle was designed to establish a consistent pattern of minimum rates in awards covering similar work thereby reducing inequities and providing a stable foundation for enterprise bargaining.' [emphasis added].¹⁷

17. Maintenance of meaningful margins in modern awards may not be expected to be an easy task for the Commission, particularly in circumstances where:
 - a. it is not only 'skill' that may be relevant to the work value of a classification. Other factors with statutory relevance to work value include 'the nature of the work, the level of responsibility involved in doing the work, and the conditions under which the work is done; and'¹⁸
 - b. work value assessments are to be conducted with the exercise of broad evaluative judgement, involving an element of discretion;¹⁹
 - c. '*a number of evaluation techniques have been applied for various purposes and with various outcomes from time to time.*'²⁰
18. To achieve and maintain meaningful margins in modern award rates, a conscious and deliberate consideration of internal and external relativities should therefore be a part of any work value assessment and assignment of commensurate rates.

¹⁶ [1991] AIRC 1122, Print H2800, Print K0300

¹⁷ Paid Rates Review Decision, Print Q7661 also cited in the Pharmacy Decision at [158]

¹⁸ s156(4)

¹⁹ Pharmacy Decision at [164]

²⁰ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries*, Print Q1002, as cited in the *Pastoral Award Decision* [2015] FWCFB 8810 at [49]

The IEU's claim

19. The IEU does not provide any explanation of how the 17.5% or 25% values (being the quantum of increases sought on the basis of work value changes) are arrived at, broken down, or how they relate to any of the evidence upon which they apparently rely.
20. In the 11 March 2019 submissions concerning the Pharmacy Decision, the IEU explains its position on how the Teachers Award's rates should relate to C10 in the Manufacturing and Associated Industries and Occupations Award 2010, and also to the Professional Employees Award 2010. These submissions do not however, explain the specific claim for 17.5% or 25% increases to the Teachers Award rates.
21. In their 26 November 2018 submissions, the IEU indicate that they rely on the following arguments:
 - a. the award rates did not properly reflect the work value of teaching at the time the Award was made;²¹
 - b. there have been increases in the value of that work since the Teachers Award was made, and since the rates that award was based on were set;²² and
 - c. flat dollar increases to wages have resulted in a compression of internal relativities in the Teachers Award²³.
22. For the reasons set out in this submission, the Commission should conclude that the IEU has not established that the proposed variation to the Teachers Award is justified on work value grounds.
23. There are further reasons why the modern awards objective and the minimum wages objective compel the Commission to reject the Application:
 - a. job evaluation evidence comparing the work value of teachers and professional engineers shows there is no basis for any increase to teacher minimum wages on work value grounds;
 - b. the variations would result in unfair and irrelevant margins in minimum wages between the Teachers Award and other modern award classifications;
 - c. The rates would discourage enterprise bargaining.

²¹ IEU submissions 26 November 2018, at para 54, 60a

²² IEU submissions 26 Nov 2018, at 47

²³ IEU submissions 26 Nov 2018, at 55

Reply to IEU Submissions on the Pharmacy Decision

24. In IEU's application on 17 August 2018, and in its submissions of 26 November 2018, the IEU do not deal with relativity issues relating to classifications and rates in other modern awards.
25. The IEU's submissions of 11 March 2019 are in response to directions from the Commission to file submissions in relation to the decision in the Pharmacy Decision.
26. In the IEU's 11 March 2019 submissions, the IEU expressly '*contends that the obligation to set rates that provide a fair and relevant minimum safety net requires rates that properly reflect appropriate relativities, both internally and externally.*'²⁴ AFEI agrees with this proposition and we refer to our submissions above.
27. Further in the IEU's 11 March 2019 submissions, the IEU claims the following in respect of external relativities:
- a. '*the appropriate reference point for the starting rate for a teacher is the C1 rate; that is, 180% of the current C10 rate that would equate to \$78,562 per annum.*'²⁵ It is noted that \$78,562 is not the starting rate for teachers being pursued in the IEU's application.²⁶
 - b. '*Alternatively, an approach that would seek to use instead the historically compressed professional rates would give rise to the current L3 rate in the Professional Employees Award being used as a reference point when setting rates for teachers, a rate that is 175% relativity to C10 (described as C1(b)), being the rate set for a professional fulfilling the full professional role. That rate...is currently \$64,462 per annum, which is 22.9% over the current starting rate for teachers.*'²⁷
28. At [173] of the Pharmacy Decision, the Full Bench includes a table outlining how the classification structure for professional scientists in Part IV of the *Metal Industry Award* was established and how the structure aligned classifications in the *Professional Engineers and Scientists Award 1998* ('1998 Professional Engineers Award') to those in the *Metal Engineering and Associated Industries Award 1998* ('1998 Metals Award'). The table discloses that the 1998 Metals Award included a classification for Professional Engineer/Professional Scientist, which required a degree as minimum training, and was assigned a C1 with 180% relativity to C10.

²⁴ IEU Submissions 11 March 2019, at 2e

²⁵ IEU submissions 11 March 2019, at 21

²⁶ The starting rate for a teacher in the IEU's 17 August 2018 Application is \$55,453 per annum, at 2.2.1.

²⁷ IEU submissions 11 March 2019, at 24

29. The classifications in the 1998 Professional Engineers Award were aligned to the 1998 Metals Award classification as follows:²⁸
- a. a Level 1 (graduate) Professional Scientist with a 3 year degree to a **C6**, with 125% relativity to C10;
 - b. a Level 1 (graduate) Professional Scientist with a 4/5 year degree to a **C5**, with 130% relativity to C10;
 - c. a Level 2 Professional Scientist with a 4 year degree and who is required to work without detailed supervision to a **C2(b)**, with 160% relativity to C10; and
 - d. a Level 3 Professional Scientist who had completed further additional training, and required to perform duties requiring the application of mature professional scientific knowledge, to a **C1**, with 180% relativity to C10.
30. In [174] of the Pharmacy Decision, the Full Bench makes the following observation in relation to the way relativities were set for Professional Scientists:
- ...professional scientists below Level 3, who require an undergraduate degree, were not aligned with the Part 1 structure on the basis of their qualifications and were not assigned the C1 classification with starting relativity of 180%.*
31. In the 11 March 2019 submissions, the IEU claims the reason *‘why graduate engineers and scientists, despite needing a degree qualification, were not assigned a pay rate corresponding to C1 relativity...appears to arise as a result of the more limited nature of the work performed by ‘fresh grads,’ and the training and supervision they are expected to receive, resulting in their not undertaking the full role initially.’*²⁹
32. The IEU further claims:
- ‘this contrasts with the position of teachers...[as] teachers are performing the full work of a professional educator, with limited to no supervision, from the first moment they begin work. Unlike professional engineers and scientists, there is no graduate program or period of on-the-job training during which they are not yet fulfilling the full professional role.’*
33. AFEI agrees with the IEU’s logic that more would be required than simply holding a degree in order for the C1 classification (or 180% of C10) to be appropriate, and the requirement for minimum

²⁸ Pharmacy decision at [173]

²⁹ IEU submissions 11 March 2019 at 17

degree training for C1 in the 1998 Metal Industry Award should not be viewed in isolation from other work value factors likely to be relevant to a C1 classification.

34. It would, however, be an oversimplification to treat the reason for the differential between a degree-trained C1 (at 180% relativity to C10) and a graduate professional engineer/scientist (potentially 125% relativity to C10), as being only related to an ability to perform the work unsupervised/with minimal on-the-job training.
35. The IEU note that *'the 1998 Metals Award classification structure is, in substance, replicated in the Manufacturing and Associated Industries Award 2010...[and] the 1998 Professionals Award classification structure is now found in the Professional Employees Award 2010.'*³⁰
36. Further indications of work value factors relevant to a C1 (180% of C10) may be sourced from the definition of a C2(b) (160% of C10) in the *Manufacturing and Associated Industries and Occupations Award 2010* at B.3.15 and B.3.16. To be classified at C2(b), a person will not only have completed an advanced diploma or equivalent, but will also have had completed sufficient training to fulfil the requirements of the role.
37. Indications of the nature of the work, level of skill and responsibility, and conditions under which work is performed, which is appropriate to a 160% relativity are included in the following details about requirements for the C2(b) role:

i. performs work requiring mature technical knowledge involving a high degree of autonomy, originality and independent judgment;

ii. looks after and is responsible for projects and coordinating such projects with other areas of the organisation as required by the operation of the organisation;

iii. is responsible for the coordination of general and specialist employees engaged in projects requiring complex and specialised knowledge;

iv. plans and implements those programs necessary to achieve the objectives of a particular project;

v. in the performance of the above functions, applies knowledge and/or guidance relevant in any or all of the fields of designing, planning and technical work as required by the operation;

vi. operates within broad statements of objectives without requiring detailed instructions;

OR

vii. performs work at the above level of skill in a particular technical field;

viii. has as the overriding feature of their employment the ability to perform creative, original work of a highly complex and sophisticated nature;

³⁰ IEU Submission 11 March 2019, at 16

ix.provides specialised technical guidance to other employees performing work within the same technical field.

38. The specialist technical nature of the work, complexity of the work, high level of autonomy and responsibility, co-ordination of projects and staff, and expectation of mature knowledge, and originality indicate that more is required to be at C2(b) (or 160% relativity) than simply being able to perform work in a position that requires minimal on-the-job training, and indirect supervision, as a graduate.
39. The L3 rate in the Professional Employees Award, described as C1(b)³¹, or 175% relativity to C10, would inevitably involve a higher work value than the C2(b) (160% relativity to C10). To the extent the IEU claims an appropriate starting point/reference point for teachers is 180% or 175% of C10, the work value of a teacher would need to exceed that of a C2(b). It does not suffice to say that teaching requires a degree, and as such should have rates set above (or even at) C2(b). An approach which takes account of additional relevant work value factors is consistent with the AIRC Full Bench approach to work value in *Child Care Industry (Australian Capital Territory) Award 1998*, as cited in the Pharmacy Decision as follows³²:

'...it is "open to the arbitrator to make comparisons with other wages and work requirements within the award, and in other awards, provided such comparisons are fair, proper and reasonable in all the circumstances."

40. The IEU has not produced any evidence in this matter comparing the work value of graduate teachers to graduate professional engineers or scientists, or comparing the work value of graduate teachers to professional engineers or scientists performing the full professional role.³³
41. The IEU did however, include evidence in matter C2013/633, which was described by the IEU as "...a report [by Leanne Issko of Mercer] on the comparability of early childhood teachers with engineers in terms of work value..."³⁴ The IEU did not include Ms Issko's Report in its identification of evidence from C2013/633 which it intends to rely on in this matter, which is extraordinary in the circumstances the IEU submits in this matter:
- a. The obligation to set rates that provide a fair and relevant minimum safety net requires rate that properly reflect appropriate relativities, both internally and externally;³⁵ and

³¹ IEU submissions of 11 March 2019 at 24

³² Pharmacy Decision, at [160]

³³ The evidence relied on by the IEU in this matter is listed at 32 – 34 of its 26 November 2018 submissions

³⁴ IEU submission in C2013/633 of 22 December 2017, at 14(f).

³⁵ IEU submissions of 11 March 2019 at 2(e)

- b. The Pharmacists Decision points to the appropriateness when considering rates, to a comparison to other professional rates,³⁶ and
 - c. ‘...an approach...would give rise to the current L3 rate in the Professional Employees Award being used as a reference point when setting rates for teachers’³⁷; and
 - d. If the Bench is satisfied that there have been substantial increases in work value for teachers since 2010, then their rates need to be set at a level above the corresponding rates in the Professional Employees Award;³⁸ and
 - e. To the extent those external professional rates are used to determine an appropriate rate for teachers, adjustment will need to be made to reflect appropriate internal relativities for teachers.
42. AFEI relies on the evidence of John Egan, job evaluation expert, Principal of Egan Associates, and co-founder of the Cullen Egan Del (CED) job evaluation methodology used by Ms Issko, filed in Matter No. C2013/633. The Report prepared by Mr Egan includes a review of the job evaluation scores in Ms Issko’s Report, and also reaches independent conclusions about the work value of early childhood teachers, primary school teachers and professional engineers at both graduate level, and at 5 years’ experience utilising job evaluation methodology.
43. It should be noted that the job evaluations for Professional Employees conducted by Ms Issko and Mr Egan are in relation to a Level 2 in the Professional Employees Award (as opposed to a Level 3). A Level 3 classification (which is referred to in the IEU submissions of 11 March 2019) is higher than Level 2 in the Professional Employees Award.³⁹
44. The table below shows:
- a. Ms Issko and Mr Egan’s work value scores using Cullen Egan Del methodology, for graduate ECT (Level 1 – Modern Award), graduate professional engineers (Level 1.1, Professional Employees Award 2010);
 - b. The graduate ECT work value scores as a percentage of the graduate professional engineer work value scores;

³⁶ IEU submissions of 11 March 2019 at 27

³⁷ IEU submissions of 11 March 2019 at 24

³⁸ IEU submissions of 11 March 2019 at 25

³⁹ Schedule B, Professional Employees Award 2010

- c. Ms Issko and Mr Egan’s work value scores using Cullen Egan Del methodology, for an early childhood teacher with 5 years’ experience, and a professional engineer at 5 years’ experience (L2);
- d. The 5yr experienced ECT work value scores as a percentage of the experienced professional engineer (L2) scores;
- e. The graduate ECT work value scores as a percentage of the experienced professional engineer (L2) scores;
- f. The Modern Award minimum rates of pay for graduate ECT, 5-year ECT, graduate professional engineer, and L2 professional engineer;
- g. The Modern Award minimum rates of pay for graduate ECT as a percentage of the modern award minimum rates of pay for a graduate professional engineer;
- h. The Modern Award minimum rates of pay for a 5-year ECT as a percentage of the modern award minimum rates of pay for a L2 professional engineer;
- i. The rates sought by the IEU for graduate ECT, as a percentage of the modern award minimum rates of pay for a graduate engineer;
- j. The rates sought by the IEU for a 5-year ECT, as a percentage of the modern award minimum rates of pay for a L2 professional engineer; and
- k. The rates sought by the IEU for a graduate ECT, as a percentage of the modern award minimum rates of pay for a L2 professional engineer.

Minimum Rates	Mercer CED – Leanne Issko		Egan & Assoc. CED – John Egan	
	ECT Graduate L1	ECT 5yrs experience L5	ECT Graduate L1	ECT 5yrs experience
Award min. rate	\$50,017	\$56,222	\$50,017	\$56,222
IEU min. rate sought	\$55,543	\$67,776	\$55,543	\$67,776
Graduate Engineer Award L1.1 min. rate	\$49,998	N/A	\$49,998	N/A
L2 Engineer Award min. rate	\$58,984	\$58,984	N/A	\$58,984
CED Scores				
CED Job Evaluation Score	268	322	222	319
Graduate Engineer Job Evaluation Score	255	N/A	236	N/A
Professional Engineer Job Evaluation Score	326	326	N/A	362
Relativities: Compared to Graduate Engineer				
Award min. rate relativity to Graduate Engineer	100%	N/A	100%	N/A

CED Score relativity to Graduate Engineer	105%	N/A	94%	N/A
IEU rate relativity to Graduate Engineer	111%	N/A	111%	N/A
Relativities: Compared to L2 Engineer				
Award Rate relativity to L2 Engineer	85%	95%	85%	95%
CED Score relativity to L2 Engineer	82%	99%	61%	88%
IEU rate relativity to L2 Engineer	94%	114%	94%	114%
Note: Percentages rounded to the nearest whole number.				

45. The following observations may be made from the table above:
- a. while the IEU are seeking graduate teachers rates that would be **111%** of the graduate professional engineer rates, Ms Issko reported a graduate ECT as having a work value score that is only **105%** of graduate professional engineers. Further, Mr Egan reported a graduate ECT as having a work value score that is only **94%** of graduate professional engineers using the same CED methodology;
 - b. while the IEU are seeking for Level 5 teacher rates that would be **114%** of the L2 Professional Engineer rates, Ms Issko valued a Level 5 teacher as having a work value score that is only **98%** of an L2 Professional Engineer. Further, Mr Egan reported a Level 5 teacher as having a work value score that is only **88%** of the L2 Professional Engineer using the same CED methodology.
46. Accordingly, the relativities sought by the IEU between the rates of teachers, and the rates of professional engineers, is not justified on work value grounds, according to the job evaluation evidence of both the IEU and the AFEI.

No basis for claim of undervaluation in the Teachers Award rates when it was made

47. In support of their argument that the Teachers Award rates did not properly reflect the work value of teaching at the time the Teachers Award was made, the IEU appears to rely on:
- i. its claim that there can be no serious suggestion that there is any difference in the work of a teacher in the non-government sector, and government-employed staff;⁴⁰
 - ii. its claim that the NSW awards were set pursuant to State Wage Case principles⁴¹;
 - iii. wage reviews conducted by the NSW Industrial Relations Commission between 1990 and 2009 for teachers;⁴² and

⁴⁰ IEU submissions 26 November 2018, at para 57

⁴¹ IEU submissions 26 November 2018, at 58 and 59

⁴² IEU submissions 26 November 2018, at 49

- iv. a comparison between the rates in the NSW *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* and the Teachers Award, at 1 January 2010.⁴³

48. There are however several reasons why the IEU's evidence concerning the rates of pay or work value decisions in the (now rescinded)⁴⁴ NSW *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* ("The Rescinded NSW School Teachers Award") do not support a conclusion that the rates of pay in the Teachers Award were undervalued in 2010. These reasons relate to the Rescinded NSW School Teachers Award's coverage, rates, and lack of relativity.

Coverage does not support undervaluation

49. The rescinded NSW School Teachers Award is irrelevant to the teachers subject of the IEU application, as demonstrated by:
- a. coverage of the rescinded NSW School Teachers Award;
 - b. differences in the regulation of teachers in the NSW government schools compared to teachers in independent schools or early childhood centres;
 - c. findings of the NSW IRC to reject parity in wages between teachers in schools, and teachers in early childhood centres.

Coverage of the Rescinded NSW School Teachers Award

50. The Rescinded NSW School Teachers Award covered employees of the NSW Department of Education and Training. The school teachers that were covered by the Rescinded NSW School Teachers Award between 1990 and 2006 are now covered by the *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2017*, which includes classifications and pay structures which differ from the Rescinded NSW School Teachers Award.⁴⁵
51. The Rescinded NSW School Teachers Award did not cover teachers outside NSW, teachers in independent schools, or teachers in the non-government early childhood sector.

⁴³ IEU submissions 26 November 2018, at para 49, 53

⁴⁴ See cl. 38.1 *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2017*

⁴⁵ See Cl. 3 in *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2017* as compared to Cl. 3 in the Rescinded NSW School Teachers Award.

52. The findings of the NSW IRC in the 2004 decision, as cited by the IEU at paragraph 50 of its November 2018 submissions, did not include evidence from early childhood teachers, teachers in independent schools, or teachers working in schools outside NSW.

Statutory framework for employment in the NSW Teaching Services

53. AFEI's submissions of 14 May 2018 in matter C2013/6333 at [36], outlined features of the statutory framework relevant to employment in the NSW Government Schools Teaching Service. Teachers in NSW government schools are employed as part of the state-wide teaching service. Their employment is subject to, inter alia, the Teaching Services Act 1980 (NSW).
54. Pursuant to the Teaching Services Act, The Department of Education has a broader statutory authority for the regulation of various aspects of a teacher's employment and termination, than employers of teachers in independent schools or early childhood centres. For example:
- a. the Secretary may temporarily, or permanently, transfer a government school teacher to another location;
 - b. the Secretary may terminate a government school teacher's employment if the person refuses to comply with a direction for transfer;
 - c. where the Secretary is satisfied that a government school teacher is in receipt of a greater salary than the maximum fairly appropriate to the work, the Secretary may transfer the Teacher to a vacant position which is appropriate to the salary;
 - d. Government school teachers may not undertake any other paid work without the permission of the Secretary of the Department;
 - e. salary payable to a government school teacher may be withheld during any period of suspension for the purpose of investigating allegations of misconduct, and subsequently forfeited to the State;
 - f. the Teaching Services Act limits the power of Courts and Tribunals to order reinstatement or re-employment of a person contrary to a termination of employment.
55. The statutory authority of the Department may be exercised without requiring an employee's agreement to such terms in an employment contract.
56. There is therefore a notable difference in the conditions under which work is performed by teachers in the NSW government sector, and teachers in independent schools or early childhood centres.

NSW IRC distinction between rates for early childhood teachers and teachers in NSW schools

57. While there had been an agreed position between the union and early childhood education employers in NSW in 1970 for parity between early childhood teachers and school teachers, this position was specifically abandoned in 1990.⁴⁶
58. In 2001, the NSW IRC rejected an application for parity in wages between early childhood teachers and teachers in schools.⁴⁷
59. Further in 2009 the NSW IRC again refused to make a direct comparison on work value between ECTs and school teachers.⁴⁸

Rates do not support undervaluation

60. The rates in the Rescinded NSW School Teachers Award do not demonstrate undervaluation of the Teachers Award rates because:
 - a. the FWC cannot be satisfied that the monetary rates in the Rescinded NSW School Teachers Award bear relevance to the framework of modern awards which must include 'minimum rates';
 - b. the Commission cannot be satisfied that the rates in the Rescinded NSW Teachers Award only included work value components; and
 - c. the Commission cannot be satisfied the monetary rates in the Rescinded NSW Teachers Award were fixed as 'properly work-valued rates.'

NSW principles for fixing award rates vs Federal principles for fixing award rates

61. The IEU seek to infer that the Rescinded NSW Teachers Award rate includes 'properly work-valued rates,'⁴⁹ on the basis that the rates in the NSW awards were set pursuant to a statutory test to set '*fair and reasonable conditions of employment*' for employees, and their claim that the statutory test in NSW should not result in rates higher than rates required by the modern awards.

⁴⁶ *Teachers (Non-Government Pre Schools) (State) Award* [2001] NSWIRComm 335 [395]

⁴⁷ *Teachers (Non-Government Pre-schools) (State) Award* [2001] NSWIRComm 335 [401], [403].

⁴⁸ *Teachers (Non-Government Early Childhood Service Centres other than Preschools) (State) Award 2006* [2009] NSWIRComm 198 [269].

⁴⁹ IEU submissions November 2018, at 54

62. It should not be understated, however, that the NSW IRC had power to set ‘reasonable’ award rates⁵⁰, whereas the FWC is required to maintain a safety net of ‘fair minimum’ rates of pay.⁵¹
63. There is inevitably a distinction between a ‘reasonable’ value, and a ‘minimum’ value. The word ‘reasonable’ is defined in the Australian Concise Oxford Dictionary as including: ‘*within the limits of reason; not greatly less or more than might be expected.*’ Such a definition of ‘reasonable’ in terms of rates of pay, is more consistent with a setting award rates at actual market rates, as in the case of NSW government teachers, rather than minimum rates.
64. Prior to award modernisation, there were a vast number of operative awards in NSW, including different awards for specific enterprises and narrowly defined industries. Prior to award modernisation, there were about 10 separate NSW awards covering the group of employers and employees now covered only by the Teachers Award (noting this number does not take into account awards in other states/territories). The more narrow scope of coverage for those NSW Awards made it more appropriate and convenient in the circumstances to reach a conclusion about what might be ‘reasonable’ rates of pay.
65. The Commission’s ability to approve rates of pay in an industry or enterprise that are considered ‘reasonable’ in the circumstances, remains available under the *Fair Work Act*, rather through enterprise bargaining, and in circumstances where an enterprise agreement may only be approved by the Commission if it is satisfied that the employees covered by it will be better off overall than if the relevant modern award applied.⁵²
66. The nature of federal modern awards as instruments containing minimum terms and conditions (including minimum wages) only, and the inherent delineation between minimum wage instruments and instruments containing bargained rates or paid rates, has been a fundamental feature of the current federal system of wage regulation since the introduction of structural efficiency principles, and remains a feature of the current regulatory framework for award wage fixation. This was recognised by the Full Bench of the Commission as having statutory recognition⁵³:

Since the early 1990s wage fixation in the federal jurisdiction has been based on two dominant ideas. The first is the creation and maintenance of a safety net of minimum wages fixed by award. The second is a system of above-award bargaining, primarily at the enterprise level...While historically there were many federal awards containing paid rates, during the last decade of the

⁵⁰ s11 Industrial Relations Act 1996 (NSW)

⁵¹ See minimum wages objective, s284

⁵² s186(2)(d)

⁵³ Equal Remuneration Case [2011] FWAFB 2700 at [260]

last century these awards were converted to minimum rates awards in an attempt to provide a stable and consistent award safety net...This approach to wage fixation, which has been developed over many years and has statutory recognition, contributes to the maintenance of stability in award relativities. It involves a strict separation between minimum wages and paid or market rates.

67. In its 30 October 1991 Safety Net Review Decision, the AIRC noted a submission from certain parties in the teaching industry, for a third category of award types to be known as ‘actual rates’ – being paid rates for the purpose of wage determination. The parties claimed the requirement for award rates of pay to bear a proper relationship to classification rates in other minimum rates awards ‘*was not intended to apply to awards in professional areas such as teaching.*’ This proposition was swiftly rejected, with the AIRC commenting that:

‘A hybrid award will only erode the distinction between minimum rates and paid rates and lead to instability in the relationship between minimum rates awards.’⁵⁴

68. To compare rates in an award for minimum wages, with rates in an award for reasonable wages, is not an appropriate, relevant, or useful comparison, even if the awards are dealing with employees employed in identical contexts, where in this case, they are not.

History of wage-fixing in the NSW Rescinded School Teachers Award

69. The IEU seek to infer that the Rescinded NSW Teachers Award rate includes ‘properly work-valued rates.’⁵⁵ In support of its argument, the IEU rely in particular on the special case in *Re Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award*, in 2003⁵⁶ (‘the 2003 interim decision’) and 2004⁵⁷ (‘the 2004 decision’)
70. The history of how wages had been fixed in that award would need to be understood in order to be satisfied of whether the original rates for teachers were fixed purely on a work value basis. To the extent any prior decisions pertaining to work value involved quantification of *increases* in work value, as distinct from fixation or total scoring of work value, the actual relationship between the rates and the work value can’t be determined.

⁵⁴ Print K0300

⁵⁵ IEU submissions November 2018, at 54

⁵⁶ [2003] NSWIRComm 479

⁵⁷ [2004] NSWIRComm 114, IEU submissions November 2018, at 50

71. In the 2003 and 2004 decision, the Federation's claim was brought pursuant to work value changes principles, on the basis that there had been a significant net addition to work requirements warranting the changes in rates of pay sought.⁵⁸
72. Similar to wage fixing principles applying federally from the 1970s onwards, the 2001 NSW Work Value Changes principle required any variation in rates on work value grounds to be justified by *changes* in the nature of the work, skill and responsibility required or the conditions under which work is performed.⁵⁹
73. The application was thus an application for an *increase* in wages, arising out of its claim that there had been an *increase* in work value. In the special case, government school teachers were awarded a 5.5% interim increase in wages in 2003, as well as a 6% increases in wages in 2004.⁶⁰
74. While the IEU's case refers to a number of NSW IRC decisions to increase rates of pay in the Rescinded NSW School Teachers Award on work value grounds from 1990 - 2009, it provides no evidence of any total valuation or total scoring of the work value of government-school teachers and the assignment of a rate commensurate to the score, or any other evidence to verify that the rates set in that award were based on work value alone.
75. In a 2005 Full Bench decision, the AIRC highlighted the impropriety of attempting to compare rates of pay for similar work, where the wage history for one set of rates is unclear.

'We hasten to add, however, that even if the evidence led us to find that the direct employees and the contractors were performing identical work, this would not necessarily translate into us adopting comparable wage rates. This is because we are unclear on the basis on which the contractors' rates have been struck.

Importantly, there is no material before us to enable us to conclude that the rates contractors receive have been reached on the basis of work value considerations to the exclusion of other relevant factors of an historic nature or which are peculiar to the matters in negotiations before the parties in reaching agreed outcomes. For example, we are unaware of whether the agreements contain an element of attraction and retention, a criterion expressly rejected by the CEPU. In addition, we are unaware of any productivity or flexibility provisions which may underpin part or all of the wage levels...'⁶¹

⁵⁸ [2004] NSWIRComm 114, [5]

⁵⁹ *State Wage Case 2001* (2001) 104 IR 438

⁶⁰ [2004] NSWIRComm 114, at [7] and [501]

⁶¹ PR957094 at [146]

76. In *Re Equal Remuneration Principle* (2000) 97 IR 177, it was acknowledged by the NSW Industrial Relations Commission, that rates of pay in NSW awards reflected not only work value considerations, but also other factors which would be irrelevant, or inappropriate for comparison of the work value of work of disparate groups of workers:

'...rates of pay fixed by current awards reflect not only work value assessments conducted by the Commission of the particular work to which the award applies but other agreed factors as well. Some awards undoubtedly reflect agreements about matters of the kind which the Labor Council and the Minister accepted would be an inappropriate or irrelevant basis for comparison of the value of the work of disparate groups of workers. Such matters included agreed productivity improvements, attraction rates and retention rates.'

77. This outcome (of NSW award rates being inclusive of agreed factors, whatsoever they may be), was perhaps fortified, due to objectives in the NSW Industrial Relations Act 1991 as observed in *Transport Industry – Waste Collection and Recycling State Award* (Unreported; Wright J President, Hungerford J and Patterson C; 30 January 2001) at p8⁶²:

'As is clear from these references to the background to the making of the principles, they developed because of the objectives of both the Industrial Relations Act 1991 and the Industrial Relations Act 1996 that there should be a "process of devolution of industrial affairs to the parties" and the recognition that, where parties are in agreement as to the terms of their industrial arrangements, the Commission should be "less prescriptive" and "less interventionist".'

78. On the wage history of the Rescinded NSW School Teachers Award, Schmidt, J. commented in *Teachers (Non-Government Pre-schools) (State) Award* [2001] NSWIRComm 335⁶³:

'...It is thus not possible to ascertain precisely how, or why, the various rates were fixed, although it is undoubted that current rates of pay reflect various agreements reached between the relevant parties over the years and in some cases, decisions of the Commission. What such agreements comprehended is difficult to say. It is entirely possible, and no doubt likely, that they reflect wage increases agreed having regard to productivity improvements and accepted work value increases. While there was no evidence about this, they could also have included a whole host of other matters, such as attraction and retention payments, an issue which arose here...'

⁶² As cited in *Teachers (Non-Government Pre-schools) (State) Award* [2001] NSWIRComm 398

⁶³ at [400]

79. As a result of the IEU's failure to address the extent to which rates in the Rescinded NSW School Teachers Awards are comprised of factors other than work value, the Commission should not accept that the rates in the Rescinded NSW School Teachers Award reflect 'properly work-valued rates.'
80. A truer assessment and quantification of the work value of teachers may be found in the job evaluation evidence of Mr John Egan. Contrary to the difficulties of referring to rates in NSW Awards, the job evaluation methodology involves the evaluation of work value in points, with sub-factors that are have global relevance, allowing for an objective, linear, evaluation of work value.⁶⁴

No relationship to federal award classifications

81. Even if the IEU were able to identify a total scoring of work value for NSW government school teachers at a previous date, and the rates in the Award could be broken down to distinguish between amounts for work value, and amounts for other purposes, that work value score (and any assigned rate) would be meaningless without context. A critical feature of the context, is relativity to work of other values.
82. In the 2011 Equal Remuneration Case⁶⁵ the Full Bench of the Commission considered a claim for variation of modern award rates on work value grounds, and re-iterated the need to confine relativity exercises to modern awards. The Full Bench commented at [261]:

We deal first with the applicants' submission that the minimum wages in the modern award do not properly reflect the value of the work. Given the basis on which minimum rates are fixed, it is not possible to demonstrate that modern award wages are too low in work value terms by pointing to higher rates in enterprise agreements, or in awards which clearly do not prescribe minimum rates. In order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards.

83. The fact that the rates in the Rescinded NSW School Teachers Award bear no stated relationship to rates in other federal minimum awards, prevents them from representing any meaningful margin between the work of teachers covered by the Teachers Award, and the work in other modern award classifications.

⁶⁴ Mercer Report, at p7, Annexed to Report of John Egan.

⁶⁵ [2011] FWAFB 2700

84. We also refer to our submissions above concerning the importance of setting wages with reference to internal and external relativities.

IEU Evidence of Work Value Changes

85. The IEU's filed evidence in this matter includes:
- a. evidence filed in these proceedings about changes in teaching work since 1996 and 2010 from 3 expert witnesses⁶⁶, as well as lay evidence from 3 early childhood teachers, 3 primary school teachers, 6 secondary school teachers, and 3 IEU officials.⁶⁷
 - b. evidence filed in matter C2013/633 about the nature of work, level of skill, responsibility, and conditions under which work was done, and history of industrial regulation, in 3 expert reports, as well as lay evidence of 7 early childhood teachers, 3 primary school teachers, and 6 IEU and AEU officials.⁶⁸
86. Due to such a small number of teacher witnesses providing evidence to the Commission in support of the IEU's application, it would be difficult for such witness evidence to be informative of the experiences of all teachers in a single workplace, or a State/Territory, let alone all teachers in the entire national system.
87. The modern award applies federally, but the IEU evidence is predominantly from New South Wales-based teachers, with some evidence coming from Queensland, Victoria and the Australian Capital Territory. The evidence does not depict the teaching profession across the whole country, despite being an application which would have federal application.
88. Certain aspects of change in the work of teachers relied on by the IEU should not be treated as involving a change in work value. These include for example, the evidence of increased reliance on technology.
89. From the IEU evidence it is clear that the main function of a teacher has been, and continues to be, the creation and delivery of developmentally appropriate learning material to children.⁶⁹ The IEU claims that the way this work is performed has changed, including greater reliance on technology and the standardisation of processes.⁷⁰ With regard to technology, the evidence does not support the contention that the use of technology has resulted in a fundamental shift in the skills or responsibilities required by a teacher. Instead, the means by which the teacher engages with the

⁶⁶ IEU submissions 26 November 2018 at 32

⁶⁷ IEU submissions 26 November 2018 at 33

⁶⁸ IEU submissions 26 November 2018 at 34

⁶⁹ Witness statement of Jenny Finlay at 68; witness statement of Gabrielle Connell 18.

⁷⁰ IEU submissions 26 November 2018 at 37-38, 46.

student or other staff may have changed,⁷¹ but this does not amount to a fundamental change. Further, this phenomenon has occurred gradually across all industries and is not unique to teaching.

90. The 1983 Work Value principles included that '*where through technological or other change the impact of work value change on the work force is widespread or general, the matter should be dealt with in national productivity cases.*'⁷²

91. It was submitted by the IEU that the work value principles utilised in NSW in the 2004 decision may be relevant to a work value claim in this jurisdiction. On the relevance of technology advances to work value, it was noted in the NSW Special Case:

*It is clear that using computers, email and the internet facilitates the performance of teachers' work. We agree with Mr Shreeve that these are skills which form part of a teacher's "professional toolkit". In our view, as with teachers in government schools, there is no basis for awarding TAFE teachers additional compensation for developing skills which not only assist them in their work, but which are inherent in their professional role.*⁷³

92. In regard to the formalisation of processes, IEU has claimed that the Early Years Learning Framework and the Australian Curriculum have changed the way the work is performed,⁷⁴ however their evidence does not support this. In fact, the evidence suggest that the introduction of national curricula has merely standardised what was, or should have, already been occurring.⁷⁵

93. The FWC should also exercise caution in distinguishing between the minimum requirements of classifications in the Modern Award, as compared to the work performed by IEU teacher witnesses. We also refer to our submissions in matter C2013/633 at [19]-[31], addressing that several of the teacher witnesses carry additional responsibilities which are not common to all teachers. These additional responsibilities include for example, being appointed as a Director, Educational Leader, or Nominated Supervisor.

94. To the extent it is relevant, we note that these additional responsibilities appear to have been taken into account in the job evaluation exercise conducted by Leanne Issko. Even with these additional responsibilities taken into account, the work value scores assigned by Ms Issko do not justify the increase in minimum wages (as compared to the rates in the Professional Employees Award 2010) as sought by the IEU.

⁷¹ Witness statement Aleisha Connellan at 18; witness statement of Luke Donnelly at 12

⁷² (1893) 4 IR 429, cited in the Pharmacy Decision at [148]

⁷³ At [371]

⁷⁴ IEU submission 26 November 2018 at 41.

⁷⁵ Witness statement of Margaret Gleeson at 17.

The claim for decompression of relativities

95. Flat dollar increases in previous national minimum wages decisions had the effect of compressing internal relativities at higher classifications across the entire modern awards system.
96. As noted in the Pharmacy Decision, '*...the compression of relativities was the intended effect of the award of flat dollar increases in the award, in that it was considered appropriate to adopt an approach to improve the relative position of lower paid award-wage workers and to depress that of higher-paid award-wage workers.*'⁷⁶
97. Even in the current annual wage review, the ACTU acknowledges its previous requests for hybrid flat dollar and percentage increases, acknowledges that such hybrid increases resulted in larger wage increases in percentage terms to the lower-paid workers, and claims that the approach at the time '*balanced the various considerations that the [National Minimum Wage Review Panel] must take into account.*'⁷⁷
98. The same reasoning should be adopted in this matter, as was in the Pharmacy Decision, that it would **not be appropriate**, in the application by a single union for variation of a single modern award, to '*unwind...a common approach to the adjustment of wages which was taken for deliberate policy reasons with the support of the union movement as a whole.*'⁷⁸

The variation would be contrary to the minimum wages and modern awards objective

Impact of the variation on relativities to other modern awards

99. Disregard for the internal and external relativities in minimum award rates would inevitably impact on the relevance and fairness of those rates.
100. The IEU claims that 'without the variation, the Teachers Award's ongoing relevance and fairness will continue to decrease.'⁷⁹ The variation sought by the IEU would however reduce the relevance and fairness of its rates in comparison to minimum rates in other modern awards.

⁷⁶ Pharmacy decision at [191]

⁷⁷ ACTU Submissions to the 2018-19 Annual Wage Review – p8, para 11.

⁷⁸ Pharmacy decision at [192]

⁷⁹ Applicant submissions of 26 November 2018, at para 6a.

101. The table below shows how the minimum rates for teachers in the Teachers Award compares with minimum rates in various other modern awards, for graduates entering the workforce with the same years of study towards a tertiary qualification.

Education Services (Teachers) Award 2010			Other Modern Award minimum rates for equivalent training			
Level	Training	Minimum rate (July 18)	Modern Award	Level	Training	Minimum rate (July 18)
Level 1	2 & 3-yr trained	\$50,017pa Rate in IEU Claim: \$55,453	Surveying Award 2010	Level 8	3yr degree entry (125% relativity)	\$50,092.80pa (\$960pw x 52.18)
			Professional Employees Award 2010	Level 1.1 (graduate professional)	3yr degree entry	\$49,998pa
Level 3	4-yr degree entry	\$52,438pa Rate in IEU Claim: \$61,615	Nurses Award 2010	Registered Nurse	4yr degree entry	\$49,706.67pa (\$952.60pw x 52.18)
			Surveying Award 2010	Level 7	4yr degree entry	\$51,115.53pa (\$979.60pw x 52.18)
			Professional Employees Award 2010	Level 1.1 (graduate professional)	4yr or 5yr degree entry	\$51,279pa
Level 4	4yr degree + 1yr post-grad entry	\$54,329pa Rate in IEU Claim: \$64,696	Professional Employees Award 2010	Level 1.1 (graduate professional)	4yr or 5yr degree entry	\$51,279pa
			Pharmacy Award 2010	Pharmacist	4yr degree + 1yr internship	\$53,922.81pa (\$1033.40pw x 52.18)
			Animal Care and Veterinary Services Award 2010	Level 1A	5yrs degree and doctor*	\$50,563pa
<ul style="list-style-type: none"> Queensland University: 5yr full-time Sydney University: 4yr doctor of Veterinary Medicine after completion of degree 						

Impact on enterprise bargaining

102. The increases in the rates claimed by the IEU are very significant, similar to the increases sought in their ERO application in matter C2013/6333, and intended to reflect actual rates paid in other jurisdictions. Such rates would create an artificially high safety net, which could be expected to largely, if not entirely, displace enterprise bargaining especially in the early childhood sector.

103. Whereas ERO rates have a particular statutory application through which they supplant rates in modern awards and in enterprise agreements, such an outcome by way of variation to a modern award's minimum rates, is fundamentally at odds with the current framework.

Concluding comments

104. The IEU's application to vary a modern award should be dismissed.