

IN THE FAIR WORK COMMISSION

**APPLICATION BY THE INDEPENDENT EDUCATION UNION OF
AUSTRALIA (AM2018/9)**

**SUBMISSIONS FILED BY CATHOLIC EMPLOYMENT RELATIONS
LIMITED**

14 JULY 2021

Contents

Summary	3
Background	3
Operative date	5
Phasing in	6
'Satisfactory Service'	7
Level 5 and HALT equivalency.....	8
Other matters	8

Summary

1. Catholic Employment Relations Ltd (**CER**) represents Catholic agencies in Australia in workplace and industrial relations matters. Catholic agencies operate Catholic Early Learning Centres (**CELC**) in metropolitan and regional areas.
2. These submissions reflect the views of a number of Catholic agencies operating CELCs in New South Wales.
3. The Full Bench of the Fair Work Commission (**Full Bench**) has proposed variations to the *Education Services (Teachers) Award 2020 (EST Award)* including variations to the minimum wages and to the classification structure¹ in its decision delivered on 19 April 2021 (**Decision**). Subsequent to the Decision and in accordance with directions made by the Full Bench, the Independent Education Union (**IEU**) has proposed further changes to the EST Award, which, according to the IEU both give effect to the decision of the Full Bench and respond to matters not decided by the Full Bench in the Decision.
4. These submissions relate to the changes sought by the IEU to the EST Award and matters not decided by the Full Bench in the Decision, and specifically, CER submits:
 - a. the operative date for the variations to the EST Award be 1 July 2022, or in the alternative, no earlier than 1 January 2022
 - b. the Full Bench should consider phasing-in arrangements to apply to increases to the minimum wages under the EST Award over a period of at least two years
 - c. progression from Levels 2 to 3 and Levels 3 to 4 of the classification structure should be dependant on satisfactory service of the employee
 - d. Level 5 of the classification structure should be limited to those teachers who have attained Highly Accomplished/Leader Teacher (**HALT**) and not extended to include any 'equivalent'.
5. These submissions will also address addition changes to the EST Award sought by the IEU.

Background

1. On 19 April 2021, the Full Bench delivered the Decision in respect of an application made by the Independent Education Union of Australia for an equal remuneration order for early childhood teachers and an application to vary the EST Award on work value grounds (**IEU Application**).
2. The Full Bench rejected the IEU Application for an equal remuneration order² but was satisfied that an adjustment to the minimum rates of teaches under the EST Award was justified³. However, the Full Bench also rejected the primary and alternative proposals of the IEU Application (for 17.5 and 20 percent uniform wage increases respectively)⁴. The Full Bench found the current classification under the EST Award to be "*anachronistic*" and "*not*

¹ *Independent Education Union of Australia – Application for equal remuneration order for early childhood teachers – Application to vary Education Services (Teachers) Award 2020* [2021] FWCFB 2051

² *Ibid* at [208].

³ *Ibid* at [645].

⁴ *Ibid* at [652]

*properly relate[d] to the work value of teachers*⁵ and instead preferred a classification and pay structure adapted from the *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2020 (NSW Teachers Award)*⁶. The Full Bench's preferred classification and pay structure provided for 5 levels:

- 2.1 Graduate teachers with provisional or conditional accreditation at Level 1
 - 2.2 Proficient teachers (or equivalent) at Level 2
 - 2.3 Levels 3 and 4 progressions tied to three years satisfactory service at the preceding level
 - 2.4 Level 5 reserved for Highly Accomplished/Lead Teacher accreditation (**HALT**)⁷.
- 3 The Full Bench addressed a number of matters in relation to the modern awards objective at section 134 of the Act and the minimum wage objectives at section 284 of the Act, but noted that it was not able to address subsections 134(1)(h) and 284(1)(a) of the Act⁸, dealing with:
- 3.1 impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy, and
 - 3.2 the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth

respectively, and as such would provide interested parties with an opportunity to adduce further evidence and make further submissions in relation to the proposed amended classification structure of the EST Award:

“...before we make findings concerning whether the variation of the EST Award to give effect to those modifications is necessary to achieve the modern awards objective and would be consistent with the minimum wages objective.”⁹ (our emphasis)

- 4 Following the decision referred to at point 1 the Full Bench directed that the matter be listed for Conference on 24 May 2021, with interested parties to file a document setting issues to be discussed at the Conference. The IEU filed a document that included, *inter alia*:
- 4.1 Amendments to the classification and pay structure preferred by the Full Bench:
 - a. Removing the requirement that service to move from Level 2 to 3 and Level 3 to 4 be 'satisfactory service'
 - b. Providing an equivalent level of qualification to HALT for Level 5
 - 4.2 A proposed transition mechanism
 - 4.3 Provisions dealing with attaining proficiency and service¹⁰.

⁵ Ibid at [653]

⁶ Ibid at [656]

⁷ Ibid at [657]

⁸ Ibid at [662]

⁹ Ibid at [665]

¹⁰ Independent Education Union of Australia – Issues for Discussion at Conference dated 24 May 2021 (<https://www.fwc.gov.au/documents/sites/caeremuneration/submissions/am20189-sub-ieu-170521.pdf>)

- 5 During the Conference of 24 May 2021, it was agreed that the IEU would provide a copy of the EST Award with the changes the IEU was seeking. A copy of the EST Award, with the IEU's suggested amendments in markup was circulated soon thereafter.
- 6 On the basis of the Full Bench's decision of 19 April 2021 and the IEU's draft amendments to the EST Award, Catholic Employment Relations Ltd (**CER**) makes submissions with respect to:
 - 6.1 the operative date of variations to the EST Award
 - 6.2 phasing-in arrangements
 - 6.3 the requirement for service from Level 2 to 3 and Level 3 to 4 be satisfactory service
 - 6.4 progression to Level 5 to be limited to achieving HALT only
 - 6.5 additional matters sought by the IEU under clause 14 of the EST Award.

Operative date

- 7 CELCs support an operative date that post-dates any determination of the Full Bench to set or vary the EST Awards minimum wages and other variations that are determined necessary.
- 8 Section 166(1) of the Act states that any determination setting or varying modern award minimum wages should generally come into operation on 1 July in the next financial year after it is made.
- 9 The Decision did not make a determination varying the minimum wages of the EST Award but rather:

"...afforded interested parties the opportunity to adduce further evidence and make further submissions which respond to the modifications to the remuneration structure in the EST Award which we consider to be justified by work value reasons, and which address s 134(1)(f) and (h) and s 284(1)(a), before we make findings concerning whether the variation of the EST Award to give effect to those modifications is necessary to achieve the modern awards objective and would be consistent with the minimum wages objective." (our emphasis)¹¹
- 10 Given the Full Bench has not yet made a determination, and that such a determination, if made, will not be made before 25 August 2021, the operative date, in accordance with section 166(1) should be 1 July 2022.
- 11 The FWC may specify another date if it is satisfied that it is appropriate to do so¹² but the specified day must not be a date before the determination is made unless it is a determination made under section 160 and exceptional circumstances exist justifying an earlier date. The application made by the IEU is not an application made under section 160, and as such the FWC does not have the power to specify an operative date which is a date before the determination is made.

¹¹ at [665]

¹² *Fair Work Act 2009* (Cth), ss 166(2)

- 12 The Explanatory Memorandum to the Act states that section 166(1) “*is designed to ensure certainty and predictability for employers and employees*”¹³.
- 13 On the assumption that the earliest date a determination could be made is 25 August 2021:
- 13.1 1 July 2022 would provide employers a period of approximately 10 months to prepare for, and implement, the variations to the EST Award
 - 13.2 1 January 2022 would only provide employers a period of approximately four months to prepare for, and implement, the variations to the EST Award.
- 14 If a determination is made after 25 August 2021, for example, in the event the Full Bench reserves its decision to a later date, the period for preparing for and implementing the variations would be even shorter.
- 15 CER submits that the appropriate operative date is 1 July 2022. However, should the Full Bench decide that an earlier date is appropriate, CER submits that date should not be earlier than 1 January 2022.

Phasing in

- 16 A number of operators of CELCs view phasing-in of increases to minimum wage rates as preferable, spreading the costs of wage increases over a period of between two and five years, in order to mitigate the costs of an increase to wage rates paid to early learning teachers.
- 17 The Full Bench may, under sub-section 166(4) of the Act, specify that a determination that changes minimum wages under a modern award take effect in stages, if satisfied that it is appropriate to do so.
- 18 In *Award Modernisation* the Full Bench of the Australian Industrial Relations Commission, in determining that wage increases, and deductions should be phased in over a five-year period, noted transitional arrangements enabled business and employees to manage changes¹⁴.
- 19 In *Application by Queensland - Training and Employment Recognition Council*¹⁵ the Full Bench of the Fair Commission accepted the need to phase-in increases to apprentice rates of pay following submissions by employer groups that phasing-in was appropriate to “mitigate the cost impact of any increases to employers”¹⁶. In that case the Full Bench decided that any increases more than 5% above the award rate should be phased in over a two-year period¹⁷.
- 20 In the present case the Full Bench should consider the impact on businesses employing early learning teachers of changes to the EST Award and in particular an increase in the minimum wages in determining if a phasing-in period is appropriate.

¹³ Explanatory memorandum at paragraph 632

¹⁴ *Award Modernisation* [2009] AIRCFB 800 at [27]

¹⁵ [2013] FWCFB 5411

¹⁶ *Ibid* at [504].

¹⁷ *Ibid* at [505].

‘Satisfactory Service’

- 21 In the present case, the Full Bench adopted the standards-based remuneration structure in the NSW Teachers Award, with modifications, in producing what was, in its view, the appropriate classification and pay structure under the EST Award¹⁸.
- 22 Notably, the NSW Teachers Award requires maintenance of proficient accreditation and satisfactory performance of duties¹⁹ and does not assume that maintenance of accreditation is synonymous with satisfactory performance of duties. The Full Bench’s classification and pay structure replicate that requirement.
- 23 The IEU has submitted that satisfactory service should be *“determined by teacher accreditation and registration authorities, because satisfactory service is central to the requirement that teachers attain Proficiency and maintain Proficiency...”*²⁰.
- 24 To an extent, the IEU is correct. In NSW for example, in order to maintain proficiency, during each maintenance period, a teacher will:
- 24.1 need to continue to meet the Australian Professional Standards for Teachers (APST)
 - 24.2 complete a minimum of 100 hours of professional development
 - 24.3 within three months before the end of the maintenance period, have their principal, or equivalent attester, attest they have continued to maintain their practice at Proficient Teacher Standards²¹.
- 25 However, in States and Territories that require registration, except South Australia, Victoria and the ACT, the maintenance period is five years. As such, in those States and Territories, under the classification and pay structure proposed by the IEU (that is, with ‘service’ rather than ‘satisfactory service’), a teacher, in the first three years of their maintenance period, may progress from Level 2 to Level 3, or from Level 3 to Level 4, in circumstances where their service has not been satisfactory and in circumstances where they would not maintain their proficiency if they were at the end of their maintenance period.
- 26 Given the above, CER’s view, supported by a number of Catholic agencies responsible for the operation of CELC, is that progression to Levels 3 and 4 should be confined to teachers who have three years’ satisfactory service.
- 27 While relevant, the APST provide a minimum standard to measure a teacher’s satisfactory performance against. Nonetheless, many Catholic agencies operating CELC have suggested that the process of assessing satisfactory service should be one of mutual dialogue, and that where a teacher is not meeting the expected standard this should be apparent and supported via evidence of discussion with the employee, documented in writing. In addition, proficient

¹⁸ at [657].

¹⁹ Ibid at [655].

²⁰ IEU Submissions dated 17 May 2021 at [4].

²¹ <https://www.educationstandards.nsw.edu.au/wps/portal/nesa/teacher-accreditation/meeting-requirements/maintaining-accreditation/proficient-teacher>

teachers should be capable of showing progressive actions toward maintaining proficient status and it should not be the obligation of the employer, alone, who should prove otherwise.

- 28 If staff development processes are not followed and there is an absence of documentary evidence of underperformance, or where the employer fails to engage in a timely performance review, then arguably there would be no justification available to the employer to refuse a move to the next classification level. However, that should be a matter for an employee to dispute.

Level 5 and HALT equivalency

- 29 The IUE has submitted that the Full Bench's proposed Level 5 should be amended so that teachers who are unable to obtain HALT are able to progress to Level 5 via an alternative²². The alternative equivalent, according to the IEU, was significant service at proficient level and a Masters Degree in education or equivalent²³, which was later amended by the IEU to nine years' service and a Masters Degree in Education (AQF Level 9) or equivalent.
- 30 HALT is nationally certified by the Australian Institute for Teaching and School Leadership (AITSL). At present there are no certifying authorities listed in Victoria, Tasmania and WA (other than for independent schools)²⁴.
- 31 Nonetheless, HALT certification is or may become available to teachers in those jurisdictions. For example, in Victoria, the Melbourne Archdiocese of Catholic Schools²⁵, and in Tasmania, the Teachers Registration Board Tasmania²⁶, have embarked on pilot HALT certification programs.
- 32 As with maintenance of Proficiency, HALT requires a reassessment and renewal process which is measured against the APST, occurring every five years²⁷. The alternative qualifications suggested by the IEU are achieved once and provide for no measure to ensure a teacher maintains the skills and competencies required to maintain HALT.
- 33 As with the NSW Teachers Award, under the EST Award HALT should remain as a distinct, nationally recognised achievement based on readily ascertainable standards and a certification process. To provide for an 'equivalent' at Level 5 risks an unfair outcome where there are two categories of Level 5 employees: those required to engage in reassessment and renewal process every five years to maintain their Level 5 classification (or else presumably they will revert to Level 4), and those who do not.

Other matters

34 Clause 14.3, Transitional provisions

²² Ibid at [8].

²³ Ibid at [9]

²⁴ <https://www.aitsl.edu.au/teach/understand-certification-and-halt-status/find-your-certifying-authority>

²⁵ <https://www.macs.vic.edu.au/News-Events/Media-Releases/2021/Certification-program-for-Highly-Accomplished.aspx>

²⁶

<https://www.trb.tas.gov.au/Web%20Pages/Certification%20of%20Highly%20Accomplished%20and%20Lead%20Teachers.aspx>

²⁷ https://www.aitsl.edu.au/docs/default-source/national-policy-framework/certification-of-highly-accomplished-and-lead-teachers.pdf?sfvrsn=227fff3c_8 at page 14.

- 34.1 While the Decision did not propose transitional provisions, CER is not opposed to such provisions being included in order to ensure that teachers translate to the new structure appropriately based on their pre-existing years of service.
- 34.2 CER does not agree with the IEU transition for existing teachers most recently proposed. Under the IEU proposal a graduate teacher (Level 3 under the EST Award's existing classification structure) is deemed to spend only one year as a graduate at Level 1 before progressing to Level 2.
- 34.3 CER is cognisant of the Full Bench's finding that it does, "*not consider that, once a teacher has been accredited at the Proficient Level, there should be in addition a requirement for two years' full-time service*"²⁸. Naturally, in the future, a graduate teacher who achieves proficient teacher status should be classified as proficient if they achieve this within a year or a one year and a half.
- 34.4 However, for the purpose of transitioning existing staff into the new structure and deeming their years of service, it is considered that the 'average' teacher is four year trained and starts at Level 3 of the existing structure, and as such should transition across to Level 1 (Graduate) of the new structure and be deemed to have spent two years at that level before reaching proficient. Put another way, only an existing Level 5 (in the old structure) should transition to Level 2 as they have two years of service at the graduate level.
- 34.5 CER submits that the following transition is appropriate:

Current Structure	New structure
Classification	CER proposal
Level 1 (3YT)	Level 1
Level 2	Level 1
Level 3 (4YT)	Level 1
Level 4	Level 1
Level 5	Level 2 *
Level 6	Level 2 *
Level 7	Level 2 *
Level 8	Level 3
Level 9	Level 3
Level 10	Level 3
Level 11	Level 4
Level 12	Level 4
	Level 5

²⁸ at [656].

34.6 CER's position is also consistent with the IEU proposal to deem the years of proficient service as a teacher by subtracting two years of graduate service in 14.6(c), 14.7(i) and (ii), 14.8 and 14.9 of its proposal. It is also noted that the IEU's original submission is consistent with the above table, that is, it assumes two years of service would be subtracted from a teacher to account for time spent at graduate level²⁹.

35 **Clause 14.4, Recognition of previous service**

35.1 CER has no objection to the IEU's proposals to amend this sub-clause. CER agrees with the exclusion of certain forms of teaching service (TAFE program and English Language School).

36 **Clause 14.5, Evidence of qualifications and teaching service**

36.1 CER has no objection to the IEU's proposals to amend this sub-clause.

37 **Clause 14.6, Progression**

37.1 CER has no objection to the IEU's proposals for this sub-clause. However, CER notes the anomaly of the IEU counting years of proficient service as being the total number of years minus "two years" for those teachers transitioning (which is inconsistent with their proposal in relation to transition in clause 14.5).

38 **Clause 14.7, Jurisdictions without compulsory accreditation / registration of Early Childhood Teachers**

38.1 In relation to clause 14.7, CER notes that in jurisdictions without a requirement for early childhood teachers (ECTs) to be accredited as proficient/ fully registered, the FWC's new structure will not be as rigorous. CER believes that there should still be a method for progression in these jurisdictions and the IEU's pathway may provide this, and may create incentives for those jurisdictions to require a pathway for teachers through accreditation.

39 **Clause 14.8, Returning to Teaching**

39.1 With this clause it seems IEU is ensuring that a returning teacher will have their earlier teaching service recognised (whether it is service as a 'proficient teacher' or otherwise).

39.2 CER does not strongly object to this clause and notes that it is not dissimilar to provisions which operate in industrial instruments, for example, in paragraphs 15.1(b) and 15.3(c)(ii) *NSW and ACT Catholic Systemic Schools Enterprise Agreement 2020*.

²⁹ IEU Submissions dated 17 May 2021 at [10]

39.3 CER also notes that the sub-clause should provide a period for a teacher to become accredited or re-accredited as proficient (for example, one year), and if a teacher does not become proficient within that time period they will then revert to being paid as a graduate, until such time as they then achieve proficient teacher status.

40 Clause 14.9, New teachers with overseas service

40.1 CER does not strongly object to this clause, however, we would submit that overseas service should be recognised in complete years of service in line with industry practice in NSW, for example by the NSW Department of Education and as per paragraphs 15.5(1) of the *NSW and ACT Catholic Systemic Schools Enterprise Agreement 2020*.

41 Clause 14.10, Provision of supervisors/mentors for accreditation/registration

41.1 CER has no objection to this clause.

42 Clause 19.4, Wage-related allowances—educational leader

42.1 CER believes that this allowance should be paid on a pro-rata basis for part-time or casual employees undertaking these duties.